SRI LANKA SUPREME COURT **Judgements Delivered (2010)**

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

In the matter of an Application for Special Leave to Appeal under Article 128 of the Constitution of Sri Lanka.

J. S. Dominic
ID, Tower Building,
No. 25, Station Road,
Colombo 04.

PETITIONER-APPELLANT

S. C. Appeal No. 83/08
S. C. (SPL) L. A. No. 16/08
C. A. (WRIT) Application No. 918/05

-VS-

1. Hon. Jeevan Kumarathunga,
   Minister of Lands.

2. Secretary,
   Ministry of Lands.

   Both of Govijana Mandiraya,
   No. 80/5, Rajamalwatta Road,
   Battaramulla.

3. Hon. Dinesh Gunawardana,
   Minister of Urban Development Authority and Water Supply.

4. Urban Development Authority

   Both of 6th and 7th Floors,
   Sethsiripaya,
   Battaramulla.

5. Finco Limited,
   No. 49/16, Iceland Buildings,
   Galle Face,
   Colombo 3.

6. Hon. Attorney-General
   Attorney General's Department,
   Colombo 12.

RESPONDENT-RESPONDENT

BEFORE	:	N. G. Amaratunga, J., Saleem Marsoof, P.C., J., & C. Ekanayake, J.
COUNSEL	:	Mr. J. C. Weliamuna with Pulasthi Hewamanne for the Petitioner-Appellant. Mrs. Ganga Wakishtarachchi, S.C., for the 1st to 3rd and 6th Respondent-Respondents. Mr. S. L. Gunasekara, Mr. Ananda Dharmaratne with Ms. R. Senaratne for the 5th Respondent-Respondent.
ARGUED ON	:	7.10.2009
DECIDED ON	:	7.12.2010

SALEEM MARSOOF, J.

The only substantive question on which special leave to appeal has been granted in this case, is whether the Court of Appeal erred in upholding the preliminary objections taken up by the 4th Respondent-Respondent Urban Development Authority, and the 5th Respondent-Respondent Finco Limited, and dismissing the writ application filed by the Petitioner-Appellant (hereinafter referred to as the Appellant) in the Court of Appeal:-

> "in as much as the Court of Appeal rejected the Petitioner-Appellant's amended petition as well as his application to add ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., as party Respondents?"

Factual Matrix

This question arises in the context of the application filed by the Appellant in the Court of Appeal on 6th June 2005 praying for several relief including a mandate in the nature of *certiorari* to quash the order marked P28a, which was made by the 1st Respondent-Respondent Minister of Lands, purporting to release a condominium unit claimed by the Appellant from a divesting order previously made by the said Minister in terms of Section 39A(1) of the Land Acquisition Act No. 9 of 1950, as subsequently amended.

It was claimed by the Appellant in his application filed in the Court of Appeal, that by virtue of the Deed bearing No. 10795 dated 22nd March 1985 (P1), he owned, and was in occupation of, premises No. 49/5 of Kollupitiya Road, Colombo 3, which was a condominium unit situated on the property referred to in the impugned order marked P28a and the schedule to the Appellant's said application filed in the Court of Appeal. According to the Appellant, while he was so in occupation of the said premises, it was

acquired and vested in the State by virtue of an order dated 20th May 1987 made under Section 38 proviso (a) of the Land Acquisition Act and published in the Gazette Extraordinary dated 27th May 1987 (P2a) along with several other such premises which were in the vicinity.

In his application filed in the Court of Appeal, the Appellant has stated that he became aware of the said acquisition on or about 27th October 1987, and since the condominium property in question was earmarked for demolition, he was provided with alternative accommodation by the 4th Respondent-Respondent Urban Development Authority on a rent free basis in another condominium unit bearing No. 1D of the Tower Building situated at Station Road, Colombo 4, until such time as compensation for the property which was the subject matter of the Deed marked P1 is paid to him. He has further stated that as he had not been paid any compensation for the condominium unit he owned and possessed in Kollupitiya, the predecessor in office to the 1st Respondent-Respondent Minister of Lands made the divesting order dated 18th July 1991 which was published in the Gazette Extraordinary dated 23rd July 1991 (P6) and amended by the subsequent order dated 30th October 1991 published in the Gazette Extraordinary dated 4th November 1991 (P7), divesting the said premises along with certain other premises, in terms of Section 39A(1) of the Land Acquisition Act No. 9 of 1950, as subsequently amended.

The Appellant has stated in his application to the Court of Appeal, that since by the time the said divesting order was made, the condominium unit situated in Kollupitiya had been demolished, he was assured by the Urban Development Authority that the title of the condominium unit occupied by him at Tower Building, Colombo 4, would be transferred to him, subject to the condition that he shall pay the difference between the value of the said condominium unit and that of the value of the condominium unit at Kollupitiya previously owned by him. He has also stated that, notwithstanding his repeated oral and written representations, there was considerable delay in transferring title to the condominium unit in the Tower Building to him, and that, to his utter dismay, the said divesting order made in the year 1991 was sought to be varied thirteen years later by the impugned order dated 14th July 2004 published in the Gazette Extraordinary bearing No. 1349/17 dated 15th July 2004 (P28a). By the said order, the Minister of Lands purporting to remove premises bearing assessment Nos. 49/5 (claimed by the Appellant) and 49/4 of Kollupitiya Road from the divesting order P6 made in 1991, as amended by P7.

It is the position of the Appellant that the impugned order P28a has purportedly been made under Section 39A(1) of the Land Acquisition Act, depriving him of the benefit of the previous divesting order made in 1991, and that it has been made for a collateral and ulterior purpose to enable the 5th Respondent-Respondent Finco Limited to construct a new condominium or apartment complex on the land on which the Kollupitiya condominium was situated, and that the said order is *inter alia* ultra vires, illegal and in violation of his rights. The Appellant has in addition to an order in the nature of *certiorari* to quash P28a, sought an order directing the Respondents to hand over the possession of the said premises to the Appellant, and additionally, a writ of *mandamus* against all Respondents other than Finco Limited, to compel them to transfer to him the title in the condominium unit bearing No. 1D of Tower Building at Station Road, Colombo 4 on a valuation and / or on the basis of the terms already agreed.

The Preliminary Objections

The preliminary objections upheld by the Court of Appeal were raised by the 5th Respondent-Respondent Finco Limited and the 4th Respondent-Respondent Urban Development Authority, in their respective Statements of Objections dated 23rd September 2005 and 8th November 2005. The said objections, disclosed certain facts which were not set out in the writ petition filed by the Appellant. Based on these facts, the said Respondents simply took up the position that the failure of the Appellant to cite or add as respondents to his writ petition three necessary parties, namely, the National Housing Development Authority, Ocean View Development Company (Private) Ltd., and ICC Housing (Pvt.) Ltd., was fatal to the maintainability of the writ petition.

It was the position of the said Respondents that the premises claimed by the Appellant in Kollupitiya were "excess" housing property in terms of the Ceiling on Housing Property Law No. 1 of 1973, as subsequently amended, and had been vested in the Commissioner of National Housing in terms of the said Law, and had been subsequently transferred by the State to the Urban Development Authority, which demolished the entire condominium complex in or about November 1989 converting it into a bare land, prior to the making of the divesting order P6 and the amendment thereto P7 in 1991. According to the Respondents, it was this property that was purportedly released from the divesting by the impugned order marked P28a made in July 2004.

Finco has also averred as follows in paragraph 1(e) of its Statement of Objections dated 23rd September 2005:

> The land shown in Acquisition Order P2 (a) which is claimed by the Petitioner was handed over by the 4th Respondent (Urban Development Authority), after having obtained the approval of the 3rd Respondent, to ICC Housing (Pvt.) Ltd., a duly incorporated company under the laws of Sri Lanka, for development, and not to the 5th Respondent (Finco Limited). Hence, ICC Housing (Pvt.) Ltd. is a necessary party to this application. The Petitioner has failed and / or neglected to make the said ICC Housing (Pvt.) Ltd., a party respondent to this application. Therefore, the Petitioner is guilty of the non-joinder of a necessary party.

In paragraph 13 (d) of the said Statement of Objections, Finco Limited also disclosed that the Urban Development Authority had consequent to a decision of the Cabinet of Ministers on that behalf, handed over the Kollupitiya condominium land to ICC Housing (Pvt.) Ltd., for the construction of a new residential condominium consisting of 106 residential units using the said land as well as land adjacent thereto which was 126.77 perches in extent.

According to Finco, the said land had been conveyed on a 99 year lease (lease to be converted into free-hold only for residential units based on a Condominium Plan after completion of the said development) to the said ICC Housing (Pvt.) Ltd., on the payment in full of a sum of Rs. 33.6 million (Rs. 33,600,000/-) plus Value Added Tax (VAT). In paragraph 13 (e) of the said Statement of Objections, it is explained that ICC Housing (Pvt.) Ltd. was a fully owned subsidiary of International Construction Consortium Limited, which is an associate company of Finco Limited.

In paragraph 1 (ii) of its Statement of objection dated 8th November 2005, the 4th Respondent-Respondent Urban Development Authority took up a similar preliminary objection to the maintainability of the application filed by the Appellant in the following terms:-

> The Petitioner (now Appellant) is not entitled to the to the relief sought by prayer (c) of the Petition due to the reason that the Petitioner (Appellant) has failed to join two essential parties who should be heard in respect of the relief prayed for by the said prayer.

The relief sought by prayer (c) of the writ petition filed in the Court of Appeal was a writ in the nature of *mandamus* for compelling the 1st ,2nd, 3rd and 4th Respondent-Respondents, or any one or more of them, to transfer Condominium Unit 1D, Tower Building, Station Road, Colombo – 4 "on a valuation and or as per terms agreed". It was the position of the Urban Development Authority that, as set out in paragraph 17 of its Statement of Objections, after the Appellant vacated his premises in Kollupitiya, he was provided with alternate accommodation on a rent free basis by the said Authority until such time compensation in respect of the said property is paid, but when the property was divested by the divesting order P6 read with P7, the need to pay compensation ceased. The Authority had also stated in the said Statement of Objections that subsequently, consequent upon the impugned order P28a being made, the title in the property reverted to the State, which was vested with the National Housing Development Authority.

It was also the position of the Urban Development Authority that the condominium property at Tower Building in Bambalapitiya, which is the premises in which the Appellant was provided alternative accommodation, is managed by Ocean View Development Company (Private) Ltd., which is a joint venture company of which shares are equally held by the said Authority and the National Housing Development Authority, and that the land in which the said Tower Building was built was a land that was vested with the Urban Development Authority. The land on which this condominium complex was put up was leased to the said Ocean View Development Company (Pvt) Ltd., in terms of the Deed of Lease No. 298 dated 1st January 1996 attested by Mr. K. D. P. Jayaweera, Notary Public. Accordingly, it was the contention of the Urban Development Authority that the National Housing Development Authority as well as the said Ocean View Development Company (Pvt) Ltd., were necessary parties to this case, particularly in the context of the relief prayed for in prayer (c) to the writ petition.

The First Decision of the Court of Appeal

The Appellant initially responded to the aforesaid preliminary objections taken up in the Statements of Objections of Finco Limited and the Urban Development Authority, respectively dated 23rd September 2005 and 8th November 2005, with his motion dated 8th December 2005, in which the Appellant prayed that for the reasons set out therein, he be permitted to amend his writ petition to add ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority as the 7th to 9th respondents thereto. The reliefs prayed for by the Appellant in the said motion were considered by the Court of Appeal on two separate occasions, and on both

occasions court decided not to grant the Appellant the primary relief prayed for by him, which was to permit him to add the aforesaid necessary parties disclosed by the Urban Development and Finco Limited in their objections as the 7th to 9th respondents to the writ petition.

Chronologically, the first of these decisions was embodied in the order of the Court of Appeal dated 12th December 2005, which for the first time dealt with the said motion dated 8th December 2005 filed by the Appellant. The said motion was an elaborate document, and it is significant that along with the said motion, the Appellant had also tendered to court a draft amended petition and sought the indulgence of court to admit the same, and issue notice on the aforesaid three entities which were sought to be added as the 7th to 9th Respondents to the application filed by the Appellant. The motion also set out, in a systematic manner, a summary of the amendments sought to be effected by the Amended Petition.

I quote below substantive paragraphs of the said motion in order to facilitate a fuller understanding of the nature of his application, which might be crucial to the decision of this appeal –

> "WHEREAS the present Application was supported on 24.06.2005 and notices having been issued on several (1st – 6th) Respondents the 4th and 5th Respondents filed their Statement of Objections on 11.11.2005. The Case is being mentioned on 12.12.2005 for the 1st and 2nd Respondents Statements of Objections and Notice Returnable on the 3rd Respondent.
>
> AND WHEREAS in view of the technical Objection of the 4th and 5th Respondents (Urban Development Authority and Finco Limited), and the Petitioner now reliably being aware of certain developments relating to the above case, respectfully *moves to file Amended Petition and respectfully moves that the same be accepted* and be filed of record
>
> ……..
>
> AND WHEREAS for fuller adjudication of matters *the Petitioner seeks Your Lordships' Court permission to add the 7th to 9th Respondents* to this Application as more fully stated in paragraph 18 and 19 of the Amended Petition *and respectfully moves that the 7th – 9th Respondents be added to this Application and Notices be issued on them.*
>
> AND WHEREAS the Petitioner seeks your Lordships indulgence *to be permitted to tender amended petition and affidavit only* as there is no change in the marked documents which have already being tendered with the original Petition and undertakes to provide additional copies if been necessary by Your Lordships Court." *(italics added)*

By its order dated 12th December 2005, the Court of Appeal refused to grant the Appellant any of the relief prayed for by him in his above quoted motion dated 8th December 2005. The said decision deprived the Appellant of the opportunity of adding the aforesaid necessary parties as respondents to his writ petition. The decision of the

Court of Appeal, which for convenience, will sometimes be referred to hereinafter as the "first decision", was embodied in the following order:–

> "12/12/05
>
> Same appearance as before.
>
> It would appear that the Petitioner has filed amended petition dated 08/12/05 and this has been objected by the learned Counsel for the 4th and 5th Respondents.
>
> Both Counsel indicate that the objections have been filed already to the original application filed by the Petitioner. Accordingly, *the application made by the Counsel for the Petitioner to accept the amended petition is refused.* SC appearing for the 1st and 2nd Respondents moves for further time to file objections.
>
> Objections to the original petition to be filed by the 1st and 2nd Respondents for 20/01/06.
>
> Mention on 20/01/06
>
> Sgd/." *(italics added)*

The Second Decision of the Court of Appeal

The second decision of the Court of Appeal which relates to the adding of necessary parties disclosed in the Statements of Objections of the Urban Development Authority and Finco Limited, is contained in the impugned judgement of that Court dated 3rd December 2007, against which the Appellant has been granted special leave to appeal by this Court, on the substantive question of law set out at the commencement of this judgement.

I shall at this stage attempt to outline the circumstance in which this "second decision" of the Court of Appeal came to be made. After the initial decision of the Court of Appeal dated 12th December 2005 not to permit the Appellant to amend his original writ petition dated 6th June 2005 by which amendment he had sought to add the parties disclosed as necessary parties in the objections filed by the Urban Development Authority and Finco Limited, the Court of Appeal permitted the 1st and 2nd Respondents-Respondents, respectively the Minister of Lands and the Secretary to the Ministry of Lands, to file their objections to the original writ petition. After obtaining several dates for filing these objections, learned State Counsel who appeared for the said Respondents, informed Court on 25th April 2006, that it was not intended to file any objections on behalf of the 1st and 2nd Respondent-Respondents as well as on behalf of the 3rd and 6th Respondent-Respondents, and thereafter the Appellant filed his Counter-Affidavit to the objections of the Urban Development Authority and Finco Limited on 24th May 2006.

When the case was mentioned on 30th October 2006, since pleadings were considered complete, the case was fixed for hearing on 30th May 2007. However, for certain technical reasons, the hearing was not taken up on that date, and the case was called thereafter on 14th June 2007 and re-fixed for hearing on 17th October 2007. Thus, the only additional

material available to Court at the time it heard the case on 17th October 2007, on which date learned Counsel for the Urban Development Authority and Finco Limited formulated their preliminary objections, was the said Counter-Affidavit filed by the Appellant in which he has specifically dealt with the preliminary objections raised by Urban Development Authority and Finco Limited.

In particular, it is relevant to note that in paragraph 4 of the said Counter-Affidavit, the Appellant has specifically pleaded that he was "unaware of any role played by Ocean View Development Company (Pvt) Ltd. and National Housing Development Authority" and that, on the contrary, he was led "to believe that the 4th Respondent (Urban Development Authority) had title and authority in relation to the condominium at Tower Building, Colombo 4." Similarly, in regard to the preliminary objection taken up by Finco Limited, the Appellant has in paragraph 6 c of his Counter-Affidavit specifically pleaded that he was "unaware of any role played by ICC Housing (Pvt) Limited.," and that the Appellant was led to believe that the Urban Development Authority had only granted permission to Finco Limited to deal with the "subject premises towards construction of a condominium complex".

On 17th October 2007, after hearing learned Counsel for the Urban Development Authority and Finco Limited as well as learned Counsel for the Appellant, on not only the preliminary objections raised by the former, but also in regard to the application made once again by learned Counsel for the Appellant that court be pleased to grant permission for the Appellant to add ICC Housing (Pvt.) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority respectively as 7th to 9th Respondents, the learned Judge of the Court of Appeal reserved judgement. However, at this point, it is also necessary to observe that the learned Judge of the Court of Appeal had in his order dated 17th October 2007 stated as follows :-

> "Court finds that the main relief sought is against the 1st Respondent (Minister of Lands) that is to quash the cancellation of the divesting order. But it appears that the 1st Respondent has not filed any objection in this application. *At this stage the learned State Counsel is permitted to file objection if any by the 1st Respondent*, and for that Counsel for the Petitioner and Counsel for the other Respondents have no objection.
>
> Objection to be filed on or before 20/11/2007.
>
> The date for the Counter Objection will be given after the order on the preliminary objection.
>
> Order on the preliminary objection on 03/12/2007……..." (Italics added.)

Through this order, *the Court of Appeal in effect re-opened the pleadings which, prior to that order, were considered closed by Court* upon learned State Counsel informing Court that no objections are intended to be filed on behalf of the 1st, 2nd, 3rd and 6th Respondent-Respondents, and the case was fixed for hearing on that basis. It is significant to note that the joint Statement of Objections of the 1st Respondent-Respondent Minister of Lands and the 2nd Respondent-Respondent Secretary to the Ministry of Lands dated 20th November 2007 were filed after Court reserved order on the preliminary objections but

prior to the impugned decision dated 3rd December 2007 was pronounced by the Court of Appeal.

By its impugned judgement dated 3rd December 2007, which for convenience may sometime hereinafter be referred to as the "second decision", the Court of Appeal refused to permit a further application made by learned Counsel for the Appellant to add the aforesaid parties, ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority, as party respondents to the writ application on the ground that it "at this stage is a belated application", and decided to dismiss *in limine* and without costs, the substantive application of the Appellant for relief by way of writ. After quoting with approval the *dictum* of J.A.N de Silva, J. (as he then was) in *Perera v. National Housing Development Authority* [2001] 3 Sri LR 50 at page 55 to the effect that the failure on the part of the petitioner in that case to move to add "necessary parties to the effectual adjudication of the question in issue" was fatal,
learned Judge of the Court of Appeal observed as follows:-

> The Petitioner would have come to know that, ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority are necessary parties to this application at least after the Respondents filed their objections but the Petitioner's attempt to amend the Petition and it was refused by court."

Should the Appellant Have Appealed Against the First Decision?

It is now convenient to consider the decision of the Court of Appeal dated 3rd December 2007 in the context of the question on which special leave has been granted by this Court, which is simply, whether the Court of Appeal erred in upholding the preliminary objections taken up by the Urban Development Authority and Finco Limited and dismissing the writ application filed by the Appellant in the Court of Appeal, inasmuch as it had rejected the Appellant's amended petition as well as his application to add ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., as party Respondents.

As already noted, applications made on behalf of the Appellant to add the aforesaid parties has been refused by the Court of Appeal on two occasions, firstly, more or less implicitly, by its order dated 12th December 2005, and later in the impugned judgement dated 3rd December 2007. The Appellant had not sought leave to appeal against the first of these decisions, and the question therefore arises as to whether the Appellant can canvass the decision of the Court of Appeal not to permit him to add the aforesaid parties and make consequential amendments to his writ petition in these appellate proceedings which are confined to the decision of the Court of Appeal dated 3rd December 2007.

Learned Counsel for the Urban Development Authority and Finco Limited have submitted that insofar as the Appellant has not appealed against the decision of the Court of Appeal dated 12th December 2005, they are not entitled to canvass in the course of this appeal, the said decision which refused to permit the Appellant to add the

aforesaid parties and make consequential amendment to the writ petition. Unfortunately, learned Counsel did not cite any authorities, in support of this submission during oral argument as well in written submissions filed thereafter.

Learned Counsel for the Appellant, has however, submitted that the fact that the Court of Appeal did not permit the adding of the relevant parties initially, did not prevent the Court of Appeal from permitting the addition of the said admittedly necessary parties, at the later point when the Urban Development Authority and Finco Limited took up the position that the writ application cannot be maintained without the said parties being added. He also submitted that the impugned decision of the Court of Appeal dated 3rd December 2007 was a "final order" dismissing the writ petition *in limine*, and that the Appellant was entitled to appeal against the said decision which stemmed from the error of law initially committed by the Court of Appeal in its earlier order dated 12th December, 2005. He further submitted that the Urban Development Authority and Finco Limited were precluded from taking up the said position having first objected to the addition of the said parties when the matter came up initially as "equity would prevent the Respondents from taking advantage of such an incongruity."He too did not cite any authorities in support of his submissions.

From a purely procedural point of view, it is plain that the submission made by learned Counsel for the Urban Development Authority and Finco Limited goes against sound and established principle enunciated by our courts, which as pointed out by Bertram, C.J. in *Fernando v. Fernando* (1919) 6 Ceylon Weekly Reporter 262 at page 265, "discourages appeals against incidental decisions when an appeal may effectively be taken against the order disposing of the matter under consideration at its final stage." It is trite law that leave to appeal will not generally be granted from every incidental order, for to do so, would be to open the floodgates to interminable litigation *(Balasubramaniam v. Valliappar Chettiar* (1938) 39 NLR 553 at page 560), but if the incidental order goes to the root of the matter and it is both convenient and in the interests of both parties that the correctness of the order be tested at the earliest possible stage, then leave to appeal will be granted *(Arumugam v. Thampu,* (1912) 15 NLR 253 at page 255; *Girantha v. Maria* (1948) 50 NLR 519 at page 521).

In the course of my judgement in *Francis Samarawickrema v. Dona Enatto Hilda Jayasinghe and another* [2000] BALJR 000, I quoted the following *dicta* of Vythialingam, J. in *K.A. Mudiyanse v. Punchi Banda Ranaweera* (1975) 77 NLR 501 at page 509-

> "A party so aggrieved, however, still has two courses of action: (1) to file an interlocutory appeal or, (2) to stay his hand and file his appeal at the end of the case even on the very same ground on which he could have filed his interlocutory appeal. If he adopts the latter course he cannot be shut out on the ground that his appeal being against the incidental order is out of time. It might well be that in spite of the incidental order against him he might have still succeeded in the action. . ."

This appears to me to be exactly what happened in the proceedings before the Court of Appeal in the instant case, as the Appellant, who was obviously aggrieved by the initial order of that court dated 12th December 2005, which order was made by that court in the face of the objections taken by the Urban Development Authority and Finco to the

addition of the other necessary parties disclosed in their very pleadings, probably decided not to appeal against the said decision in the hope that he could succeed in his substantive application with greater ease. In my considered opinion, the Appellant cannot be "shut out" from challenging the refusal of the Court of Appeal to permit the adding of the necessary parties at the stage of the final appeal simply because he had not rushed to the Supreme Court at the initial stage with an interlocutory appeal.

It is also significant that the second application to add the necessary parties was made by the Appellant in sheer desperation in the course of the hearing into the preliminary objections taken up by the Urban Development Authority and Finco Limited on 17th October 2007. Learned Counsel who appeared for the latter parties, who had objected to the adding of the necessary parties when application was made initially by the motion dated 8th December 2005, this time objected to the addition of the necessary parties on the ground that the application was belated. The Court of Appeal has by its order dated 12th December 2005 (first decision) and the impugned judgement dated 3rd December 2007 (second decision) disallowed the applications to add these necessary parties. In my opinion, these two decisions are intrinsically interrelated.

Was the Appellant's Motion Misconstrued?

The first question that has to be considered on this appeal is whether the Court of Appeal did err in its first decision in refusing permission to the Appellant to add the parties disclosed by the Statements of Objections filed by the Urban Development Authority and Finco Limited? It would appear from the order of the Court of Appeal dated 12th December 2005 that it had misconstrued the motion dated 8th December 2005 filed by the Appellant simply as a motion with which an amended petition has been tendered to court after the Urban Development Authority and Finco Limited had filed their objections. The Court of Appeal has failed to appreciate that the said motion was filed primarily for the purpose of seeking permission of Court *to add the parties disclosed in the Statement of Objections filed by the Urban Development Authority and Finco Limited* as the 7th to 9th Respondents to the petition dated 6th June 2005 filed by the Appellant in the Court of Appeal, and by the said motion an application was also made for permission to make consequential amendments to the original writ petition filed on 6th June 2005 possibly in order to save time.

It is manifest that the Appellant had acted with reasonable expedition and in good faith in making his application to add the parties sought to be added by him at the stage he made his application by the motion dated 8th December 2005. It is clear that the Appellant did not know, nor was he reasonably expected to know, that the parties sought to be added by him as party respondents by the said motion, had any interest in the matters raised in the writ petition at the time he originally sought to invoke the jurisdiction of the Court of Appeal. It is important to mention that learned Counsel for the Urban Development Authority and Finco Limited did not contest the position taken up by the Appellant in his said motion that the he was not aware of the interests ICC Housing (Pvt.) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority had in the properties which constitute the subject matter of his writ petition until he had notice of the Statements of Objections of the Urban Development Authority and Finco Limited little less than a month before the date of the said motion.

It is apparent from the letters dated 25th January 2005 (P29) sent by the Appellant himself and the subsequent letter dated 4th April 2005 (P30) sent on behalf of the Appellant by his lawyer to the Chairman of the Urban Development Authority, with copies to other relevant officials, that a few months before he filed his writ petition, he has been making more than reasonable endeavours to seek administrative relief for his long standing grievance. In order to give some idea of the efforts taken by the Appellant over a fairly long period of time, some extracts from this letter are quoted below:-

> "In lieu of the demolishing of my residential premises I made several representations and finally was assured that I would be compensated for same by transferring Tower Building apartment to my name.
>
> I have been periodically visiting and communicating with various Officers of the UDA as on most occasions they wrote to me as well as telephoned me and requested my presence towards concluding this matter. For instance I've had discussions with Mr. Wedamulla, Mr. Batuwangala, Mr. Dickson, Prof. Willie Mendis, Mr. Ivan Gunaratne and finally Mr. Dharmasiri.
>
> As these matters have been pending for a long time and repeated assurances had been given to transfer the apartment in my name and due to my persistent follow up I met Mr. Dharmasiri in December 2003 who assured me there would be no further delay and instructed Mr. Newton to expedite the transfer without further delay. However, not withstanding my several visits and communications the delay continued.
>
> Then all of a sudden like a bolt from the blues in or about October 2004 I was informed the divesting order relating to my land had been cancelled. This apart from being most surprising I consider irregular and unreasonable especially as I had no prior warning or knowledge of it. I made representations on this aspect as well and I was assured that the wrong cancellation of the divesting order would be looked into and relief granted to me.
>
> Since then I have made several representations and visits towards ensuring that the promises given to me would be fulfilled, but there is an unexplained delay. I have undergone immense mental and financial hardships for several years as you will no doubt agree. I therefore appeal to your good office to ensure that there be no further delays in fulfilling the promises and assurances given to me. I await your early action to alleviate my suffering.
>
> cc - Director General, UDA
> Secretary, Ministry of Lands
>
> Yours faithfully
> J. S. Dominic"

This was followed up by the letter dated 4th April 2005 (P30), which was also addressed to the Chairman of the Urban Development Authority, with copies to the then Minister of Lands, the Secretary to the Ministry of Lands, the then Minister of Urban Development and Water Supply and the Attorney General, by Ishara Gunawardena, Attorney-at-law, on instructions from the Appellant, seeking redress after outlining the basic facts to the extent that the Appellant was aware. There is no doubt in my mind that

had the Appellant been aware of the interests of ICC Housing (Pvt.) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority to the matters with respect to which he ultimately sought relief from the Court of Appeal, he would not have failed to copy the letters marked P29 and P30 to those parties as well. The fact that the Appellant moved court to add these parties as respondents soon after he became aware of their interest, shows that he had no intention of shutting out these parties from the writ proceedings, and would have cited them as party respondents to his writ petition had he been aware of their interests at the time he filed the same. I am therefore of the opinion that the Court of Appeal did err in its first decision in not permitting the addition of parties prayed for in the motion dated 8th December 2005 filed by the Appellant.

Did the Court of Appeal Err?

This brings me to the question whether the Court of Appeal erred in its impugned decision dated 3rd December 2007, which is for short referred to as the "second decision". The circumstances in which the Court of Appeal arrived at this decision has been explained earlier in this judgement, but it needs to be emphasized that the second decision was made in the context of the preliminary objections taken by the Urban Development Authority and Finco Limited in regard to the maintainability of writ application filed by the Appellant. It is also necessary to stress that although at the point of time when this case was taken up for final hearing on 17th October 2007, on which date the learned Counsel for the aforesaid two respondents formulated their preliminary objections and made submissions in support thereof, *pleadings were considered by Court to be complete*, as learned State Counsel who appeared for the 1st and 2nd Respondent-Respondents being the Minister of Lands and Secretary to the Ministry of Lands had informed Court on 25th April 2006 that it was not intended to file any objections on behalf of those respondents as well as on behalf of the 3rd and 6th Respondent-Respondents, and the Appellant had filed his Counter-Affidavit with respect to the objections of the Urban Development Authority and Finco Limited.

However, by a curious turn of events, at the same time when the Court of Appeal heard submissions of Counsel on the preliminary objections raised in the case on 17th October 2007, it took upon itself to make order, *ex mero motu* that since "the main relief sought is against the 1st Respondent, that is to quash the cancellation of the divesting order", learned State Counsel may file the objections of the Minister of Lands on or before 20th November 2007. *This in effect re-opened the pleadings that were considered closed by the Court of Appeal itself* at the time when the case was taken up for hearing on the very same day. It is therefore ironic, and in fact a grave travesty of justice, that the Court of Appeal by its judgement dated 12th December 2007 refused the Appellant permission to add the necessary parties disclosed by the Urban Dvelopment Authority and Finco Limited and went on to dismiss the substantive writ application filed by the Appellant on the ground that the very same necessary parties were not before court. It is unfortunate, to say the least, that in doing so the Court of Appeal was unmindful of the state of the law which has been lucidly and correctly explained in the following passage from Dr. S. F. A. Coorey's *Principles of Administrative Law in Sri Lanka* (2nd Edition) page 537, which had been quoted in the judgement of the Court of Appeal, with apparent approval:-

> "The failure to make a necessary party a respondent is fatal. If the omission is discovered during the pendency of the application for the writ the Petitioner is well advised to apply to court to add such party as a respondent. *Such an application for addition will be allowed only if the application is not yet ready for final disposal by court; Vinnasithamby v. Joseph* (1961) 65 NLR 359. Once the final hearing of the application by court commences, such an application made thereafter will be refused; *Goonetilleke v. Government Agent, Galle* (1946) 47 NLR 549; *Jamila Umma v. Mohamed* (1948) 50 NLR 15, 17; *Dharmaratne v. Commissioner of Elections* (1950) 52 NLR 429, 432." *(italics added)*

The impugned decision of the Court of Appeal dated 12th December 2007 is in my opinion not only self-contradictory and fundamentally flawed, but it is also extremely unreasonable. It is self-contradictory because at the time when the preliminary objections were taken up for hearing, the court had permitted the pleadings to be re-opened, and in fact the joint Statement of Objections of the 1st Respondent-Respondent Minister of Lands and the 2nd Respondent-Respondent Secretary to the Ministry of Lands were *filed with the permission of Court* only on 20th November 2007, that is after the Court reserved order on the preliminary objections but prior to the pronouncement of the impugned decision dated 3rd December 2007 by the Court of Appeal. In other words, at the time when submissions on the preliminary objections were heard and the judgement reserved, *the case was not ready for final disposal,* and in fact passed the test enunciated by Dr. Coorey in the passage quoted by the Court of Appeal itself in its impugned judgement as the applicable criterion to be considered eligible to make application to court to add any subsequently disclosed necessary party or parties.

In my view, the said decision is also fundamentally flawed, for another important reason. The court fell into error because it failed to realize that unlike in the generality of writ applications coming before our courts, the mandate in the nature of *mandamus* prayed for by the Appellant in prayer (c) was not dependant or conditional upon the grant of the writ of *certiorari* prayed for by him in prayer (a) and arose from two distinct transactions. The relief prayed for by the Appellant in his original writ petition related to two distinct premises both of which were condominium units, the first situated in Kollupitiya, and the second situated in the Tower Building, Bambalapitiya, and the writ of *certiorari* was sought by the Appellant by prayer (a) to his petition, to quash the order dated 14th July 2004 (P28a), which had been made for the purpose of releasing the Kollupitiya condominium unit claimed by the Appellant and another from the divesting order dated 18th July 1991 (P6 and amended by P7). The Appellant had also sought by prayer (c) to the petition, a mandate in the nature of *mandamus* to compel the 1st,2nd, 3rd and 4th Respondent-Respondents or any one or more of them and or their agents or servants, to transfer Condominium Unit 1D, Tower Building, Station Road, Colombo – 4 "on a valuation and or as per terms agreed". Thus, even if the Appellant did not succeed in regard to the relief prayed for by him in prayer (a), this by itself would not disentitle him to relief by way of *mandamus* as prayed for in prayer (c), and equally, the failure to succeed in the application for *mandamus* will not preclude the Appellant from relief by way of *certiorari* in terms of prayer (a).

An important fact worthy of note, which had apparently escaped the Court of Appeal, is that although Ocean View Development Company (Pvt) Ltd., which is said to be a joint venture company of which shares were at the relevant time equally held by the Urban

said Authority and the National Housing Development Authority, acquired its interests in the Bambalapitiya land upon the Indenture of Lease bearing No. 298 and dated 1st January 1996 (4R2) attested by K. D. P. Jayaweera, Notary Public, much prior to the filing of the writ petition by the Appellant, the interests of ICC Housing (Pvt) Ltd., in the Kollupitiya property had been acquired *after* the writ petition was filed.

It is apparent from the letter dated 10th June 2005 (5R3) by which the Urban Development Authority had informed the Chairman of ICC Housing (Pvt) Ltd., that the Authority has decided to allocate the Kollupitiya land to the said company, that even ICC Housing (Pvt) Ltd., became aware of its interests only approximately 4 days after the Appellant filed his writ petition dated 6th June 2005. It is apparent from the letter dated 16th June 2005 (5R4) that the payment of Rs. 38,640,000/- being the full premium for the 99 year lease with respect to the land was made by ICC Housing (Pvt) Ltd., by way of cheque 10 days after the writ petition was filed. Hence, there was no way in which the Appellant could have been aware of the interests of ICC Housing (Pvt) Ltd., at the time of filing his writ petition, and to deny the Appellant the opportunity of maintaining his application for *certiorari* on the ground that the said company, which has incurred such expenditure, had not been cited or added as a party respondent, was a grave travesty of justice.

In any event, the second decision of the Court of Appeal was extremely unreasonable because the court had treated the application made by the Appellant to add the necessary parties, ICC Housing (Pvt) Ltd., Ocean View Development Company (Pvt) Ltd., and the National Housing Development Authority, as party respondents as a "belated application" when it had been made within one month from the date on which the Appellant became aware of the interests of the said necessary parties in the properties which constituted the subject matter of the writ application filed by him. As already noted, when the application to add these parties was renewed on 17th October 2007, the Court of Appeal, having permitted pleadings to be re-opened for the Minister of Lands, refused the Appellant permission to add on the ground that the pleadings were closed, and the case was ready for final disposal by court. As this Court noted in *V. Ramasamy v. Ceylon State Mortgage Bank* (1976) 78 NLR 510, the validity of a plea of delay must be tried on principles which are substantially of an equitable nature, and the principles of laches must "be applied carefully and discriminatingly, and not automatically and as a mere mechanical device (*per* Wanasundera, J. at page 517). There is no doubt that in all the circumstances of this case, equity would very much favour the Appellant.

In this context, it is important to mention that writs in the nature of *certiorari* and *mandamus*, which are granted by our courts "according to law" as provided in Articles 140 and 154P (4)(b) of our Constitution, had their origins in English common law and were known as 'prerogative writs' as they were the means by which the Crown, acting through its courts, ensured that inferior courts or public authorities acted within their proper jurisdiction. The hallmark of such writs was that they were granted in the name of the Crown, as the title of every case indicated, but as the law developed, initially individual litigants were permitted to initiate proceedings in the name of the Sovereign, and in jurisdictions such as Sri Lanka, even without expressly referring to the Crown.

As H.W.R. Wade and C.F. Forsyth observe in *Administrative Law,* page 591 (Ninth Edition), "The Crown lent its legal lent its legal prerogatives to its subjects in order that

they might collaborate to ensure good and lawful government." The fact that our Constitution expressly refers to these writs by their ancient names shows that our Constitution makers intended to preserve the beneficial characteristics of these ancient remedies, which possess the inherent character and virility to be able to change to suit changing circumstances and needs. It is therefore unthinkable that a court of law will subvert the objectives of these beneficial remedies by non-suiting a party through a process of tying it down in unshakable knots, as the Court of Appeal has sought to do in the instant case.

Conclusions

Accordingly, for the reasons already set out in this judgement, I am of the opinion that the substantive question of law on which special leave to appeal has been granted by this Court, should be answered in the affirmative. I therefore hold that the Court of Appeal had erred in upholding the preliminary objections taken up by the 4th Respondent-Respondent Urban Development Authority, and the 5th Respondent-Respondent Finco Limited, and dismissing the writ application filed by the Petitioner-Appellant in the Court of Appeal, inasmuch as the Court of Appeal had rejected the Petitioner-Appellant's amended petition as well as his application to add ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., as party Respondents.

I make order allowing the appeal with costs fixed at Rs. 50,000/- payable jointly by the 4th and 5th Respondent-Respondent to the Appellant within a month from the date of this judgement. I set aside the judgement of the Court of Appeal dated 3rd December 2007 as well as the order of the Court of Appeal dated 12th December 2005 insofar as it rejected the amended petition filed with the motion dated 8th December 2005, and make order accepting the said amended petition. I direct that the original docket of the Court of Appeal be returned to that Court with a certified copy of this judgement, and further direct that this case be called in that court within six weeks of the date hereof, after notice to all the parties including ICC Housing (Pvt.) Ltd., National Housing Development Authority and Ocean View Development (Pvt.) Ltd., who are hereby added as 7th to 9th Respondents, and that after all respondents file their respective Statements Objections to the amended petition, and the Appellant files counter-objections, if any, the case be expeditiously taken up for hearing before a Bench to be specially nominated by the President of the Court of Appeal consisting of three judges of that court excluding any judge who might have previously heard this case.

JUDGE OF THE SUPREME COURT

N. G. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

Case No SC (CHC) Appeal 13/2001

Commercial High Court No CHC 15/99 (1)

People`s Bank

No 75, Sir Chittampalam A Gardiner mawatha

Colombo 02

PLAINTIFF

Vs

Lokuge International Garments Ltd.

No 10, Parsons Road,

Colombo02

DEFENDANT

AND NOW

People`s Bank

No 75, Sir Chittampalam A Gardiner mawatha

Colombo 02

PLAINTIFF-APPELLANT

Vs

Lokuge International Garments Ltd.

No 10, Parsons Road,

Colombo02

DEFENDANT-

RESPONDENT

Before	**:**	**JAN de Silva CJ**
		Sripavan J
		Ekanayake J
Counsel	**:**	**Rasika Dissanayake for Plaintiff-Appellant**
		Navin Marapana for Defendant-Respondent
Argued on	**:**	**20-11-2009**
Decided on	**:**	

JAN de SILVA CJ

This is an appeal from a judgment of the commercial High Court of the western province. It concerns a transaction between the appellant bank and the defendant who is a customer of the said bank involving a certain export bill of exchange. The appellant alleges that the defendant had neglected to pay certain sums owing to the plaintiff bank.

The learned High Court judge had with the consent of the parties heard issues 14 and 16 as preliminary issues.

Namely,

14. is the plaintiff`s cause of action prescribed in law in terms of the provisions of the prescription ordinance?

16. Is the defendant estopped in law from claiming any benefit on the plea of prescription as the defendant has already admitted paragraphs 1, 2,3,5,6 and 8 of the plaint and documents marked “P2” and “P4”?

It was the contention of the counsel for the appellant that the learned judge had erred in hearing the said issues as a preliminary issue.

Section 147 of the civil procedure code reads thus,

> “*when issues of both law and fact arise in the same action,* ***and the court is of opinion that the case may be disposed of on the issues of law only****, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined*.”

In **Pure Beverages Ltd. v. Shanil Fernando** (vide 1997 (3) SLR 202), it was held that only pure questions of law should be tried as preliminary issues.

De Z. Gunawardena, J. Was of the view that

> **“**An issue can be tried in limine, that is, as a preliminary issue, only if that issue is an issue of law **and the factual position, from which that issue of law emaciates, is common-ground.** If an issue of law arises

> in relation to a fact or factual position in regard to which parties are at variance that issue cannot and ought not to be tried first, as a preliminary issue of law"

I am mindful of the fact that the counsel for the plaintiff consented to hearing the issues number 14 and 16 as preliminary issues. Therefore this court must first decide as to whether this court is precluded from hearing the above argument.

The appellant submits in the main that the action was revived by a letter purportedly sent by the defendant admitting liability.

In **Moorthiapillai v. Sivakaminathapillai** (14 NLR 30) Hutchinson C.J was of the view that,

> "When the time has expired within which an action to recover a debt is maintainable, and the debtor afterwards promises in writing to pay the debt, or makes a payment on account of it, the effect of the promise in writing or of the payment (from which a promise to pay the balance is inferred) is to take the case out of the operation of the enactments which prescribe the time within which an action must be brought."

Justice C.G. Weeramantry in his treatise "The Law of Contracts" appears to concur. He refers to Wigram V.C. `s observations in Philips v. Philips and states that the position in Ceylon is similar to that of in England.

> "An acknowledgement even after the full period of prescription has run, will take the case out of the statute"

The very recent judgment of **Bradford & Bingley plc v. Rashid [2006] UKHL 37** also confirms the English law position.

On examining the available authorities on the question of revival I am inclined to agree that such a letter would revive the action and prescription would begin to run anew.

The appellants further argue that a second letter of demand would have the same effect. This proposition deserves closer scrutiny.

A letter of demand is inherently charasterically different from an admission of liability. The law of limitations was introduced due to strong policy reasons. One of which is that a defendant should not have the cloud of impending litigation hovering above him indefinitely. When liability is admitted at some point before the term of prescription ends, this operates as a renewal of the running of prescription.

This should not be the position with regard to letters of demand which originate from the plaintiff. Such a principle would bring about the anomalous result of renewing the running of prescription each time a letter of demand is sent by the plaintiff. This is irreconcilable with the policy objectives of the statute of limitations set out previously. Therefore I am of the opinion that the learned High Court judge was correct in deciding that a second letter of demand, if one existed, would not revive the action.

Next I draw my attention to the letter that is alleged to be one which the defendant admits his liability. The letter first surfaces annexed to the written

submissions filed by the appellant counsel. Whilst the contents are suggestive, I am precluded from considering its contents as the validity of the document in issue. This court is a court of law which hears appeals on judgments and orders made by lower courts with regard to facts proven before such courts. Where a fact is not proven by the party on which the burden of doing so is on, such statements must be altogether discarded.

Written submissions offer court a speedy and effective method of disposing hearings as supplementary to oral advocacy. It does not offer an opportunity to a judge to consider evidence that is inadmissible although they may be submitted as evidence. The judge can only consider what is proven before him or that which is admitted.

Several sections of the civil procedure code permit the presentation of documents to court. Sections 49 and 50 require a plaintiff to annex to the plaint a list of documents he relies on as evidence. Section 121 (2) requires a plaintiff to file in court a list of documents which he relies on as evidence and which he wishes to produce at the trial. Section 175(2) provides for the production of documents not in such list upon obtaining leave from court.

Now it is clear that the appellant has not utilised any of the provisions adverted to above. The letter dated 1993-03-16 is first mentioned in averment 11 of the plaint. As stated previously the plaintiff had neglected to annex the letter as part and parcel of the plaint.

It is quite possible that the significance of the letter dawned on the plaintiff at a later stage as the plaintiff attempts to draw the learned High Court judge's attention to the said letter in his written submissions. However the learned High

Court judge has dealt mainly with the consequences of the possible existence of a second letter of demand dated 1998-09-16, which too had not been produced before court.

Furthermore the written submissions addressed to both this court and to the High Court cite subsequent letters purportedly originating from the respondent bank admitting its liability(vide paragraphs 10 and 11)

Having decided on the admissibility of these documents at this stage of the proceedings, I now consider as to whether the learned High Court judge ought to have tried issues no 14 and 16 as preliminary issues.

It is worth noting that at the very inception both parties consented to disposing of issues 14 and 16 as preliminary issues.

Section 147 requires court to form an opinion as to whether a case could be disposed of on the issues of law only and only thereupon should court on the said issues of law first.

The learned High Court judge has in this instance framed fifteen issues as suggested by the parties. Thereupon the learned judge moves to try issues 14 and 16 first.

However issue no 4(a) deserves closer scrutiny. It reads,

> "**As set out in paragraph 11 of the plaint,** did the defendant attempt to make alternative arrangement to cause the value of the said bill of exchange to be paid to the plaintiff bank?"

Paragraph 11 of the plaint makes reference to the letter dated 16-3-1993, where allegedly, the defendant seeks to introduce an alternative buyer to the plaintiff bank. Paragraph 11 is denied by the defendant and places the burden of proving such on the plaintiff.

Therefore it is clear that the fact of the existence of the said letter was a matter of controversy between the parties. I am also of the opinion that the finding on this issue has a direct bearing on issue no 14. In other words issue no 14 cannot be conclusively decided without first deciding on issue Number 11. Therefore it follows that issue 14 cannot be considered a pure question of law. Therefore it is my position that the learned High Court judge had erred in forming an opinion that issues no 14 and 16 can dispose of the case completely.

It may be that had no such issue been framed and the letter dated 16-3-1993 was not identified as being in issue, then the learned High Court judge would have been correct in deciding the case on issues 14 and 16 as preliminary issues. This is because once issues are framed the pleadings recede to the background (Hanafi v. Nallamma 1998 (1) SLR 73) and irrespective of the pleadings the judge is expected to decide on the case as crystallised in the issues. In this instance having identified the letter dated 16-3-1993 as a matter in issue between the two parties, and one which has a bearing on issue no 14, the learned judge ought not have decided the case on the preliminary issues 14 and 16 even though to the learned judge`s credit, it was the wishes of the parties to do so.

In the above circumstances I set aside the judgment of the learned High Court judge dated 25-05-2001 and direct him to try the case on all the issues. I make no order with regard to costs.

Chief Justice

Sripavan J

I agree.

Judge of the Supreme Court

C. Ekanayake J.

I agree.

Judge of the Supreme Court

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

Presidential Elections Act 1981.
Election for the Office of President holden on the Twenty Sixth day of January 2010.

Sarath Fonseka,
No. 6, 37th Lane,
Queen's Road, Colombo 3.
And presently detained at The Navy Headquarters,
Colombo 1.

- Petitioner -

S.C. PRESIDENTIAL ELECTION PETITION NO. 01 / 2010

Vs.

1. Mahinda Rajapakse,
   "Temple Trees",
   Galle Road, Colombo 3.
   And
   Medamulana,
   Weeraketiya.

2. Mohomed Casim
   Mohomed Ismail,
   No. 118, Soysa Watta,
   Welisara,
   Ragama.

3. Achala Ashoka Suraweera,
   Susiri Place,
   Muruthalawa.

4. Channa Janaka Sugathiri Gamage,
   No. 51, Piliyandala Road,
   Maharagama.

5. W.V. Mahiman Ranjith,
   No. 3, 34th Lane, Queen's Road,
   Colombo 3.

6. Anura Liyanage,
   No. 7, Sumner Place,
   Colombo 8.

7. Sarath Manamendra,
   No. 50, Ketawalamulla Lane,
   Colombo 9.

8. M.K. Sivagilingam,
   Ammankoviladi,
   Velvetithurai.

9. Ukkubanda Wijekoon,
   No. 24 /6, 4th Lane,
   Pitakotte, Kotte.

10. Lal Perera,
    No. 7/9B, Sewana Mawatha,
    Gangabada Road, Suwarapola,
    Piliyandala.

11. Siritunga Jayauriya,
    No. 57/7, D.S. Fonseka Road,
    Colombo 5.

12. Wickramabahu Karunaratne
    No. 17, Barrack Lane,
    Colombo 2.

13. Idurus Mohomed Ilyas,
    No. 68, Masjid Road,
    Puttalam.
14. Wije Dias,
    No. 301 1 /1, Main Road,
    Aththidiya, Dehiwala.

15. Sanath Pinnaduwa,
No. 240/1D, Boralugoda,
Athurugiriya.

16. M.M. Mohomed Musthafa,
No. 16, Ramakrishna Road,
Colombo 6.

17. Battaramulla Seelarathana Thero,
No. 185/B, Dewala Road,
Thalangama South, Koswatta,
Battaramulla

18. Senarathne De Silva,
No. 5/B, Webada Road,
Negombo.

19. Aruna De Soysa,
"Susiri", Nupe,
Kosgoda.

20. Upali Sarath Kongahage,
No. 2, Community Road,
Obehena Road,
Madiwela.

21. Muthubandara Theminimulla,
No. 3/1, Sanghamitta Mawatha,
Kandy.

22. Dayananda Dissanayake,
Commissioner of Elections,
Election Secretariat,
Sarana Mawatha,
Rajagiriya.

23. Razik Zarook P.C.,
31/1, Horton Place,
Colombo 7.

24. Kalinga Indatisa,
325 ½ Thimbirigasyaya Road,
Colombo 5.

25. Hudson Samarasinghe,
Chairman,
Sri Lanka Broadcasting Corporation,
Torrington Square,
Colombo 7.

26. Wimal Weerawansa,
21/1, Asoka Mawatha,
Jayanthipura, Battaramulla.

- *Respondents*-

Before **J.A.N. de Silva, C.J.**

Dr. Bandaranayake, J.

Sripavan, J.

Ratnayake, J.

Imam, J.

Counsel : Upul Jayasuriya with Sandamal Rajapakse,
Madubashana Ariyadsa & Sehan Kumarasinghe
instructed by Asoka Samararatne for the Petitioner.

D.S.Wijesinghe, PC with Nihal Jayamanne PC.,
S.S. Sahabandu PC., D.P. Mendis PC., Palitha Kumarasinghe PC, .
Jayatissa de Costa PC., Upali
Senaratne, Sagara Kariyawasam, M.U.M. Ali Sabry, Ms.
Kaushalya Molligoda, Chamila Jalagoda & Isuru Somadasa
instructed by Athula de Silva for the 1st Respondent.

Nihal Jayamanne PC., with W. Dayaratne PC., Chandana Liyanapatabendy, Ananda Goonathilake, Champani Padmasekara, Ajith Munasinghe, Ms. Nurani Amarasinghe, Ms. Uditha Kollure, Dilan de Silva, Ms. Mokshani Jayamanne, Shantha Herath, Premachandra Epa, Sarathchandra Liyanage instructed by Ms. Chathurika Wijesinghe for 6th Respondent.

A.P. Niles with Suren Fernando for 10th Respondent.

S.S. Sahabandu PC., with Dr. Jayatissa de Costa PC., Jayantha Weerasinghe PC., Sanjaya Gamage, Saman de Silva, Senarath Jayasundara, Hariguptha Rohanadeera, Saliya Mathew & Upali Samaraweera instructed by Priyantha Upali Amarasinghe for 17th Respondent.

Palitha Kumarasinghe, PC., with Sunil Abeyratne, Mayura Gunawansa, Viraj Premasiri, Chinthaka Mendis & Viran Fernando instructed by Sumudu Liyanarachchi for 18th Respondent.

Manohara de Silva PC., with Kuvera de Zoysa, Palitha Gamage, Ranjith Caldera, Pathmapriya Ranawaka, Rasanga Harischandra & Lalith Gunaratne instructed by Manjula Balasuriya for the 20th Respondent.

Gamini Marapana, PC with Nihal Jayawardana, B. Manawadu, K. Liyanagamage, Manoj Gamage, Manjula Wellalage, A.Ariyapperuma, Tissa Gunawardena, Naveen Marapana,

Rohana Deshapriya instructed by Ms. A.B.D. Dharmadasa for 23rd Repondent.

Kushan de Alwis with Kaushalya Nawaratne and Chamath Fernando instructed by Upendra Gunasekera for the 24th Respondent.

Priyantha Jayawardana with Rasika Balasuriya, Shan Senanayake, Ms. Sumana Ariyadasa & Ms. Priyani Perera instructed by Shamika Seneviratne for 25th Respondent.

S.L. Goonesekera with J.M. Wijayabandara, Lalith Abeysiriwardena, Ajith Prasanna, Ruwan Udawela & Akalanka Ukwatta instructed by Kapila Gamage for 26th Respondent.

W.P.G. Dep PC. Solicitor General, with Ms. Indika Demuni de Silva, DSG., A.H.M.D. Nawaz DSG. & M. Gopallawa, SSC. Instructed by S. Pieris SA., for 22nd Respondent.

Argued on : 13.09.2010, 14.09.2010 & 15.09.2010

Decided on : 29.10.2010

Written Submissions

Filed on :

Petitioner	**– 29th September 2010**
1st Respondent	**– 29th September 2010**
10th Respondent	**– 29th September 2010**
18th Respondent	**– 29th September 2010**
20th Respondent	**– 29th September 2010**
22nd Respondent	**– 29th September 2010**
24th Respondent	**– 29th September 2010**
25th Respondent	**– 29th September 2010**
26th Respondent	**– 29th September 2010**

J.A.N. De Silva, CJ

When this petition was taken up on 5th July 2010, several Counsel appearing for the 1st, 6th, 17th , 18th , 20th, 23rd, 24th and 26th Respondents informed Court that they have already filed preliminary objections to the maintainability of the petition. Learned Counsel for the petitioner was granted permission to file petitioner's statement of objections at least one week prior to the hearing of the said preliminary objections. The Court fixed 13th, 14th, and 15th September 2010 for the hearing of the said preliminary objections.

When the petition was taken up again on 13th September 2010, it was observed that no statement of objections were filed by the petitioner. Learned Counsel for the petitioner informed Court that the petitioner has only filed a motion dated 13th September 2010 together with an affidavit of Mr. Vijitha Asoka Samararatne, dated 12th September 2010 and two registered postal article receipts marked as **Z1 and Z2.** As no objections were filed by the petitioner to the preliminary objections raised by several Counsel for the Respondents, the Court proceeded to hear the said preliminary objections raised by the Respondents. Oral submissions were made by the Counsel in respect of the following preliminary objections:

(a) The reliefs sought in the prayer to the petition are misconceived in law and cannot be granted by Court;
(b) The petitioner has failed to join necessary parties as Respondents;
(c) The petitioner has failed to furnish material facts in terms of Section 96(c) of the Presidential Elections Act No. 15 of 1981; and,
(d) The petition does not conform to the requirements of Section 96(d) of Act No. 15 of 1981, in that, it does not set forth full particulars of any corrupt or malpractices, the petitioner has alleged.

Learned President's Counsel for the 1st Respondent brought to the notice of Court that the petitioner has not sought a declaration that the election was void as provided in Section 94(a) of Act No. 15 of 1981 (hereinafter referred to as the "Act").

Section 94 of the Act provides all or any of the reliefs that could be claimed in an election petition:

(a) A declaration that the election is void;
(b) A declaration that the return of the person elected was undue;
(c) A declaration that any candidate was duly elected and ought to have been returned;
(d) Where the office of the President is claimed for an unsuccessful candidate on the ground that he had a majority of lawful votes, a scrutiny.

Counsel for the Petitioner and the Counsel for the 10th Respondent sought to argue that Section 91 of the Act must be read with Section 94 in order to interpret the reliefs that could be claimed by the petitioner in terms of Section 94(a). Both Counsels submitted that the Court assumed jurisdiction to declare the election of the Office of the President void by virtue of the provisions contained in Section 91.

I regret that I am unable to agree with this submission. The Supreme Court derives its jurisdiction to hear a Presidential Election petition in terms of Article 130 of the Constitution and not from Section 91 of the Act. It is well settled that the language of a statute constitutes the depository or reservoir of the legislative intent and the duty of the Court is to interpret the words the legislature has used and not to travel outside on a voyage of discovery. Every word of a statute should be construed with reference to the context in which it has been enacted. The marginal note to Section 94 also gives an indication and furnishes a clue to the meaning and purpose of the

said Section. Thus, in my view, Section 94 is clear, unambiguous and specifies the only reliefs that may be claimed by the petitioner in an Election Petition. The petitioner cannot ask for any other reliefs other than those specified in Section 94. In this petition, the petitioner has chosen not to ask for the relief specified in Section 94(a). However, the Petitioner has asked for the following relief in paragraph (a) of the prayer to the petition, not specified in Section 94:

(a) That Your Lordships' Court be pleased to determine and declare that the election of the 1st Respondent above named void.

Where the Act makes general provision in terms of Section 91 for the avoidance of election on an election petition and makes a specific provision with respect to the reliefs which may be claimed, the latter must prevail over the general provision in relation to the different reliefs that a petitioner could claim. In the case of *Nanayakkara* vs. *Kiriella* (1985) 2SLR 391, Thambiah, J. at page 411, made the following observations regarding the proceedings in an election petition.

> *"Election Petition proceedings are purely statutory proceedings , unknown to the common law and, therefore, considerations of equity which guide Courts in dealing with matters of civil rights and their remedies will have no place in dealing with election petitions. The statutory requirements of Election Law must be strictly observed."*

Considering the observations made by Thambiah, J. I am unable to agree with the Learned Counsel for the petitioner and the Learned Counsel for the 10th Respondent that the relief sought to in Section 94(a) must be read with Section 91 and a liberal interpretation be given to Section 94(a). I am of the view that Section 94(a) is a stand alone section and must be interpreted strictly in accordance with its plain and natural meaning. Thus, the Court cannot grant the relief sought by the petitioner in paragraph (a) of the prayer to the petition.

In the case of *Gamini Athukorale* vs. *Chandrika Bandaranaike Cumaratunga* (2001) 1 SLR 60, **S.N. Silva, C.J.** at page 68 succinctly states the legal effects of Sections 91 and 96 as follows:

> *"It is to be noted that grounds (a) and (b) of Section 91 are of a general nature with a concomitant impact on the result of the election. If these grounds are established, the election would be declared void. Whereas, grounds (c), (d), (e), and (f), are what may be described as "candidate specific grounds," where a particular action of a candidate or his agent or any disqualification of the candidate is drawn in issue, Unlike in the case of grounds (a) and (b) the entire election itself would not be drawn in issue in relation to the latter set of grounds. If any of these grounds are established in relation to the particular candidate who is elected, the return of the person so elected would be declared undue.*
>
> *Section 96, which specifies the contents of an election petition, reads as follows:*
>
> *"An Election Petition –*
>
> *(a) shall state the right of the Petitioner to petition within Section 93;*
>
> *(b) shall state the holding and result of the election;*
>
> *(c) shall contain a concise statement of the material fact on which the Petitioner relies;*
>
> *(d) shall set forth full particulars of any corrupt or illegal practice that the Petitioner alleges, including as full a statement as possible of the names of the parties alleged to have committed such corrupt or illegal practice and the date and place of the commission of such practice; and shall be accompanied by an affidavit in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice; .*
>
> *(e) shall conclude with a prayer as, for instance, that some specified person should be declared duly returned or elected, or that the election should be declared void, or as the case may be, and shall be signed by all the Petitioners;*
>
> *Provided, however, that nothing in the preceding provisions of this section shall be deemed or construed to require evidence to be stated in the petition."*

Paragraphs (a), (b), (c) would apply in relation to any Petition, whatever be the ground of avoidance that is relied on. Whereas paragraph (d) would apply in relation to the specific grounds of corrupt or illegal practice as stated in Section 91(c)."

Having pleaded general intimidation, general treating, general bribery and non-compliance with the provisions under Section 91(a) and 91(b) of the Act in paragraph 7 of the petition, the petitioner has failed to seek a declaration that the election was void. Thus I hold, even the incidents referred to are proved by the petitioner, the absence of a specific relief in terms of Section 94(a), precludes this Court from granting a declaration that the election was void.

The second relief claimed by the petitioner in terms of paragraph (b) of the prayer to the petition reads thus:

"(b) That Your Lordships' Court be pleased to determine and declare that the return of the 1st Respondent was undue.".

In order to succeed to the grant of this relief, the petitioner must prove the corrupt practices referred to in paragraphs 14, 15 and 16 of the petition. Further, Section 95(1) (b) mandates that the petitioner should join as Respondents to his election petition, any other candidate or person against whom allegations of any corrupt or illegal practice are made in the petition.

Learned President's Counsel for the 1st Respondent submitted to Court that the petition does not comply with the mandatory provision of Section 95(1)(b) of the Act, in that, the petitioner has failed to join as Respondents to the petition, Sri Lanka Rupavahini Corporation, Sri Lanka Broadcasting Corporation, "Lakhanda" and the Independent Television Network. The Learned Counsel drew the attention of Court to paragraph 16(c) of the petition which reads as follows:

"(c) Commencing approximately at 1 p.m. on the day of the Election, 26th January 2010, Upali Sarath Kongahage, Razik Zarook, Kalinga Indatissa, Hudson Samarasinghe and Wimal Weerawansa (the 20th, 23rd, 24th, 25th & 26th Respondents hereto) made false statements, that the petitioner was not qualified to be elected as President of Sri Lanka, and that even if the petitioner were elected as President he will be disqualified from holding such office. These false statements were broadcast without break until the close of poll at 4 p.m. by Sri Lanka Rupavahini Corporation, Sri Lanka Broadcasting Corporation, Lakhanda and the Independent Television Network. These false statements repeatedly broadcast on the above media had a deterrent effect preventing voters supporting the Petitioner from exercising their franchise. The said Upali Sarath Kongahage, Razik Zarook, Kalinga Indatissa, Hudson Samarasinghe & Wimal Weerawansa were supporters of the 1st Respondent, and had been actively engaged in speaking and working to promote the candidacy of the 1st Respondent throughout the period from the nomination to the close of the poll. The said institutions which broadcast the said false statements were owned and/or controlled by the State and therefore by the 1st Respondent, and were agents of the 1st Respondent. The said false statements were made and broadcast with the knowledge and consent of the 1st Respondent." (emphasis added)

Thus, the petitioner claims that the aforesaid institutions which broadcast false statements were agents of the first Respondent. Further, in paragraph 22 of the petition, the petitioner alleges that the said agents of the said Respondent are guilty of the corrupt practice of making false statements. It is on this basis, the learned President's Counsel argued that agents referred to in paragraphs 16(c) and 22 should have been made as Respondents in terms of Section 95(1)(b) of the Act. Counsel also submitted that the failure to join necessary parties as Respondents was a fatal irregularity and that the petition be dismissed in limine.

By the use of the word "shall" , Section 95 is couched in mandatory terms , so that strict compliance with every letter of the law is necessary. The non-observance of

Section 91(1) (b) and a departure from it is fatal to an election proceedings. In this regard, it may be relevant to consider the observation made by Sharvananda, J. in the case of *Kobbekaduwa* vs. *Jayewardene*, (1983) 1 SLR page 416 at 443.

> "In this case the petitioner has filed one petition challenging the 1st respondent's election on the grounds that the respondent had committed corrupt and illegal practices and has furnished security on the basis of one petition. The petition has to stand or fall as a single petition and not as an aggregate of petitions depending on the number of grounds of challenge. In the circumstance it is not open to the petitioner to seek to salvage his petition by stating that the failure to join the United National Party as a Respondent against whom the allegation of illegal practice was made avoids only that charge but that the petition is good for the purpose of maintaining the other charges preferred in it. In my view, this course of action is not available to the petitioner; for the vice of the omission to join the United National Party to his election petition which included an allegation of illegal practice against the Party affects the entire petition and renders the entire petition as a nullity. Had there been two petitions, one incorporating the charges of corrupt practice and the other the charge of illegal practice the position would have been different; the petition relating to the corrupt practice would have been saved. But, we have only one petition and that petition has not complied with the imperative requirements of section 95."

Thus, in *Kobbekaduwa's* case, the Court held that although the United National Party was an unincorporated body it should have been made a respondent in compliance with the imperative provisions of Section 95(1) (b) of the Act. It was also held that the provisions of Section 95 are mandatory and failure to comply with them renders the whole petition nullity and not merely a particular part of it invalid.

Further, in the case of Bandaranaike *vs. Premadasa. (*1989) 1 SLR 240, Ranasinghe, C.J., at page 253 noted that –

*Election petitions have been dismissed for non-joinder of necessary parties though in both the 1946 Order in Council and in Act No. 15 of 1981, the consequences of the failure to comply with mandatory provisions regarding joinder has not been stated [*See *Wijewardne* vs. *Senanayake* 80 CLW 1: *Kobbekaduwa* vs. *Jayewardene].*

Ranasinghe, C.J. took the view that non-compliance with the mandatory provisions for non-joinder of necessary parties and non-service of the notice of presentation of the petition are fundamental and fatal defects which render the whole petition bad and a nullity. Thus, at page 255, the Court took the view that it has the power to reject an election petition in limine, if there is a fundamental defect in an election petition arising out of non-compliance with a mandatory provision.

Though the Act did not define the term "person", Section 2(c) of the Interpretation Ordinance defines the term "person" as including "any body of persons corporate or unincorporated". Out of the media institutions against whom the allegations of committing the corrupt practice of making/broadcasting a false statement has been made, it is observed that Sri Lanka Rupavahini Corporation and the Sri Lanka Broadcasting Corporation are incorporated bodies in terms of Section 2(2) of the Sri Lanka Rupavahini Corporation and Section 6 (2) of the Sri Lanka Rupavahini Corporation Act No. 6 of 1982 respectively. The Independent Television Network is a corporate entity incorporated in terms of the Companies Act and Lakhanda is an unincorporated body amalgamated to Independent Television Network. Accordingly, I hold that the failure to add the aforesaid institutions as parties to this petition is a fundamental flaw and amounts to a non-compliance with Section 95(1)(b) of the Act. Thus, the 1st Respondent is entitled to succeed in his preliminary objection that the petition should be dismissed in limine.

The third relief sought by the petitioner in terms of paragraph (c) of the prayer to the petition reads as follows:

> (C) "That Your Lordships' Court be pleased to determine and declare that the petitioner was duly elected and ought to have been returned as the President of Sri Lanka."

Having pleaded general intimidation, general treating, misconducts, non-compliance with the provisions of the Act and corrupt practices in paragraph 7 of the petition, in paragraph 17 the petitioner states that the majority of the electors were or may have been prevented from electing the candidate whom they preferred. Further, in paragraph 18 of the petition, the petitioner states that in view of the cumulative effect of the facts and circumstances set out in paragraphs 8- 16, the said election was not free and fair. In view of the said averments, it is not possible for this Court to declare that the petitioner was duly elected and ought to have been returned as the President of Sri Lanka. It appears that the relief sought in paragraph (c) of the prayer to the petition is inconsistent with the several averments referred to in the petition. When there are violations as alleged by the petitioner and the said election was not free and fair, all what the Court could do is to declare the election void. However, the petitioner has not prayed for such a relief and the Court cannot, in law, grant a declaration that the petitioner be duly elected as the President of Sri Lanka. Thus, I hold that the petitioner cannot succeed in obtaining the relief sought in paragraph (c) of the prayer to the petition.

The petitioner claims the following relief in paragraph (d) of the prayer to the petition:

> "(d) That Your Lordships' Court be pleased to order a scrutiny of all the ballots cast at the said election held on 26th January 2010 to be carried out by the 22nd respondent and his officials in the presence of the petitioner and 1st to 21st Respondents and / or their authorized representatives."

Upon the careful perusal of Section 94(d), it would appear that a scrutiny is possible only on the ground of a claim made by an unsuccessful candidate who had obtained a majority of "**lawful votes"** . (emphasis added).

Nowhere in the petition, the petitioner claims to have obtained a majority of lawful votes. The petitioner in paragraph 26 of the petition only avers that in view of the facts and circumstances set out in paragraphs 8- 16(viz., general intimidation, general treating, general bribery, false statements which constitute misconduct, non-compliance with the provisions of the Act, corrupt practice, etc.) he had obtained a majority of the votes and therefore entitled to a scrutiny of the ballots. What is required for a scrutiny of the ballots in terms of Section 94 of the Act was "**a majority of the lawful votes"** and not "**a majority of the votes"** Hence, the petitioner does not become entitled to the relief sought in paragraph (d) of the prayer to the petition. (emphasis added)

The Learned President's Counsel for the 1st Respondent also raised a preliminary objection on the failure to comply with Section 96(c).

Section 96(c) stipulates that

> "An Election Petition shall contain a concise statement of the material facts on which the Petitioner relies."

I have already dealt with the issues where the Petitioner has pleaded "general grounds" of avoidance but not sought relief by way of an avoidance of the election. Accordingly it would be necessary only to deal with what was referred to as "candidate specific grounds" for avoidance. Under this area, the Petitioner has focused on corrupt practices allegedly committed by the 1st Respondent which he claims, fall within Sec. 91 (c) of the Act.

In India there is an identical provision to Section 96(c) of the Act, in the Indian Representation of the Peoples' Act of 1951. Hence, it would be relevant to consider Indian Authorities in dealing with this objection.

The Indian Supreme Court has applied a very strict standard when considering the pleadings relating to corrupt practices in respect of the identical provision in the said Indian Representation of the Peoples' Act. In the case of *Dhartipakar Madanlal Agarwal vs. Shri Rajiv Ghandi* 1987 3 SCR 369 it is stated "Allegations of corrupt practice are in the nature of criminal charges, it is necessary that there should be no vagueness in the allegations so that the returned candidate may know the case he has to meet. If the allegations are vague and general and the particulars of corrupt practice are not stated in the pleadings, the trial of the election petition cannot proceed for want of cause of action. The emphasis of law is to avoid fishing and roving inquiry. It is therefore necessary for the Court to scrutinize the pleadings relating to corrupt practice in a strict manner."

In the case of *Gamini Athukorale vs. Chandrika Bandaranaike Cumaratunge* 2001 (1) SLR 60 the test to be applied to determine whether the required material facts had been correctly pleaded was laid down in the following manner "…….. The test required to be answered is whether the Court could have given a direct verdict in favour of the election petition in case the returned candidate has not appeared to oppose the election petition, on the basis of the facts pleaded in the petition." Accordingly, the pleadings should contain sufficient material that could permit the Court to give the decision in favour of the Petitioner if the returned candidate does not appear and oppose.

The Petitioner has averred treating, bribery and false statements as corrupt and illegal practices which grounds fall within Section 91(c) of the Act. The Provisions in respect of corrupt practices are laid down from Sections 76 to 80 of the said Act.

When it comes to dealing with the corrupt practice of treating and bribery it has to be kept in mind that the 1st Respondent was the Executive President on the material dates referred to in the petition. Accordingly, his official position requires him to have meetings with various groups of people in the performance of his duty. Therefore, it would be necessary for the Petitioner to state material facts which would show that these meetings were at least beyond his performance of official functions.

Sir Hugh Fraser in *The Law of Parliamentary Election and Election Petitions*, 3rd Edition at 108 states thus:-

> "Any act of treating tending to interfere with the free exercise of the franchise was always considered a corrupt and illegal act at common law. But it has never been considered necessarily a corrupt thing for persons interested in particular subjects to invite other persons to a discussion relating to the subject, even though some entertainment may be provided. It would, we think, be to impose restrictions upon the advocacy of many public questions which the Legislature never intended to be imposed, if it were to be held that a temperance meeting or a meeting to advocate the admission of women to the franchise, or a meeting for the disestablishment of the Church in Wales, at which tea or other refreshments were provided, was to be considered as a corrupt act, simply because the effect of the meeting might be to give force and strength to an agitation in favour of a political measure to carry out the views of the promoters of the meeting."
>
> "When that eating and drinking take the form of enticing people for the purpose of inducing them to change their minds, and to vote for the party to which they do not belong, then it becomes corrupt, and is forbidden by the statute. Until that arrives, the mere fact of eating and drinking, even with the

connection which this supper had with politics, is not sufficient to make out treating".

In the above treaties, Fraser has also cited a passage from Willes J. in Tamworth 1861 1 O & H 82 at 83 as follows:-

> "Treating to be corrupt, must be treating under circumstances and in a manner that the person who treated used meat or drink with a corrupt mind, that is, with a view to induce people by the pampering of their appetite to vote or abstain from voting, and in so doing to act otherwise than they would have done without the inducement of meat or drink. It is not the law that eating and drinking are to cease during an election." (emphasis added)

Averments in the petition in respect of the corrupt practice of treating is given in paragraph 14 of the petition. Names of various associations/ groups/professional bodies have been given and the dates and the venues have also been given. But significantly the names of the persons who participated have not been given. Participants are described as "Artists", "Ayurveda Physicians," "Graduates," "Dharma School teachers" etc. No facts are stated or material given to establish that these meetings went beyond the official functions of the 1st Respondent who was the Executive President at the relevant time.

Applicable provisions of the Act clearly and expressly state that these acts have to be done with a "corrupt" intention. There was not even an express averment in the petition to this effect.

Averments in respect of the corrupt practice of bribery is given in paragraph 15 of the Petition. Similar deficiencies as stated in respect of the corrupt practice of treating could be seen in these pleadings. It is observed that even in these pleadings there is no express averment of the corrupt intention. Pleadings are also

insufficient for the Court to arrive at an inference of a corrupt intention, more so in the context of the fact that the 1st Respondent was performing the function of the Executive President at the relevant time.

Facts relating to the corrupt practice of making false statements are contained in paragraph 16 of the petition. These averments do not give the exact words used in the alleged false statements supposed to have been made by the 1st Respondent or on his behalf by the Respondents referred to. In respect of the "fake document" referred to in paragraph 16 (a) and (b) of the petition at the least a copy has not been produced by the Petitioner.

As stated even the Indian Supreme Court has emphasized the necessity of the allegations not being vague. *(Dhartipakar Madanlal Agarwal vs. Shri Rajiv Ghandi (supra)).*

The Learned President's Counsel for the 1st Respondent in his submissions drew the attention of Court to many local and Indian cases to show that false statements made in respect of the candidates public conduct and character as opposed to his personal conduct and character do not fall into the category of corrupt practice. He took up the position that the statements referred to do not touch on his personal conduct and personal character. In my view, due to the basic deficiencies in the pleadings in respect of the allegation of false statements it is not necessary for this Court to consider or decide on these aspects.

The consequences of non compliance was dealt with in *Kobbekaduwa vs. Jayawardena* (1983) 1 SLR 416 in the following manner:

> "Material facts are those which go to make out the Petitioner's case against the Respondent. The word 'material' means necessary for the purpose of formulating the charge and if any one material fact is omitted statement of claim is bad and liable to be struck out."

In the case of *Udhav Singh vs. Madhav Rao Scindia* 1977 1 Supreme Court case the Indian Supreme Court held,

> " …….. In short all those facts which are essential to cloth the petitioner with a complete cause of action are "material facts" which must be pleaded, and failure to plead even a single material fact amounts to disobedience of the mandate of Section 83(1) (a)".

During the hearing of the case the counsel for the petitioner submitted that the relevant sections of the Act have been expressly quoted and pleaded in the petition and accordingly there is sufficient compliance with the requirements of section 96(c). In this regard, I would like to cite the following quotation from the Indian Supreme Court in the case of *Hari Shanker Jain vs Sonia Gandhi* AIR 2001 SC 3689 and AIR 2001 SCC 233

> "Material facts required to be stated are those facts which can be considered as materials supporting the allegations made. In other words, they must be such facts as would afford a basis for the allegations made in the petition and would constitute the cause of action as understood in the Code of Civil Procedure, 1908. The expression "cause of action" has been compendiously defined to mean every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgment of the court. Omission of a single material fact leads to an incomplete cause of action and the statement of claim becomes bad. The function of the party is to present as full a picture of the cause of action with such further information in detail as to make the opposite party understand the case he will have to meet. (See Samant N Balakrishna etc. vs George Fernandez and others etc. – (1969) 3 SCR 603, Jitender Bahadur Singh vs Krishna Behari (1969) 2 SCC 433.) Merely quoting the words of the section like chanting of a mantra does not amount to stating material facts. Material facts would include positive statement of facts as also positive averment of a negative fact, if necessary. In V.S. Achuthanandan vs P.J.Francis and another (1999 3 SCC 737) this court has held on conspectus of a series of decisions of this court, that material facts are such

preliminary facts which must be proved at the trial by a party to establish existence of a cause of action. Failure to plead material facts is fatal to the election petition and no amendment of the pleadings is permissible to introduce such material facts after the time limit prescribed for filing the election petition." *(Emphasis added)*

Thus, quoting the relevant sections is not a substitute for the mandatory requirement contained in section 96(c).

Due to the above facts I hold that the election petition does not comply with the requirements contained in Section 96(c) of the Presidential Elections Act.
Learned Counsel for the 24th Respondent submitted that no proper affidavit has been filed by the Petitioner to comply with the mandatory requirements contained in Section 96(d) of the Act.

Section 96 or any other Provision of the Act do not prescribe the form of the affidavit.

Paragraph 1 of the affidavit sworn by the Petitioner himself states as follows:- " I am affirmant hereto and the petitioner above named. I affirm to this affidavit from facts within my personal knowledge and obtained by me from the supporters of the New Democratic Front and the other political parties who supported me at the election held on 26th January 2010 who were connected with me and/or had personal knowledge of the several acts and incidents on which relief is prayed for by me in the election petition."

Based on the above statement and the contents of the affidavit the Respondents allege that the affidavit is based on "hearsay" and accordingly contains facts which are not within the affirmant's personal knowledge but obtained from elsewhere. The Petitioner could have filed affidavits "from supporters of the New Democratic

Front and other political parties" referred to in the 1st paragraph to his affidavit who may have personally witnessed the events referred to in the affidavit.

During the course of the submissions the Counsel for the Petitioner referred to the wording of the section which speaks of "an affidavit" and submitted that he was restricted to filing one affidavit. But the Counsel for the Respondents drew the attention of Court to Section 2 of the Interpretations Ordinance where it states "……. words in the singular number shall include the plural and vise versa".

Jayasinghe vs. Jayakody & others (1985) 2 SLR 77 is a case where the election of a Member of Parliament was challenged under the Provision of the Ceylon Parliamentary Election Order in Council 1946 as amended by Act 9 of 1970. Section 80 of the Ceylon Parliamentary Election Order in Council also has a similar Provision in respect of an affidavit in the following manner.

> "The Petition shall also be accompanied by an affidavit in the prescribed form in support of the allegation of such corrupt or illegal practice and the date and place of the commission of such practice."

In paragraph 2 of the affidavit filed by the Petitioner in Jayasinghe vs. Jayakody, (Supra) it is stated as follows:-

> "That the averments of facts set out in my petition and the particulars of the commission of corrupt practice set out therein are made from my personal knowledge and observation or from personal inquires conducted by me in order to ascertain the details of the incident referred to in the petition. "

Even in Jayasinghe vs. Jayakody (supra), the Petitioner did not say in his affidavit which facts in the petition are based on personal knowledge and which of them are based on information. In that case the Election Judge held that the affidavit can be based on personal knowledge or on information and belief provided that in the latter the deponent must disclose the source of

information and the grounds of his belief. The Election Judge rejects the affidavit in the said case due to the above reason in the following manner. "I reject the affidavit filed by the Petitioner on the ground that the Petitioner has not verified and confirmed the facts stated in the petition. I uphold the objection that there was no proper affidavit supporting the allegation of corrupt practice pleaded in the petition and therefore the Petition was defective." But in the appeal to the Supreme Court Sharvananda CJ. held as follows:-

> "I agree with the Election Judge that where some of the statements in the paragraph of the affidavit accompanying the election petition are based on the knowledge of the deponent and some on information received from others, the affidavit is defective. But I do not agree with the Election Judge that the petition should be dismissed on that ground of defect in the verification. The allegation of corrupt practice cannot be ignored merely on the ground that the source of information, is not disclosed, when the allegation is based on information, as it is not a requirement of law that the source of information or the ground of the deponent's belief should be set out, since the form of the mandatory affidavit has not been prescribed. In my view the Election Judge was in error in upholding this objection regarding the affidavit.
>
> I agree with Samarawickrama,J that an election petition should not be dismissed on the ground of defective affidavit, where no form has been prescribed by law. "

Accordingly Sharvananda C.J. held that the affidavit is defective but did not dismiss the election petition on that ground alone.

In the matter before us, the Petitioner has obtained most of the facts in the affidavit "from the supporters of the New Democratic Front and other political parties who supported" the Petitioner at the election. The name of the supporters or at least the

name of the political parties from whom the information was obtained have not been disclosed. In the circumstances, on the same reasoning of Sharvananda CJ in the case of Jayasinghe Vs. Jayakody (Supra) , I do not dismiss the election petition on this ground alone but hold that the affidavit filed in this case is defective.

The totality of the circumstances referred to above establish defects in the pleadings of the petitioner. It is the duty of the Court to examine the petition and make a decision to reject it if it is misconceived in law. Failure to file proper pleadings, is fatal to an election petition and no amendments of the pleadings are permissible at this stage. If a proper petition had been filed, this Court may, upon such terms as to costs or otherwise as the Court may deem fit allow the particulars of any corrupt practice specified in the petition to be amended or amplified in terms of Section 97 of the Act. However, if the pleadings, do not disclose proper reliefs worth to be tried by Court, the pleadings are liable to be struck off and the election petition is liable to be dismissed in limine.

For the reasons set out above I uphold the preliminary objections raised by the respondents and dismiss the petition in limine. However, I order no cost.

Chief Justice

Dr. Bandaranayake J.

I agree.

Judge of the Supreme Court

Sripavan J.

I agree.

Judge of the Supreme Court

Ratnayake J.

I agree.

Judge of the Supreme Court

Imam J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Pradeep Sanjeewa Samarasinghe,
775S, Vihara Mawatha,
Narangoda Paluwa,
Ragama

- Petitioner-

S.C.(F.R.) Application No. 361/2009

Vs.

1. The Associated News Papers of Ceylon Ltd.,
   Lake House,
   Colombo 01.

2. Bandula Padmakumara,
   The Chairman,

3. Nihal Rathnayake,
   Director Editorial

4. Shan Shanmuganathan,
   Director Finance.

5. Upul Dissanayake,
   Director Operations,

6. Rasanga Harishchandra,
   Director Legal,

7. Rohana Ariyarathna,
   Chief Administrative Officer

8. Abaya Amaradasa,
   The General Manager

9. Gamini Samarasinghe,
   The Editor, Sarasaviya Newspaper

10. Kumudu Goonawardena,
The Company Secretary
All are in "The Associated Newspapers of Ceylon Ltd.", Lake House,
Colombo 1.

11. Hon. Attorney General,
Attorney General's Department Hulftsdorp,
Colombo 12.
.

- *Respondents* –

Before : **S. Marsoof, J.**

K.Sripavan, J.,

Imam, J.

Counsel : Upul Jayasooriya for Petitioner.

M.U.M. Ali Sabry with Samith Fernando for 1st to 10th Respondents.

Argued on : 11.01.2010

Decided on : 08.06.2010

SRIPAVAN. J.

The petitioner who is a journalist in the "Associated Newspapers of Ceylon Ltd." sought a declaration that his fundamental rights to equality, the equal protection of the Law and the right to form and join a trade union as enshrined in Articles 12(1), 12(2), 14(1)(d) and 14(1)(g) of the Constitution have been violated by the First to Ninth respondents. However, Leave to Proceed was granted on 19.01.09 for the alleged infringement of Article 12(1) of the Constitution.

It is not disputed that at all times material to this application, the petitioner was holding the post of branch Secretary of a Trade Union, namely, "Jathika Sevaka Sangamaya"in the first respondent company. The substantial complaint of the petitioner was that, he was transferred from "Sarasaviya" editorial of the first respondent to "Mihira" editorial with effect from 02.02.2009 and that after two months of the said transfer , the petitioner was again transferred to the Anuradhapura Office of the first respondent by letter dated 08.04.2009 marked **P18** illegally, arbitrarily and in violation of the rules of natural justice. The petitioner in paragraph 25 of the petition claims that the 7th respondent has no power or authority to transfer a Secretary or a President of a Workers' Union in as much as such powers are vested in the Secretary to the relevant Ministry, in terms of the Public Administration Circular No. 58/91 dated 12th December 1991 issued by the Secretary, Ministry of Public Administration, Provincial Councils and Home Affairs marked **P20.** Thus, the petitioner seeks to set aside the transfer letter marked **P18** issued by the 7th respondent.

For purpose of convenience, I shall reproduce the said Circular No. 58/91 issued by R. Abeyratne, Secretary, Ministry of Public Administration, Provincial Councils and Home Affairs.

Public Administration Circular No. 58/91

Ministry of Public Administration,
Provincial Councils & Home Affairs,
Independence Square,
Colombo 7.
12th December , 1991.

To: All Secretaries of Ministries
Secretaries of Provincial Councils
Heads of Departments
Government Agents
Secretaries to Provincial Governors
Secretaries to Provincial Public
Service Commissions.

Interdiction/Transfers of Presidents and
<u>Secretaries of Trade Unions</u>

If any Public Officer holding the post of President or Secretary of any recognisd Trade Union were subjected to interdiction or transfer, that decision should be taken personally by the Secretary to the relevant Ministry..

2. You are requested to bring this to the notice of all officers.

Sgd. R. Abeyratne
Secretary,
Ministry of Public Administration,
Provincial Councils & Home Affairs,

It is evident from the said Circular, that it applies only to a "Public Officer" holding a post of President or Secretary of any recognized Trade Union. The Constitution in Article 170 defines "Public Office" as follows:

"Public Officer" means a person who holds any paid officer under the Republic other than a judicial officer but does not include –

(a) the President;

(b) the Speaker;

(c) a Minister;

(ca) a member of the Constitutional Council,

(cb) a member of the Election Commission,

(cc) a member of the National Police Commission,

(cd) the Commissioner General of Elections,

(ce) Officers appointed to the Election Commission by the Election Commission.

(d) a member of the Judicial Service Commission;

(e) a Member of the Public Service Commission,

(f) a Deputy Minister;

(g) a Member of Parliament;

(h) the Secretary-General of Parliament;

(i) a member of the President's staff;

(j) a member of the Public Service Commission;

(k) a member of the staff of the Secretary-General of Parliament.

The appointment, promotion, transfer, dismissal and disciplinary control of "Public Officers" are vested in the Public Service Commission, in terms of Article 55 of the Constitution. No material was placed before Court to establish that the petitioner was appointed as a journalist by the Public Service Commission. On the contrary, the first respondent is a Company in which the Public Trustee holds the majority of the shares. Section 2 of The Associated Newspapers of Ceylon Ltd. (Special Provisions) Law, No. 28 of 1973 reads thus :

"The following provisions shall, on the appointed date, apply in respect of the company which was, on the day immediately prior to that date, carrying on business under the name of The Associated Newspapers of Ceylon, Limited :

(a) Such company, hereinafter in this Law referred to as "the company", shall be, for the purposes of the Companies Ordinance, a company other than a private company within the meaning of that Ordinance.

(b) Not less than seventy-five per centum of the total number of all the shares of the company shall vest in the Public Trustee on behalf of the Government, and the company shall register the Public Trustee, under the title "The Public Trustee on behalf of the Government of Sri Lanka", as the holder of such shares of the company, and shall issue the necessary share certificates to the Public Trustee under that title.

(c) From and after the appointed date, persons who were shareholders of the company in terms of the Annual Return in Companies Form 63 made up to the fourth day of January, 1972, and tendered to the Registrar of Companies, shall not be entitled to more than twenty-five per centum of the total number of shares to the company:

Provided that no individual shareholder shall hold more than two per centum of the total number of shares of the company as on the fourth day of January, 1972.

(d) In accordance with the preceding provisions of the section, the persons whose names and addresses are specified in the entries in Column 1 of the Schedule to this Law, being persons who were shareholders of the company in terms of the Annual Return in Companies Form 63 made up to the fourth day of January, 1972, and tendered to the Registrar of Companies, may hold shares in the company in such number as are specified in the corresponding entries in Column II of that Schedule.

(e) The balance shares of the company shall vest in the Public Trustee on behalf of the Government in terms of the provisions of paragraph (b).

(f) The memorandum and articles of association of the company shall, with effect from the appointed date, cease to be in force.

(g) The new memorandum and articles of association of the company shall be as prescribed.

(h) .Any transfer of the ownership of shares in the company made on or after the fourth day of January, 1972, shall be void."

The documents marked **P2 & P3** dated 16.06.95 and 16.01.2002 respectively indicate that the petitioner's appointment and promotions were made by the Chief Administration Officer of the first respondent Company. Hence, the petitioner is not a "Public Officer" and does not hold any paid office under the "Republic". Thus, I have no hesitation in concluding that the petitioner is not a "Public Officer" within the meaning of the Public Administration Circular No. 58/91. Therefore, the said Public Administration Circular No. 58/91 has no application to the petitioner. Hence, I hold that the petitioner's fundamental right guaranteed by Article 12(1) of the Constitution has not been violated, by the first to ninth respondents.

The petitioner in paragraph 21 of the petition states that the Company Secretary of the first respondent Company on 17.03.2008 directed the petitioner to forward an explanation as to why disciplinary action should not be taken against the petitioner for the violation of the notice dated 6th January 2006. Having averred in paragraph 22 of the petition that the petitioner or the Trade Union he represents have not received any such notice dated 06.01.2006, the petitioner in paragraph (f) of the prayer to the petition seeks to quash the

notice dated 06.01.2006 marked **P19(5**) issued by the Secretary to the first respondent Company.

If the petitioner's fundamental right has been violated by the direction issued on 17.03.2008 for not complying with the notice dated 6th January 2006, the petitioner should have applied to this Court within one month from 17.03.2008 as provided in Article 126 (2) of the Constitution. The present application was filed on 06.05.2009. Having slept over his right for more than one year the petitioner cannot now be heard to complain of a direction dated 17.03.2008. I do not see any merit in the petitioner's application. The application is therefore dismissed, in all the circumstances without costs.

JUDGE OF THE SUPREME COURT

S. MARSOOF, J.

I agree.

JUDGE OF THE SUPREME COURT

IMAM, J.,

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal under and in terms of Article 128(2) of the Constitution from an order of the High Court established under Article 154P of the Constitution and in terms of Section 5A of the High Court of the Provinces (Special Provisions)(Amendment) Act No.54 of 2006.

Ediriweera Jayasekera
Kurundupatabendige Chandrani,
GalgeVihara Road,
Main Street,
Devinuwara.

PLAINTIFF

SC Appeal No. 15/2009
SC.HC.(CALA) No. 29/09
WP/HCCA/KALUTARA No.101/2003
DC PANADURA No.745/P

vs.

1. Ediriweera Jayasekera
   Kurundupatabendige Badhra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

2. Gampolage Chandra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

3. Senadheeerage Alice Nona,
   No.248, Batadombathuduwa Road,
   Alubomulla (Deceased)

4. Willorage Rasika Lakmini,
   Batadombathuduwa Road,
   Alubomulla

DEFENDANTS

AND BETWEEN

Willorage Rasika Lakmini,

Batadombathuduwa Road,
Alubomulla

4TH DEFENDNT-APPELLANT

V.

Ediriweera Jayasekera
Kurundupatabendige Chandrani,
GalgeVihara Road,
Main Street,
Devinuwara.

PLAINTIFF-RESPONDENT

1. Ediriweera Jayasekera
   Kurundupatabendige Badhra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

2. Gampolage Chandra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

3. Senadheeerage Alice Nona,
   No.248, Batadombathuduwa Road,
   Alubomulla (Deceased)

DEFENDANT-RESPONDENTS

AND NOW BETWEEN

Ediriweera Jayasekera
Kurundupatabendige Chandrani,
GalgeVihara Road,
Main Street,
Devinuwara.

PLAINTIFF-RESPONDENT-PETITIONER

V.

Willorage Rasika Lakmini,
Batadombathuduwa Road,
Alubomulla.

4TH DEFENDNT-APPELLANT RESPONDENT

1. Ediriweera Jayasekera
   Kurundupatabendige Badhra De Fonseka,
   No.51/3, De Fonseka Road,
   Panadura.

2. Gampolage Chandra De Fonseka,
No.51/3, De Fonseka Road,
Panadura.

3. Senadheeerage Alice Nona,
No.248, Batadombathuduwa Road,
Alubomulla. (Deceased)

DEFENDANT-RESPONDENT-RESPONDENTS

Before	:	**J A N de Silva, C J** **Saleem Marsoof P C, J** **Chandra Ekanayake, J**
Counsel	:	Manohara de Silva, PC with Arinda Wijesundara and G.W.C.Bandara Thalagune for the Plaintiff - Respondent - Appellant. Uditha Egalahewa with Amaranath Fernando for the 4th Defendant-Appellant-Respondent.
Argued on	:	10.06.2010.
Written submissions tendered on	:	30.04.2009 (by the plaintiff-respondent - appellant). 05.06.2009 (by the 4th defendant-respondent - respondent)
Decided on	:	07.10.2010.

Chandra Ekanayake, J.

The plaintiff-respondent-petitioner (hereinafter sometimes referred to as the plaintiff) by her petition dated 25.02.2009 has sought inter alia, special leave to appeal to this Court from the order of the learned Judges of the High Court of Civil Appeal of the

Western Province (Holden in Kalutara) dated 15.01.2009 marked "E", to uphold the preliminary objections raised on her behalf and to dismiss the appeal filed by the 4th defendant-appellant-respondent (hereinafter sometimes referred to as the 4th defendant). When the above application was supported this Court by its order dated 19.03.2009 had granted special leave to appeal on the questions of law set out in sub paragraphs (a) to (g) of paragraph 9 of the said petition. Those sub paragraphs are reproduced below:

(a) The said order is contrary to law and against the weight of the evidence,

(b) The learned Judges of the High Court erred in holding that "all necessary parties have been noticed" by the 4th defendant appellant,

(c) The learned Judges of the High Court failed to take in to consideration that only the plaintiff has been named as respondent in the notice of appeal, and only the plaintiff and the 1st defendant are named as respondents in the Petition of Appeal,

(d) The learned Judges of the High Court failed to take into consideration that the bond furnished by the appellant only covers the cost of the plaintiff-respondent and does not cover the cost of the 1st, 2nd, and 3rd respondents and that the appellant has failed to obtain an acknowledgement or waiver of security from the said 1st , 2nd and 3rd respondents as required by Section 755(2) (a)of the Civil Procedure Code as amended by Act No.79/1988.

(e) The learned Judges of the High Court failed to take in to consideration that the appellant had failed to serve a copy of the notice of appeal on all the respondents and to furnish proof of service as required by Section 755(2) (a) of the Civil Procedure Code.

(f) The learned Judges of the High Court erred by considering that "the 1st and 2nd defendants both have tendered one proxy and not tendered a statement of claim" (which fact only establishes that the 1st and 2nd defendants did not dispute the plaintiff's claim in the District Court) and thereby concluding that the 1st and 2nd defendants would not be contesting the appeal of the 4th defendant-appellant.

(g) The learned Judges of the High Court erred by holding that "in the instant case only the plaintiff and 3rd and 4th defendants remain as disputed parties" as in the event the District Court judgment is set aside or varied in any manner, the rights of the 1st and 2nd defendants who have not been given an opportunity to be heard before the High Court, would be prejudiced.

According to Section 5C(1) of the said Act No. 54 of 2006 an appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154 P of the constitution, with leave of the Supreme Court first had and obtained. But in the present case the plaintiff – respondent – petitioner (hereinafter referred to as the plaintiff) by petition dated 25-02-2009 has sought special leave.

At the hearing of the appeal before this Court the Counsel for the plaintiff vehemently stressed on the preliminary objection raised in the High Court on 25-08-2008 by the plaintiff which had been to the following effect – (vide pg – 4 of the written submissions of the plaintiff filed in this Court on 30-04-2009):

'that the 4th defendant-appellant-respondent had failed to comply with the mandatory provisions of Sections 755(1), 755(2)(a), 755(2)(b) and 758(1) by:-

(a) failing to name the parties to the action,

(b) failing to name all the respondents to the action,

(c) failing to give required notices of this appeal to the 1st, 2nd and 3rd defendants, and to submit proof thereof.

(d) failure to provide security of the1st, 2nd and 3rd defendants' costs of appeal ?

With regard to (c) and (d) above it has to be noted that 3rd defendant had died before the delivery of the judgment by the District Judge.

In addition to the oral submissions made here plaintiff-respondent-petitioner and 4th defendant-appellant-respondent have filed their written submissions also. The appeal preferred by the 4th defendant was one against the judgment pronounced by District Judge of Panadura in case bearing No. 745/ Partition – instituted against the 1st to 4th defendants, to partition the land morefully described in the amended plaint filed in the said partition case. The Learned High Court Judges by their judgment dated 15.01.2009 had concluded that all necessary parties had been noticed by the 4th defendant-appellant-respondent in compliance with the provisions of Section 755 of the Civil Procedure Code and proceeded to fix the case for argument after overruling the aforementioned preliminary objection raised by the plaintiff with regard to the maintainability of the appeal in the High Court.

However, perusal of the notice of appeal (C1) filed in the District Court makes it clear that only following particulars were included under items (3) and (5) thereof:-

Under item (3) i.e. – Names and addresses of the parties	)	only plaintiff's and 4th defendant's names and addresses given.
Under item (5) i.e. – Name of the respondent	)	only plaintiff's name and address given.

What needs to be examined now is whether the finding of the learned High Court Judge viz- 'all necessary parties were noticed in compliance with Section 755 of the Civil Procedure Code' - is correct?

To examine the same one should first consider the procedure that has to be followed when preferring an appeal against an interlocutory decree or judgment entered in a partition action. It is undisputed that the appeal in hand is an appeal preferred from the judgment of the District Court. Now Section 67 of the Partition Act No.21 of 1977 (as amended) would become relevant. The said section thus reads as follows:

> 67. "An appeal shall lie to the Supreme Court against any judgment, decree or order made or entered by any court in any partition action; and all the provisions of the Civil Procedure Code shall apply accordingly to any such appeal as though a judgment, decree or order made or entered in a partition action were a judgment, decree or order made or entered in any action as defined for the purposes of that Code."

A plain reading of the above section would make it amply clear that in an appeal lodged against the judgment/decree made or entered by Court in a partition action – all the provisions of the Civil Procedure Code shall apply. This renders the entire chapter in the Civil Procedure Code pertaining to appeals namely – Chapter LVIII applicable to an appeal preferred from a judgment entered in a partition action also.

The relevant Section in the Civil Procedure Code with regard to 'Notice of Appeal'- appears to be Section 755. As the requisites of notice of appeal are embodied in sub-paragraph (i) of Section 755 same is reproduced below:

755(1)"Every notice of appeal shall be distinctly written on good and suitable paper and shall be signed by the appellant or his registered attorney and shall be duly stamped. Such notice shall also contain the following particulars:

(a) the name of the court from which the appeal is preferred;

(b) the number of the action;

(c) the names and addresses of the parties to the action;

(d) the names of the appellant and respondent;

Provided that where the appeal is lodged by the Attorney-General, no such stamps shall be necessary."

Further Section 755(2) of the Civil Procedure Code is clear enough as to what should accompany a notice of appeal- namely security for a respondent's costs of appeal in such amount and nature as is prescribed in the rules enacted under Article 136 of the Constitution, or acknowledgement or waiver of security signed by the respondent or his registered attorney. Sub Sections 755(2) (a) and 2 (b) thus read as follows:

755 (2) "The notice of appeal shall be accompanied by –

(a) except as provided herein, security for respondent's costs of appeal in such amount and nature as is prescribed in the rules made by the Supreme Court under Article 136 of the Constitution, or acknowledgement or waiver of security signed by the respondent or his registered attorney; and

(b) proof of service, on the respondent or on the his registered attorney, of copy of the notice of appeal, in the form of a written acknowledgement of the receipt of such notice or the registered postal receipt in proof of such service."

Examination of the security bond in this case (C2) amply demonstrates that it only covers the cost of the plaintiff-respondent and it does not cover the costs of 1st and 2nd defendant-respondents and it accompanied the proof of service only on the plaintiff. Therefore it has to be observed that the security bond C2 is not in compliance with the provisions of sections 755 (2) (a) and 755(2)(b).

The contention of the Counsel for the plaintiff was that when it comes to statutes of procedure, failure to complete required steps within the specified time frame, is fatal to the case and thus the preliminary objection should have been upheld by the Learned Judges of the High Court due to non-compliance of the provisions of Section 755(1), 755(2)(a) and 755(2)(b) which had to be complied with when the notice of appeal was tendered and that was within 14 days from the judgment.

The main submission of the 4th defendant-appellant-respondent's Counsel was that - no prejudice was caused to the 2nd defendant-respondent-respondent by not making her a party and further this Court has the power to add the 2nd defendant as a party to the said appeal. This merits careful consideration in the light of the circumstances of this case. It is to be noted that the following matters were not in dispute:-

1. plaintiff had instituted this partition action naming 1 to 4 defendants as the defendants in the case,

2. the 3rd defendant who had passed title to the 4th defendant reserving life interest had died on 29-03-2003.

3. by the judgment of the learned District Judge dated 21.07.2003 pronounced after trial, only the plaintiff, 1st defendant and 2nd defendant (who got only life interest of the share allocated to the 1st defendant) were given shares,
4. as per the notice of appeal filed by the 4th defendant (C1) only the plaintiff had been named as a party (naming him as a respondent) but not the 1st and 2nd defendants,
5. failure to give required notice of the appeal to the 1st and 2nd defendants,
6. failure to provide security for the costs of appeal of the 1st and 2nd defendants.

From the above it is manifestly clear that although shares were given to the plaintiff, 1st defendant and 2nd defendant (to whom life interest of 1st defendant's share was given by the judgment) none of them were made respondents to the appeal or given notice, and failed to provide security for the costs of appeal of 1stand 2nd defendants. Even in the petition of appeal dated 02-09-2003 (C3) only the plaintiff and the 1st defendant were named as respondents and as such the petition of appeal too is not in conformity with the provisions of S-758 (1) of the Civil Procedure Code. Thus the questions of law on which special leave was granted by this Court are answered in the affirmative and the impugned judgment of the High Court is hereby set aside.

The 4th defendant's position is that the failure to make the 2nd defendant a party to the appeal and non-compliance of the provisions of Section 755 of the Civil Procedure Code has not caused any prejudice to the plaintiff-appellant. The Learned Counsel for the 4th defendant-appellant-respondent has submitted that Court has the power even at this stage to add the 2nd defendant as a party to the appeal. For this

submission he has relied on the principle of law enunciated in the decision in Kiri Mudiyanse and another vs. Bandara Menika (1974) 76 NLR-371.

This leads me to the next point viz - 'would it be correct to say that failure on the part of the 4th defendant to comply with the requirements of Sec. 755 has not caused any prejudice to the other parties to the main partition case?' The gist of the submission of the Counsel for the plaintiff was that as it is mandatory to comply with steps that need to be taken during a permitted period of time and as the 4th defendant has failed to comply with the same, the preliminary objection raised in the High Court should have been upheld and the appeal was liable to be dismissed there. Further he has urged that since the 4th defendant has failed to move Court for relief under Section 759 of the Civil Procedure Code granting relief under said section (S. 759) does not arise. I am unable to agree with the said submission for the reason that it is undoubtedly incumbent upon the Court to utilize the statutory provisions and grant the relief embodied therein if it appears to Court that it is just and fair to do so. In this background S-759(2) of the Civil Procedure Code [which is similar to former section -756(3) of the old Civil Procedure Code] has to be considered. S-759 (2) thus reads as follows:

> "In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, (other than a provision specifying the period within which any act or thing is to be done) the Court of Appeal may, it if should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as may deem just."

The issue at hand clearly falls within the purview of a mistake, omission or defect on the part of the appellant (i.e.- 4th defendant) in complying with the provisions of S-755 when filing the notice of appeal. In such a situation if the Court of Appeal was

of the opinion that the respondent has not been materially prejudiced, it was empowered to grant relief to the appellant on such terms as it deemed just. A plain reading of the said subsection (2) makes it clear that the power of Court to grant relief under the same is discretionary. In this regard the decision of the Supreme Court in Nanayakkara vs. Warnakulasuriya 1993 (2) SLR 289 - would lend assistance. In the said case per Kulatunga, J.

> "The power of the Court to grant relief under S.759(2) of the Code is wide and discretionary and is subject to such terms as the Court may deem just. Relief may be granted even if no excuse for non-compliance is forthcoming. However, relief cannot be granted if the Court is of opinion that the respondent has been materially prejudiced which event the appeal has to be dismissed."

In the course of the judgment in the said case (at page 293) Kulatunga, J. had further observed that:-

> "In an application for relief under section 759(2), the rule that the negligence of the Attorney-at-Law is the negligence of the client does not apply as in the case of defaults curable under sections 86(2), 87(3) and 77 of the Civil Procedure Code. Such negligence maybe relevant, it does not fetter the discretion of the Court to grant relief where it is just and fair to do so."

It was a case where the failure to hypothecate the sum deposited as security by bond as required by section 757(1) was considered by Court. In the case at hand also the notice of appeal (C1) had been filed by registered attorney-at-law and the failure to comply with the provisions of section 755 as already concluded above appears to be a negligence on his part. In view of the above principle of law I hold that such a negligence though relevant does not fetter the discretion of court to grant relief when it appears that it is just and fair to do so.

Further in this regard it would be pertinent to consider the pronouncement made by the Supreme Court in the case of Keerthisiri vs Weerasena 1997 1SLR 70. This too was an instance where non compliance of section 755(1) of the Civil Procedure Code (failure to duly stamp the notice of appeal) arose and granting relief under section 759(2) of the Code was considered. In the above case it was held by G P S de Silva, CJ (with Kulatunga, J. and Ramanathan, J. agreeing) that:

> "Section 759(2) of the Civil Procedure Code which required the Notice of Appeal to be 'duly stamped' is imperative. However, the Court of Appeal has jurisdiction to grant relief to the appellant in terms of Section 759(2) of the Code in respect of the 'mistake' or 'omission' in supplying the required stamp fee."

Further, G P S de Silva, CJ. in the course of the said judgment has observed that "what is required to bar relief under Section 759(2) is not any prejudice but "material prejudice". Per G P S de Silva, CJ at page 74:

> "What is required to bar relief is not any prejudice but material prejudice, i.e. detriment of the kind which the respondent cannot reasonably called upon to suffer. In the instant case there is nothing to suggest that the respondent has been materially prejudiced. I accordingly hold that the Court of Appeal had jurisdiction to grant relief in terms of section 759(2) of the present Code."

Having considered all the facts and circumstances of the present case I am inclined to the view that the plaintiff, being the only respondent named in the notice of appeal, would not be materially prejudiced by the grant of relief under Section 759(2).

It is clearly seen that persons who were parties to the action in the Court against whose decree the appeal is made (namely – the District Court) have not been made parties in the High Court of Civil Appeal. As such although the impugned judgment of the High Court has been already set aside, I am of the view that ***Section 770 of the Civil Procedure Code is more to the point.*** The aforesaid section thus reads as follows:-

> 770 "If, at the hearing of the appeal, the respondent is not present and the court is not satisfied upon the material in the record or upon other evidence that the notice of appeal was duly served upon him or his registered attorney as herein before provided, or if it appears to the court at such hearing that any person who was a party to the action in the court against whose decree the appeal is made, but who has not been made a party to the appeal, the court may issue the requisite notice of appeal for service."

The above section shows that if it appears to the Court at the hearing of the appeal that any person who was a party to the action in the Court against whose decree the appeal is made but who has not been made a party to the appeal, it is within the discretion of the Court to issue the requisite notice of appeal on those parties for service. In the case at hand too the 4th defendant-appellant respondent had failed to name the 1st and 2nd defendants to the District Court case as respondents in the appeal. The 2nd defendant was made entitled only to the life interest of the 1st defendant. The impugned judgment of the learned District Judge (dated 21.07.2003) also reveals that the 4th defendant was given rights subject to the life interest of the 3rd defendant. But the 3rd defendant had died on

29.3.2003. So the question of adding the 3rd defendant as a respondent to the appeal does not arise.

At this juncture it would become pertinent to consider whether the 1st and 2nd defendants would be prejudicially affected if the 4th defendant appellant succeeds in the appeal. When considering this, the pronouncement of the Supreme Court in Kiri Mudiyanse & another vs Bandara Menike 74NLR 371 would be of importance. Being a partition suit the main issue in the said case was also a preliminary objection raised by the plaintiff that the appeal was not properly constituted because some parties who were allocated shares in the judgment were not made party respondents to the appeal. In the above case having discussed the pronouncements in the previous two Full Bench decisions, namely, Dias vs Arnolis (17 NLR 200) and Ibrahim vs Bebbe (19 NLR 289) it was held that:

> "The Supreme Court had the discretionary power under section 770 of the Civil Procedure Code to direct the 1st to the 3rd and the 6th to the 8th defendants to be added as respondents. The exercise of the discretion contemplated in section 770 is a matter for the decision of the Judge who hears the appeal in the particular case. Furthermore, it should be exercised when some good reason or cause is given for the non-joinder. The discretion which is an unfettered one must, of course, be exercised judicially and not arbitrarily and capriciously."

It is evident from the points of contest raised at the trial by the parties that the plaintiff had relied on the title by deeds and prescription as averred in the amended plaint and 3rd and 4th defendants too had claimed the share on deeds and prescription. Further according to the judgement buildings marked as A, B and C have been given according to soil rights and improvements D and E given to the 3rd defendant without any

soil rights in the corpus. Even the plantation had been given according to soil rights. In view of the above I am inclined to conclude that in the present case if the appeal preferred against the judgement pronounced in the partition case is ultimately allowed, the 1st, and 2nd defendants' rights also would be prejudicially affected. Further in the aforementioned Kiri Mudiyanse's case at page 375 Pathirana J. goes onto say this:

> "Intrinsically there is nothing in Section 770 either expressly or by necessary implication to inhibit the discretion to the principles that have been set out in the case of Ibrahim *v. Beebee* as to do so will be tantamount to saying that the exercise of the discretion is cribbed, cabined and confined exclusively to these principles, limiting the exercise of the discretion in a particular way, and thereby putting an end to the discretion itself. In this connection I would quote the observations made by Lord Wright in *Evans v. Bartlam*, [1] 1937, 2 A.E.R., 646, at 655:
>
> "To quote again from Bowen, L.J., in *Gardner v. Jay*, at p.58;
>
> "When a tribunal is invested by Act of Parliament or by rules with a discretion without any indication in the Act or rules of the grounds upon which the discretion is to be exercised, it is a mistake to lay down any rules with a view of indicating the particular grooves in which the discretion should run, for if the Act or the rules did not fetter the discretion of the judge why should the Court do so?
>
> Similarly, it has been held by the Court of Appeal, in *Hope v. Great Western Railway Company* (7), that the discretion to grant or refuse a Jury in King's Bench cases is in truth, as it is in terms, unfettered. It is, however, often convenient in practice to lay down, not rules of law, but some general indications, to help the Court in exercising the discretion, though in matters of discretion no one case can be an authority for another. As Kay, L. J., said in

Jenkins v. Bushby (8), at p. 495: the Court cannot be bound by a previous decision, to exercise its discretion in a particular way, because that would be in effect putting an end to the discretion.

A discretion necessarily involves a latitude of individual choice, according to the particular circumstances, and differs from a case where the decision follows *ex debito juctitiae,* once the facts are ascertained."

When a discretion necessarily involves a range of individual choice the manner in which it has to be exercised would depend on facts and circumstances of each case. On the other hand it is needless to stress that the discretion given under S - 770 is a very wide one and same has to be exercised cautiously which being a power expressly and plainly conferred on the Judge who hears the appeal.

On the other hand if a particular party in a partition case who should have been made a respondent is not made a respondent in the appeal, then granting relief to the appellant (in this case to the 4th defendant) will not help such a party to safeguard his rights and making him a respondent would not act to the prejudice of the appellant. For the above reasons I conclude that 1st and 2nd defendants named in the District Court case should be added as respondents to the appeal pending in the High Court.

In view of the above necessity has now arisen to consider which Court should exercise this power given by Sec – 770 of the Civil Procedure Code. The impugned judgment of the High Court is already set aside. Perusal of the above section shows that 'if at the hearing of the appeal, if it appears to Court at such hearing that any person who was a party to the action in the Court against whose decree the appeal is made, but who has not been

made a party to the appeal, the Court has the discretion to issue the requisite notice of appeal for service. In the case at hand the appeal had been taken up for hearing in the High Court of Civil Appeal (although it was originally pending before the Court of Appeal) under the provisions of High Court of the Provinces (Special Provisions) –Amendment - Act No. 54/2006. Thus it becomes clear

that it is the High Court of Civil Appeal that has to exercise this power now and, I direct the High Court in terms of Sec - 770 of the Civil Procedure Code that 1st and 2nd defendants in the District Court case (also named as 1st and 2nd defendant - respondent – respondents in the caption to the present petition) be made respondents to the appeal preferred by the 4th defendant and to issue the requisite notices of appeal on them.

The Learned Judges of the High Court of Civil Appeal are further directed to take such other appropriate steps under the Civil Procedure Code and to conclude the appeal expeditiously. The plaintiff – respondent – appellant will however, be entitled to Rs.15,000/- as costs payable by the 4th defendant – appellant - respondent.

Judge of the Supreme Court

J A N de Silva, C J

Judge of the Supreme Court

Saleem Marsoof P C, J.

Judge of the Supreme Court

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

S.C. Appeal No. 15/2008
S. C. (Spl.) L.A. No. 01/2008
C.A. Application No. 362/1995
D.C. Tangalle No. 215/L

In the matter of an Application for Special Leave to Appeal under Article 128 (2) of the Democratic Socialist Republic of Sri Lanka.

Hewa Alankarage Rosalin Hami,
Kanumuldeniya West,
Olu Ara,
Walasmulla.
2nd Defendant-Appellant-Petitioner

Vs.

1A. E. Hewage Hami
1B. L.H. Indrasena
1C. L.H. Dharmawathi
1D. L.H. Somawathi
1E. L.H. Weerasena
1F. L.H. Chandrasena
1G. W.L. Serasinghe
1H. L.H. Somapala
1I. L.H. Dharmasena
All of Kenumuldeniya South,
Nathuwala,
Walasmulla.
Substituted Plaintiff-Respondent-Respondents

BEFORE : **Ms. TILAKAWARDANE.J**
AMARATUNGA.J &
IMAM.J

COUNSEL : Faiz Musthapha, P.C., with Amarasiri Panditharatne for the 2nd Defendant-Appellant-Petitioner.
D.M.G. Dissanayake for the Substituted Plaintiff-Respondent-Respondents.

ARGUED ON : 28.10.2010.

DECIDED ON : 03.12.2010

Ms. S. TILAKAWARDANE.J

Special Leave to Appeal was granted on the Application of the 2nd Defendant-Appellant-Petitioner (hereinafter referred to as the Appellant) on the questions of law set out in paragraph 8 (a) - (g) of the Petition dated 01.01.2008.

However at the commencement of the arguments Counsel agreed that the only two matters for determination was whether possession had been handed over to the Plaintiff by the Fiscal in District Court Tangalle Case No. L/882 and whether there is evidence to prove exclusive and uninterrupted possession of the disputed corpus by the 2nd Defendant-Appellant-Petitioner

An earlier action was instituted in District Court Tangalle Case bearing No. L/882 by the Plaintiff-Respondent-Respondents in relation to the same land that is presently in dispute, between the parties who were in occupation of the land at that time, and the Appellant at the time of the institution of the said action was not a party, but was the spouse of the 1st Defendant in that case. The Appellant did not seek to intervene in the said action.

The Plaintiff-Respondent (hereinafter referred to as the Respondent) who had instituted action in this case relied on the pedigree set up by him and on the chain of title depicted in

Deeds P1 to P5 and submitted that he had purchased the land in 1954 from Kirigoris by a Deed of Sale dated 19.09.1954 bearing No. 1944 (marked P6) attested by D.B. Karunanayake, Notary Public.

The parties in the present case admitted the identity of the corpus. It was also further admitted that the corpus had been correctly depicted in plan No. 137 (marked P10) prepared by T. Weerasinghe, Licensed Surveyor which was 1R 22P in extent, and which was prepared through a Court Commission issued in District Court Tangalle Case bearing No. L/882.

Case bearing No. L/882 of District Court Tangalle was filed by the Respondent, to obtain a declaration of title and possession through eviction of the 1st Defendant, who was at the time, in occupation of this land, and who is the spouse of the present Appellant. The Respondent had obtained Judgment in his favour, and obtained an Order of eviction against the 1st Defendant in that case. The Appellant at that time was not a party to the case and had made no Application to intercede. It is evident that her purported claim on Deed bearing No. 3829 dated 03.10.1961,was prior to the possession being handed over to the Respondent by the Fiscal 17.09.1962, but at the time she did neither sought to challenge the execution of the said writ in Court nor intervened in the case.

The Counsel for the Appellant claimed that though the Judgment had been entered in favour of the Respondent in District Court of Tangalle case No. L/882, the writ for possession was never executed and that possession of the land had not been delivered to the Respondent, a fact that was strongly challenged by the Respondent. .

In this context, this court has carefully perused a writ of delivery of immovable property issued by the Learned District Court Judge. This was executed on 23.07.1962. In terms of the Fiscal Report pertaining to the execution of this writ and the affidavit dated 17.09.1962 of D. de S. Abeyweera the Fiscal Officer, there is an explicit endorsement that the possession of the land had been delivered to the Respondent. (The Plaintiff in Case No.L/882 referred to above) This was marked as P11 and produced as evidence in the present case. In this context, this Court rules on a statutory presumption in favour of the execution, in terms of Section 114 (d) of the Evidence Ordinance. This Section reads as follows;

"The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case – that judicial and official acts have been regularly performed."

This evidence contained in the affidavit has not been challenged either by raising an issue on this matter or calling the Fiscal Officer who executed the writ and eliciting the fact that possession had not been handed over as claimed by the Appellant. No independent evidence was led to rebut this presumption.

The Appellant submitted that evidence of Wijemuni Arachchige Peiris should be relied upon to prove that possession had never been handed over as alleged, but his evidence was inconsistent in so much as under cross examination, he admitted that he was not there at the time the Fiscal came to execute the writ and in the circumstances, it can be determined that he is not in a position to testify that the Fiscal has not handed over the possession. Under these circumstances, this Court comes to a finding that the possession had been duly handed over on 17.09.1962 to the Respondent by the Fiscal executing the Writ of delivery of property.

In the circumstances this court holds that there was no error in law in the Judgment of the Court of Appeal where it concluded that the possession was handed over to the Respondent by the Fiscal in Case No. L/882, and this court further holds that the legality of the Fiscal's Report has not been assailed.

Therefore, the claim by the Appellant that the possession of the disputed land had never been handed over to the Respondent is untenable and is not based on the facts of this case.

The next matter urged by Counsel for the Appellant was whether there is evidence to prove exclusive and uninterrupted possession of the corpus by the Appellant. It is relevant to mention that the Appellant also produced Deed bearing No. 3829 dated 03.10.1961 attested by Lionel Amaraweera (marked 2V4) had been produced to purportedly prove her title. This Deed explicitly

stated that it was an undivided portion of the land and that her purported claim on the Deed was only for 5/90 of the said corpus, less than what is now being claimed by the Appellant.

In the case of Hariette Vs. Pathmasiri (1996) 1 SRI L R 358 (SC). the Plaintiff produced title Deeds to undivided shares in the land but her action being one for declaration of title to the entirety she cannot stop at adducing evidence of paper title to an undivided share. It was her burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster. Our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land because the owner of the undivided share has an interest in every part and portion of the entire land. But such was not the case formulated by the Plaintiff.

As it was held in the case of Sura Vs. Fernando (1 ACR 95) a co-owner was allowed to maintain an action of *rei vindicatio* in respect of his share of his property in dispute where the whole property was claimed by the defendant, and where it was found possible to decide the action without interfering with or endangering the right of any other co-owners.

In considering the present case, it is pertinent to note that an action bearing No. 25101 (marked 2V3) dated 09.08.1963 had been instituted in the Magistrates Court of Walasmulla by the Respondent alleging that the Appellants had committed criminal trespass by forcibly entering the land on 18.10.1962. The case was dismissed on the grounds that the Respondent was absent in court on 10.07.1966. On 15.07.1966, the Respondent instituted a fresh action bearing No. 2844 in the Magistrate's Court of Walasmulla (marked 2V2) on the same basis against the Appellant, her spouse (the 1st Defendant in L/882) and his mother. It was admitted by the parties that this case was still pending in the Court. InDeed, a further complaint was lodged by the Respondent to the Grama Sevaka on 20.07.1978 (marked P12) that the Appellant was continually disturbing the possession of the Respondent in this case.

When one considers the fact that having obtained the possession, the Respondent had been in occupation until the possession was disturbed by the Appellant on 18.10.1962 , and that litigation is

continuing, the Appellant has not proved that she was in undisturbed and uninterrupted possession adverse to the Appellant as pending suits, even when they become dormant, stop prescription.

In the full bench decision of Siman Appu Vs. Christian Appu (1896) 1 NLR 288 it was stated that, "Possession" of a land must be continuous, and peaceful, and for a certain period. It is "interrupted" if the continuity of possession is broken either by the disputed legitimacy putting the possessor out of the land and keeping him out of it for a certain time, if the possessor is occupying it; or by occupying it himself for a certain time and using it for his own advantage, if the party preventing it is not in occupation.

And possession is "disturbed" either by an action intended to remove the possessor from the land, or by acts which prevent the possessor from enjoying the free and full use of the land of which he is in the course of acquiring the dominion, and which convert his continuous user into a disconnected and divided user.

In Ettana Vs. Naide, (1878) 1 S.C.C.11 the Plaintiff sued the Defendant for the recovery of certain lands. The answer was filed nearly 12 years after the date of the libel and set up a right to hold the land sued for by prescription. The defendant admittedly held possession of the land during the whole of the interval between the date of the filing of his answer, and that of filing the libel and during some period antecedent thereto, but he failed to prove that the period of possession previous to the suit extended back so far as ten years.

It was held that the possession contemplated by the Prescription Ordinance is a possession of ten years previous to the institution of the suit, and that the possession of the defendant since the institution of this suit, though such possession should exceed the term of ten years, could not give him a title by prescription.

Indeed, even the title Deed (marked 2V4) which was referred to above which was relied upon by the Appellant refers to an undivided land where the boundaries do not tally with the plan which admittedly referred to the corpus in this case and which was marked as P10.

Under these circumstances, this Court finds that the Appellant has not proved prescription and that she has also failed to prove that she was in an undisturbed possession adverse to the interest of the Respondent for a continuous period of 10 years.

Furthermore, as the land is an undivided portion of the land which was co-owned the Appellant has not proved ouster or adverse possession against the Respondent in this case.

Accordingly for the above reasons the Appeal of the Appellant is dismissed. No costs.

JUDGE OF THE SUPREME COURT

AMARATUNGA.J

I agree.

JUDGE OF THE SUPREME COURT

IMAM.J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 17 read with article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.F/R Application No:466/2005

1. Bandula Senadhi Wimalsundera,
   No.43, Fife Road,
   Colombo 5.

2. Waduge Denzil Fernando,
   108/1, Galle Road,
   Walana, Panadura.

3. Clement Rangivi Samaraweera,
   5 B/81/L,
   Raddolugama.

Petitioners

Vs

1. Vocational Training Authority of Sri Lanka,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 5.

2. Lionel Pinto,
   Chairman,
   Vocational Training Authority of Sri Lanka,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 5.

3. D.G.Dayarathna,
   Vice Chairman,
   Vocational Training Authority of Sri Lanka,
   354/2, Elvitigala Maatha,
   Narahenpita.

4. Secretary,
   Ministry of Skills Development
   Vocational & Tertiary Education,
   354/2,Elvitigala Mawatha,
   Narahenpita,
   Colombo 5.

5. W.A.Ranaweera,
   Training Division,
   Vocational Training Authority of Sri Lanka,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 5.

6. R.T.B.Thilakasiri,
   Vocational Training Authority of Sri Lanka,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 5.

7. D.G.Mahinda Jayathilaka,
   Vocational Training Authority of Sri Lanka,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 5.

8. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

Before J.A.N.De Silva CJ,

S.I.Imam J,

R.K.S.Suresh Chandra J.

Counsel : Manohara de Silva P.C. with S.N.Wijithsingh for Petitioners

Mr.Uditha Egalahewa for the 1st to 7th Respondents

Mr.Rajitha Perera SC for Attorney General

Argued on 2nd July 2010.

Written Submissions tendered on

For Respondents: 11th August 2010

Decided on:

R.K.S.Suresh Chandra J,

The Petitioners in their application dated 9th November 2005 have stated that the 1st and 2nd Petitioners started their careers at the Vocational Training Authority of Sri Lanka as Assistant Directors with effect from 3rd June 1996 and 1st February 1996 respectively. The 3rd Petitioner too had joined the said Authority as a Training Manager with effect from 1st December 1995 and that thereafter he had been promoted as an Assistant Director with effect from 1st April 1999. By letter dated 8th January 2003 the Chairman of the said Authority had appointed the 1st Petitioner to cover the duties of

Director , National Vocational Training Institute, Narahenpita. The 5th, 6th and 7th Respondents were Assistant Directors of the said Authority and were in equal status with the petitioners. The next promotion for the Petitioners was to the post of Deputy Director. No promotions had been effected from 1999. In 2001 applications had been called for the post of Deputy Director and the Petitioners having applied for same had presented themselves for interviews on 8th August 2001. However no appointments had been made after the interviews. When the employees of the said Authority had become aware that some employees were to be promoted to higher positions, 60 employees of the Authority had sent a letter of protest to the Chairman on 6th September 2005. The petitioners have stated they became aware of a report regarding political victimization and that according to the said report the 5th,6th and 7th Respondents were to be appointed as Deputy Directors. The Petitioners have stated that the 5th , 6th and 7th Respondents were not subjected to any political victimization in that there were no promotions made to any higher posts and there was no notice displayed in the Authority calling for the forwarding of any grievances regarding political victimization.

The Petitioners stated further that the 5th and 6th Respondents were appointed as Deputy Directors with effect from 3rd October 2005 and that they did not know whether the Cabinet had approved the said report and the promotions. They stated further that they came to know about the said appointment of 5th and 6th Respondents only on 19th October 2005 and by letter dated 20th October 2005 they registered their protest with the Chairman of the Authority. The petitioners allege that the promotions effected were violative of their fundamental rights guaranteed under Article 12(1) of the Constitution. In their prayer they sought to quash the letters of appointment issued to the 5th and 6th Respondents and the report of the Political Victimization Committee, and if any letter of appointment is issued to the 7th Respondent to quash such letter, an interim order restraining the 1st to 4th Respondent appointing the 7th Respondent as a Deputy Director, to quash any decision given by the Officers of the Ministry of Skills Development and Technical Education or by the Cabinet of Ministers. Leave to proceed had been granted in terms of Article 12(1) of the Constitution when the application of the Petitioners was supported.

The Acting Director General of the 1st Respondent Authority filed objections and stated therein that the 1st, 2nd and 3rd Petitioners have passed the ages of 58, 51 and 55 years respectively and that the Authority was not in a position to extend their services beyond the age of 55 years, that the 5th, 6th and 7th Respondents were appointed as Assistant Directors with effect from 1st January 1996, 18th December 1995 and 10th May 1996 respectively, and were Graduates and were senior to the Petitioners and to his knowledge the Petitioners were not Graduates. The change of Government had taken place in October 2001. No promotions had been made to the post of Deputy Director based on the results of the interviews held in August 2001 and the 5th, 6th and 7th Respondents had referred appeals to the Political Victimization Committee that was appointed in 2004, that consequent to an advertisement in the Dinamina published by the Ministry of Vocational Training, Skills Development and Technical Education calling for information and appeals of those subjected to political victimization, the Respondents had forwarded their appeals to the Committee and the committee had decided that they had been subjected to political victimization. Consequent to the recommendations of the said committee, the 5th and 6th Respondents were appointed as Deputy Directors from 1st September 2005 by letter dated 30th September 2005 in which reference was made to the Cabinet decision. That since the Petitioners had been aware of the appointments of the 5th and 6th Respondents by the 6th of September 2005 or at least by 19th September 2005 or 3rd October 2005 that their present application had been filed out of time, that the fundamental rights of the petitioners had not been breached, that the members of the Political Victimization Committee or the Cabinet of Ministers have not been made parties to the application.

It was brought to the notice of Court by the respondents on 11th August 2010 along with their written submissions that the 1st Petitioner had retired on 8th October 2007 on reaching 60 years, that the 2nd Petitioner had been promoted as Deputy Director Training from 21st August 2007 and that the 3rd petitioner is an Assistant Director Training and has been given three extension beyond the age of 57 years.

The Respondents have taken up the following objections regarding the maintainability of the application of the Petitioners:

a. That the application of the Petitioners has been filed out of time

b. That the necessary parties have not been brought in by the Petitioners in that they have not made the Political Victimization Committee and the Cabinet of Ministers parties to the application.

The Petitioners have filed their application on 09th of November 2005 on the basis that they became aware of the appointments of the relevant Respondents on or about the 14th of September 2005. On a perusal of the documents filed by the Petitioners it would seem that they have filed as P7 the report of the Political Victimization Report which the Petitioners state that they were made aware of in September 2005 which would indicate that they were aware of the steps that were being taken by the Vocational Training Authority regarding the promotions of its officers. Further it is hard to accept their assertion that they were not aware of the Political Victimization Committee. Though there is a doubt as to the exact date that the Petitioners became aware of the promotion of the relevant Respondents, It would seem that they were aware at least by the 3rd of October 2005 about the said promotions. Therefore when they made their application on 9th November 2005 their applications was out of time even though they seem to try and cover it up by saying that they were aware of the appointments on the 19th of October and that they sent a letter of protest on 20th October 2005.

The other objection taken up by the Respondents regarding the failure of the petitioners to make the necessary parties as Respondents is much more serious in nature. The Petitioners in their application appear to have surmised that the promotions had been made consequent to the recommendations of the Political Victimization Committee and that thereafter the Cabinet had approved same when they sought in prayer (g) of the petition to quash the decision to promote the relevant Respondents based on a Cabinet decision. Prayer (g) states as follows:

(g) Quash any decision given by the officers of the Ministry of Skills Development "Vocational and Technical education or by Cabinet of Ministers.

A party coming into Court must decide as to who should be made necessary parties to such application and it is not for a party to surmise what objections would be taken up by the opposing party and then decide to add parties to the application when it becomes necessary. Further an Applicant cannot take

up the position that it would add as parties those persons whom the Court considers necessary as has been stated in the petition of the Petitioners. There may be instances where such a recourse may be allowed which is not fatal for the maintenance of the application. But when it comes to a situation where the proper and necessary parties have to be brought in at the time of filing the application is a mandatory requirement, reserving a right to add parties would not be sufficient and would amount to a fatal defect in the maintaining of such an application.

In the present instance, the promotions that are complained of have been made after a recommendation had been made by the Political Victimization Committee and after obtaining Cabinet approval. In such a situation the Political Victimization Committee and the Cabinet of Ministers would be necessary parties to the application at the time of filing the application.

Failure to cite the Cabinet of Ministers as a necessary party at the time of filing an application has been held to be a fatal defect in several judgments of this Court.

In Dr.K.D.G.Wimalaratne v The Secretary to the Ministry of Public Administration S.C.Application 654/95 decided on 09/06/1997 the Petitioners application failed as they had failed to make the Cabinet of Ministers as parties to the application.

In H.A.S.Hettiarachchi v Secretary of Public Administration and Home Affairs S.C.Application 780/1999 decided on 25/01/2001 the failure to make the Cabinet of Ministers as Respondents was held to be a fatal irregularity resulting in the rejection of the petition.

Following the cursus curiae of this Court, therefore in the present instance since the Petitioners have failed to bring in the Cabinet of Ministers as Respondents at the time of filing their application, such factor is a fatal defect in the application and necessarily the objection raised by the Respondents has to be upheld.

The Petitioners submitted that the Cabinet of Ministers and the Political Victimization Committee had no authority regarding the appointments and promotions of the Vocational Training Authority. This submission would necessitate the making of the Political Victimization Committee and the Cabinet of Ministers as parties to the application of the Petitioners. Since the

Petitioners have failed to do so and since it is a fatal defect as stated above the said submission has no application.

In the above circumstances the application of the Petitioners is dismissed. There will be no costs.

Judge of the Supreme Court

J.A.N.de Silva C.J.,

I agree.

Chief Justice

S.I.Imam J,

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in Terms of Article 17 read with Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. F/R Application No: 417/2005

1. S.S.Senaweera,
   142A, Kaldemulla Road,
   Moratuwa.

2. K.W.G.Hubert Morayes
   68-B-3 Parakum Mawatha,
   Gampaha Road, Yakkala.

3. G.R.M.C.Kulathunga
   67G, Wathumulla,
   Udugampola.

4. S.P.H.Ranasinghe,
   3/40, Weralugodawatta,
   Wataddara,
   Veyangoda.

5. R.N.K.M.J.seneviratne,
   "Pubudu",
   Meewanapalana,
   Horana.

6. J.A.Jayathilaka,
   Pahala Walahapitiya,
   Naththandiya.

Petitioners

Vs

1. Vocational Training Authority
   Of Sri Lanka
   354/2, Elivitgala Mawatha,
   Narahenpita,
   Colombo 05.

2. Lionel Pinto
   Chairman,
   Vocational Training Authority
   Of Sri Lanka,
   354/2, Elvitigala Mawatha,
   Colombo 05.

3. Secretary,
   Ministry of Skills Development
   Vocational & Technical Education,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 05.

4. H.K.Jayantha de Silva,
   Vocational Training Authority,
   District Office,
   Moneragala.

5. H.W.R.P.Wijesekera,
   Vocational Training Authority,
   District Office,
   Panawella,
   Kahawatte.

6. A.Galappaththi,
   Vocational Training Authority,
   District Office,
   Hambanthota

7. C.A.D.I.Kolonne,
   Training division,
   Vocational Training Authority,
   354/2, Elvitigala Mawatha,
   Narahenpita,
   Colombo 05.

8. W.H.Chandradasa,
   Vocational Training Authority,
   District Office,
   Talalla, Matara.

9. P.M.Perera,
   Vocational Training Authority,
   District Office,
   Nuwarawewa Road,
   Anuradhapura.

10. A.K.Arachchige ,
    DVTC Ambegoda,
    Bandarawela.

11. W.G.Wijerathna,
    DVTC Inamaluwa,
    Dambulla.

12. T.D.S.Sangadasa,
    VTC Thalgaswala,
    Nigagama,
    Galle.

13. Hon.Attorney-General,
    Attorney General's Department,
    Colombo 12.

Respondents

Before : J.A.N.De Silva CJ,

S.I.Imam J,

R.K.S.Suresh Chandra J

Counse: S.N.Wijithsingh for Petitioners

Uditha Egalahewa for the 1st to 12th Respondents

Rajitha Perera SC for Attorney General

Argued on 2nd July 2010.

Written Submissions tendered on

For Petitioners : 4th August 2010

For Respondents: 11th August 2010

Decided on :

R. K. S. Suresh Chandra J.

The Petitioners in their application dated 13th October 2005 citing the 1st to 10th Respondents alleging a violation of their fundamental rights have stated in their petition that the 1st Petitioner had been appointed as a Training Manager by the Vocational Training Authority with effect from 17th May 1999, that the 2nd, 3rd,5th and 6th Petitioners joined the Labour Department as Instructors of Vocational Training and that after the coming into operation of Act No.12 of 1995 they were absorbed to the Vocational Training Authority and were functioning as Training Managers, that the 4th Petitioner had been appointed as a Training Manager by the vocational Training Authority with effect from 1st August 2000. They filed an amended petition on 7th November 2005 citing the 1st to 13th Respondents by adding the 10th,11th and 12th Respondents as parties. They stated that their next promotion was for the post of Senior Training Managers and then to the post of Assistant Directors.

The Petitioners stated further that no one had been promoted to the position of Assistant Director or other positions for several years from the time that they had been appointed as Training Managers. The 2nd Petitioner and the 5th and 6th Respondents had faced an interview for the post of Assistant Directors in 1999 but were not promoted as they had not qualified to be so appointed. .

When the employees of the Authority had become aware of steps being taken by the Authority to promote certain employees to higher positions without adopting due procedures , 54 employees had sent a letter of protest on 6th September 05(P7)to the Chairman of the 1st Respondent Authority regarding the prospective promotions. Thereafter on 14th September 2005, they had become aware of a Report (P7A) regarding Political Victimization which had recommended that the 4th, 5th,6th, 7th and 8th Respondent be promoted as Assistant Directors whereas to the knowledge of the Petitioners there was no political victimization as alleged. The Petitioners also stated in their petition that they were unaware of a Political Victimization Committee looking into matters relating to the Respondent Authority. Subsequently the said 4th, 5th and 6th Respondents had assumed duties as Assistant Directors by letter dated 29th September 2005 and the 9the, 10th, 11th and 12th Respondents had assumed duties after 3rd October 2005 according to the averments in the amended petition of the Petitioners. The Petitioners alleged that the said promotions of the said Respondents violated their fundamental rights guaranteed under Article 12(1) of the Constitution. The Petitioners also stated that the names of the 9th, 10th, 11th and 12th Respondents were not included in the political victimization report but had been appointed as Assistant Directors. Leave had been granted in terms of Article 12(1) of the Constitution when the application of the Petitioners was supported.

The Respondents in their objections have stated that the 4th,5th,6th 7th and 8th Respondents had made complaints to the Political Victimization Committee and consequent to recommendations made by the said Committee regarding which adequate publicity had been given and that the Cabinet had approved the said recommendations and in effecting the said appointments , seniority, experience and educational qualifications had been taken into account. The 4th, 5th and 6th Respondents had assumed duties by letters dated 29th September 2005 after Cabinet had approved the said appointments, and the 9th,10th,11th and 12th Respondents had been appointed as Assistant Directors on 3rd October 2005 by a Board decision of the Authority. All these Respondents had prior to their being appointed as Assistant Directors been either covering up duties or acting as Assistant Directors. The Respondents have taken up the following objections regarding the maintainability of the application of the Petitioners:

a. That the application of the Petitioners has been filed out of time
b. That the necessary parties have not been brought in by the Petitioners in that they have not made the Political Victimization Committee and the Cabinet of Ministers parties to the application.

It has also been brought to the notice of Court by the Respondents that the 1st Petitioner had gone overseas without obtaining leave and had been served with a vacation of post notice, the 2nd Petitioner had already retired having reached the age of 60 years, the 4th Petitioner had retired having reached the age of 59 years and that the 3rd Petitioner had been promoted as Senior Training Manager with effect from 1.1.2008 and that the 5th and 6th Petitioners continue to be Training Managers.

The Petitioners have filed their application on 13th of October 2005 on the basis that they became aware of the appointments of the relevant Respondents on or about the 14th of September 2005. On a perusal of the documents filed by the Petitioners it would seem that they have filed as P7A the report of the Political Victimization Report which the Petitioners state that they were made aware of in September 2005 which would indicate that they were aware of the steps that were being taken by the Vocational Training Authority regarding the promotions of its officers. Further it is hard to accept their assertion that they were not aware of the Political Victimization Committee. Though there is a doubt as to the exact date that the Petitioners became aware of the promotion of the relevant Respondents, giving them the benefit of doubt, It would be seen that the application when first made on 13th October 2005 was made within time when considering the position that the Petitioners were made aware of the said promotions on or about the 14th of September 2005, but according to the averments in the amended petition the Petitioners had been aware of the appointment of the 10th, 11th and 12th by the 3rd of October 2005, therefore the application of the Petitioners against the 10th, 11th and 12th Respondents would be out of time as the amended petition bringing in these three Respondents had been filed on 9th November 2005.

The other objection taken up by the Respondents regarding the failure of the petitioners to make the necessary respondents is much more serious in nature. The Petitioners in their application appear to have surmised that the promotions had been made consequent to the recommendations of the Political Victimization Committee and that thereafter the Cabinet had approved same when they sought in prayer (d) of the petition to quash the decision to promote the relevant Respondents based on a Cabinet decision. Prayer (d) states as follows:

(d) Quash any decision given by the officers of the Ministry of Skills Development "Vocational and Technical education or by Cabinet of Ministers in relation to the said appointment.

A party coming into Court must decide as to who should be made necessary parties to such application and it is not for a party to surmise what objections would be taken up by the opposing party and then decide to add parties to the application when it becomes necessary. Further an Applicant cannot take up the position that it would add as parties those persons whom the Court considers necessary as has been stated in the petition of the Petitioners. There may be instances where such a recourse may be allowed which is not fatal for the maintenance of the application. But when it comes to a situation where the proper and necessary parties have to be brought in at the time of filing the application is a mandatory requirement, reserving a right to add parties would not be sufficient and would amount to a fatal defect in the maintaining of such an application. The decision cited on behalf of the Petitioners, Jayanetti v Land Reform Commission 1984(2) SLR 172 would therefore have no application in the present instance.

In the present instance, the promotions that are complained of have been made after a recommendation had been made by the Political Victimization Committee and after obtaining Cabinet approval. In such a situation the Political Victimization Committee and the Cabinet of Ministers would be necessary parties to the application at the time of filing the application.

Failure to cite the Cabinet of Ministers as a necessary party at the time of filing an application has been held to be a fatal defect in several judgments of this Court. In

Dr. K. D. G. Wimalaratne v The Secretary to the Ministry of Public Administration S.C.Application 654/95 decided on 09/06/1997 the Petitioners application failed as they had failed to make the Cabinet of Ministers as parties to the application.

In H. A. S. Hettiarachchi v Secretary of Public Administration and Home Affairs S.C.Application 780/1999 decided on 25/01/2001 the failure to make the Cabinet of Ministers as Respondents was held to be a fatal irregularity resulting in the rejection of the petition.

Following the cursus curiae of this Court, therefore in the present instance since the Petitioners have failed to bring in the Cabinet of Ministers as Respondents at the time of filing their application, such factor is a fatal defect in the application and necessarily the objection raised by the Respondents has to be upheld.

The Petitioners submitted that the Cabinet of Ministers and the Political Victimization Committee had no authority regarding the appointments and promotions of the

Vocational Training Authority. This submission would necessitate the making of the Political Victimization Committee and the Cabinet of Ministers as parties to the application of the Petitioners. Since the Petitioners have failed to do so and since it is a fatal defect as stated above the said submission has no application.

In the above circumstances the application of the Petitioners is dismissed. There will be no costs.

Judge of the Supreme Court

J.A.N.de Silva C.J.,

I agree.

Chief Justice

S.I.Imam J.,

I agree.

Judge of the Supreme Court

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

In the matter of an application for special leave to appeal in terms of Article 154(P) of the constitution read with Section 31DD of the Industrial Disputes Act as amended

01. Kotagala Plantations Ltd.
No 53 1/1, Baron Jayathilake Mawatha
Colombo 1

02. Lankem Tea & Rubber Plantations (Pvt) Ltd,
No 53 1/1 sir Baron Jayathilake Mawatha
Colombo 1

SC APPEAL 144/2009
WP/HCCA/KAL/ 18/2008
LT/35/MG/102/2005

Respondent – Respondent – APPELLANTS

Vs.

Ceylon planters Society (for and on behalf of L.P. D. Seneviratne)
No 40/1, Sri Dhammadara Mawatha,
Ratmalana

Applicant – Appellant - RESPONDENT

Before: J.A.N. De Silva, CJ
Sripavan, J
Ekanayake, J

Counse: Uditha Egalahewa with Gihan Galabadage for the Respondent-Respondent-Appellant s
Gamini Perera for the Applicant- Appellant- Respondent

Argued On: 05/07/2010

Decided On: 15/12/2010

J.A.N. De Silva, CJ

The Applicant-Appellant-Respondent made an application on behalf of L.P.D.Seneviratne being a Planter, to the Labour Tribunal of Matugama alleging that the services of the said Seneviratne had been terminated wrongfully and unjustifiably and prayed that he be reinstated with back wages or in the alternative be granted compensation in lieu of reinstatement.

The 1st Respondent-Respondent-Appellant filed answer stating that the services of the said Seneviratne were terminated after he was found guilty at a domestic inquiry held against him for misconduct and prayed that the application be dismissed.

The 2nd Respondent-Respondent-Appellant filed answer stating that it was the Managing Agent of the 1st Respondent-Respondent-Appellant and that there was no contract of employment between the said Seneviratne and the 2nd Respondent-Respondent-Appellant.

After trial the Labour Tribunal held that the termination of the services of the said Seneviratne was justified and dismissed the application. The Applicant-Appellant-Respondent appealed against the said order of dismissal to the provincial High court of Kalutara and the said High Court allowed the appeal and granted compensation to the said Seneviratne in a sum of Rs.840,000/-.

The Respondent-Respondent-Appellants made an application for special Leave to Appeal to the Supreme Court and leave was granted on the following questions of law:

(a) Was the Judgment of the Honorable Judge of the High Court just and equitable?
(b) Was the judgment of the Honorable Judge of the High Court contrary to law?
(c) Did the Honorable Judge of the High Court err in law by not evaluating the evidence and the award of the Labour Tribunal?

(d) Whether the Hon. Judge of the High Court erred in law in computing the compensation payable to the said employee?

At the inquiry before the Labour Tribunal, since the termination of the services of the workman was admitted by the Employer, evidence was led by the Employer regarding the act of misconduct of the workman and also his service record. The President of the Labour Tribunal having considered the evidence led regarding the act of misconduct through witnesses Chaminda Priya Nandasiri and Nuwan Thusahra Jayatunga,who were Assistant Field Officers accepted their evidence as regards the act of misconduct which was one of the charges against the workman for assaulting the Field Officer, Jayakody in the presence of the two witnesses who testified before the Labour Tribunal. The President of the Labour Tribunal had given careful consideration to the evidence of the said two witnesses and held that the Employer had proved the fact of assault on Jayakody by the workman. The President had also considered the evidence of the workman regarding the said incident where the workman had admitted his presence and the exchange of words between him and Jayakody. In those circumstances the President of the Labour Tribunal was in the best position to assess the credibility of the said witnesses in relation to the said incident especially in the light of the fact that the workman had not expressly denied the act of assaulting Jayakody.

On behalf of the workman it had been submitted that the victim of the assault, Jayakody was not brought in as a witness to establish the assault. It transpired in the course of the evidence before the Tribunal that Jayakody and three others had also been dismissed for having assaulted the workman in this case soon after the assault by the workman on Jayakody had taken place. The President of the Labour Tribunal considered this position too in arriving at his conclusion.

The President of the Labour Tribunal had considered the documents and evidence relating to the past record of service of the workman in arriving at the conclusion that the workman was not entitled to any relief. Further the President also adverted to the fact that the workman while being employed under the Employer had engaged himself in doing some work outside his realm of duties by managing another property for his relations which was established by the production of the documents relating to the lease of a land which was singed by him, which fact was not seriously challenged on behalf of the workman.

The President of the Labour Tribunal thus arrived at a finding that the acts of misconduct of the workman were established by the Employer before the Tribunal and held that the workman was not entitled to any relief on a consideration of the totality of the evidence placed before the Tribunal which included the facts relating to his past conduct and the doing of work outside the scope of his duties for others.

An appeal lies from an order of a Labour Tribunal only on question of law. A finding on facts by the Labour Tribunal is not disturbed in appeal by an Appellate Court unless the decision reached by the tribunal can be considered to be perverse. It has been well established that for an order to be perverse the finding must be inconsistent with the evidence led or that the finding could not be supported by the evidence led. (Vide Caledonian Estates Ltd. v. Hillman 79 NLR 421 .)

Thus, the question before the High Court was to see whether the order of the President of the Labour Tribunal was perverse. A perusal of the judgment shows that the High Court had acted on a misconception that the Labour Tribunal had based its decision on the past record of the workman which the high court considers to be irrelevant and extraneous.

The learned Judge of the High Court has failed to consider the fact that the question of arriving at a decision on the primary facts of a case rests with the original Tribunal. It is not for an Appellate Court to view the evidence and come to a different conclusion regarding the facts of the case unless the finding on the facts by the Tribunal was against the weight of the evidence. In fact on a reading of the entirety of the judgment of the High Court, it would appear that the High Court Judge has misdirected himself.

The learned Judge of the High Court formed the misconception that the Tribunal had based the justifiability of terminating the services of the workman on his past record which the learned judge considered as matters relating to inefficiency. However he failed to consider the manner in which the Tribunal had evaluated the evidence that was placed before the Tribunal. The High Court having stepped out of the path went onto hold that the Tribunal was wrong in holding that the termination was justifiable and held that the termination of the services of the workman was unjustified.

It is noted that the High Court did not consider the fact that the workman was an Assistant Manager and should set an example to his subordinates. The workman having had an altercation with the Field Officer Jayakody on the field had gone to the extent of assaulting him in the presence of other workers of the Estate. This is a high handed action on the part of an Executive Officer which cannot be condoned by the fact of the said workman being himself subjected to an attack by the said Field officer Jayakody and three others subsequently. The Employer had also taken steps to terminate the services of the said employees who had attacked the workman.

The Employer could not turn a blind eye on the act of misconduct of the workman when he had complained of an attack on him by other employees of

the Estate. All those who had acted in that manner which was subversive and detrimental to the maintaining of discipline on the estate had been dealt with by the employer in the same way.

In dealing with the evidence of the two Assistant Field Officers who gave evidence regarding the assault on Jayakody by the workman Seneviratne, the learned High Court Judge has considered their evidence but has not stated as to whether such evidence was acceptable or not . In effect he has stated that both witnesses speak to the same facts which would thus be a corroboration of the fact that the workman Seneviratne had assaulted Jayakody and therefore the conclusion reached by the President of the Labour Tribunal that the act of misconduct committed by the workman Seneviratne had been established cannot be faulted.

The learned High Court Judge in his judgment states that the Employer has acted in breach of the conditions of its 'sales agreement' apparently meaning the terms and conditions of the 'contract of employment' by stating that there is a duty cast on the employer to provide a safe place of work for the employee and that in the instant case the employer had not done so. He in fact goes to the extent of stating that the employer by failing to safeguard the employees had discriminated by allowing subordinates to proceed to the superior's (the workman in the present case) office and attack him while on duty and that the management had not taken any steps against the violations committed by Jayakody and other workers. There was material before the Tribunal to show that the employer had terminated the services of Jayakody and three others regarding the assaulting of the workman Seneviratne. Thus this court does not see any substance in the observations made by the learned judge of the High Court.

Further, the Learned High Court Judge in his judgment stated that inefficiency is not relevant as the termination of the workman had been based on assault and nothing else and that the Labour Tribunal relied on inefficiency which is not the issue that resulted in the termination of the services of the workman. He has stated that the employer had not taken any steps regarding the inefficiency of the workman and therefore the documents R8 to R38 which contain matters regarding the efficiency and shortcoming of the workman are not acceptable documents as they were not challenged by way of an inquiry. This would be another clear misdirection on the part of the learned Judge when considering matters relating to the relationship between the employer and the workman. Evidence regarding past conduct of a workman is relevant to show how a workman has performed during his period of employment, his attitude towards, work, efficiency, conduct, discipline etc, as these contributing factors influence an employer when dealing with promotions, increments, granting of benefits to a workman. Matters relating to misconduct and inefficiency are not

condoned just because no immediate action is taken against an employee when such matters occurred.

An allegation involving misconduct or moral turpitude is a determining factor in proceedings before a Labour Tribunal in order to decide whether the workman is a fit and proper person to be continued in employment in an establishment. If the conduct of the workman had induced the termination, he cannot in justice and equity claim compensation for loss of career. On the other hand, if the termination was not within the control of a workman but solely by the act and will of an employer, a Tribunal exercising just and equitable jurisdiction is well entitled to grant relief in the nature of compensation to a discharged workman. The jurisdiction of the Labour Tribunal is intended to produce in a reasonable measure a sense of security in a workman so long as he performs his duties efficiently, faithfully and for the betterment of his establishment and not otherwise. No workman should be permitted to suffer for no fault of his, but on unwanted, dishonest, troublesome workman maybe discharged without compensation for loss of his employment. The workman in those circumstances has to blame himself for the unpleasant and embarrassing situation in which he finds himself.

In the instant case, it is noted that acts of misconduct previously committed by the workman include, unsatisfactory attendance, purchase of diesel in an unauthorized manner for personal use, leaving the estate without obtaining leave, failure to report for duty once the period of leave expires, acting in breach of the terms and conditions of employment and managing a tea plantation that does not belong to the Applicant-Appellant-Respondent etc.

This Court is at a loss to understand the legal basis upon which the High Court granted compensation to the workman. Judicial discretion plays an indispensable part in our legal system. However, such discretion must be exercised fairly and reasonably within the four corners of the Industrial Disputes Act. Though a just and equitable order must be fair by the parties to an application, it never means the interests of the workman alone be safeguarded. The desirability of giving reasons for decisions so widely recognized by appellate Courts, that a failure to do so amounts to a failure to do justice especially where the concepts of social security and social justice form an integral part of Industrial Law. It is of fundamental importance that reasons should be given for decisions and decisions should be based on evidence of probative value

Accordingly, I set aside the Order of the learned High Court Judge dated 6th August 2009 and affirm the Order made by the President of the Labour Tribunal dated 4th December, 2008. The appeal is thus allowed, without costs.

Chief Justice

Sripavan, J
I Agree,

Judge of the Supreme Court

Ekanayake, J
I Agree,

Judge of the Supreme Court

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

1. R.P. Annama
   "Shanthi", 2nd Mile Post
   Hingurakgoda

Plaintiff

2. Senarath Pathiranalage Gunathilake
   "Shanthi", 2nd Mile Post
   Hingurakgoda

Substituted Plaintiff

SC Appeal No 26/2009
SC(CALA) 130A/ 08
NCP/HCCA/65/2007
DC Polonnaruwa 5341/L

Vs

S.P. Sunil Ekanayake
"Shanthi Rice Mill"
Hathamuna, Hingurakgoda

Defendant

AND

S.P. Sunil Ekanayake
"Shanthi Rice Mill"
Hathamuna, Hingurakgoda

Defendant-Appellant

Vs

1. R.P. Annama
   "Shanthi", 2nd Mile Post
   Hingurakgoda

Plaintiff-Respondant

2. Senarath Pathiranalage Gunathilake
   "Shanthi", 2nd Mile Post
   Hingurakgoda

Substituted Plaintiff-Respondent

AND NOW BETWEEN

Senarath Pathiranalage Gunathilake
"Shanthi", 2nd Mile Post
Hingurakgoda

Substituted Plaintiff-Respondant-Petitioner

Vs

S.P. Sunil Ekanayake
"Shanthi Rice Mill"
Hathamuna, Hingurakgoda

Defendant-Appellant-Respondent

Before : Hon. J.A.N. de Silva CJ.
Hon. Sripavan J
Hon. Ekanayake J

Counsel : Mr. Ananda Kasturiarachchi with Theja Malawarachchi for the Plaintiff-Respondent-Appellant
Mr. W Dayaratne PC with Ms. R Jayawardene for the Defendant-Appellant-Respondent.

Argued on : 29-06- 2010

Written : 06-11-2009 by Substituted Plaintiff-Respondent-Appellant

submissions on 10-09-2009 by Defendant-Appellant-Respondent

Decided on : 15.12.2010

J.A.N. de Silva, CJ

This is an appeal against the judgment of the provincial Civil Appellate High Court of Anuradhapura which the Appellant seeks to set aside. The facts of this case are as follows.

One RP Anamma (hereinafter referred to as the Plaintiff) instituted action in the District Court of Polonnaruwa praying for a declaration of title and the eviction of the Defendant-Appellant Respondent (hereinafter referred to as the Respondent). The case proceeded to trial where the Plaintiff and the land officer of the district secretariat gave evidence. Thereafter the Respondent too gave evidence. On 28-02-2001 Court was informed of the death of the Plaintiff and an order was made by Court for the appropriate steps be taken for substitution. On the following date of the trial the Attorney at law for the deceased Plaintiff on record, one Mr. Iddawela, filed a petition and affidavit moving Court to substitute the present Appellant as the substituted Plaintiff (hereinafter referred to as substituted Plaintiff). The Respondent filed objections but Court allowed the substitution. Subsequently

further evidence was led by the Respondent and a judgment was found in favour of the Substituted Plaintiff, by the learned District Court Judge.

The Respondent gave notice of appeal and subsequently filed a petition of appeal. The substituted Plaintiff in the meantime filed an application for writ pending appeal. This was objected to on various grounds. The learned district Judge overruled the objections and issued a writ as prayed for.

The Respondent appealed against the said order for writ of execution to the Court of Appeal. The learned Judges of the Court of Appeal refused leave and dismissed the application. The Respondent thereafter preferred a special leave to appeal application to this Court which was later refused.

The substituted Plaintiff had also filed an application for acceleration before the Court of appeal. However that application too had been refused.

The final appeal was fixed before the Civil Appellate High Court of Anuradhapura where the substituted Plaintiff had filed a proxy as well as papers for substitution. In appeal the Respondent took up a preliminary objection that there had been a failure to file a proxy on behalf of the substituted Plaintiff and therefore there was no proper application before Court to substitute him or to represent him by an Attorney at law.

The substituted Plaintiff objected on the basis that an objection on the ground of a valid proxy not being filed had not been taken at any stage previously and that such an objection cannot be raised for the first time in appeal. The substituted Plaintiff also submitted that the failure to object coupled with the subsequent filing of a proxy cured any defect which may have invalidated the proceedings.

After hearing submissions from both parties the learned Judges of the Civil Appellate Court of Anuradhapura allowed the appeal on the ground that no valid proxy had been before Court thereby rendering the **judgment dated 2002-02-02 of the learned District Court Judge null and void.**

Being aggrieved of the said order the substituted Plaintiff moved this Court to grant special leave to appeal and leave was granted on the following questions.

[a] Did the Honourable Judges of the Civil Appellate High Court err in law when they allowed the appeal on the ground that the petitioner was not properly substituted in to the District Court?

[b] Did the Honourable Judges of the Civil Appellate High Court err in holding that the petitioner was not properly substituted?

[c] Did the Honourable Judges of the Civil Appellate High Court err in holding, that (due to) the proxy of the substituted Plaintiff had not been filed of record at the time of the substitution the proceedings became illegal and void *ab inito*?

[d] Did the Honourable Judges of the Civil Appellate High Court err in not considering that the Respondent had acquiesced and/or accepted the substituted Plaintiff in all subsequent proceedings in the District Court and (was) thereby stopped from objecting to the appeal on the ground of proxy?

[e] Did the Honourable Judges of the Civil Appellate High Court err in holding that there was a valid final appeal for the exercise of appellate jurisdiction?

I would first consider the question of the validity of the proxy as it appears to be the central issue from which all other issues flow. Several authoritative judgments

of this Court and of the Court of Appeal were placed before this court and I shall consider their applicability in due course.

Section 27 of the Civil Procedure Code reads as follows.

> *(1) The appointment of a registered Attorney to make any* ***appearance or application****, or do any act as aforesaid,* ***shall be in writing signed by the client****, and shall be filed in Court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered Attorney, instead of the party whom he represents, may be made.*
>
> *(2)* ***When so filed, it shall be in force until revoked with the leave of the Court and after notice to the registered Attorney by a writing signed by the client and filed in Court****, or until the client dies, or until the registered Attorney dies, is removed, or suspended, or otherwise becomes incapable to act, or until all proceedings in the action are ended and judgment satisfied so far as regards the client.*
>
> *(3) No counsel shall be required to present any document empowering him to act. The Attorney-General may appoint a registered Attorney to act specially in any particular case or to act generally on behalf of the State.*

The form of an appointment of a registered Attorney is found in the 1st Schedule to the civil procedure code.

Now section 27(1) states with clarity that a party in order to be represented by an Attorney must make such appointment in writing and such document is further required to be filed in Court.

This Court has on several occasions dealt with the question of a defective proxy being filed of record and they may be of assistance in deciding the question before us, i.e. total absence of a proxy.

The latest of these authorities is the case of **Paul Coir v. Waas** 2002 (1) SLR 13 in which Justice Wigneswaran cites with approval a passage from Justice Thamotheram's judgment in the case of **LJ Peiris & Co Ltd v Peiris** 74 NLR 261.

> *"" The relationship of a Proctor and client may well be a contract of agency but there is no law requiring that the contract should be in writing. A proxy is a writing given by a suitor to Court authorising the Proctor to act on his behalf. It does not contain the terms of the contract between the suitor and the Proctor. That contract is a distinct one and has nothing to do with the proxy which is an authority granted by virtue of that contract."*

Thamotheram J also proposes the following questions to be answered to ascertain compliance with section 27(1).

> *"(1) Is there a contract of agency between the Proctor and his client? No writing is required to establish this.*
>
> *(2) Is there a writing, appointing a client's Proctor giving him authority to act on the client's behalf for the purposes mentioned in Section 27 of the Civil Procedure Code?*
>
> *(3) Is this writing signed by the client?"*

Therefore both justices seek to draw a distinction between the actual contract of agency between the Attorney and the client and the proxy which is to be filed in Court.

I see no reason to hold a position contrary to the learned justice's assertions.

Therefore it is now necessary to consider as to whether the default of not filing a proxy could be cured by the belated filing of proxy in view of the authority given by contract previously to the proctor to appear and make applications on the client's behalf.

In **Paul Coir v. Waas 2002 (1) SLR 13** the Justices were of the view that the proxy is not the contract of agency between the proctor and the suitor and that the two were distinct and separate. They held further that existence of such an agency depended on the validity of the contract.

In **AG v. Silva** 61NLR 500 the application had been made by a proctor without a proxy. The said proctor filed a proxy after the objection was taken and a submission was made that the previous defective acts of the proctor were rectified by such subsequent filing of proxy. HNG Fernando J in his judgment suggests that such rectification may be allowed under two circumstances. Namely, when the defect is pointed out at the earliest time and the Plaintiff is then made to file a fresh plaint.

This argument seems to suggest that Fernando J was of the view that the totality of proceedings that took place under the default constituted a nullity. His lordship refers to circumstances in which undesirable consequences would flow if unreserved rectification were to be allowed. Both examples cited relate to the default of the party instituting the proceedings. Would similar consequences ensue if the opposite party would be in default? If this were so would not a defaulter be in a position to profit from his default. If a party Defendant's default were to be brought to the attention of Court in the twilight stages of a trial would then the entire proceedings have to be recommenced?

If this were to be so, we would have disparate consequences where the Plaintiff defaults and in circumstances where the Defendant defaults. This should not be so. Rules of procedure must be certain, unambiguous and equal in application to all parties to an action. They form the foundation of fair play.

Hence it is my view that this difference can be obviated by taking the position that it is not the proceedings thereunto that are rendered a nullity, but all appearances and applications made by the proctor or the counsel as his agent.

In **Tillekeratne v. Wijesinhe** 11 NLR 270, the Plaintiff had granted a proxy to a proctor, which, by oversight, had not been signed by the Plaintiff. The proctor acted on the proxy without any objection in the lower Court. When the case was taken up in appeal, the defendant's counsel objected to the status of the proctor in the case.

It was held by his lordship Hutchinson CJ that the requirements in section 27 of the Civil Procedure Code were merely directory and that the mistake in the proxy could be rectified at this stage by the Plaintiff signing it. It was further held that such signature would be a ratification of all the acts done by the proctor in the action.

The case of **Nelson De Silva v. Casinathan** 55 NLR 121 was also submitted for our consideration, which seems to take the position that even though the proxy was held to be bad as the objection **had not been taken in the lower Court** and **since the defect did not affect the merits of the case**, Courts did not reverse the decree.

The said line of thinking offers much attraction due to its simplicity. However I am concerned as to whether the wording of section 27 permits such liberties. Section 27 does not reveal whether an objection to the non conformance with the provision needs to be taken at the first available opportunity and if so whether the failure to raise an objection at that time estoppes the raising of the objection later.

There are certain objections which must be raised at the earliest opportunity available. The objection to the jurisdiction of a Court is one.

In **Jalaldeen v. Rajaratnam** 1986 (2) SLR 201 it was held that

> *"An objection to jurisdiction must be taken at the earliest opportunity. Further, issues relating to the fundamental jurisdiction of the Court cannot be raised in an oblique or veiled manner but must be expressly set out. The action was within the general and local jurisdiction of the District Court. Hence its decision will stand until the wronged party has matters set right by taking the course prescribed by law."*

In my view this is because of the effect of the failure giving rise to the objection, that such promptness is required.

If a Court inquires into a matter for which it has no jurisdiction all subsequent acts constitute a nullity. If jurisdictional objections are permitted at the very end of proceedings and upheld, all proceedings would have to be held void thus wasting precious judicial time and resources and causing grave injustices. Therefore jurisdictional objections are required to be taken at the first opportunity, the failure of which would constitute acquiescence to jurisdiction of the Court.

A similar analysis may be useful in respect of the present question. The Respondent argues that the proceedings constitute a nullity due to the failure of the Plaintiff to file a valid proxy, whilst the appellant submits that the omission can be cured. Thus if I were to be persuaded by the submissions of the Respondent that the default of the Plaintiff amounts to a nullity according to the same analysis as above I would have to hold that the Respondent would be precluded from raising the objection to file proxy at this late stage.

Having discussed the authorities on the legal question consequences of failure to file a valid proxy I would now proceed to examine the provisions of section 27. Section 27(1) throws light on the purpose of filing a proxy. The purpose is to **appoint** a registered Attorney to appear or make any application before Court. It is mandatory that the proxy contain an address for the process to be served.

Section 27(2) adverts to the circumstances in which the proxy "loses its force." The first of which is revocation **with the leave of Court. When such revocation is granted, unless fresh proxy is filed,** the case is considered to be equivalent to a situation where a party remains unrepresented. However proceedings may continue on that footing. Obviously the proceedings that had thus far transpired would remain unaffected.

The other methods by which a proxy loses its force are the death of the client, the suspension or removal of the Attorney etc. The death of the client occasions the demise of the agency relationship and therefore requires little explanation. The other grounds support the inference drawn earlier as each of those instances render the "Attorney" incompetent to "appear or make application before Court". Yet the consequences are the same. Once the Attorney meets with such incapacity he is no longer the client's representative. The client is considered to be unrepresented then on. The foregoing analysis lends little support to the proposition that the "loss of force" of a proxy touches on the validity of the proceedings in toto.

Therefore it stands to reason that even in the case of an Attorney when he is incapable of appearing or making application due **to the total failure to file proxy**, such default should not in any way affect the validity of the proceedings.

The case **of Udeshi v. Mather** 1998(2) SLR 12 is of assistance at this point. Atukorale J's judgment in my view clearly lays down the conditions in which the doctrine of rectification would not apply. Accordingly the first is a situation where some other legal bar stands in the way of curing the default. But more importantly the fundamental question to be asks is whether the proctor had in fact the authority of his client to do what was done although in pursuance of a defective appointment.

The case of **Kadirgamadas v. Suppiah** 56 NLR 172 is of direct authority. In the said case the petition of appeal was filed on behalf of the defendant. The proctor had not been appointed in writing as required by section 27 of the civil procedure code. He had however without objection from any of the parties, represented all the defendants at various stages of the proceedings. It was held by Gunasekera J that the irregularity of the appointment of the proctor was cured by the subsequent filing of a written proxy.

Therefore an analysis of the facts thus far established is necessary to ascertain whether the proctor had in fact the authority.

The journal entry dated 28-02-2001 confirms that Court was informed of the Plaintiff's death, and that Court had directed that appropriate steps be taken. On the next date, that being 28-03-2001, Mr. Iddawela who had hitherto appeared for the Plaintiff filed a petition and an affidavit moving Court to order substitution.

On 25-06-2001 the Respondent filed his objections to the substitution. However the learned District Court permitted the substitution and fixed a date for further trial. Mr. Iddawela's name continued to be in the record as being the Attorney for the Plaintiff.

On 21-11-2001 the trial recommenced and the record notes Mr. Iddawela as having appeared for the substituted Plaintiff. No objection to this was taken up by the Defendant.

From that point onwards this Court notes no less than seventeen journal entries with Mr. Iddawela's name appearing for the substituted Plaintiff, whilst the substituted Plaintiff's presence in Court is also duly noted. At no time was an objection taken to Mr. Iddawela's appearance.

On 28-05-2008 on the direction of Court the petitioner filed a proxy naming the same Mr. Iddawela as his Attorney.

The aforementioned facts in my opinion, provides a sufficiently strong indication that the substituted Plaintiff had at all material times granted Mr. Iddawela **the authority to appear and make applications on behalf of him**, despite the substituted Plaintiff not filing a proxy as an overt manifestation of the granting of such authority. The facts of the substituted Plaintiff's regular presence at all Court proceedings and the retaining of Mr. Iddawela in the Civil Appellate High Court proceedings is highly suggestive of this.

Therefore I hold that the substituted Plaintiff by virtue of filing a proxy belatedly, has succeeded in ratifying the appearances and applications of the registered Attorney and thereby supplying all such acts with legal validity. Hence this appeal is allowed. We set aside the judgment of the Civil Appellate High Court dated 16th September 2008. The judgment of the learned District Court Judge is restored. We order no costs.

Chief Justice

Hon. Sripavan J

I agree.

Judge of the Supreme Court

Hon. Ekanayake J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal from the Judgment of the Court of Appeal in CA. Writ Application No. 1192/2005 under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 78/08

SC (SPL) LA No. 121/08

CA. (WR) 1192/2005

M/s Singer Industries (Ceylon) Ltd,
No. 435, Galle Road, Ratmalana.

Petitioner

-Vs-

1. The Ceylon Mercantile Industrial & General Workers Union (CMU), No.03, 22nd Lane, Colombo-03.

   (on behalf of W.A.S. Jayaweera)

2. The Minister of Labour,
   Labour Secretariat, Narahenpita,
   Colombo-05.

3. Mahinda Madihahewa
   The Commissioner of Labour
   Labour Secretariat,
   Narahenpita, Coloombo-05.

4. T.Piyasoma,
   77, Pannipitiya Road,
   Battaramulla.

5. The Registrar,
   Industrial Court,
   9th Floor, Labour Secretariat,
   Colombo-05.

Respondents

And Now Between

M/s Singer Industries (Ceylon) Ltd,
No. 435, Galle Road, Ratmalana.
And presently of No. 2, 5th lane,
Ratmlana.

Petitioner-Petitioner

-Vs-

1. The Ceylon Mercantile Industrial & General Workers Union (CMU), No.03, 22nd Lane, Colombo-03.
(on behalf of W.A.S. Jayaweera)

2. The Minister of Labour,
Labour Secretariat, Narahenpita,
Colombo-05.

3. Mahinda Madihahewa
The Commissioner of Labour
Labour Secretariat,
Narahenpita, Coloombo-05.

4. T.Piyasoma,
77, Pannipitiya Road,
Battaramulla.

5. The Registrar,
Industrial Court,
9th Floor, Labour Secretariat,
Colombo-05.

Respondents-Respondents

Before: : **J A N de Silva C.J.**
Shiranee Thilakawardena, J. &
Chandra Ekanayake, J.

Counsel: Sanjeewa Jayawardena with Ms.Senani Dayaratne
for the Petitioner –Appellant.

Shirley M Fernando PC with D V Dias and Palitha Perera for the 1st Respondent – Respondent.

Mrs. M N B.Fernando, DSG for the 2nd and 3rd Respondent-Respondents.

Argued on: 17.07.2009

Written Submissions Tendered on: 03.09.2009 (by the Petitioner-Appellant)

01.09.2009 (by the 1st Respondent-Respondent)

Decided on: 07.10.2010

*****

Chandra Ekanayake, J.

The Petitioner-Appellant (hereafter referred to as the appellant) by petition dated 05.06.2008 (filed together with an affidavit) has sought special leave to appeal from the Judgement of the Court of Appeal dated 29.04.2008 pronounced in CA (Writ) Application No.1192/2005 (annexed to the petition marked P9). By the aforesaid application the Petitioner has sought the following other reliefs also in addition to special leave:

i) to set aside the aforesaid judgement of the Court of Appeal marked P9. and/or in the alternative thereto,

ii) vary the same in such a manner and subject to such terms as to this Court shall seem meet in the exercise of the appellate jurisdiction of this Court and to issue a mandate in the nature of writ of certiorari quashing the impugned arbitral award dated 29.04.2005 annexed to the petition marked P2 – (X10 in P1) and the gazette notification produced marked P2(a).

Further interim reliefs too had been sought as per sub paragraphs (f) and/or (g) of the prayer to the petition.

The appellant had instituted CA. (Writ)Application No.1192/2005 in the Court of Appeal, seeking inter alia, to quash the purported arbitral award of the 4th respondent-respondent (hereinafter sometimes referred to as the 4th respondent) dated 29.04.2005, which ordered the petitioner to pay 3/4ths of a month's salary as gratuity for each year of service to its employees with more than 20 years service. It is the contention of the appellant that, in the year 1991 during the course of negotiations aimed at reaching a collective agreement between the petitioner and its manual workers and supervising staff, the 1st respondent union (CMU) made a proposal for the payment of gratuity in excess of that provided for by the Payment of Gratuity Act, 12 of 1983 – i.e., in excess of ½ month's salary for each completed year of service. In response to the said proposal the appellant had made an offer to pay 3/4th of a month's salary as gratuity to employees with more than 20 years service, for each completed year of service beyond the 20th year of service (vide A18 in P1). The said offer made by the appellant was rejected by the 1st respondent, who made a counter proposal that employees with more than 20 years service, be paid one month's salary for each year of service – (vide A19 in P1). The appellant Company in turn had rejected the said counter proposal and specifically stated that the said initial offer made by the appellant could not be varied (vide A20 in P1). The stance taken by the appellant in the present petition is that no agreement or consensus was reached in respect of enhanced gratuity payments, but a formal collective agreement was executed in 1994 in pursuance of a process of collective bargaining including a salary increase and other financial benefits and same did not specifically provide

for the payment of gratuity in excess of that is provided by the Payment of Gratuity Act No12 of 1983 – i.e. half a month's salary for each completed year of service- (vide A3 in P1).

It was further argued that thereafter in 1996 during the negotiations aimed at revising the1994 collective agreement (A3 in P1) the 1st respondent had made the following proposals with regard to payment of gratuity in excess of that provided for by the Payment of Gratuity Act No.12 of 1983;

i. employees with 10 to 20 years' service be given 3/4ths of a month's salary as gratuity for each year of service;

ii. employees with 20 to 25 years' service be given one month's salary as gratuity for each year of service;

iii. employees with 25 to 30 years' service be given 1 and 1/4th of a month's salary as gratuity for each year of service; and,

iv. employees with more than 30 years' service be given one and half months' salary as gratuity for each year of service.(vide A4 in P1).

When the appellant company rejected the said proposal by A5 the 1st respondent had submitted an amended proposal (vide A6 in P1) to the following effect;

1. employees with less than 20 years' service be given 3/4ths of a month's salary as gratuity for each year of service and

2. employees with more than 20 years' service be given one month's salary as gratuity for each year of service.

The aforesaid amended proposal too being rejected by the appellant (vide A7 in P1) the 1st respondent ordered its members to strike work with effect from 20.05.1997 and after 6 weeks the members of the 1st respondent resumed work on 28/06/1997, upon referral of the said dispute with regard to enhanced gratuity, to arbitration by the 4th respondent-arbitrator.

The statement of the matter as referred to arbitration was as follows:

> "Whether the demand of the Ceylon Mercantile Industrial & General Workers' Union (C M U) for a gratuity on the basis of ¾ of a month's salary for each year of service to the employees who have more than 20 years of service at M/s. Singer Industries (Ceylon) Ltd. is justified and if not, to what relief the said employees are entitled."

At the conclusion of the arbitral proceedings the 4th respondent proceeded to make the impugned award P2 dated 29.04.2005 purporting to hold as follows:

> "Going through the proceedings the statements and the documents marked by both parties, I hold the view that the respondent had shown its willingness as far back as 1991 to give a maximum of 3/4th salary as gratuity for those who serve for more than 20 years in the company. For the last 14 years it seems that the members of the CMU had been living with that expectation."

Thereafter the appellant sought to quash the said arbitrator's award in CA(WR) Application No.1192/2005 and the Court of Appeal by its judgment dated 29.04.2008 dismissed the application for a writ of certiorari and upheld the arbitrator's award. Being aggrieved with the aforesaid Court of Appeal Judgment the appellant sought special leave to appeal upon the questions of law set out in paragraph 14 of the aforementioned Petition dated 05.06.2008.

When the application was supported on 11.09.2008 this Court had proceeded to grant special leave to appeal only upon the questions set out in paragraph 14(a), (b), (c), (d), (e), (h) and (o) of the said petition which read as follows:

(a) Did the Court of Appeal err by failing to appreciate that no agreement had ever been finally reached between the CMU and the Petitioner in respect of any enhanced gratuity payments in excess of that mandated by the Gratuity Act No.12 of 1983?

(b) Accordingly, did the Court of Appeal err by failing to appreciate that the learned arbitrator had erred in law by holding that the petitioner company could be compelled to make gratuity payments to its employees in excess of that mandated by the Payment of Gratuity Act, No.12 of 1983?

(c) Did the Court of Appeal err by failing to appreciate that the arbitrator had erred by holding that the petitioner had made a binding and enforceable offer to make enhanced gratuity payments to its employees in excess of that mandated by the Payment of Gratuity Act No.12 of 1983?

(d) Did the Court of Appeal fail to take cognizance of the significant fact that neither the collective agreement signed in 1991, nor the collective agreement signed in 1994, provided for any enhanced gratuity payments?

(e) Did the Court of Appeal err by not appreciating the fact that the CMU had in fact rejected the offer made by the Petitioner in 1991 to pay 3/4ths of a month's salary as gratuity to employees with **more than** 20 years' service, for each completed year of service beyond the 20th years of service?

(h) Without prejudice to the foregoing, in any event, did the Court of Appeal err by failing to appreciate that the petitioner's proposal made in 1991(which was firmly in the realm of an offer), was in any event, to pay only ¾ ths of month's salary as gratuity to employees with more than 20 year' service, for each completed year of service **beyond the 20th year of service,** and **not for each completed year of service?**

(o) Did the Court of Appeal fail to consider the effect of the substantial passage of time between 1991 and the strike in 1997?

Counsel for the appellant is seeking to assail the judgement of the Court of Appeal amongst other grounds inter alia, mainly on the basis that the Court of Appeal was in error when it failed to appreciate that in the absence of a finally reached agreement between the 1st respondent (CMU) and the petitioner company in respect of any enhanced gratuity payments in excess of that is mandated by the Gratuity Act No.12 of 1983 holding that the petitioner Company could be compelled to make gratuity payments in excess of that is mandated by the said Act.

It is common ground that the terms of reference to arbitration were the terms enunciated in paragraph 5 above. The pivotal question that had to be determined by the arbitrator was whether an agreement was finally reached between the 1st respondent (CMU) and the appellant company in respect of enhanced gratuity payments meaning :- in excess of what has been awarded by the Gratuity Act No.12 of 1983.

In view of the above necessity has now arisen to examine the arbitrator's (4th respondent's) award dated 29.04.2005. The arbitrator had made order to be effective from 10.06.1997, (which being the date on which the industrial dispute was referred to arbitration by the Minister), that the first respondent company to pay 3/4ths of a month's salary as gratuity for each year of service to the employees who have more than 20 years service at the appellant company. It appears further that the arbitrator had acted on a wrong premise namely that the appellant company had shown its willingness as far back as 1991 to give such enhanced gratuity. Thus this leads to examination of evidence on record had in this regard. On behalf of the present 1st respondent namely the CMU, one Senadheera Pathirage Leelaratne had testified. His uncontradicted position had been that discussions between the company and the 1st respondent - CMU for enhancement of gratuity commenced from 08.10.1996, and several proposals and amendments were suggested but no agreement was arrived upon with regard to the same. It is observed that the arbitrator had based the above finding heavily relying on the premise that the appellant company had shown its willingness as far back as 1991 to give 3/4ths of a month's salary as gratuity for those who had served for more than 20 years in the company and the expectations the employees had for the same. What becomes clear from A 7 - more particularly under sub head 'Gratuity' - is that the company is unable to consider a deviation of the formula stipulated by law for this purpose. The above witness's position had been that since the discussions failed the 1st respondent (CMU) directed the employees to launch a strike by letter dated 16.04.1997 (A12) after the expiry of 2 weeks from the date of A 12 and accordingly the workers of the appellant company launched a strike. The said strike had been concluded on the agreement to refer the dispute for arbitration and same had given rise to the making of the arbitral award P2.

It would be important to stress here that the above witness of the 1st respondent had commenced cross-examination by admitting that the appellant company was already paying the gratuity as required by law and their claim is for a higher amount than that is mandated by law. This is amply clear by evidence given by him in cross-examination (as appearing at pages 86 and 87 of the brief: -

ණප්‍ර: ඒ අනුව තමන් බාර ගන්නව නේද නීතියෙන් ගෙවිය යුතු පාරිතෝෂික ප්‍රමාණය වගඋත්තරකාර ආයතනය විසින් සේවකයන්ට ගෙවන බව?

උ: ඔව්"

ප්‍ර: තමන් ඉල්ලා සිටින්නේ නීතිය අභිබවා යමින් පාරිතෝෂික ප්‍රමාණයක් ලබා දෙන ලෙද නේද?

උ: අන්‍යෝන්‍ය එකගතාවයක් ඇති වී නීතියට පරිභාහිරවයි අපි ඉල්ලා සිටින්නේ"

ප්‍ර: පණතෙන් නියම කරන ලද ප්‍රමාණයට වඩා පාරිතෝෂික මුදල් ප්‍රමාණයක් ගෙවන ලෙස නේද තමුන් ඉල්ලා සිටින්නේ?

උ: ඔව්"

ප්‍ර: ඒ අනුව නීතියෙන් ගෙවන ලද ප්‍රමාණයට වඩා සමාගම විසින් ගෙවිය යුතුයි යන ස්ථාවරයේ නේද තමන් සිටින්නේ?

උ: ඔව්"ණී

However, it appears that he had taken up the position that the company agreed to pay a higher gratuity than what is mandated by the said Act. He has attempted to substantiate his above position by relying on a letter dated 21.10.1991 marked as A18 addressed to the 1st respondent by the Employers' Federation of Ceylon. Perusal of A18 makes it clear that the appellant company had firmly stated that it cannot better the offer it had already made on this point of gratuity. i.e. - to pay a maximum of 3/4ths of a month's salary

for those who served for more than 20 years i.e. from the 21st year, and further this offer, as mentioned at the discussion is tied down to agreement being reached on the following matters:

a) guarantors for hire purchase contracts,

b) housing loans,

c) designations in electronic department,

d) presence of foremen during overtime.

Further it goes on to say that these are the matters on which the 1st respondent wanted finality with the management. Thus what has to be inferred from A18 is - it was nothing more than an offer made by the appellant company. By letter dated 31.10.1991 (A19) the aforesaid offer in A18 was rejected by the 1st Respondent (CMU) who made a counter proposal as per clause 3 of the same under sub head 'gratuity' - to the following effect:

> "We propose that the demand for one month's salary for each year of service be limited to those who serve for a minimum period of 20years, having regard to the Company's proposal."

This is well established by the testimony of the 1st Respondent's witness's cross-examination. As appearing at Page 90 of the brief, his evidence was that what was embodied in A 18 was a suggestion subject to other conditions and it was not a promise. Further his evidence was that there was no agreement in A18 and even with regard to A19 (which being the reply to A18) his specific position had been that there was nothing to indicate that they had agreed to the above conditions. The item 3 'Re-gratuity' appearing in A19 clearly indicates that it was only a proposal.

The only witness who testified on behalf of the appellant company was Wasantha Wijemanna. His uncontradicted position in evidence was that the stance taken in the letter of Employers' Federation of Ceylon sent on behalf of the appellant – [A20] was a proposal of this member (meaning the appellant) was already conveyed by their letter of 21.10.1991 (A18) and same cannot be varied. Further it is clear from his evidence that there was no agreement to pay any gratuity in excess of what is mandated by the law in any of the existing Collective Agreements marked by the 1st respondent as A2- one in 1991, A3- one in 1994, A23- one in 1997 and A24 – one in 2000. On the other hand it has to be noted that the Collective Agreements signed by this same Union (1st respondent) and several other companies which were marked in evidence as A15, A16 and A21 in fact have made specific provision for the payment of enhanced gratuity. Having considered the above evidence I am inclined to hold the view that there had been overwhelming evidence before the arbitrator to conclude that no agreement existed at any time with regard to enhanced gratuity as claimed by the 1st respondent.

At this point it becomes relevant to examine the reasons given by the arbitrator for his award. As appearing at page 9 of his award under item 11 he goes on to state that:

> "In the field of industrial relations the principles of offer and acceptance should not be strictly adhered to. In the law of contracts a counter offer can destroy an offer but in labour relations I hold the view that a counter offer or a counter proposal can keep the original offer alive. I therefore reject the contention of the respondent company, that there was no understanding between the parties to pay an enhanced gratuity although an enhanced gratuity was not embodied in the Collective Agreement A2 and A3."

Further goes on to say:

> "It appears that the respondent had indicated its willingness to consider the gratuity question favourably which gave the employees of the company an expectation in that regard but when the respondent repeatedly delayed the matter the membership of the union had become restless and finally gone on strike."

It is needless to say that as held by the arbitrator viz: - 'In industrial relations the principles of offer and the acceptance should not be strictly adhered to' - is not the correct proposition of law. For a contract to be concluded there should be an offer and acceptance –only then a consensus will exist in the minds of such contracting parties. In this context it is apt to quote the following observations of Weerasooriya, SPJ, in Muthukuda vs Sumanawathie(1964)65 NLR 205 at 208 and 209 with regard to the requirement of offer and acceptance in a contract:

> "It is an elementary rule that every contract requires an offer and acceptance. An offer or promise which is not accepted is not actionable, for no offer or promise is binding on the person making the same unless it has been accepted."

Further per C.G.Weeramantry in his treatise on - 'The Law of Contracts' Vol. I at page 109, (paragraph 105):

> "Most agreements are reducible to an offer by one party and its acceptance by other[13]. The search for offer and acceptance is convenient and adequate as an aid to determining with precision the moment at which agreement is reached, and perhaps the exact terms of the contract."

At page 123 (paragraph 124) author further goes on to say that:

> "A counter offer is an alternative proposal made by the offeree in substitution for the original offer. When the purported acceptance of an offer contains a counter offer, it is no acceptance at all,[43] and is equivalent to a rejection of the original offer,[44]. Such a counter-offer may, however, in its turn be accepted by the original offeror, and thus result in a contract[45]."

In the case at hand there was no evidence that the counter offer by the 1st respondent was accepted by the offeror. It has to be borne in mind that 'Industrial Contract' or 'Contract of Employment' is not defined in the Industrial Disputes Act and/or any other labour law in Sri Lanka unlike in United Kingdom where there is a Contract of Employment Act. In the absence of such laws, the general principles of law of contract apply to the creation of a contract of industrial employment. Thus the ordinary principles of law of contract such as 'offer' and 'acceptance' and 'consideration' therefore apply to the formation of a valid industrial contract. A contract of service in industrial relations therefore can be entered into by the parties having capacity to do so and for a consideration. Then what is it that makes an industrial contract different from an ordinary contract?

The general presumption is that parties to a contract have equal bargaining power thus the terms of the contract are mutually negotiated. However in the industrial contracts, it is regarded that the employer has superior bargaining power over the employee. Thus such a contract is referred to as a contract between unequal partners where the employer is considered the economically stronger party and the employee the weaker partner. With the objective of adjusting and declaring the rights of parties consistent with the need to ensure fairness and equity, the state has brought in legislative regulations to restore the balance of power between the parties. Therefore industrial contracts unlike the normal contracts, are partly contractual between the employer and employee, and also partly non contractual, in that the State by means of legislature or through industrial adjudication, may prescribe many of the obligations that an employer may owe to his employees. In Sri Lanka, Industrial Disputes Act, Payment of Gratuity Act, EPF & ETF Acts are some of the legislation

introduced in this regard. Per O.P.Malhotra in his book titled "The Law of Industrial Disputes' – 5th Edition – Vol. I at page188:

> "One of the recurring problems in the industrial law is, how far the relationship between an industrial employer and his employees is explicable in terms of contract. The relation is partly contractual in that mutual obligation maybe created by an agreement made between the employer and workman. For instance the agreement may create an obligation on the part of the employer to pay a certain wage and corresponding obligation on the workman to render services. The relation of industrial employment is also partly non-contractual, in that the State, by means of legislation or through industrial adjudication, may prescribe many of the obligations that an employer may owe to his employees."

Agreements arising from collective bargaining between employers and trade unions on behalf of employees also can have an impact on industrial contracts. However such agreements do not *ipso facto* become part of individual contracts of employment, unless terms agreed and acted upon by the parties and incorporated as terms in each contract of employment or specifically included in a collective agreement.

What has to be noted in this case is that there had been no evidence to conclude that there was an agreement with regard to enhanced gratuity in excess of that is mandated by law. But what appears to have taken place between the parties were negotiations to arrive at a satisfactory agreement with regard to enhanced gratuity. That is

what is popularly known as 'Collective Bargaining'. S.R. de Silva in his famous book on – 'The Legal Framework of Industrial Relations in Ceylon' – has opted to define (at page 66) 'collective bargaining' as –

> " negotiations about working conditions and terms of employment between an employer, a group of employers or one or more employers' organizations, on the one hand, and one or more representative workers' organizations on the other, with a view to reaching agreement."

In other words collective bargaining is another term for settling industrial disputes through mutual negotiations between an employer on the one hand, and one or more representative workers organizations on the other, with a view to arriving at an agreement.

However the question of payment of gratuity to a workman is regulated by the provisions of the Gratuity Act. Thus unless there is an existing scheme or collective agreement or award of an Industrial Court providing more favourable terms of gratuity to a workman, he would not be entitled to claim such benefits. Thus the burden of proving the existence of a valid collective agreement with regard to gratuity in excess of what is mandated by law fairly and squarely rests on the employee who asserts the same. The general principles of contract law would necessarily apply to the creation of a collective agreement. For the above reasons I am inclined to hold the view that the arbitrator was in grave error when he concluded that -

> 'In the law of contracts a counter offer can destroy an offer but in labour relations a counter offer or a counter proposal can keep the original offer alive.'

What has to be examined now is the impugned judgement of the Court of Appeal in CA/WR/1192/2005 dated 29.04.2008 (P9). The learned Judge of the Court of Appeal by the aforesaid judgement has proceeded to conclude as follows – (as appearing at page 8 of P9):-

" (a) The findings and the decision of the arbitrator is in accordance with the evidence led in the inquiry.

(b) The petitioner had shown its willingness to give a maximum of 3/4^{ths} of a month's salary as gratuity for those who served for more than 20 years in the company and in their expectation of the gratuity particularly the 1st respondent has agreed and has undertaken to abide by some conditions detrimental to them.

(c) Considering all the relevant facts the arbitrator has correctly concluded that the respondent company (the petitioner in this application) has to pay 3/4^{ths} of a month's salary as gratuity for each year of service to the employees who have more than 20 years at Singer Industries Limited."

On the above footing the learned Court of Appeal Judge had dismissed the application for writ of certiorari without costs.

The arbitrator had concluded that the respondent company had shown its willingness as far back as 1991 to give a maximum of 3/4th of month's salary as gratuity for those who had served more than 20 years. Having considered the evidence that had been available before the arbitrator I am unable to agree with the above conclusion that the

respondent had shown such willingness as far back as 1991. That appears to be a finding which was not supported by evidence led in the arbitration and in fact appellant's only witness, Leelaratne's evidence had been totally contrary to the above. In the light of the above the only legitimate conclusion one could arrive upon the evidence is that there had been no final agreement between the 1st respondent, (CMU) and the appellant company in respect of enhanced gratuity payments. From the evidence available on record there is nothing to infer that the petitioner company had shown its willingness to give 3/4ths of a month's salary as gratuity for those who have more than 20 years service as concluded by the learned Court of Appeal Judge.

It is a cardinal principle of law that in making an award by an arbitrator there must be a judicial and objective approach and more importantly the perspectives both of employer as well as the employee should be considered in a balanced manner and undoubtedly just and equity must apply to both these parties. In the case of Municipal Council of Colombo vs Munasinghe (71 – NLR 223 at page 225), His Lordship the Chief Justice H.N.G. Fernando, held that:

> "When the Industrial Disputes Act confers on an Arbitrator the discretion to make an award which is 'just and equitable', the Legislature did not intend to confer on an Arbitrator the freedom of a wild horse. An award must be 'just and equitable' as between the parties to a dispute; and the fact that one party might have encountered 'hard times' because of personal circumstances for which the other party is in no way responsible is not a ground on which justice or equity requires the other party to make undue concessions. In addition, it is

> time that this Court should correct what seems to be a prevalent misconception. The mandate which the Arbitrator in an industrial dispute holds under the law requires him to make an award which is just and equitable, and not necessarily an award which favours an employee. An Arbitrator holds no license from the Legislature to make any such award as he may please, for nothing is just and equitable which is decided by whim or caprice or by the toss of a double-headed coin."

In this regard the pronouncement made by Sirimanne J, (H N G Fernando C.J. agreeing) in the case of Heath & Co.(Ceylon)Ltd. vs Kariyawasam (71 NLR 382) - which too being a case where application was made by the petitioner for a writ of certiorari to quash an award made by an arbitrator appointed under the Industrial Disputes Act, would lend assistance here. In the said case it was held that :

> "In the assessment of evidence, an arbitrator appointed under the Industrial Disputes Act must act judicially. Where his finding is completely contrary to the weight of evidence, his award is liable to be quashed by way of certiorari."

Further the pronouncement of F N D Jayasuriya J, in All Ceylon Commercial and Industrial Workers' Union vs Nestle Lanka Ltd. - 1999 1SLR-343, which too being a case dealing with an award made by an arbitrator having referred for arbitration under Section 4(1) of Industrial Disputes Act also would be relevant here. It was held that:

"1. Although Arbitrator does not exercise judicial power in the strict sense, it is his duty to act judicially, though ultimately he makes an award as may appear to him to be just and equitable.

2. There is no evidence or material which could support the findings reached by the Arbitrator, findings and decisions unsupported by evidence are capricious, unreasonable or arbitrary.

3. A deciding authority which has made a finding of primary fact wholly unsupported by evidence or which has drawn an inference wholly unsupported by any of the primary facts found by it will be held to have erred in point of law. "No evidence rule" does not contemplate a total lack of evidence it is equally applicable where the evidence taken as a whole, is not reasonably capable of supporting the finding or decision."

Having considered the evidence had before the arbitrator and the conclusions of the arbitrator in his award (P2) I am of the view that the arbitrator's findings and decisions are not supported by the evidence before him. Further, for the reasons stated above the learned Court of Appeal Judge too had erred when he proceeded to state that:

> 'The findings and the decision of the arbitrator is in accordance with the evidence led in the inquiry.'

In view of the foregoing analysis I proceed to answer all questions of law on which special leave was granted by this Court in the affirmative. Accordingly I would allow the appeal and set aside the judgement of the Court of Appeal dated 29.04.2008 (P9) and direct that a mandate in the nature of writ of certiorari be issued quashing the impugned arbitral

award dated 29.04.2005 (P2) and the Gazette Notification, produced marked P2a. The appellant company is entitled to costs of this appeal fixed at Rs.25,000/- payable by the 1st respondent-respondent.

Judge of the Supreme Court.

J A N de Silva, C.J.

Chief Justice.

Shiranee Thilakawardena, J.

Judge of the Supreme Court.

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

S.C. Appeal No. 44/2006
S.C. (Spl.) L.A. No. 252/2005
C.A. Appeal No. 455/99(F)
D.C. Negombo No. 3576/L

Bastian Koralage Denzil Anthony Chrishantha Rodrigo Weerasinghe Gunawardena,
"Villa Victoria",
Uswetakeiyawa,
Kandana.

Defendant-Appellant-Appellant

Vs.

1a. A. Ralph Senake Deraniyagala,
No. 15, Rajakeeya Mawatha,
Colombo 07.

2a. Hilda Niloo Edward de Saram,
No. 6/3, Wijerama Mawatha,
Colombo 07.

3. Shiran Upendra Deraniyagala,
No. 4, 36th Lane,
Borella,
Colombo 08.

Plaintiffs-Respondents-Respondents

4. Hasley Limited,
No. 37, Moor Road,
Wellawatte,
Colombo 05.

5. N.K.Thambipillai,
No. 37, Moor Road,
Wellawatte,
Colombo 05.

Added Defendants-Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
P.A. Ratnayake, J.

COUNSEL Gamini Marapana, PC, with Keerthi Sri Gunawardena and Navin Marapana for Defendant-Appellant-Appellant

D.S. Wijesinghe, PC, with Kaushalya Molligoda for Plaintiffs-Respondents-Respondents

ARGUED ON: 23.03.2009

WRITTEN SUBMISSIONS
TENDERED ON: Defendant-Appellant-Appellant : 11.05.2009
Plaintiffs-Respondents-Respondents: 11.05.2009

DECIDED ON: 03.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 13.10.2005. By that judgment the Court of Appeal had affirmed the judgment of the District Court of Negombo dated 30.03.1999, which had decided in favour of the plaintiffs-respondents-respondents (hereinafter referred to as the respondents) and had dismissed the appeal instituted by defendant-appellant-appellant (hereinafter referred to as the appellant).

The appellant preferred an application for Special Leave to Appeal, which was granted by this Court.

When this matter was taken up for hearing, learned President's Counsel for the appellant submitted that the main issue in this appeal was founded on the question as to whether on the basis of the documentary evidence placed before the District Court by the respondents, it

is clear that the land, which was the subject matter of the action, had vested in the Land Reform Commission and whether the Land Reform Commission could have by their letter dated 19.01.1982 (P_{18}) divested itself of its title in favour of the respondents, by stating that the said land had been excluded from the category of 'agricultural land'. Accordingly, learned President's Counsel for the appellant contended that the main point of law on which the Supreme Court had granted special leave to appeal was on the following:

> "Whether the Land Reform Commission could divest itself of title to property vested in it, in the manner it had purported to do by the letter P_{18}."

Learned President's Counsel for the appellant also contended that this question was raised in the same form in the Court of Appeal, but the Court of Appeal had held that it was a new matter that had been raised for the first time in appeal and such mixed question of fact and law cannot be raised for the first time in appeal.

Learned President's Counsel for the respondents strenuously contended that the said question was a new point raised for the first time in the Court of Appeal, which was not a pure question of law.

The facts of this appeal as submitted by the appellant, *albeit* brief, are as follows:

The respondents had instituted action in October 1987, in the District Court of Negombo, claiming *inter alia* a Declaration of title to the land morefully described in Schedule 2 to the Plaint. The respondents' position was that at one point of time, Justin Ferdinand Peiris Deraniyagala owned the said land and that upon his death in 1967, his Estate was vested in his brother and sister, namely the 1st and 2nd respondents and one P.E.P. Deraniyagala. The respondents had also stated that the interests of the said P.E.P. Deraniyagala had devolved on the 3rd respondent. They had produced the Inventory filed in Justin Deraniyagala's Testamentary case bearing D.C. Gampaha No. 948/T at the trial marked P_4. The said Inventory had revealed that the said Justin Deraniyagala had possessed agricultural land well in excess of 500 Acres (P_4). The respondents' position had been that they had made a request to the Land

Reform Commission to have this land released to them as it was not agricultural land. In June 1978 the respondents by their letter dated 22.06.1978 (P_{28}) had requested the Land Reform Commission to exempt the land in question from the operation of Land Reform Law on the basis that it was a marshy land. The Land Reform Commission had, by its letter dated 15.10.1979 (P_{29}) refused the request of the respondents. The respondents, by their letter dated November 1979 (P_{24}) appealed against the said decision and the Land Reform Commission had decided to exclude the land from the definition of 'agricultural land'.

The District Court had held in favour of the respondents and the Court of Appeal had affirmed the said order of the learned District Judge.

Learned President's Counsel for the respondents contended that the respondents, being the plaintiffs in the District Court of Negombo case, had instituted action against the appellant seeking inter alia a declaration of title to the land described in Schedule II to the Plaint and for ejectment of the defendant, who is the appellant in this appeal from the said land. The respondents had traced their title to the land described in Schedule II to the Plaint, known as Muthurajawela, from 1938 onwards through a series of deeds. The respondents had also made a claim for title based on prescriptive possession. The appellant had filed answer and had taken up *inter alia* the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The appellant had taken up the position that his father had obtained a lease of the land in question from Justine Deraniyagala, who was the respondents' predecessor in title, which lease expired on 01.07.1967. The appellant had further claimed that his father and the appellant had overstayed after the expiry of the lease adversely to the title of the respondents and he had further stated that he had rented out part of the land to the added respondents.

Learned President's Counsel for the respondents referred to the issues framed both by the appellant and the respondents before the District Court and stated that on a consideration of the totality of the evidence of the case and having rejected the evidence of the appellant as 'untruthful evidence'; the learned District Judge had proceeded to answer all the issues framed at the trial in favour of the respondents.

It was the contention of the learned President's Counsel for the respondents that although the appellant had preferred an appeal to the Court of Appeal, the appellant had not urged any of the grounds stated in the Petition of Appeal, but instead informed Court that he will confine his submissions to the question with regard to the maintainability of the action on the ground that title to the land in suit remains vested in the Land Reform Commission and that the respondents are not entitled to succeed in that action.

The contention of the learned President's Counsel for the respondents was that, the submission of the learned President's Counsel for the appellant on the basis of the question, which was referred to at the outset, was not taken up in the District Court as there was no issues to that effect nor was it referred to in the Petition of Appeal to the Court of Appeal. Therefore the learned Counsel for the respondents had objected to that matter being taken up in the Court of Appeal, as it was not a pure question of law, which could have been raised for the first time in appeal.

Learned President's Counsel for the appellant strenuously contended that the main point on which the Supreme Court had granted special leave to appeal was based on as to whether the Land Reform Commission could divest itself of title to property vested in it in the manner it had purported to by the letter marked as P_8 and the said matter was taken up in the same form in the Court of Appeal. Learned President's Counsel for the appellant contended that although the Court of Appeal had held that the said question was a new matter, which was raised for the first time in appeal and that mixed questions of fact and law cannot be so raised for the first time in appeal, that not only the appellant, but also the respondents had taken up the issue in question in the District Court.

Accordingly it is evident that the main issue in question is to consider whether the question of vesting of the land with the Land Reform Commission was urged before the District Court, and it would be necessary to consider the said question in the light of the decision of the Court of Appeal.

Learned President's Counsel for the appellant referred to the documents marked as P_{18}, P_{24}, P_{28}, P_{29} and P_{36} and stated that the main issue in this appeal, which is raised on the basis as to

whether the Land Reform Commission could divest itself of title to property vested in it in terms of letter P_{18} was taken up before the District Court, although learned District Judge had misunderstood the question.

The trial had commenced in June 1989 and in the absence of any admissions, issues 1-6 were raised on behalf of the respondents and issues 7-9 were raised on behalf of the appellant. The said issues were as follows:

1. Does the ownership of the land described in Schedule II to the amended Plaint vest with the plaintiffs [respondents in this appeal] as stated in the amended Plaint?

2. Has the defendant [appellant in this appeal] claimed title to the said land by making a false and illegal declaration by deed No. 897 as stated in paragraph 9 of the amended Plaint?

3. Has the defendant [appellant in this appeal] interrupted the possession of the plaintiffs [respondents in this appeal] on or about November 1985, as stated in paragraph 10 of the Plaint?

4. Has the defendant [appellant in this appeal] caused damage/losses to the said land as stated in paragraph 4 of the Plaint?

5. If the issues 1, 2 and/or 3 and/or 4 above are answered in favour of the plaintiffs [respondents in this appeal] are the plaintiffs [respondents in this appeal] entitled to the relief claimed in the prayer to the Plaint?

6. If so, what are the damages that the plaintiffs [respondents in this appeal] are entitled to?

7. Has the defendant [appellant in this appeal] acquired a prescriptive title to the land described in Schedule II to the amended Plaint?

8. If issue No. 7 is answered in the affirmative, should the action of the plaintiffs [respondents in this appeal] be rejected?

9. If the issues of the plaintiffs [respondents in this appeal] are decided in favour of the plaintiffs [respondents in this appeal] is he [the defendant] [appellant in this appeal] entitled to the sum claimed by him in respect of improvements – what is that amount?

As stated earlier, learned District Judge had answered all these issues in favour of the respondents.

A careful examination of the issues clearly reveals that the issue as to whether the land in question, being vested in the Land Reform Commission, had not been raised before the District Court. It is also to be noted that when the matter was before the District Court, the appellant had failed to plead that the property in question was vested in the Land Reform Commission. Instead, the appellant had denied the title of the respondents and had pleaded title upon prescriptive possession.

This position could be clearly seen, when one examines the proceedings before the District Court.

The appellant took up the position in the District Court that although the respondents had declared both agricultural and non-agricultural land to the Land Reform Commission, they had not made a declaration regarding the land in question as the said land did not belong to them. The respondents at that time had taken the position that, they had not taken steps to declare the land in question to Land Reform Commission, as it was not agricultural land within the meaning of Land Reform Law. Considering the title of the respondents, learned District Judge had clearly stated that,

> "Another attack on title of the plaintiffs was launched on the basis that the 1st plaintiff had not declared this land as another land belonging to them under the Land Reform Law of 1972. To substantiate this, the defendant produced D_1 of 1st November 1972 and D_2 of same date and D_8 to D_{11} of 19th September 1973. These documents show that the plaintiffs have not declared this

land as part and parcel of their property under the Land Reform Law.

But the 1st plaintiff by letters addressed to the Chairman of the Land Reform Commission in November 1976 (P_{24}) and letter of 22nd June 1978 (P_{28}) informed the Commission.

P_{28} discloses all the circumstances why this land has not been declared and why it should be regarded as a non-agricultural land. They also submitted the plan and report made by A.F. Sameer dated 03.11.1977, 03.04.1979, respectively.

In response to these the Commission has taken various steps as evidenced by their documents P_{36} dated November 1981, P_{37} dated 6th November 1981
and P_{39} dated 17th August 1981, respectively.

By P_{29} dated 15.10.1979 the Commission originally rejected the plea of the plaintiffs.

Thereafter the Commission has decided that this land is a non-agricultural land by their documents P_{18} dated 19.11.1982 and P_{38} dated 27th November 1981."

After considering all the aforementioned documents for the purpose of ascertaining as to the ownership of the land in question, learned District Judge clearly had stated that,

"It is abundantly clear from these documents listed above that the plaintiffs and their predecessors-in-title were the owners of this land for a long period of time."

Except for the aforementioned paragraphs, the District Court had not considered as to whether the land in question was vested in the Land Reform Commission by operation of the

provisions of the Land Reform Law. Learned President's Counsel for the respondents, correctly submitted that, for the Court to determine whether any land had been vested in the Land Reform Commission by operation of the provisions of the Land Reform Law, the Court has to decide two preliminary issues in terms of section 3(2) of the Land Reform Law, No. 1 of 1972, viz.,

1. whether the land was agricultural land under the provisions of Land Reform Law of 1972;

2. if so, whether the land in question had vested in the Land Reform Commission by operation of law.

It is to be borne in mind that the respondents had instituted action in the District Court against the appellant and had prayed for a declaration of title and for ejectment of the appellant and in his answer dated 02.09.1986 the appellant took up the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The documents referred to by learned President's Counsel for the appellant (P_{18}, P_{24}, P_{28}, P_{29} and P_{36}) all were documents filed by the respondents in the District Court. Out of them the appellant had made specific reference to P_{18} to show the decision taken by Land Reform Commission.

All the aforementioned letters referred to by the appellant, deal with correspondence regarding the exemption of the land in question from the operation of the Land Reform Law on the basis that the said land being a non-agricultural land.

The document marked P_{18} is dated 19.01.1982, which was addressed to the 1st respondent and reads as follows:

"**ඉඩම් ප්‍රතිසංස්කරණ පනත**

ඉහත සඳහන් පනතේ 18 වන වගන්තිය යටතේ ඔබ විසින් ඉදිරිපත් කරන ලද ප්‍රකාශණය හා බැඳේ.

ඔබගේ ප්‍රකාශණයේ විස්තර කර ඇති ඉඩම් අතුරෙන් පහත උප ලේඛණයේ දී ඇති ඉඩම/ඉඩම් කෘෂිකාර්මික ඉඩම් ඝනයෙන් බැහැර කර ඇති බව කොමිෂන් සභාවේ අණ පරිදි දක්වනු කැමැත්තෙමි.

උප ලේඛණය

ඉඩමේ නම	පිහිටීම	ප්‍රමාණය
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It is to be noted that this letter was sent to the original 1st respondent. It refers to a declaration made by the 1st respondent, but the Administrative Assistant of the Land Reform Commission, who gave evidence on the declarations made by the 1st respondent had stated in the cross-examination that the 1st respondent had not made a declaration in respect of the land in question either as an agricultural land or as a non-agricultural land. Accordingly, it is evident that the document marked P_{18} is contradictory to the direct evidence given by the officer of the Land Reform Commission. It is also to be borne in mind that there had been no evidence that the land in question was agricultural land in terms of the provisions of the Land Reform Law, No. 1 of 1972. The obvious reason for the said lack of evidence as to the status of the land was due to the fact that there was no issue raised by the parties as part of the case in the District Court.

A careful perusal of the proceedings before the District Court and the judgment of the District Court of Negombo, clearly reveal that the question as to whether the land in issue was

agricultural or not in 1972 was not raised as an issue before the District Court and therefore the said issue had not been considered by the District Court.

In such circumstances it is clearly evident that the question whether the land in issue was vested in the Land Reform Commission and/or whether the land in question was agricultural or not in 1972, was taken up for the first time by the appellant in the Court of Appeal.

In **Talagala v Gangodawila Co-operative Stores Society Ltd.** ((1947) 48 N.L.R. 472), the question of considering a new ground for the first time in appeal was considered and Dias J., had clearly stated that as a general rule it is not open to a party to put forward for the first time in appeal a new ground unless it might have been put forward in the trial Court under one of the issues framed and the Court of Appeal has before it all the requisite material for deciding the question.

The same question as to whether a new point could be raised in appeal was again considered by Howard C.J., and Dias. J. in **Setha v Weerakoon** ((1948) 49 N.L.R. 225), where it was held that,

> "a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

There are similarities in the facts in **Setha v Weerakoon** (supra) and the present appeal. In **Setha** (supra) learned Counsel for the appellant had sought to raise a new point, which was neither covered by the issues framed at the trial, nor raised or argued at the trial. Learned Counsel for the respondent had objected either to this new contention being raised or argued at that stage.

Examining the question at issue, Dias, J., referred to a decision of the House of Lords and a series of decisions of the Supreme Court.

In **Tasmania** ((1890) 15 A.C. 223) considering the question of raising a new point in appeal, Lord Herschell had stated that,

> "It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box."

The decision in **The Tasmania** (supra) was followed in **Appuhamy v Nona** ((1912) 15 N.L.R. 311), in deciding whether it could be allowed to raise a point in appeal for the first time. Examining the said question, Pereira, J., clearly held that,

> "Under our procedure all the contentious matter between the parties to a civil suit is, so as to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under someone or other of the issues framed and when such a ground that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the **Tasmania** may well be observed."

The question of raising a matter for the first time in appeal came up for consideration again in **Manian v Sanmugam** ((1920) 22 N.L.R. 249). In that case, for the first time in appeal, learned Counsel for the appellant, in scrutinizing the record had found that the evidence was formally insufficient to justify the finding of the lower Court on that particular item. In that matter, at the hearing, the plaintiff swore that he gave defendant some jewellery. Defendant's Counsel stated that he could not cross-examine on this point, but that he would call the defendant to deny it and leave it to the Court to decide on the credibility of the parties. The defendant, however, was not called as a witness. The Judge decided for the plaintiff on that matter. On appeal Counsel urged that the evidence was formally insufficient to justify the finding, as the plaintiff did not say in express terms that he supplied the jewellery.

Considering the matter in question, Bertrem, C.J., had held that as the point was not taken in the lower Court, that point could not be taken in appeal. It was further held that,

> "The point is, in effect, a point of law . . . . The case seems to me to come within the principles enunciated in the case of **The Tasmania** ((1890) 15 A.C. 223)."

The same question as to a point raised for the first time in appeal came up for consideration in **Arulampikai v Thambu** ((1944) 45 N.L.R. 457), where Soertsz, J., had held that the Supreme Court may decide a case upon a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material upon which the question could be decided.

On an examination of all these decisions, it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. The appellate Courts may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material that is required to decide the question.

The contention of the learned President's Counsel for the appellant was that the Court of appeal should have considered the question as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of P_{18}. As has been described in detail earlier, except for the declaration made by the 1st respondent, there is no evidence as to whether the land in question had been declared in a section 18 declaration by the 2nd and 3rd respondents. Further as stated by the officer from the Land Reform Commission, the 1st respondent had not made a declaration in respect of the said land either as an agricultural land or as a non-agricultural land. The document marked P_{18} refers to a declaration made by the 1st respondent, which is contradictory to the direct evidence led through the officer of the Land Reform Commission. The Committee of Experts, which had been appointed to inspect the land and to report to the Land Reform Commission, had informed that the said land was a non-agricultural land. The Land Reform Commission had taken into consideration the fact that the said land was a non-agricultural land in 1982 and on that basis had written P_{18} stating that it could not have been an agricultural land even in 1972. However, it is to be borne in mind that no evidence had been led to ascertain whether the land was in fact an agricultural land in terms of the provisions of Land Reform Law in 1972.

Accordingly, it is not disputed that there has been no evidence to establish as to whether the land was agricultural or not in 1972 and whether it was vested or not in the Land Reform Commission in 1972.

Learned District Judge had not come to any of such findings since there were no issues framed by the appellant and/or reported in the District Court regarding the said aspects. An issue should have been raised on the basis as to whether the land in question was agricultural land in 1972, before the District Court for both parties to adduce evidence and for the learned District Judge to arrive at a finding in the District Court.

Considering all these circumstances of the appeal it is abundantly clear that the question of vesting of the land with the Land Reform Commission was not urged before the District Court and therefore the Court of Appeal did not have before it all the material that is required to decide the question. Accordingly the Court of Appeal had correctly refrained from considering

an issue that was raised for the first time in appeal, which was at most a question of mixed law and fact.

For the reasons aforesaid, the judgment of the Court of Appeal dated 13.10.2005 is affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Saleem Marsoof, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 134/2009

S.C. (Spl.) L.A. No. 218/2009

H.C. Appeal No. HCMCA 260/08

M.C. Colombo Case No. 9283/01/07

Kesara Dahamsonda Senanayake,
No. 86, Rajapihilla Mawatha,
Kandy.

Accused-Appellant-Appellant

Vs.

1. Hon. The Attorney-General,
   Attorney General's Department,
   Colombo 12.

2. Commission to Investigate Allegations of Bribery & Corruption,
   No. 36, Malalasekara Mawatha,
   Colombo 07.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
K. Sripavan, J. &
S.I. Imam, J.

COUNSEL : C.R. de Silva, PC, with R.J. de Silva and Dulan Weerawardena for Accused-Appellant-Appellant

Gihan Kulathunga, SSC, with Asitha Anthony for Respondents-Respondents

ARGUED ON: 17.03.2010

WRITTEN SUBMISSIONS
TENDERED ON: Accused-Appellant-Appellant : 29.04.2010
Respondents-Respondents : 27.04.2010

DECIDED ON: 06.12.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the order of the High Court dated 28.08.2009. By that order, the High Court had affirmed the conviction and sentence imposed by the learned Magistrate in M.C. Colombo Case No. 9283/01/07. The accused-appellant-appellant (hereinafter referred to as the appellant) preferred an appeal before this Court on which special leave to appeal was granted.

At the stage this matter was supported for special leave to appeal, learned Senior State Counsel for the respondents-respondents (hereinafter referred to as respondents) had raised a preliminary

objection as to the maintainability of this appeal. After granting leave, this Court had stated that the said objection would be considered at the stage of hearing.

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant, who was the Mayor of the Kandy Municipal Council, was prosecuted by the 2nd respondent, in the Magistrate's Court of Colombo in respect of two counts under Section 70 of the Bribery Act, No. 20 of 1994. It was alleged in Count No. 1 of the charge sheet that the appellant, whilst being the Mayor of the Kandy Municipal Council, had obtained funds for the purpose of attending a workshop organized by the International Union of Local Authorities – Asian and Pacific section and scheduled to be held between 13th to 15th April 2004 in Taipei, Taiwan had not attended the said workshop, but had toured Singapore with his wife and thereby caused a loss of Rs. 185,185/56 to the Government.

The second Count was also in respect of the same amount and it was alleged therein that he was guilty of obtaining an illegal benefit to the same value.

The appellant stated that he could not get a visa from Sri Lanka to Taiwan since there was no diplomatic relationship between Sri Lanka and Taiwan. He had met with an accident in Singapore on 12.04.2004, while he was on his way to Taiwan Consulate to obtain his visa to proceed to Taiwan. The appellant accordingly had submitted that in the circumstances he did not have the requisite *mens rea* to commit the alleged offences and that he had not acted intentionally.

After trial the appellant was convicted on both counts by the learned Magistrate on 18.09.2008, and sentenced to one year's imprisonment suspended for 5 years and a fine of Rs. 100,000/- with a default term of 3 months simple imprisonment for the first Count and a fine of Rs. 100,000/- with a default term of 3 months simple imprisonment for the second Count.

When this matter came up for hearing it was agreed that the preliminary objection would be taken up for consideration first. Both parties were accordingly heard only on the preliminary issue raised by the learned Senior State Counsel for respondents.

The contention of the learned Senior State Counsel for the respondents was that the appellant had failed to name the Director-General of the Bribery Commission, who is the complainant, as a party respondent in the appeal to the Supreme Court. In the circumstances, it was contended that the appellant had not complied with Rules 4, 28(1) and 28(5) of the Supreme Court Rules of 1990. Accordingly learned Senior State Counsel for the respondents moved that this appeal be dismissed *in limine*.

Learned President's Counsel for the appellant conceded that the question of identifying the proper party is an essential question in any type of litigation and that the purpose of having the proper party named is to ensure that any decree of Court or a finding of a Court is properly enforceable once such decree is entered or such finding has been made.

Accordingly it was contended that in order to ascertain as to whether it is necessary to make the Director-General of the Bribery Commission a party to this appeal, it would be necessary to consider the provisions of Commission to Investigate Allegations of Bribery and Corruption Act, No. 19 of 1994.

Learned President's Counsel for the appellant referred to Sections 2, 3, 4, 5, 6, 7, 8 and 11 of the said Act, No. 19 of 1994 and contended that the said provisions clearly show that the Director-General has to act on the directions given by the Commission and it is the Commission, which has the responsibility of investigation and the institution of proceedings. Accordingly, the learned President's Counsel for the appellant submitted that the Commission itself was the proper party to have been made a party and there was no necessity to make the Director-General a party to this appeal.

The word 'complainant' is not defined by the Code of Criminal Procedure Act. However, the meaning of the word 'complaint' is defined in Section 2 of the Code of Criminal Procedure Act and is stated as follows:

"Complaint means the allegation made orally or in writing to a Magistrate with a view to his taking action under this Code that some person, whether known or unknown, has committed an offence."

Chapter XIV of the Code of Criminal Procedure Act deals with the commencement of proceedings before the Magistrate's Courts and Section 136(1)a refers to the fact that proceedings in a Magistrate's Court shall be instituted on a complaint being made orally or in writing to a Magistrate of such Court that an offence has been committed, which such Court has jurisdiction either to inquire into or try such complaint.

Referring to the provisions in the Code of Criminal Procedure Act, which deals with the complaints, Dias, J. in **The Attorney-General v Herath Singho** ((1948) 49 NLR 108) had stated that the 'complainant' must mean the person, who makes the 'complaint'. In **Herath Singho** (supra) Dias, J., had to consider the applicability of the word 'complaint' defined in Section 2 of the Code of Criminal Procedure Act in relation to other relevant sections in the Code. Considering the question, Dias, J., was of the view that the 'aggrieved person or persons' or the police, who have been induced by the aggrieved person or persons, could take up the grievance before Court. In such instances, if the aggrieved person or persons desire to be the 'complainant', the Code of Criminal Procedure Act would give him the right to make a 'complaint' making himself the 'complainant'. If, on the other hand, the aggrieved person or persons, without exercising their right to make a complaint in terms of the Code of Criminal Procedure Act, state their grievances to the police, who after inquiry decides to take up the case and institute proceedings on their own, the said police would file their 'complaint' and the aggrieved person or persons would cease to be 'complainants'. In such situations, it is clear that the police officers, who 'instituted the proceedings' would become the complainant.

Dias, J., in **The Attorney-General v Herath Singho** (supra) referring to Dalton, J.'s decision in **Nonis v Appuhamy** ((1926) 27 NLR 430) had stated that,

". . . for the institution of proceedings by complaint or written report, the person making the complaint or written report is regarded as the party instituting the proceedings against the accused person."

This position was further affirmed by Dalton, J., in **Babi Nona v Wijeysinghe** ((1926) 29 NLR 43), where the Court had considered the right of appeal of an aggrieved party in a matter in which the proceedings were instituted on a written report by a police officer.

As stated earlier in terms of Section 136(1) of the Code of Criminal Procedure Act, the proceedings before the Magistrate's Court would commence after the institution of a complaint being made to the Magistrate. Considering the provisions contained in Sections 2 and 136(1) of the Code of Criminal Procedure Act and the ratio of decisions referred to earlier, it is evident that a person, who makes such a complaint to the Magistrate would be regarded as a 'complainant'.

The powers and functions of the Commission to Investigate Allegations of Bribery or Corruption are stipulated in Act, No. 19 of 1994. The Commission consists of a Chairman and two (2) other members and has the power to investigate into allegations of bribery or corruption. A Director-General is appointed to the Commission in terms of Section 16 of the Act, No. 19 of 1994, to assist the Commission in the discharge of the functions assigned to the Commission. Section 3 of the Act, No. 19 of 1994 states that, based on the communication made to the Commission, where there is disclosure of the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the Commission shall **direct the institution of proceedings** against such person for such offence in the appropriate Court. The said Section 3 of the Act, No. 19 of 1994 is as follows:

"The Commission shall subject to the other provisions of this Act, investigate allegations, contained in communication made to it under Section 4 and where any such investigation discloses the commission of any offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, **direct the institution of proceedings against such person for such offence in the appropriate Court**" (emphasis added).

Section 4 of the Act, No. 19 of 1994 refers to communications received by the Commission and the conduct of investigations that would be carried out, if it is satisfied that such communication is genuine and discloses material upon which an investigation ought to be conducted. Section 11 of the said Act, No. 19 of 1994, specifies the steps that should be taken by the Commission, where in the course of an investigation conducted by the Commission under Act, No. 19 of 1994, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975. The said Section 11, which is reproduced below, clearly states that the Commission shall direct the Director-General to institute criminal proceedings against such persons.

"Where the material received by the Commission in the course of an investigation conducted by it under this Act, discloses the commission of an offence by any person under the Bribery Act or the Declaration of Assets and Liabilities Law, No. 1 of 1975, the **Commission shall direct the Director-General to institute criminal proceedings against such person in the appropriate court and the Director-General shall institute proceedings accordingly**.

Provided, however, that where the material received by the Commission in the course of an investigation conducted by it discloses an offence under Part II of the Bribery Act and consisting of soliciting, accepting or offering, by any person, of a gratification which or the value of which does not exceed two thousand rupees, the Commission shall direct the institution of proceedings against such person before

the Magistrate's Court and where such material discloses an offence under that part and consisting of soliciting, accepting or offering, by any person of any gratification which or the value of which exceeds two thousand rupees, the Commission shall direct the institution of proceedings against such person in the High Court by indictment" (emphasis added).

An examination of the aforementioned provisions of the Act, No. 19 of 1994, reveals that, the functions of the Commission are restricted to investigating allegations and directing the institution of proceedings. It is also evident that on the material received by the Commission in the course of an investigation conducted by the Commission there is disclosure of the commission of an offence, thereafter the role of the Commission is only to direct the Director-General to institute criminal proceedings and the indictment would be signed by the Director-General. The said procedure is clearly laid down in Section 12(1) of Act, No. 19 of 1994, where it is stated thus:

"Where proceedings are instituted in a High Court in pursuance of a direction made by the Commission under Section 11 by an indictment signed by the Director-General, such High Court shall receive such indictment and shall have jurisdiction to try the offence described in such indictment in all respects as if such indictment were an indictment presented by the Attorney-General to such Court."

Considering the provisions contained in Sections 11 and 12 of the Act, No. 19 of 1994 it is quite obvious that where the material received by the Commission to Investigate Allegations of Bribery or Corruption, in the course of an investigation conducted under and in terms of the Act, No. 19 of 1994, discloses the commission of an offence, the said Commission shall direct the Director-General to institute criminal proceedings against such person in the appropriate Court. The said provisions also indicate, quite clearly that when such a direction is given by the Commission that it is mandatory for the Director-General to institute proceedings. Furthermore in terms of Section 12

of the Act, No. 19 of 1994, the indictment under the hand of the Director-General is receivable in High Court.

It is therefore evident that the Director-General has to be regarded as the complainant, as the authority to institute criminal proceedings on the offences under Act No. 19 of 1994, is exclusively vested with the Director-General of the Commission.

The provisions contained in Section 3 of the Act, No. 19 of 1994, further clarifies this position. The said Section 3 of the Act referred to earlier, deals with the functions of the Commission and clearly states that the functions of the Commission are limited to investigate allegations and to direct the institution of proceedings against such person.

A careful examination of the provisions in Sections 3 and 11, thus clearly indicates that, whilst the Commission has the authority to investigate, and on the basis of the findings of such investigation, the Commission has the authority to direct the institution of proceedings, such institution of proceedings shall be carried out in effect by the Director-General of the Commission.

It is common ground that the Director-General has not been made a party to the application before the Supreme Court.

Learned Senior State Counsel for the respondents contended that since the Director-General of the Bribery Commission, who is a necessary party to this application, had not been named as a respondent, that the appellant had not complied with Rules 4 and 28 of the Supreme Court Rules 1990 and therefore the appeal should be dismissed *in limine*.

Rule 4 of the Supreme Court Rules 1990, which deals with the applications for Special Leave to Appeal refers to the necessity in naming as the respondents the necessary and relevant parties. The said Rule reads as follows:

"In every such application, there shall be named as respondent, the party or parties (whether complainant or accused, in a criminal cause or matter, or whether plaintiff, petitioner, defendant, respondent, intervenient or otherwise, in a civil cause or matter), in whose favour the judgment or order complained against was delivered, or adversely to whom such application is preferred, or whose interest may be adversely affected by the success of the appeal, and the names and present addresses of all such respondents shall be set out in full."

Rule 28 deals with other appeals, which come before the Supreme Court and the said Rule reads as follows:

"28(1)Save as otherwise specifically provided by or under any laws passed by Parliament, the provisions of this Rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal.

. . . .

28(5) In every such petition of appeal and notice of appeal, there shall be named as respondents, all parties in whose favour the judgment or order complained against was delivered, or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the respondents shall be set out in full."

The totality of the aforementioned Rules indicates the necessity for all parties, who may be adversely affected by the success or failure of the appeal to be made parties to the appeal.

This position was considered by the Supreme Court in **Ibrahim v Nadarajah** ([1991] 1 Sri L.R. 131), where the Court had to consider whether there was a violation of Rules 4 and 28 of the Supreme Court Rules.

In that case learned Counsel for the appellant submitted that the party who was not added was, the minor daughter of the respondent, who was named and that no prejudice would be caused because the same counsel might have appeared for the daughter had she been made a party to the appeal and that in any event the decision against the daughter will be the same as that against her mother.

Considering the applicability of the Supreme Court Rules and taking the view that a failure to comply with the requirements of Rules 4 and 28 is necessarily fatal, Dr. Amerasinghe, J., held that,

> "It has always, therefore, been the law that it is necessary for the proper constitution of an appeal that all parties who may be adversely affected by the result of the appeal should be made parties and, unless they are, the petition of appeal should be rejected."

As stated earlier it is common ground that the Director-General of the Commission to Investigate Allegations of Bribery and Corruption was not made a party to this appeal. On the basis of the examination of the provisions of the Act, No. 19 of 1994 it is evident that the Director-General, has to be regarded as the complainant in such an application and therefore is a necessary party to this appeal. **In terms of the Supreme Court Rules, for the purpose of proper constitution of an appeal, it is vital that all parties, who may be adversely affected by the result of the appeal should be made parties**.

It is thus apparent that the appellant has not complied with Rules 4 and 28 of the Supreme Court Rules of 1990.

For the reasons aforesaid, I uphold the preliminary objection raised by the learned Senior State Counsel for the respondents and dismiss this appeal for non compliance with Supreme Court Rules.

I make no order as to costs.

Judge of the Supreme Court

K. Sripavan, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 2/2009
S.C.(H.C.) C.A.L.A. No. 110/2008
H.C.C.A. NWP/HCCA/KUR No. 16/2001(F)
D.C. Maho No. 4241/P

Rajapaksha Mudiyanselage Somawathie, Nikawewa,
Moragollagama.

Plaintiff-Respondent-Appellant

Vs.

N.H.B. Wilmon,
Nikawewa,
Pahala Elawatta,
Moragollagama.

4th Defendant-Appellant-Respondent

1. N.H. Asilin,

2. N.H. Ranjith Nawaratna,

   Both of Nikawewa, Pahala Elawatta, Moragollagama.

3. N.H. Pulhiriya,
   Nikawewa, Serugasyaya,
   Moragollagama.

4. N.H.B. Wilmon,

5. N.H. Simon Pulhiriya,

   Both of Nikawewa, Pahala Elawatta, Moragollagama.

Defendants-Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
P.A. Ratnayake, J.

COUNSEL : Lakshman Perera with Anusha Gunaratne for Plaintiff-Respondent-Appellant

Ranjan Suwandaratne for 4th Defendant-Appellant-Respondent

ARGUED ON: 04.05.2009

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Respondent-Appellant : 15.06.2009
4th Defendant-Appellant-Respondent : 08.06.2009

DECIDED ON : 24.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the High Court of Civil Appeal of the North Western Province (hereinafter referred to as the High Court) dated 21.08.2008. By that judgment the High Court allowed the appeal preferred by the 4th defendant-appellant-respondent (hereinafter referred to as the 4th respondent) and dismissed the action filed by the plaintiff-respondent-appellant (hereinafter referred to as the appellant) on which the District Court by its decision has allotted an undivided 1/3 share of the corpus to the appellant and left the balance undivided portion unallotted.

Being aggrieved by the judgment of the High Court, the appellant preferred an application to this Court on which leave to appeal was granted by this Court on the following questions:

1. has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?;

2. has the High Court erred in law in failing to consider that the Deed of Gift on the face of it clearly indicates that the life interest holder has signed in acceptance on behalf of the donees?;

3. was the High Court wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect?

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant instituted action on 06.05.1996 for the partition of the land morefully described in the schedule to the Plaint. The appellant, in his Plaint had set out that an undivided one-third (1/3) share of the said land, was owned by one Meniki, who by Deed No. 4059 dated 10.01.1944, attested by one Illangaratne, Notary Public had sold the said undivided share to one Singappuliya. The said Singappuliya, by a Deed of Gift, No. 22372, dated 04.03.1962, attested by T.G.R. de S. Abeygunasekera, Notary Public had gifted his undivided one third-share to Peter, Martin and Laisa. The said Peter, Martin and Laisa, by Deed No. 11560 dated 16.12.1994, attested by Mrs. C.M. Balalla, had transferred the said undivided share to the appellant. The appellant is unaware as to the original owners of the remaining two-thirds (2/3) of the undivided share of the land. The 1st, 2nd and 3rd defendants-respondents-respondents (hereinafter referred to as 1st, 2nd and 3rd respondents) are the present owners of undivided one-third (1/3) share of the land and the 5th defendant-respondent-respondent (hereinafter referred to as the 5th respondent) is the present owner of the remaining undivided one-third (1/3) share of the land. The 4th respondent, according to the appellant, is the nephew of the 5th respondent and has no right or title to the land, although he has been cultivating a portion of the land.

Although all the respondents had been present and represented before the District Court, only the 4th respondent had filed a statement of claim. In his statement of claim the 4th respondent had stated, inter alia, that,

1. the land sought to be divided had been possessed by the 4th respondent's maternal grandfather, one Samara Henaya, about 60 years ago and thereafter about 25 years prior to the institution of this action in the District Court, the said land had been possessed by the 4th respondent with the said Samara Henaya;

2. in 1982, the 4th respondent had built the house depicted as 'B' in Plan No. 3270/96, dated 15.12.1996 made by B.G. Bandutilake, Licensed Surveyor, filed of record and lived in that house with his family. Later in 1992 he had built on the said land and had been living in that house depicted as 'A' in the said Plan;

3. the 4th respondent had acquired prescriptive title to the land in dispute as he had continuous and undisturbed possession adversely to the rights of all others for over a period of 15 years.

At the trial the appellant and one of the appellant's predecessors in title, one Peter had given evidence on behalf of the appellant. The 4th respondent had led the evidence of the Surveyor Bandutilake, the 5th respondent, two farmers, namely Kiriukkuwa and Rajapaksha and the Grama Niladari, viz., Hemamali Rajapaksha.

Learned District Judge, Maho, by the judgment dated 22.01.2001 had declared that the appellant was entitled to an undivided one-third (1/3) share of the land and had left the remaining two-thirds (2/3) share unallotted. It was further held that the plantations and buildings on the land should be allocated among the parties as they had claimed before the Surveyor in the Report marked 'Y'.

Being aggrieved by the aforementioned judgment of the learned District Judge dated 22.01.2001, the 4th respondent had preferred an appeal to the High Court. The High Court by its judgment dated 21.08.2008, had held that the predecessors in title of the appellant could not be held to have derived title by the said Deed of Gift. Accordingly the High Court had allowed the 4th respondent's appeal and dismissed the appellant's action.

Being aggrieved by the said judgment of the High Court dated 21.08.2008 the appellant preferred an application before the Supreme Court.

Having stated the facts of the appeal, let me now turn to consider the questions on which leave to appeal was granted by this Court.

The High Court after considering the provisions contained in section 4(1)d of the Partition Law, No. 21 of 1977, had held that the appellant had sufficiently pleaded the pedigree in compliance with the provisions of section 4(1)d of the Partition Law. However, on the question of whether the appellant had proved the pedigree pleaded by her in compliance with the law, the High Court had held that the Deed of Gift marked as P_2 had not been accepted by the donees on the face of it, but has only been signed by the donor and the holder of the life interest and that the appellant had not sought to adduce any evidence to establish acceptance by the donees.

The three (3) questions on which leave to appeal was granted, referred to above, are all based on the Deed of Gift marked as P_2 and since the 3rd question states that there were no issues raised in the District Court on the basis of the non-acceptance of the Deed of Gift, let me first consider that question before proceeding to consider the questions No. 1 and 2.

a) Was the High Court of Civil Appeal wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court, or to lead any evidence to that effect?

At the outset of the trial, one admission had been recorded and 14 issues were raised by the appellant and the 4th respondent, which were accepted by Court. It is to be noted that there was no issue raised at the trial as to whether the Deed of Gift P_2 was invalid for want of acceptance. Accordingly, no evidence was led regarding the acceptance or non-acceptance of the Deed of Gift marked as P_2. A careful perusal of the proceedings before the District Court clearly reveals the fact that there was no opportunity at the trial to have led evidence on the question of non-acceptance, since there was no such issue raised by either party.
In the light of the above, it is quite evident that the question of non-acceptance of the Deed of Gift (P_2) was raised for the first time in appeal.

The question of examining a new ground for the first time in appeal was considered in several decided cases. In considering this question, Dias, J., in **Talagala v Gangodawila Co-operative Stores Society Ltd.,** ((1947) 48 N.L.R. 472) had clearly stated that as a general rule it is not open to a party to put forward for the first time in appeal a new ground unless it might have been put forward in the trial Court under one of the issues framed and the Court hearing the appeal has before it all the requisite material for deciding the question.

The question as to whether a matter that has not been raised as an issue at the trial could be considered in appeal was examined in detail in **Gunawardena v Deraniyagala and others** (S.C. (Application) No. 44/2006 – S.C. Minutes of 03.06.2010), where attention was paid to several decided cases (**Setha v Weerakoon** ((1948) 49 N.L.R. 225), **The Tasmania** ((1890) 15 A.C. 223), **Appuhamy v Nona** ((1912) 15 N.L.R. 311), **Manian v Sanmugam and Arulampillai v Thambu** ((1944) 45 N.L.R. 457)).

After a careful examination of the aforementioned decisions, it was clearly decided in **Gunawardena v Deraniyagala and others** (supra), that according to our procedure a new ground cannot be considered for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. Accordingly the Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled.

a. the question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;

b. the question raised for the first time in appeal is an issue put forward in the Court below under one of the issues raised; and

c. the Court which hears the appeal has before it all the material that is required to decide the question.

It was not disputed that no issue was raised on the non-acceptance of the Deed of Gift. It is also to be noted that the respondent had not contested the validity of the Deed of Gift as to whether there was acceptance by the donees, at the time of the trial in the District Court. Since no such issue was raised, the District Court had not considered the said non-acceptance

of the Deed of Gift and therefore there was no material before the high Court on the said issue. In the circumstances, the High Court was in error when it considered the question of non-acceptance of the Deed of Gift, which was at most a question of mixed law and fact.

Questions No. 2 and 3 both deal with the issue of the non-consideration by the High Court the acceptance of the Deed of Gift by the donees. Accordingly, both the said questions, listed below, could be considered together.

2. Has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?

3. Has the High Court erred in law in failing to consider that the Deed of Gift on the face of it clearly indicates that the life interest holder has signed in acceptance on behalf of the donees?

The Deed of Gift in issue is the Deed No. 22372 marked P_2, dated 04.03.1962 attested by T.G.R. de S. Abeyagunasekera, Notary Public.
By that Deed as stated earlier, Singappuliya had gifted his undivided one-third (1/3) share to Peter, Martin and Laisa. The said gift was subject to the life interest of the donor and his wife, Muthuridee, the mother of the three donees.

Learned Counsel for the 4th respondent strenuously contended that by the said Deed of Gift, the donor had conveyed the life interest of the said property to the said Muthuridee. Accordingly learned Counsel for the 4th respondent contended that the said Deed of Gift has to be accepted formally by the said Muthuridee, and it was necessary for her to have signed the said Deed of Gift in order to accept the life interest, which was gifted to her by the donor. Further it was submitted that the said Muthuridee had been acting in dual capacity as she had to accept the Deed of Gift on behalf of her three children in addition to accepting it on her own behalf and accordingly it was necessary for her to have signed twice indicating the acceptance on behalf of her children and on her own behalf. Since, the said Muthuridee had only signed once on the Deed of Gift, learned Counsel for the 4th respondent contended that the said gift had not been accepted by the donees.

Learned Counsel for the 4th respondent further contended that the learned High Court Judges had considered the question as to the acceptance of the Deed of Gift by the donees and had come to the conclusion that the said Deed of Gift had not been accepted by the donees, as only the donor and the holder of the life interest had signed it. The High Court had been of the view that a donation is not complete unless it is accepted by the donees and that the appellant had not sought to adduce any evidence to establish that the gift in question was accepted by the donees.

The essence of a Deed of Gift is to convey movable or immovable property as a gratuitous transfer. The intention of the donor is to convey the movable or immovable property to the donee. Therefore for the purpose of making the donation complete, the gift has to be accepted. Considering the question of the validity of a Deed of Gift, Canekaratne, J., in **Nagalingam v Thanabalasingham** ((1948) 50 N.L.R. 97) stated thus:

> "The donor may deliver the thing, e.g., a ring or give the donee the means of immediately appropriating it, e.g., delivery of the deed, or place him in actual possession of the property."

Regarding the question of acceptance, it is thus apparent that such acceptance could take different forms. In **Senanayake v Dissanayake** ((1908) 12 N.L.R. 1), Hutchinson, C.J., considered the question of acceptance of a Deed of Gift and had held that it is not essential that the acceptance of a Deed of Gift should appear on the face of it, but that such acceptance may be inferred from circumstances. In arriving at the said conclusion, Hutchinson, C.J., had stated that,

> "**The deed does not state that the gift was accepted; but that is not essential**. It is an inevitable inference from the facts which are above stated that Kachchi was in possession, with the consent of the grantor, at the date of the sale of her interest; and thereafter the purchaser of her interest possessed it during the rest of her life. It is the natural conclusion from the evidence that Ukku Menika, with the consent of the grantor,

accepted the gift for herself and her children, (emphasis added)"

Canekaratne, J., in **Nagalingam v Thanabalasingham** (supra) had also considered the question of acceptance of a Deed of Gift. On a careful consideration of the facts and circumstances of that appeal, Canekeratne, J. had clearly stated that,

> "There is a natural presumption that the gift was accepted. Every instinct of human nature is in favour of that presumption. **It is in every case a question of fact whether or not there are sufficient indications of the acceptance of a gift**" (emphasis added).

It is not disputed that in the present appeal, the mother of the three donees, had accepted the said Deed of Gift on behalf of the donees. It is specifically stated in Deed No. 22372 (P_2) that,

> **"තවද ඉහතකී තැගි ලැබුම්කාර තිදෙනා වෙනුවට ඔවුන්ගේ මෑණියන්වූ එකී නිකවැවේ පදිංචි, නවරත්න හේනයලාගේ කව්වා හේනයාගේ මුතුරිදී වන මම ඉහත සඳහන් කළ පරිත්‍යාගය ප්‍රත්‍යාදර ගෞරවයෙන් හා ස්තුතියෙන් මෙයින් පිළිගනිමි."**

The said Muthuridee had signed the Deed of Gift No. 22372 dated 04.03.1962.

Furthermore, the donees had been in possession of the land in question for a period of over 30 years. The evidence of Peter, one of the donees, clearly clarified this position.

> **"මම මේ නඩු කියන ඉඩම දන්නව. මේ ඉඩම අපි වික්කා. වික්කෙ සෝමාවතිට. එන්. එච්. පීටර්, එන්. එච්. මාටින්, එන්. එච්. ලයිසා කියන අපි වික්කෙ. (ඔප්පුව පෙන්වා සිටී. එය හඳුනා ගනී.) මට අයිති වුනේ තාත්තා අරන් තිබුනා. කේ. සිංගප්පුලියා තාත්තා. 4940/59 දරණ ඔප්පුව ඊට පස්සේ අපට තාත්තා ලියා දුන්නා. අයිතිවාසිකම් අපි වික්ක. අපි මේ ඉඩම බුක්ති වින්ද.**

පැමිණිලිකරුට වික්කෙ 94. විකුණන තෙක් අපි බුක්ති විින්ද. 1/3 පංගුවක් බුක්ති විින්ද.”

It is therefore evident that after the execution of the Deed of Gift the donees had possessed and had enjoyed the land in question.

Considering the totality of the circumstances in this appeal, it is abundantly clear that at the time of the execution of the Deed of Gift, it was clearly stated in the said Deed that the gift was accepted by the mother of the donees on behalf of the donees and she had also signed the said Deed of Gift. Moreover, the donees had possessed and had enjoyed the land in question for more than 30 years. Considering the dicta enumerated in **Senanayake v Dissanayake** (supra) and **Nagalingam v Thanabalasingham** (supra) the aforementioned facts clearly show that they are sufficient indications that the donees had accepted the Deed of Gift.

For the reasons aforesaid the questions on which leave to appeal was granted by this Court are answered as follows:

1. yes, the High Court had erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees;

2. yes, the High Court had erred in law in failing to consider that the Deed of Gift on the face of it clearly indicated that the life interest holder had signed in acceptance on behalf of the donees;

3. yes, the High Court was wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect.

The judgment of the High Court dated 21.08.2008 is set aside and the judgment of the District Court dated 22.01.2001 is affirmed. This appeal is accordingly allowed.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 10/2007
S.C. (Spl.) L.A. No. 233/2006
C.A. (Writ) Application No. 679/2003

1. Andiapillai Karuppannapillai,

2. Kaliappapillai Soundararajan,

3. Arunasalampillai Manickawasagar,

   Trustees of Sammangodu Sri Kathirvelayutha Swami Temple,

   all of No. 91/1, Main Street,
   Colombo 11.

2nd Respondent-Appellants

Vs.

1. Raja Rajeswari Visvanathan,

2. Romesh Sadesh Kumar Visvanathan,

3. Romesh Kandiah Visvanathan,

4. Rashidharan Visvanathan,

   All of No. 27, Lorensz Road,
   Colombo 04.

Substituted Respondents-Petitioners-Respondents

1. Sammangodu Sri Kathiravelayutha Swamy Kovil Paripalana Society Ltd.,
   No. 105, Bankshall Street,
   Colombo 11.
   Presently of No. 91/1, Main Street,
   Colombo 11.

Applicant-Respondent-Respondent

3. Hema Wijesekara,
   The Commissioner of National Housing,
   Department of National Housing,
   Ministry of Housing,
   "Sethsiripaya",
   Sri Jayawardanapura,
   Kotte,
   Battaramulla.

4. Hon. Arumugam Thondaman,
   Then Minister of Housing,
   Ministry of Housing and Plantation Infrastructure,
   "Sethsiripaya",
   Sri Jayawardanapura,
   Kotte,
   Battaramulla.

5. Hon. Ferial Ashroff,
   Minister of Housing,
   Ministry of Housing,
   "Sethsiripaya",
   Sri Jayawardanapura,
   Kotte,
   Battaramulla.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
K. Sripavan, J.

COUNSEL : Wijayadasa Rajapakse, PC, with Nilantha Kumarage for 2nd Respondent-Appellants

A. Gnanathasan, ASG, PC, with N. Wigneswaran, SC, for 3rd,4th and 5th Respondents-Respondents

Dr. Sunil Coorey for Substituted Respondents-Petitioners-Respondents

ARGUED ON: 08.07.2009

WRITTEN SUBMISSIONS

TENDERED ON:	2nd Respondent-Appellants	:	31.08.2009
	3rd, 4th & 5th Respondents	:	29.07.2010
	Substituted Respondents-Petitioners-Respondents	:	29.07.2010

DECIDED ON: 26.10.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 21.08.2006. By that judgment, the Court of Appeal had decided to set aside the approval granted by the Minister dated 19.02.2003 (3R15a) and the divesting order published in the Gazette on 25.02.2003 (3R16). Accordingly the application for a writ of certiorari made by the substituted respondents-petitioners-respondents (hereinafter referred to as the substituted respondents) was allowed. The 2nd respondent-appellants (hereinafter referred to as the appellants) came before this Court against the judgment of the Court of Appeal for which Special Leave to Appeal was granted.

At the hearing of this appeal it was agreed by all learned Counsel that the only issue that has to be considered was whether the original respondent, namely, Kandiah Visvanathan, (hereinafter referred to as the respondent), who was the father of the substituted respondents, was entitled to a communication of the decision of the Commissioner of National Housing prior to its publication.

The facts of this appeal as submitted by the appellants, *albeit* brief, are as follows:

The appellants are the Trustees of Sammangodu Sri Kathiravelayutha Swamy Temple and were the owners of the house bearing No. 27, Lorensz Road, Colombo 04 (hereinafter referred to as 'the said premises'). When the Ceiling on Housing Property Law (hereinafter referred to as the CHP Law), came into operation, the appellants had made a declaration as

required by the said law to the Commissioner of National Housing (X_1). On the basis of the said declaration made by the appellants, the said premises, was vested as a surplus house by the Commissioner of National Housing (X_2 and X_3). The appellants had thereafter appealed against the said vesting order to the Board of Review of Ceiling on Housing Property (hereinafter referred to as the Board of Review). The respondent's father, Kanagasabai Kandiah was the tenant of the said premises and after his death, his widow Sellamma Kandiah became the tenant of the said premises. At the time that appeal was taken for hearing before the Board of Review, the said Sellamma Kandiah had died and her son Kandiah Visvanathan, viz., the respondent, appeared before the Board of Review.

The Board of Review, by its order dated 26.06.1978, had dismissed the appeal and had decided that the respondent, Kandiah Visvanathan, is the tenant of the said House (X_4).

Thereafter, one Wigneswarie Kandiah, a sister of Kandiah Visvanathan, had challenged the said order of the Board of Review by instituting action in the District Court of Mt. Lavinia and the said Court had dismissed that action, by its judgment dated 27.03.1995 (X_{13}). Being aggrieved by that judgment the said sister of Kandiah Visvanathan had made a final appeal to the Court of Appeal and by judgment dated 14.10.1999, the Court of Appeal had affirmed the judgment of the District Court (X_{14}). Against the said judgment of the Court of Appeal the said Wigneswarie Kandiah had come before this Court and by its judgment dated 22.10.2002 this Court had dismissed the said appeal (X_{15}).

In the mean time the Commissioner of National Housing, by his letter dated 04.06.1997 (X_{16}), had informed the respondent to pay a sum of Rs. 96,335/- as the assessed value of the said premises and the said respondent had accordingly paid the said sum to the National Housing Authority. Thereafter an inquiry had been held on 20.04.1999 and it was decided that no action would be taken in respect of the transfer of the said premises without the conclusion of all cases relating to said premises.

Since the appellants were agitating for several years for the divesting of the said premises as neither compensation was paid nor the Commissioner had transferred title of the said property to a third party, they had made an application under section 17A of the CHP Law to the Commissioner, for divesting the ownership of the said premises to the appellants. On

the basis of the inquiry that was held, the Commissioner had decided to divest the said premises and had sought approval of the Minister for the said divestiture in terms of section 17(A)(1) of the CHP Law (3R15). The Minister had granted approval on 19.02.2003 (3R15a) and the divesting order was published in the Gazette of 25.02.2003 (3R16). Thereafter the Commissioner by his letter dated 12.03.2003 had informed the Attorney-at-Law for the respondent that action had been taken under section 17(A)(1) of the CHP Law on the application made by the appellant. The respondent had appealed to the Board of Review on the basis of the said decision and had also filed an application seeking for a writ of certiorari before the Court of Appeal to quash the decisions of the Minister of Housing and the Commissioner of National Housing, approving the divesting of the ownership of the said premises and seeking a writ of mandamus compelling the 3rd respondent to issue an instrument of disposition transferring the said premises to the respondent.

During the pendency of the said writ application, the said respondent had died and the 1st to 4th respondents were substituted in place of the deceased.

The Court of Appeal by its judgment dated 21.08.2006 set aside the approval granted by the Minister on 19.02.2003 and the divesting order published in the Gazette on 25.02.2003.

Learned Counsel for the substituted respondents contended that the facts of this appeal are similar to the facts in **Goonewardene and Wijesooriya v Minister of Local Government, Housing and Construction** ([1999] 2 Sri L.R. 263). It was accordingly submitted that the respondent, who had participated at the inquiry, had a legitimate expectation of becoming the purchaser of the said premises. Therefore learned Counsel for the substituted respondents contended that the Court of Appeal had correctly decided that the respondent was a party aggrieved by the decision to divest and therefore had a statutory right of appeal to the Board of Review in terms of section 39(1) of the CHP Law. It was further contended on behalf of the substituted respondents that the Commissioner had failed to notify the respondent of the decision to divest and the reasons for such decision. The contention was that the Commissioner, by failing to notify the respondent of his decision had violated the rules of natural justice.

The Court of Appeal, having considered the application filed by the respondent had held that he had a legitimate expectation of purchasing the premises in question and that a decision to divest would have affected him adversely. The Court of Appeal had arrived at the aforesaid decision on the basis of the letter dated 04.06.1997 (X_{16}) referred to earlier, by which the Commissioner of National Housing had requested the respondent to deposit a sum of Rs. 96,335/-.

It was not disputed that the respondent's father K. Kandiah was the tenant of the premises in question until his death in July 1952. Thereafter the widow of the said Kandiah became the tenant of the said premises. She passed away in July 1973.

The said premises in question was regarded as an excess house by the Board of Review, by its order dated 26.06.1978 (X_4). The said Board of Review, by that order had decided that the respondent was deemed to be the chief occupant of the premises.

The CHP Law, which came into operation on 13.01.1973, specifically deals with the procedure that should be followed by a tenant, who may apply to purchase a surplus house. Section 9 of the said Law, which deals with such situations, has clearly stated that,

> "The tenant of a surplus house or any person who may succeed under section 36 of the Rent Act to the tenancy of such house may, within four months from the date of commencement of this Law, apply to the Commissioner for the purchase of such house."

Reference was made to the applicability of Section 9 of the CHP Law in **Desmond Perera and Others v Karunaratne, Commissioner of National Housing and Others** ([1994] 3 Sri L.R. 316), where it was held that,

> "Section 9 of the CHP Law is precise, clear and unambiguous. **A tenant who wishes to purchase a surplus house should make an application to the Commissioner within 4 months**

from the date of commencement of the CHP Law which was 13.01.1973" (emphasis added).

It was not disputed that the respondent had made an application to the Commissioner of National Housing in terms of section 9 of the CHP Law only on 06.03.1979. The date of commencement of the CHP Law as defined in section 47 of the said Law, was 13.01.1973 and the respondent had made his application, six (6) years after the relevant date of commencement. Considering the provisions contained in section 9 of the CHP Law, the application of the respondent to purchase the premises in question therefore is clearly out of time.

In **Desmond Perera and Others v Karunaratne, Commissioner of National Housing and Others** (supra), the Court had taken pains to consider whether there was any obscurity and/or ambiguity in the wording of section 9 of the CHP Law. In that case, the 1st petitioner had made his application for the purchase of the premises on 27.03.1981, which was 8 years after the CHP Law coming into effect. Considering the application made by the 1st petitioner in 1981 and the applicability of the provisions contained in section 9 of the CHP Law, Grero, J. had stated that,

> "The Court is of the view, that there is no obscurity and ambiguity in the wording of section 9 of the CHP Law . . . . Therefore this Court has to give effect to the plain meaning of this section. In doing so this Court is of the view, that a tenant who wishes to purchase a surplus house should make an application to the Commissioner within 4 months (four) from the date of commencement of the CHP Law. Much prominence was given to this Law, when it came into force. Petitioners who are the tenants of the 3rd respondent should be or ought to be vigilant about the laws enacted and published regarding their rights and duties. They may make full use of them if they so desire. Failure in their part to comply with section 9 of the CHP Law is not a ground to make a complaint against draftsmen of the said Law. When the

> wording of the section is so clear and precise, they should have made applications to the Commissioner within four months after the commencement of the Law to purchase the houses as stated in that section. This Law came into operation on 13.01.1973. The 1st petitioner (but not the other petitioners) made his application to the Commissioner on 27.03.81, i.e., 8 years after the commencement of this Law."

The applicability of the provisions contained in Section 9 of the CHP Law was again considered in **Desmond De Perera and Others v Karunaratne, Commissioner for National Housing** ([1997 1 Sri L.R. 148), where G.R.T.D. Bandaranayake, J., had stated that,

> "Section 9 . . . creates the opportunity for the tenant to opt to purchase the house he lives in. So the section categorically requires him to do only one single thing – namely, to apply to the Commissioner for the purchase of a house. This he must do within the stipulated period of four months from the date of commencement of the law – which was 13.01.73."

In **Desmond Perera and Others** (supra) Court had held that the 1st petitioner had failed to comply with the provisions of section 9 of the CHP Law.

As could be clearly seen, the facts of the present appeal as regards the application made to the Commissioner of National Housing in terms of section 9 of the CHP Law, is similar to the facts in **Desmond Perera and Others** (supra). As stated earlier it is not disputed that the original respondent had made his application 6 years after the commencement of the said Law and therefore the respondent has not acted in terms of the time frame laid down in section 9 of the CHP Law.

The next issue that should be considered is as to whether the respondent had a legitimate expectation as was held by the Court of Appeal on the basis of the request made by the Commissioner of National Housing on 04.06.1997 to deposit a sum of Rs. 96,335/- (X_{16}).

Referring to the said letter dated 04.06.1997 (X_{16}), the Court of Appeal had held that although the application to purchase the house was made out of time and the respondent has no right to purchase the house under section 9 of the CHP Law, the Commissioner had used his discretion and had elected to sell the house to the tenant by requesting the respondent to pay the assessed value of the property, survey fees and the fees for the deed. Accordingly the Court of Appeal had proceeded on the premise that although the respondent had no legal right to purchase the property in terms of section 9 of the CHP Law, since the Commissioner had used his discretion to sell the house to the respondent, that exercise of discretion could confer legitimate expectation to the respondent. In deciding that the respondent had a legitimate expectation in purchasing the premises in question, the Court of Appeal had referred to the decision in **Goonawardene and Wijesooriya v Minister of Local Government, Housing and Construction and Others** (supra). Referring to the questions that had to be considered by the Court in that case, the Court of Appeal had held that on the application made to divest the premises in question, the Commissioner, after holding an inquiry on 09.04.2002 had decided to divest the said premises. Thereafter the Commissioner had sought approval from the 4th respondent-respondent (hereinafter referred to as the 4th respondent) to divest the premises in question in terms of section 17A(1) on the basis of his recommendation dated 06.01.2003 (3R15). The Court of Appeal had further held that although the divesting order was published in the Gazette of 25.02.2003 (3R16), the Commissioner had failed to communicate his decision of divesting, to the respondent, before obtaining the approval of the Minister.

Section 17A(1) of the CHP Law refers to divesting the ownership of houses vested in the Commissioner and the section reads as follows:

> "Notwithstanding that any house is vested in the Commissioner under this Law, the Commissioner may, with the prior approval in writing of the Minister, by Order published in the Gazette, divest himself of the ownership of such house, and on publication in the Gazette of such Order, such house shall be deemed never to have vested in the Commissioner."

Learned President's Counsel for the appellant contended that the appellant's position was that the Trustees of the Temple had written several letters requesting the release of the premises in question to the Temple, as the premises in question is situated within the Courtyard of the Temple. Accordingly, the appellant had made an application in terms of section 17A(1) of the CHP Law to the Commissioner for divesting the ownership of the premises in question to the appellant.

On the basis of the said application, the Commissioner, after holding an inquiry on 09.04.2002 had decided to divest the premises in question. The Commissioner thereafter had taken necessary steps to obtain the approval of the Minister in terms of section 17A(1) of the CHP Law and the divesting order was published in the Gazette on 25.02.2003 (3R16).

Learned President's Counsel for the appellant, referring to the aforementioned decision taken by the Commissioner, contended that as the respondent had not made any application to the Commissioner for the purchase of the premises in question within the time period prescribed in section 9 of the CHP Law, the Commissioner was not bound to communicate the decision of such divesting to the respondent.

It is to be noted that section 17A(1) of the CHP Law, does not stipulate a time limit within which an application must be made in terms of that section. However, the provision contained in section 9 of the CHP Law is different in that context, since a mandatory time frame is clearly prescribed in that section. Considering the provisions contained in sections 9 and 17A(1) of the CHP Law it is clear that, if a tenant is to make complaints against the Commissioner regarding these decisions, it would be necessary for him to follow the procedure laid down in the respective provisions of CHP Law, prior to making such complaints.

In **Desmond De Perera and Others v Karunaratne, Commissioner for National Housing** (supra), the tenants had failed to make applications to purchase the relevant houses within the time prescribed by section 9 of the CHP Law as in this appeal. Considering the question as to the need for the Commissioner to have notified the tenants, this Court had stated that,

> "**In the absence of applications to purchase houses tenanted by them in terms of the law, these appellants cannot be heard to complain of dereliction of duty by the 1st respondent**. **In the aforesaid situation, there is no administrative duty to notice the tenants of houses vested that those houses are to be divested**" (emphasis added).

Legitimate expectation cannot simply be taken in isolation. It has to be considered in the light of administrative procedures where the legal right or intent is affected. This position was carefully considered in **Attorney-General of Hong Kong v Ng Yuen Shiu** ([1983] 2 AC 629), where it was stated that,

> ". . . . When a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty."

As stated earlier the Court of Appeal in this matter had referred to the decision in **Goonawardene and Wijesooriya v Minister of Local Government, Housing and Construction and Others** (supra) in support of the position that the respondent had a legitimate expectation of purchasing the premises and that a decision to divest would have affected him adversely.

In **Goonawardene and Wijesooriya v Minister of Local Government, Housing and Construction and Others** (supra) the tenants had submitted their applications in terms of the relevant applicable procedure, and considering the said position, the Court had correctly come to the finding that the said tenants had a legitimate expectation. When a party had tendered applications as per the provisions of the applicable statute, they do have a legitimate expectation to receive instructions thereafter as to the relevant procedure that they should follow on the basis of the relevant provisions and the applications they had made.

In **Goonawardene and Wijesooriya** (supra) the Court had carefully considered this position and had stated that,

> "What appears to have happened seems to be that the learned Judge of the Court of Appeal, having erroneously found as a fact that "Admittedly they (the appellants) have not made applications to purchase the premises under section 9 of the Law", proceeded to base himself on the decision in **Perera v Karunaratne** (supra) and held against the appellants. It appears that the facts in the above case (otherwise known as the Baur's case) were quite different to those in the instant case. In the Baur's case, the tenants of the Flats in question had not made applications to the Commissioner of National Housing to purchase any of the Flats (except for one who applied, not to the Commissioner, but to the Board of Review nearly 8 years after the stipulated four months) . . . . In the circumstances the Court rightly held that the tenants had no *locus standi* to question the validity of the Commissioner's decision
>
> . . . . They had no legitimate expectation of becoming owners of the Flats. It is thus clear that Baur's case is quite different, and has no application to the two appeals before us."

In the present appeal as has been stated earlier, there was no valid application filed by the respondent in terms of section 9 of the CHP Law. The concept of legitimate expectation could apply only if there was a valid application filed by the respondent. Accordingly, the Court of Appeal was in error in holding that the respondent had a legitimate expectation.

Learned Counsel for the substituted respondents submitted that the respondent had made an application to divest the said premises and the Commissioner after holding an inquiry on 09.04.2002 had directed to divest the premises in question. The Commissioner had sought the approval of the 4th respondent to divest the premises in question in terms of section 17A(1) of the CHP Law. The Minister had granted his approval on 19.02.2003 (3R15a) and

the divesting order was published in the Gazette dated 25.02.2003 (3R16). The contention of the learned Counsel for the respondent was that the Commissioner had not communicated the said decision to the respondent and that had been a failure in observing the rules of natural justice.

As has been stated earlier, section 9 of the CHP Law clearly states that the application for the purchase of a surplus house must be made within four months from the date of commencement of the CHP Law. As has been stated earlier, it is not disputed that the respondent had not made an application within the stipulated time frame described in section 9 of the CHP Law. When the respondent had not complied with the relevant provisions, there had been no valid application before the Commissioner for the purchase of the house in question and in such circumstances, there is no requirement or a necessity for the Commissioner to consider such application or inform the respondent of such decision.

For the reasons aforesaid it is evident that the respondent was not entitled to a communication of the decision of the Commissioner of National Housing prior to its publication.

This appeal is accordingly allowed and the judgment of the Court of Appeal dated 21.08.2006 is therefore set aside.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.
I agree.

Judge of the Supreme Court

K. Sripavan, J.
I agree.

Judge of the Supreme Court

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

In the matter an Application for Special Leave to Appeal under Article 128 of the Constitution of 1978 against a Judgment of the Court of Appeal dated 02.07.2003 in C.A. (Writ) Application No. 1169/2001.

S.C. Appeal No. 19/2004

S.C. (Spl.) L.A. No. 178/2003

C.A. Application No. 1169/2001 (Writ)

Customs Case No. POM 1050/2000

1. Car Plan Ltd.,
   No. 297, Union Place,
   Colombo 2.
2. Mahendra Tambiah,
   Managing Director,
   Car Plan Ltd., No. 297, Union Place, Colombo 2.
3. Rodney Mason,
   Director, Car Plan Ltd., No. 297,
   Union Place, Colombo 2.

Petitioners-Petitioners

Vs.

1. K.L.G.T. Perera,
   Deputy Director of Customs,
   Customs House, Bristol Street,
   Colombo 1.

2. W.D.L. Perera,
Director General of Customs,
Customs House,
Bristol Street, Colombo 1.

3. The Attorney General,
Attorney General's Department, Hulftsdorp,
Colombo 12.

Respondents-Respondents

BEFORE : **TILAKAWARDANE.J**
RATNAYAKE.J &
EKANAYAKE.J

COUNSEL : Shibly Aziz, P.C., with Nigel Hatch, P.C., and Aneeta Perera instructed by Julius & Creasy for the Petitioner-Petitioner.
Deputy Solicitor General U Y Wijetilleke with Rajitha Perera, S.C., for the Respondent-Respondents

ARGUED ON : 06.09.2010

DECIDED ON : 10.11.2010

TILAKAWARDANE.J

Special Leave to Appeal was granted on 26.02.2004 on the questions of law set out in paragraph 28 (a) to (g) of the Petition dated 08.08.2003. The matter was argued and the arguments were concluded. The Judgment was reserved on 21.02.2005 by the Hon. Chief Justice. However, the Judgment could not be delivered due to the retirement of Honorable Chief Justice. This matter was re-listed to be heard 06.09.2010.

At this hearing all parties to the Application agreed that the only issue to be determined by this Court was whether the 1st Petitioner Company had made a false declaration to the Sri Lanka Customs by failing to declare and include the conversion cost of US $ 1500 on every vehicle imported in this consignment. It was not disputed that if such false declaration had been made this would attract a forfeiture of the vehicles in terms of Sections 52 and 119 of the Customs Ordinance as amended.

The broad facts pertaining to this case are also not disputed. The Petitioner Company being an incorporated company involved *inter alia* in the business of importation and sale of motor vehicles was appointed as the sole distributor and/or the agent of KIA Motor Company of Korea in 1996. Several consignees referred to in paragraph 7 of the aforesaid Petition dated 08.08.2003, placed an order for the importation of 15 Nos. KIA Grand Sportage 1998 cc RFTCI Inter Cooler Turbo Diesel Right Hand Drive Model K08Z- B52 Jeeps. It is not contested that the aforesaid KIA Jeeps of the aforesaid model was only manufactured in the Left Hand Drive model and CIF price of the Left Hand Drive model was admittedly US $10,920.

In paragraph 6 of the Petition dated 08.08.2003 the Petitioner admits that the importation on behalf of all the consignees were for Right Hand Drive Jeeps of the said model, and that the specific requirement under the law for driving in Sri Lanka required that the jeeps were in the Right Hand Drive model, and a conversion of the Left Hand Drive necessarily had to take place.

In terms of the contents of the document P5, KIA Motor Corporation of Kuala Lumpur sent a letter dated 09.03.2000 under the authority of its General Manager H.T. Lee to all distributors in the Asia and Pacific Region introducing them to a sub contractor Korea Co. Limited which had successfully converted the Sportage Diesel Left Hand Drive model to the Right Hand Drive model of the Jeep. In this letter the ordering procedure was set out. The Left Hand Drive model had to be ordered from the KIA Motors Corporation and then the jeep would be delivered to the factory of Korea Co Limited where the conversion work would be undertaken, but the shipment would be done by the KIA Motor Corporation.

The total responsibility of the conversion was solely upon the Korea Company Ltd. So that, they would bear full liability and accountability of all local technical problems due to the

conversion and be responsible only under the warranty of the said Korea Company Ltd. The KIA Corporation of Kuala Lumpur would bear no liability with regard to problems that rose on the conversion. It is clear that the author of this letter himself had come up with this suggestion.

This letter also referred to the fact that the KIA Motor Corporation would receive the payment for the Left Hand Drive model and conversion cost of US $ 1500 should be sent to the account of the Korea Company Ltd. directly and the details to facilitate a bank transfer were also supplied in the said letter.

The importance of the distinction with regard to the mode of payment was clarified further by letter dated 29th March 2000 which was produced at the customs inquiry marked P20 and in this case as P17X1. The obvious, unambiguous conclusion was that though there were two modes of payment the CIF value of the fully fitted vehicle arriving in Sri Lanka was the sum value of the two amounts totaling to US $ 12,420.

At the customs inquiry much evidence was led with regard to the fact that these vehicles had been bought from permit holders who where permitted to obtain concessions due permit for the importation of the motor vehicles by virtue of the Treasury Circular No.866 dated 22.02.1999 as amended by treasury circular No: 866(1) dated 23.06.1999. As this is not directly relevant to the question of the CIS value of the KIA Grand Sportage Jeeps that had been admittedly imported, this Court would not deal with that evidence which was referred to in the inquiry notes and P8A to P8I or the documents annexed to the Petition, other than the evidence relating to the importation of the said 15 jeeps and its CIF value.

The salient part of the evidence with regard to the fact that is in issue in this case, is the evidence that deals with the CIF value of each of the vehicles that were imported. All the witnesses', whose permits had been used, gave explicit evidence that in terms of said KIA great Sportage jeeps the value given to them was US $ 12,490. Categorically at page 175 of the inquiry notes it was specifically clarified that this was the precise price of the Right Hand Drive model of the said vehicle which was being imported.

The evidence in this case reflects that the Petitioner had issued two pro forma voices for each vehicle. Undoubtedly when one peruses document P5 sent by the KIA Motor Corporation, Kuala Lumpur the reason for this is *ex facie* evident. It stated that the payment for the conversion for the Left Hand Drive model to the Right Hand Drive model was to be directly sent to the Korea Company Ltd., and was in a sum of Rs. US $ 1500. Therefore two pro forma invoices for each vehicle were for the value of US $ 10920 and US $ 1500, and had been remitted, the former against letters of credit and the latter by a telegraphic transfer. Both had been sent through the same Bank, except for the vehicle imported by Dr. Janapriya.

Significantly, by document P17 the fact of two modes of payments and the need of conversion of Left Hand Drive to Right Hand Drive have been set out by the Managing Director of the Petitioner Company by document which was marked as P17X1 annexed to the Petition.

The important document in this context is document P17X3 dated 19.05.2000. In this letter, whilst including the Right Hand Drive component, the total CIF Right Hand Drive value has been set out as US $ 12,420 and the annotation at the bottom of this document is relevant and noteworthy. In that document, the author of the letter, Mr. Mahin Thambiah who was the Managing Director of the Petitioner Company has said “Please sole (this probably should read as Seoul) office that when negotiating final document it must be at US $ 10,920 otherwise we will have problems with the Sri Lanka Customs”. The document thereby disclosed by its contents, the complicity and intention of the Petitioner Company to undervalue the vehicles, even at the inception of this transaction.

Another factor that is also evident from the evidence, that the position of the Appellant had been recorded at the inquiry was that there was a considerable delay in the delivery of these vehicles and those importers had to face losses due to the expiration of their permits and the letters of credit. The fact of the delay is evident in the inquiry notes and document annexed to the Petition P5B. The position of the Appellant was that It was only in this context that subsequently the KIA Motor Corporation had agreed to waive off the conversion cost of US $ 1500 for certain vehicles including some of the 15 vehicles in question. No evidence whatsoever was led

or documents produced that this waiver was ever actually given to the consignee, on these vehicles that had been imported.

It is relevant to note what was imported was not a Left Hand Drive diesel jeep, but KIA Sportage Right Hand Drive diesel jeep. Clearly the total cost of the vehicle included the conversion to the Right Hand Drive, as this was the specification of the vehicle that had been imported into the country. The fact that conversion cost was waived off, even if proof was available that they did so, would not be relevant with regard to the declared CIF value. Value at the time was relevant, as time was of essence, and at the time the value was US$ 12,420. This was specially relevant as any waiver that may have been granted was not as a matter relating to the value of a jeep , but as a mitigation for the delay in the delivery of the vehicle, which had allegedly caused loss to the person who had originally ordered the vehicles, and who had complained about the delay. The fact that there had been some negotiations to return this money or a waiver of US $ 1500 by the Korean Company was merely adverted to, but there was no evidence whatsoever led at the inquiry to prove that those amounts had been deducted and remitted back. It was a mere assertion by the Appellant, which was never proved by way of evidence or through documents. In fact Dr. Janapriya said that he never received any refund of US $ 1500. Dr. Janapriya in his evidence too corroborated the position of the Attorney General. In this context, Dr. Janapriya gave evidence at the inquiry and through a letter dated 03.10.2000 said that he had paid the full CIF price of the vehicle, as demanded by the Petitioner Company of US $ 12,420 and he did not get any refund of any part of the money.

In this context, it is relevant to refer to the case of Culasubadhra vs. University of Colombo and others in 1985 1 SLR 244 at 257 Seneviratne.J stated thus:-

"It is not the function of this Court to determine whether the finding is justified or not. A finding of fact by a Tribunal such as this can be set aside by way of a writ only if it is found that there was no evidence at all to base such a finding or if the Tribunal has not property directed itself in evaluating the evidence and drawing necessary inferences and could not have come to that conclusion if it properly directed itself".

On the evidence that was led at the inquiry and the evidence that had been placed before this Court that CIA value of that jeep was US $ 12920 and therefore, this Court finds that the Petitioner has made an incorrect and false statement with regard to the CIF value of the Right Hand Drive KIA Sportage jeep. Accordingly, the vehicles are liable to forfeited in terms of Sections 52 read with 119 of the Customs Ordinance, as amended.

This would, however, not preclude the 2nd Respondent from acting in terms of Section 163 to mitigate the forfeiture or penalty where it may be considered to be unduly severe.

In any event, the Writ of Mandamus directing the 2nd and/or 3rd Respondents to release the vehicles to the Petitioner cannot be done. The Director General had no power to release the vehicles under section 163 of the Customs Ordinance, as amended which only permits mitigation of forfeiture. The power to Order the restoration of seized goods has been given to the Minister to be exercised in terms of section 164 and 165 of the Customs Ordinance (Vide Bangamuwa Vs S.M.J Senaratne. Director General of Customs and another. SLR 2000 Vol. 1 page 106).

Under all the facts aforesaid this Court sees no reason to interfere with the Judgment of the Court of Appeal dated 02.07.2003. The said Judgment is affirmed. The Appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

EKANAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (Appeal) No. 33/2009
S.C. (Spl.) L.A. No. 4/2009
C.A. No. 412/2002(F)
D.C. Colombo No. 17736/L

D.G. Subadra Menike,
56/1, Kirikiththa,
Weliweriya.

appearing by her Attorney
M. Piyadasa of Mahawatta,
Batapola.

Plaintiff-Appellant-Appellant

Vs.

H.D.S. Jayawardena,
334/F, Robert Gunawardena Mawatha,
Malabe.

Defendant-Respondent-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
Imam, J.

COUNSEL : Ikram Mohamed, PC, with Padma Bandara for Plaintiff-Appellant-Appellant

Ranjan Suwandaratne with Salini Herath for Defendant-Respondent-Respondent

ARGUED ON: 05.10.2009

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Appellant-Appellant : 17.11.2009
Defendant-Respondent-Respondent : 15.12.2009

DECIDED ON: 04.03.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 27.11.2008. By that judgment the Court of Appeal had set aside part of the judgment of the District Court dated 20.05.2002, which was in favour of the defendant-respondent-respondent (hereinafter referred to as the respondent) and dismissed the respondent's claim. The plaintiff-appellant-appellant (hereinafter referred to as the appellant) instituted an application before this Court for special leave to appeal on the basis that the Court of Appeal had not entered judgment in favour of the appellant as prayed in the Plaint on which special leave to appeal was granted by this Court.

When this matter was taken up for hearing, both learned Counsel agreed that the appeal could be considered on the following questions:

1. Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

The facts of this appeal, as submitted by the appellant, *albeit* brief are as follows:

The land in dispute was originally owned by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, whom by Deed No. 4830 dated 07.07.1967 attested by Kodikara and Abeynayake, Notaries Public had transferred the same to one Robert Lamahewa. The said Robert Lamahewa had transferred the said property to the appellant by Deed No. 13496 dated 05.07.1930 attested by D.I. Wimalaweera, Notary Public. Sumanalatha Kodikara had however executed another Deed of Transfer bearing No. 1200 on 25.02.1980 attested by Kodikara and Abeynayake, Notaries Public in favour of one Asela Siriwardena in respect of the same property, who had thereafter executed a Deed of Transfer bearing No. 9271 on

25.08.1982 attested by Kodikara and Abeynayake, Notaries Public, in favour of the appellant. The appellant therefore had claimed that she had become the lawful owner of the said property by way of the aforementioned Deed as well as by way of prescriptive possession.

The appellant submitted that the respondent around 09.06.1996 had started to disturb the appellant's possession of the said property and disputed her title thereto and therefore the appellant had instituted action by plaint dated 15.01.1997 against the respondent for a declaration of title and for a permanent injunction restraining the respondent from interfering with her possession.

The respondent had filed answer dated 04.06.1997 and had pleaded *inter alia* that the said property belonged to Sumanalatha Kodikara, who by Deed No. 1200 dated 25.02.1980 transferred the same to one Asela Siriwardena. Thereafter the said Asela Siriwardena had transferred the said property by Deed No. 2708 on 31.10.1995 attested by W.H. Perera, Notary Public to the respondent. It was also submitted that the said Deed was duly registered in the Land Registry and that Deed had obtained priority over the appellant's Deeds. Therefore the respondent sought a declaration that his Deed No. 2708 obtains priority over the appellant's Deeds Nos. 9271 and 13496 and that the appellant's Deeds are void in law as against the respondent's Deed No. 2708.

After trial the District Court on 20.05.2002, had dismissed the appellant's action and had entered judgment in favour of the respondent as prayed in the answer, holding that the respondent's title Deed had obtained priority over the appellant's Deed. The appellant had come before the Court of Appeal against that order, where the Court of Appeal by its judgment dated 27.11.2008 had held that the respondent is not entitled to the reliefs claimed by way of a Claim in Reconvention in the Answer as he was only a co-owner, who was only entitled to a half share of the subject matter and had set aside that part of the judgment in favour of the respondent. The appellant had filed an application before the Supreme Court as the Court of Appeal had not entered judgment as prayed in the Plaint in favour of the appellant.

Having stated the facts of this appeal, let me now turn to examine the two questions of law on which this appeal was argued.

1. **Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?**

The contention of the learned Counsel for the respondent was that Sumanalatha Kodikara was the sole owner of the property in question. In support of his contention, learned Counsel for the respondent submitted that the appellant in the Pedigree set out in the Plaint, had merely stated that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were the legal owners of the property described in the schedule to the Plaint. It was also stated that they had transferred the said property by Deed No. 4830 dated 07.07.1967 to one Robert Lamahewa. The appellant had alleged that the said Robert Lamahewa had conveyed the said property by Deed No. 13496 dated 05.07.1970 to her and thereby she had become the owner of the said property. The appellant in her Plaint had alleged that Sumanalatha Kodikara had conveyed the said property by Deed No. 1200 dated 25.02.1980 to one Asela Siriwardene.

It was also submitted that the appellant had alleged in her Plaint that Sumanalatha Kodikara had acted fraudulently, but stated in the Plaint that the appellant had got a transfer of the property in question by Deed No. 9271 dated 25.08.1982 attested by K. Abeynayake, Notary Public, in her favour.

Accordingly the contention of the learned Counsel for the respondent was that, the appellant by purchasing rights from Sumanalatha Kodikara in August 1982 by Deed No. 9271 dated 25.08.1982 had conceded that Asela Siriwardena had obtained rights by virtue of Deed No. 1200 dated 25.02.1980 and therefore the appellant is estopped from disputing the flow of title from Sumanalatha Kodikara to Asela Siriwardena. Learned Counsel for the respondent therefore contended that in terms of the aforementioned devolution, Sumanalatha Kodikara has acted as the sole owner of the property in question. It was further contended that by obtaining the transfer of the property by Deed No. 9271 dated 25.08.1982, the appellant had conceded that Sumanalatha Kodikara was the sole owner of the property concerned.

Learned President's Counsel for the appellant contended that as submitted at the outset on the basis of the facts of this appeal, the subject matter in question had originally belonged to

both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. Later by Deed No. 4830 dated 07.07.1967 (P_1) both of them had transferred the said property to one Robert Lamahewa. The said Robert Lamahewa, by Deed No. 13496 dated 05.07.1970 (P_2) had transferred this property to the appellant by which the appellant had become the sole owner of the land. Thereafter the said Sumanalatha Kodikara had executed another Deed of Transfer bearing No. 1200 dated 25.02.1980 (P_3) in favour of one Asela Siriwardena in respect of the same property and later the said Asela Siriwardena had by Deed No. 9271 dated 25.08.1982 (P_4) had transferred the same property in favour of the appellant. Accordingly, the appellant claimed that she had thus obtained title to the said land by the aforementioned Deed as well as by prescription.

It is in the above background, that it would have to be ascertained as to whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

The contention of the learned Counsel for the respondent was that although the learned President's Counsel for the appellant contended that by Deed No. 4830 dated 07.07.1967, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa, that there was no reference in the said Deed of such a transaction.

A perusal of the Deed No. 4830 dated 07.07.1967, clearly indicates that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa. It is interesting to note that, the respondent in his evidence in chief had stated that Sumanalatha Kodikara had got title by Deed No. 3312 dated 23.09.1962. He had further stated that the said land was divided and the land in question is Lot No. 45. According to the said Deed No. 3312, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had become co-owners of the entirety of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta,* situated at Thalangama, depicted in Plan No. 2464 dated 08.09.1962, prepared by V.A.L. Senaratne, Licensed Surveyor (P_5) in extent A10-R2-P16.5 and the land in question is Lot No. 45 shown in the said Plan No. 2464, which is 20 perches in extent as could be seen from the first schedule in Deed No. 4830 (P_1). This land is described in the schedule of Deed No. 3312 dated 23.09.1962, in the following terms:

"WHICH SAID allotments of land adjoin each other and now forming one property and according to a recent figure of survey, is described as follows: All that defined allotment of land depicted in Plan No. 2464 dated 8th September 1962 made by V.A.L. Senaratne, Licensed Surveyor of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta* situated at Talangama aforesaid and bounded on the North by land of P.D. Abraham East by Road and land of Albert and others South by Path and land of P.D. Abraham and on the West by paddy field and containing in extent ten acres two roods and sixteen decimal five perches (A10.R2.P16.5) according to the said Plan No. 2464."

As stated earlier, the respondent in his evidence in chief had accepted the position that the land in question is Lot 45 in Plan No. 2464, which was a part of the larger land purchased and the co-owners of Lot No. 45 had been both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara.

"**හේවදේව ධර්මසිරි ජයවර්ධන**

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ප්‍ර තමා මූලික සාක්ෂියේදී කියා සිටියාද මේ නඩුවට අදාළ, දේපල, සුමනලතා කොඩිකාර සහ මැල්කම් ජයතිස්ස කියන දෙදෙනකුට අයිතිව තිබුනාය කියාරෑ

උ ඔව්.

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ප්‍ර $වි_3$ දරණ ලේඛනයේ සටහන් අනුව එම 3312 දරන ඔප්පුව මගින් සුමනලතා සහ මැල්කම් ජයතිස්ස යන දෙදෙනා විසින් මිළදී ගති කියා සදහන් වෙනවා?

උ මම දන්නේ නැහැ.

ප්‍ර මෙහි තිබුනා කියුවොත් පිළි ගන්නවාද?

උ ඔව්

ප්‍ර තමා විසින් ඉදිරිපත් කරන ලද ලේඛනයේ ඉහතින්ම ඇති සටහනේ 3312 දරන ඔප්පුවට අදාලව ලියා පදිංචි කර තිබෙන්නේ එහි සඳහන් දේපල සුමනලතාට සහ මැල්කම් යන දෙදෙනාට ලැබී තිබෙනවා කියුවොත් ms<s .kakjd?

උ ඔව්

ප්‍ර ඒ අනුව එම ලේඛනයේ සඳහන් දේප, අයිතිව තිබෙන්නේ දෙදෙනෙකුට

උ ඔව්

ප්‍ර ඒ සුමනලතා සහ මැල්කම් යන අයට

උ ඔව්

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ප්‍ර මේ නඩුවට අදාල දේපල තමා ඉදිරිපත් කරන ලද ඔප්පු අනුවද කුවිතාන්සි අනුවද සුමනලතා සහ මැල්කම්ට අයිති වී තිබෙනවා?

උ ඔව්

ප්‍ර තමාට ඉහලින් තිබෙන පූර්වගාමී අයිති කාරයන් දෙදෙනාගෙන් එක්කෙනෙකුගෙන් අරන් තිබෙන්නේ

ඌ ඔව්

ප්‍ර එම ලොට් 45 කියන සම්පූර්ණ දේපල අරගෙන තියෙනවා

ඌ ඔව්

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ප්‍ර තමා දන්නවාද 3312 ඔප්පුව මගින් සුමනලතා සහ මැල්කම් යන දෙදෙනා අක්කර 10 රූඩ් 2 ක් පමණ විශාල ඉඩමක් මිළදී ගෙන තිබුනා කියාරෑ

ඌ ඔව්ණී

It is to be noted that it is common ground that the land in question is depicted as lot No. 45 in Plan No. 2464 dated 08.09.1962 prepared by V.A.L. Senaratne, Licensed Surveyor. It is also to be noted that, the respondent had produced a Deed of Transfer (V_3) bearing No. 3312 dated 23.09.1962. The contents of the said Deed No. 3312, clearly demonstrate the fact that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara both of Dewala Road, Nugegoda had derived their title from Kahawita Appuhamilage Dona Grace Perera, Totagodagamage Kusumawathie, Swarna Perera and Totagodagamage Charles Perera all of Lily Avenue, Wellawatta as co-owners of the entirety of land called *Delgahawatta, Delgalanda* and *Delgalandawatta* situated at Talangama and depicted in Plan No. 2464 dated 08.09.1962 made by V.A.L. Senaratne, Licensed Surveyor, in extent A10-R2-P16.5.

Thereafter both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had transferred the aforementioned property to Robert Lamahewa by Deed No. 4830 dated 07.02.1967.

Considering all the aforementioned it is abundantly clear that the subject matter had originally belonged to both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara and they have been the original co-owners of the property in question.

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

Learned Counsel for the respondent contended that Section 7 of the Registration of Documents Ordinance gives priority to an instrument which is registered and such an instrument would get priority over any other instrument which is not registered, although the previous document is prior considering the time it was purchased. Accordingly the contention of the learned Counsel for the respondent was that whether the Vendor gets absolute right to an immovable property or undivided interest to an immovable property is apparently irrelevant in considering the absolutely clear provisions contained in Section 7 of the Registration of Documents Ordinance.

Learned President's Counsel for the appellant on the other hand referred to the Full Bench decision in **Silva v Gunawardena** ((1915) 18 N.L.R. 241) and stated that a previous instrument to be void as against the subsequent instrument on the basis of due registration of the subsequent instrument, the said subsequent instrument must necessarily be adverse to the previous instrument and not against a part of the said previous instrument. The contention of the learned President's Counsel for the appellant was that, the concept of prior registration in terms of Section 7 of the Registration of Documents Ordinance would not be applicable to an undivided share such as the land in question.

The Registration of Documents first came into being in the maritime provinces of the country in 1801, by a proclamation of 01.03.1801, which imposed on the Presidents of Civil and Land Raads the obligation to maintain a Register of Lands within their respective districts. The proclamation had declared that,

> "All title deeds, transfers, mortgage bonds and assignments so made out and enrolled by the aforesaid registers were to have **preference and precedence** over the like kind drawn up and executed before a notary or other person, excepting those passed by or before the Courts of Justice and Land Raads, Weeskamers or elsewhere, according to the formalities required by the Dutch Government."

After several Regulations, the first Registration Ordinance came into operation in Ceylon in 1863, which was enacted by Ordinance No. 8 of 1863 and later amended by Ordinance No. 3 of 1865 and replaced by Ordinance No 14 of 1891. Thereafter in 1927 the Ordinance No. 23 of 1927 was introduced for the registration of documents. This was for the purpose of amending and consolidating the law relating to registration of documents and the said Ordinance No. 23 of 1927 had been amended on several occasions.

Chapter III of the said Ordinance on Registration of Documents refers to the registration of Instruments affecting land and Section 7 deals with registered and unregistered instruments. Section 7(1) of the said Ordinance reads as follows:

> "7(1) An instrument executed or made on or after the 1st day of January, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this chapter or if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in Section 26 of that Ordinance."

It is to be borne out in mind that Section 7(1) of the Registration of Documents Ordinance deals with a situation where the instrument becomes void if there is no due registration and this is not applicable to one's rights or title acquired under such an instrument. Thus the key provision contained in this Ordinance clearly had pronounced that unregistered instruments are void against subsequent registered instruments and such an instrument means an instrument affecting land. It is also to be noted that, such an instrument would become void against all parties 'claiming an adverse interest thereto on valuable consideration'.

It is therefore important that when a question arises in terms of Section 7(1) as to the registration or non registration of an instrument, it is necessary to consider whether the instruments in question are adverse to each other. Furthermore, it is also necessary to refer to the provisions contained in Section 7(4) of the Registration of Documents Ordinance, which clearly states that registration of an instrument under the chapter on Registration of Documents shall not cure any defect in the instrument or confer upon it any effect or validity, which it would not otherwise have, except the priority conferred on it. This position has been carefully considered in a series of cases, which has clearly settled the applicable law in this country.

In **Massilamany v Santiago** ((1911) 14 N.L.R. 292) Van Langenberg, A.J., considering the effect of the registration of a document had stated thus:

> "The only effect of registration was to give priority to the subsequent deed. The earlier deed is not affected in any way, save that it has to take second place."

In **Lairis Appu v Tennakoon Kumarihamy** ((1958) 61 N.L.R. 97) Sinnetamby, J., was of the view that,

> "Our Registration Ordinance provides for the registration of documents and not for the registration of titles. If it had been the latter, then, from whatever source the title was derived, registration by itself would give title to the transferee. When, however, provision is made only for the registration of documents of title, the object in its simplest form, is to safeguard a purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by his vendor. **The effect of registration is to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds**" (emphasis added).

The implications of Section 7 of the Ordinance dealing with the registration of documents as to priority of registered instruments was clearly described by Clarence, J. in **Silva v Sarah Hamy** ((1883) Wendt's Reports 383), where he had stated that,

> "When an owner of land conveys it to A for value, and subsequently executes another conveyance of the same land in favour of B also for value, it is true that at the date of the second conveyance the owner has nothing left in him to convey, but, by the operation of the Ordinance, B's conveyance overrides A's, if registered before it. **Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment**" (emphasis added).

Learned President's Counsel for the appellant strenuously contended that, a previous instrument to be void as against the subsequent instrument, on the basis of due registration of the subsequent instrument, the subsequent instrument must necessarily be adverse to the previous instrument and not against a part thereof. It was also contended that an undivided share cannot in our law gain priority by virtue of prior registration. The contention was that the concept of priority as contained in Section 7(1) of the Registration of Documents Ordinance, does not apply to an undivided share and therefore the subsequent transfer, even though duly registered, does not gain priority and will not confer any title since the owner has in fact transferred his title by the earlier instrument, although it was not duly registered.

As clearly stated earlier, the effect of an unregistered instrument becomes material only if there is a conflict with a subsequent registered instrument. However, if there is such a registered instrument, the unregistered Deed becomes deprived of any legal force. The criteria of such a situation was clearly described by Lascelles, C.J., in **James v Carolis** ((1914) 17 N.L.R. 76), where he had stated that,

> "If an intending purchaser finds on the register no adverse deed affecting the property, he is placed in the same position, as regards his title to the land, as if no such deed in fact existed.

> On the other hand, the grantee under the prior unregistered deed is penalized for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist, and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration."

It is therefore apparent that in a situation, where there is a conflict between a registered and an unregistered Deed, the registered Deed has to be given priority. This appears to be a penalty a party has to pay for the non-registration of an instrument, as he has been negligent in protecting his own rights. When considering the provisions contained in Section 7(1) of the Ordinance, it also appears that the intention of the Legislature was to protect the 'innocent' second purchaser of the land in question. This aspect was referred to in **Samaranayake v Cornelis** ((1943) 44 N.L.R. 508), where it was stated that,

> "The ordinance does not expressly penalize the purchaser who did not register, nor was that its object probably, for it arrived at protecting the innocent second purchaser, but the result is that the first purchaser pays the penalty.

On a consideration of the facts of this appeal, it appears that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara have been the co-owners of the land in question. Both of them had transferred the said land by Deed No. 4830 dated 07.07.1967 (P_1) to Robert Lamahewa, who in turn had transferred the same to the appellant by Deed No. 13496 dated 05.07.1970 (P_2). Thereafter Sumanalatha Kodikara had transferred the same land by Deed No. 1200 dated 25.02.1980 (P_3) to one Asela Siriwardena from whom the appellant had purchased her rights by Deed No. 9271 dated 25.08.1982. Asela Siriwardena had also sold his rights by Deed No. 2708 dated 31.10.1995 (V_7) to the respondent, which Deed was admittedly duly registered.

In such circumstances, what would be the position regarding the competing Deeds of the appellant (P_2) and the respondent (V_7)?

As referred to earlier the original owners of the land known as *Delgahawatta, Delgahalanda* and *Delgahalandawatta* had co-owned lot 45 viz., the land in question. The general rule regarding co-ownership is that, a co-owner has no right to alienate more than his undivided share of the common property (**Vaz v Haniffa** ((1948) 49 N.L.R. 286, Voet 18.1.14). When Sumanalatha Kodikara and Malcolm Jayatissa Kodikara transferred the property in question to Robert Lamahewa, both of them had transferred the entire extent of the said lot 45 to him and therefore when Robert Lamahewa in turn transferred the said property to the appellant, she became the owner of the said lot 45. However, thereafter, Sumanalatha Kodikara had transferred the same land to Asela Siriwardena by Deed No. 1200 dated 25.02.1980 (P_3). It is obvious that the said transfer was only limited to the half share of Sumanalatha Kodikara and not the entire extent of the land in question.

It is quite clear that in terms of Section 7(1) of the Registration of Documents Ordinance, an instrument becomes void if it is not duly registered, provided that there is an adverse claim against the said instrument by virtue of a subsequent instrument, which is duly registered.

It is also important to note that there is no provision made under the Registration of Documents Ordinance, stating that instruments dealing with co-owned immovable property come under the category of instruments of which registration is optional or not necessary.

In this appeal the adverse claims are between the appellant and the respondent. Whilst the appellant claims that she derived her rights form Robert Lamahewa to whom the land in question had been sold by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, the respondent's claim is that he got his rights from Asela Siriwardena to whom the land was sold by Sumanalatha Kodikara. If it was only by Sumanalatha Kodikara, it could only be a half share, as the property in question was owned both by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. In those circumstances, considering the fact that the respondent had registered his Deed, when the appellant had not taken steps for such registration in terms of Section 7(1) of the Registration of Documents Ordinance, the Deed which was registered would prevail over an unregistered Deed. Accordingly the respondent's deed should prevail over the appellant's Deed.

However, since it was only a half share that was transferred to the respondent, he would only be entitled to a half share of the land in question.

Accordingly, the two questions on which this appeal was heard are answered as follows:

1. Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

2. The concept of prior registration would apply in respect of an undivided share in terms of Section 7 of the Registration of Documents Ordinance.

For the reasons aforesaid the judgment of the Court of Appeal dated 27.11.2008 is affirmed and this appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

Imam, J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 49/2003
S.C. (Spl.) L.A. No. 1/2003
C.A. No. 631/98(F)
D.C. Homagama No. 247/P

Horagalage Sopinona,
No. 400, Porikiyahena,
Pitipana South,
Homagama.

Substituted Plaintiff-Respondent-Appellant

Vs.

3. Pitipana Arachchige Cornelis,
No. 364, Pitipana South,
Homagama.

Defendant-Appellant-Respondent (deceased)

3a. Kumara Ratnakeerthi Pitipanaarachchi,
No. 364, Pitipana South,
Homagama.

3b. Ramya Chandrakumari Pitipanaarachchi
No. 364, Pitipana South,
Homagama.

Substituted Defendants-Appellants-Respondents

41. Matarage Menchinona,
No. 363, Porikiyahena,
Pitipana South,
Homagama.

Defendant-Appellant-Respondent

BEFORE **:** Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
Jagath Balapatabendi, J.

COUNSEL : Nihal Jayamanne, PC., with Dilhan de Silva
for Substituted-Plaintiff-Respondent-Appellant

Rohan Sahabandu for Defendants-Appellants-Respondents

ARGUED ON : 13.01.2009

WRITTEN SUBMISSIONS
TENDERED ON : 10.02.2009

DECIDED ON : 03.02.2010

Dr. Shirani A. Bandaranayake, J.

I have had the advantage of reading in draft, the judgment of my brother Marsoof, J. Although I am in agreement with the findings of Marsoof, J., that the three (3) questions of law on which special leave to appeal was granted by this Court on 01.07.2003, must be answered in the negative, I

am not in agreement with his conclusion that the judgment of the Court of Appeal dated 22.11.2002 be set aside.

I do not intend to make reference to the facts of this appeal since that had been dealt in detail by Marsoof, J. I would also not dwell on the three questions of law on which special leave to appeal was granted, as I am of the view that, considering the facts and circumstances, and more importantly the legality of the questions raised, they must be answered in the negative.

In the light of the above, I would only consider the question as to whether it would be correct to conclude that the judgment of the Court of Appeal dated 22.11.2002, which decided to set aside the judgment of the learned District Judge and to hold a trial *de novo* should be set aside.

The main issue before the Court of Appeal was on the basis that the learned District Judge had answered only one issue, which was raised by the plaintiff-respondent-appellant (hereinafter referred to as the appellant). The contention of the learned President's Counsel for the appellant was that since the main issue raised by the appellant was answered by the learned District Judge, there was no necessity to answer the other issues framed by the defendants-appellants-respondents (hereinafter referred to as the respondents). Considering the submissions made by both learned Counsel before the Court of Appeal, Somawansa, J., had taken the view that the learned District Judge had failed to consider and analyse the totality of the evidence led before the District Court and more importantly that she had decided on the allocation of shares in accordance with the pedigree given in the plaint without examining the devolution of title. In arriving at this conclusion, learned Judge of the Court of Appeal had referred to several instances, where the learned District Judge had erred. Referring to such instances, Somawansa, J., in his judgment had stated thus:

"The fact that she has not given her mind to analyse the evidence is borne out by her misstatements that the 3rd defendant-appellant is a son of Jeeris when in fact he was a grandson and again that Carolis is a son of Haramanis's brother when in fact he was the son of Odiris, who is the son of Haramanis.

It is apparent that the learned District Judge has failed to consider and analyse the totality of the evidence led and more importantly has failed to examine the title of parties. With a sweeping statement she has directed that allocation of shares should be in accordance with the pedigree as shown in the plaint when in fact it was incumbent on her to examine the devolution of title. It is also to be noted that the learned District Judge has failed to consider and answer 13 issues on the basis that in view of answer to issue No. 01 it was not necessary to answer the other issues. Here again, I am of the view that she has erred in not answering the balance 13 issues. For issue No. 01 is based not only on devolution of title, but also on prescription. Therefore it becomes necessary to consider and analyse the evidence to ascertain whether parties disclosed in the plaint had prescribed which the learned District Judge has failed to do."

Learned Judge of the Court of Appeal had referred to several decisions (**Victor v Cyril de Silva** [1998] 1 Sri L.R. 41, **Warnakula v Ramani Jayawarden**a [1990] 1 Sri L.R. 206, **Wijesundera v Herath Appuhamy and others** 67 C.L.W. 63, **Dharmadasa v Meraya** (1948) 50 N.L.R. 197, **Peiris v Perera** (1896) 1 N.L.R. 362 and **Mather v Thamotheram Pillai** (1903) 6 N.L.R. 246).

By this the learned Judge of the Court of Appeal had emphasized the need to evaluate both oral and documentary evidence in a partition action in order to ascertain the actual owners of the land in question before entering the decree, which is good and conclusive against the whole world.

The action in question was initially instituted in the District Court of Homagama seeking to partition a land, which was known as Porikiyahena in extent 3R. 11P., morefully described in the schedule to the plaint and depicted as lots A and B in the preliminary plan No. 255 prepared by A.P.S. Gunawardena, Licensed Surveyor dated 06.07.1970.

Since a partition action is instituted to determine questions of title, it is necessary to conduct a thorough investigation and the duty of such investigation undoubtedly devolves on the Court. Bertram A.C.J., in **Neelakutty v Alvar** ((1918) 20 N.L.R. 372) had considered the reason underlying the need for a careful investigation by Court and had clearly stated that it is due to the effect of a partition decree, which is much the same as that of a judgment in rem. Browne A.J. in **Batagama Appuhamy v Dingiri Menika** ((1897) 3 N.L.R. 129) emphasized the fact that in order to obtain a decree of partition, which is binding against the whole world, the Court should require the parties to prove their title. This position was again considered by Bonser, C.J., in **Peiris v Perera** (supra), where it was clearly stated that,

> "It is obvious that the Court ought not to make a (partition) decree, unless it is perfectly satisfied that the persons in whose favour it makes the decree are entitled to the property. The Court should not, as it seems to me, regard these actions as merely to be decided on issues raised by and between the parties. The first thing the Court has to do is to satisfy itself that the plaintiff has made out his title, for unless he makes out his title, his action cannot be maintained; and he must prove his title strictly , as has been frequently pointed out by this Court."

The need for a careful investigation of all titles has been emphatically reiterated by our Courts in many decisions (**Mather v Tamotheram Pillai** (supra), **Ferreira v Haniffa** (1912) 15 N.L.R. 445, **Fernando v Mohamadu Saibo** (1899) 3 N.L.R. 321, **Fernando v Perera** 1 Thambyah Reports 71, **Manchohamy v Andiris** 9 S.C.C. 64, **Gooneratne v Bishop of Colombo** (1931) 32 N.L.R. 337, **Nagamuttu v Ponampalam** 4 Thambayah 29, **Caronchi Appuhamy v Manikhamy** 4 Thambayah 120, **Cooke v Bandulhamy** 4 Thambyah 63) and there is no doubt regarding the necessity for a thorough investigation of title in partition actions.

It is not disputed that the learned District Judge had not carefully examined and analysed the totality of the evidence placed before her and had not taken steps to investigate the title of parties before the District Court. It is also not disputed that the learned District Judge had answered only issue No. 1 and had not answered the 13 issues raised by the respondents.

An important feature in our Civil Procedure Code is the requirement that specific issues be framed (Civil Procedure in Ceylon, K.D.P.

Wickramanayake, 1st edition, 1971, pg. 177). In partition actions they are commonly known as points of contest and not as issues. In **John Singho v Pediris Hamy** ((1947) 48 N.L.R. 345) reference was made to such points of contest in a partition action.

Considering all the aforementioned circumstances, I would now turn to consider the question, that was raised at the outset, as to whether it would be correct to conclude that the judgment of the Court of Appeal dated 22.11.2002, which decided to set aside the judgment of the District Court and to hold a trial *de novo,* should be set aside.

Section 187 of the Civil Procedure Code deals with the requisites of a judgment of a trial Court and reads as follows:

> "The judgment shall contain a concise statement of the case, the points for determination, the decision thereon and the reasons for such decision; and the opinions of the assessors (if any) shall be prefixed to the judgment and signed by such assessors respectively."

Considering the provisions contained in Section 187 of the Civil Procedure Code, in **Warnakula v Ramani Jayawardena** (supra), the Court of Appeal observed that the learned District Judge had failed to consider the totality of the evidence led on behalf of the plaintiff-appellant and had held that,

> "Bare answers to issues without reasons are not in compliance with the requirements of S. 187 of the Civil Procedure Code. The evidence germane to each issue must be reviewed or examined. The judge must

> evaluate and consider the totality of the evidence."

In **Tikiri Menika v Deonis** ((1903) 7 N.L.R. 337) it was held that a judgment which does not deal with the points in issue and does not pronounce a finding definitely on them is not a judicial pronouncement and as stated in **Dona Lucihamy et al. v Ciciliyanahamy et al.** ((1957) 59 N.L.R. 214) bare answers in a judgment to issues are insufficient, unless all matters, which arise for decision under each head have been examined. Moreover, examining the provisions contained in Section 187 of the Civil Procedure Code, Sirimane, J. in **Meera Mohideen v Pathumma** (76 C.L.W. 107) had clearly stated that,

> "A trial Judge should assess the oral evidence and bring his mind to bear on the facts relevant to the dispute and give reasons for his decision of the dispute as required by Section 187 of the Code."

Considering the facts and circumstances of this appeal, it is evident that by only answering the point of contest raised as the only issue by the appellant in the District Court and not giving any consideration to the points of contest raised by the respondents, justice was denied to them for no fault of the respondents. The respondents' allegation before the Court of Appeal was that there deeds were not at all considered, which leads not only to the conclusion that there had been a denial of justice, but also considering the rights of the respondents that there had in fact been a miscarriage of justice. In **Cooray v Wijesuriya** ((1958) 62 N.L.R. 158, Sinnetamby, J. referred to the importance of Court being cautious of its investigations regarding the entitlement of parties in a partition action. According to Sinnetamby, J.,

> "It is unnecessary to add that the Court, before entering a decree, should hold a careful investigation and act only on clear proof of the title of all the parties."

It is to be borne in mind that a partition suit could be said to be a proceeding taken for the prevention or redress of a wrong within the ambit of section 3 of the Court's Ordinance (**De Silva v De Silva** (3 C.W.R. 318). Accordingly in a partition action, it would be the prime duty of the Trial Judge to carefully examine and investigate the actual rights and titles to the land, sought to be partitioned. In that process it would essential for the Trial Judge to consider the evidence led on points of contest and answer all of them, stating as to why they are accepted or rejected.

It is not disputed that this action has been pending since 1969 for a period of over 4 decades. It is unfortunate to note that even after such a long time span, to this date the points of contest taken up in the form of issues at the District Court, have remained unanswered. Whilst the inordinate delay from the very commencement of this case cannot be condoned, in order to mete out justice in a fair and a rational manner, it would be necessary for the District Court to take up this matter *de novo* to carefully examine the devolution of title on the basis of oral and documentary evidence on the allocation of shares and to take steps to answer all the points of contest raised as issues, as otherwise there could be a miscarriage of justice.

Accordingly, for the reasons aforesaid the question is answered in the negative and the judgment of the Court of Appeal dated 22.11.2002, which set aside the judgment of the District Court, Homagama and directed the case to be sent back for a trial *de novo,* is affirmed.

The Registrar is directed to send the case record to the District Court, Homagama forthwith and the learned District Judge is directed to hear and conclude the case as expeditiously as possible.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal.

Seetha Luxmie Arsakulasooriya
No. 41, Willium Gopallawa Road,
Kandy.

DEFENDANT-APPELLANT-APPELLANT

S. C. Appeal No. 54/2008
S. C. (H.C.) C.A. L. A. No. 34/2008
C.P./H.C.C.A. No. 303/00
D.C. Kandy Case No. 2592/RE

-Vs-

Avanthi Sudarshanee Tissera, nee Wadugodapitiya,
No. 24, Hathbodiya Road,
Kalubowila, Dehiwala.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE	:	Hon. R. A. N. G. Amaratunga, J., Hon. Saleem Marsoof, P.C., J., and Hon. P. A. Ratnayake, P.C., J.
COUNSEL	:	Mohan Peiris, P.C. with Harindra Rajapaksa for Appellant. S. Ratwatte for Respondent.
ARGUED ON	:	30-09-2008 and 11-11-2008
WRITTEN SUBMISSIONS	:	19-01-2009
DECIDED ON	:	09-09-2010

MARSOOF, J.

This is an appeal from the decision of the Civil Appellate High Court of the Central Province holden in Kandy dated 5th March 2005, which affirmed the judgement of the District Court of Kandy pronounced on 7th February 2003 in favour of the Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent"), for the ejectment of the Defendant-Appellant-Appellant (hereinafter referred to as the "Appellant") from the premises in suit, namely premises No. 41, William Gopallawa Mawatha, Kandy, more fully described in the schedule to the plaint, and for damages.

The action has been instituted on 15th May 2000 on three causes of action of which only the first, which was for the recovery of possession of the premises on the basis of the alleged reasonable requirement of the Respondent, was pressed at the trial. In paragraph 3 of the plaint, the

Respondent had averred that the Appellant was the tenant of the said premises from about 1979 for which the standard rent was Rs. 95.30 per month. In paragraph 5 of the answer, the Appellant has specifically denied that the tenancy commenced in 1979, and has expressly stated that the tenancy commenced in the year 1969. The Appellant has also in paragraph 7 of the answer, denied the position taken up by the Respondent in paragraph 8 of the plaint that notice of the proposed action has been issued to the Commissioner for National Housing.

At the commencement of the trial in the District Court, two admissions were recorded to the effect that the Respondent is the owner of the premises and that it was subjected to a tenancy in which the Appellant was the tenant of the Respondent landlord. It appears from the proceedings in the District Court that the issues raised by the Respondent were not confined to the initial notice to quit issued by the Respondent to the Appellant on 27th November 1998, requiring her to vacate the premises by 1st December 1999, on the ground of the alleged reasonable requirement of the Respondent landlord, and in addition raised the question of the alleged repudiation of the tenancy and the challenge posed by the Appellant to the rights of the Respondent as landlord, by entering into a lease agreement with the Basnayaka Nilame of the Sri Naatha Devalaya, Kandy, with respect to the premises in suit, and by the institution of D. C. Kandy Case No. 20541/L against the Respondent seeking a declaration that the Appellant was entitled to possess the premises in suit by virtue of the said lease agreement. The issues raised on behalf of the Respondent were as follows:-

" **විසඳුම් ප්‍රශ්න : (පැමිණිල්ලෙන්) :-**

(1) පැමිණිලිකාරිය විසින් සිය නීතීඥ තැන විසින් එකී දේපලේ පැමිණිල්ලේ 6 වන ඡේදයේ දක්වා ඇති ආකාරයට හිස් හා නිරවුල් බුක්තිය ලබා දීමට විත්තිකරුට නොහීසියක් යවා ඇත්ද ?

(2) එකී නොහීසි කාලයෙන් පසුවද, විත්තිකරු එකී දේපලේ පදිංචිව සිටින්නේද ?

(3) පැමිණිලිකාරියට එසේ පදිංචිව සිටීමෙන් සිදු වන අලාභය කොපමණද ?

(4) කෙසේ වෙතත් මෙම නඩුවේ විත්තිකරු එල් 20541 දරණ මහ/දිසා අධිකරණයේ නඩුව පවරා පැමිණිලිකාරියගේ අයිතිවාසිකම් තර්ජනයට ලක්කර ඇත්ද ?

(5) විත්තිකරු 1999/8/27 දින අංක : 2961 දරණ බදු ඔප්පුව මගින් වෙනත් පාර්ශවයකින් ලබාගෙන තර්ක කර ඇත්ද ?

(6) ඉහත විසඳනාවන් වලට පැමිණිලිකාරියගේ වාසියට පිලිතුරු ලැබෙන්නේ නම් විත්තිකාරියට කුලී නිවැසි භාවය හිමි නොවිය යුතුද ?

(7) ඉහත විසඳුම් ප්‍රශ්න පැමිණිල්ලේ ආයාචනයේ ඉල්ලා ඇති සහන ලබාගත හැකිද ?"

It is noteworthy that only issues 1,2 and 3 strictly arose from the pleadings, and issues 4, 5 and 6 were raised on behalf of the Respondent without any objection from the Appellant, and adopted by court. The Respondent was the only witness to testify at the trial. In the course of her testimony, the Respondent produced in evidence the Deed of Gift bearing No. 1009 dated 13th March 1993 made in her favour by her sister Ruwani Dilhara Priyatilake *nee* Wadugodapitiya and attested by Visakha K. Girihagama, Attorney-at-Law and Notary Public, by which she derived title to the premises in suit. She explained in her testimony that by the Amended Final Decree dated 29th July 1997 entered in D.C. Kandy Case No. 7911/P, her sister and she were jointly allotted lot No. 4 of Plan No. 1552 dated 13th October 1995 prepared by Bernard P. Rupasinghe, Licensed Surveyor and Court Commissioner. She further testified that she had become the owner of the entirety of the said lot by virtue of the aforesaid Deed No. 1009 by which her sister had donated to her all rights, title and interest, divided or undivided, that may be allotted to her "in Partition Case No. P/7911 in the District Court of Kandy".

The Respondent testified that she did not own any other housing property, and that she required the premises in suit for occupation as a residence. She stated in evidence that she desired her daughter to be educated in Kandy in the same manner in which she herself had been educated, and that she was unable to have her daughter admitted to a reputed school in Kandy as she was compelled to reside in Dehiwala with her in-laws, as the premises in suit was unavailable for her

occupation by reason of the tenancy in favour of the Appellant. She testified that notice was issued on the Appellant by the letter dated 27th November 1998 requiring her to vacate the premises in suit on or before 1st December 1999, but the Appellant did not so vacate the premises. She made no mention in the course of her testimony of any notice being served on the Commissioner for National Housing as contemplated by Section 22(1A) of the Rent Act, which was in the submission of the President's Counsel for the Appellant, a "mandatory requirement" imposed by law for the ejectment of a tenant protected by the Rent Act, nor was she specifically asked in cross-examination as to whether she had taken this allegedly vital step prior to institution of action.

In the course of her testimony, the Respondent also adverted to the conduct of the Appellant, which from her perspective amounted to a repudiation of the admitted tenancy between the Appellant and the Respondent. In particular, she referred to the fact that the Appellant had prior to the institution of the action from which this appeal arises, entered into a Lease Agreement with the Basnayake Nilame of the Sri Naatha Devalaya, Kandy, bearing No. 2961 dated 27th August 1999 attested by O. C. Meegastenne, Attorney-at-Law and Notary Public, for a period of 20 years commencing on 8th March 1999 with respect to the premises in suit. She also referred to D. C. Kandy Case No. 2054/L instituted by the Appellant against her on or about 3rd September 2001, whereby the Appellant prayed for a declaration that she was the lawful tenant of the premises in suit under its alleged owner, the Sri Naatha Devalaya, Kandy.

Although the Appellant did not testify at the trial nor call any other witness to give evidence on her behalf, the position of the Respondent that the Appellant had repudiated her contract of tenancy with the Respondent is strengthened by the issues raised on behalf of the Appellant herself, which were as follows:-

"**විසඳුම් ප්‍රශ්න : (වත්තියෙන්) :-**

(8) වත්තිකාරිය මෙම දේපල 1999 මාර්තු මස 8 වෙනි දින නාථ දේවාලයේ බස්නායක නිලමේ තුමාගෙන් අංක : 2961 දරණ බදු ගිවිසුම යටතේ ලබා ගෙන තිබෙද ?

(මෙය වත්තියේ උත්තරයේ සඳහන් කර නැති නිසා එයට විරුද්ධ වන බව නීතීඥ සමන්ත රත්වත්තේ මහතා කියා සිටියි.)

(9) එම බදුකරය මඟින් වත්තිකාරිය කුලී නිවැසියෙක් ලෙස පදිංචිව සිටින්නේ නම්, පැමිණිල්ලට මෙම නඩුකරය පවත්වාගෙන යා හැකිද ?

(10) ඉහත ගිවිසුම අනුව වත්තිකාරිය අදාළ දේපොලේ නීත්‍යානුකූල බදු කාරියද ?

(11) ඉහත විසඳනාවන් එකකට හෝ සියල්ලටම 'ඔව්' යනුවෙන් පිළිතුරු ලාවෙන්නේ නම් පැමිණිල්ල නිශ්ප්‍රභා වේද ?"

In this factual setting, the thrust of the submissions of learned Counsel for the Respondent in the District Court was that in view of the repudiation of the tenancy by the Appellant, she is disentitled to the protection of the Rent Act, and that in view of the fact that the existence of the tenancy has been admitted by the Appellant in her pleadings as well as at the commencement of the trial, the Respondent was entitled to an order for ejectment as well as the other relief prayed for in the plaint. On the other hand, it was strenuously contended by learned Counsel for the Appellant that the failure on the part of the Respondent to prove that a notice as contemplated by Section 22(1A) of the Rent Act was served on the Commissioner for National Housing, was fatal to the maintainability of the action.

At the conclusion of the trial, the learned District Judge pronounced his judgement dated 7th February 2003 in favour of the Respondent, answering issues 1, 2, 4, 5, 6, 7, 8 and 9 in the affirmative and 10 and 11 in the negative, and granted the Respondent relief as prayed for in prayers අ and ආ of the plaint, that is to say, for the ejectment of the Appellant and her servants, agents, assigns and any other person claiming under her from the premises in question and the delivery of vacant and peaceful possession thereof to the Respondent and for damages in a sum of

Rs. 7,500/- per month with legal interest thereon payable by the Appellant from 1st December 1999 up to delivery of vacant and peaceful possession of the premises in suit to the Respondent. It is not clear on what basis the learned District Judge arrived at the aforesaid quantum of damages, as he has specifically answered issue 3 in favour of the Appellant and held that the Respondent has failed to adduce evidence to sustain the claim for damages, but this is not one of the questions for determination on this appeal.

The primary basis on which the District Court held in favour of the Respondent was that the Appellant, having admitted the Respondent as her landlord, has proceeded to repudiate the tenancy by her persistent conduct, and has thereby deprived herself of the protection afforded to tenants covered by the Rent Act. The learned District Judge relied on the decisions in *Mansoor v. Umma* [1984] 1 Sri LR 151 and *Dean v. Rauf* [2002] 2 Sri LR 6 and held that the Appellant has by reason of her conduct, forfeited the protection of the Rent Act. The Civil Appellate High Court for the Central Province holden in Kandy has, by its judgement dated 5th March 2005, affirmed the decision of the District Court on the same basis. Against this decision, this Court has on 9th June 2008 granted leave to appeal on the following substantial questions of law:-

(i) Did the Civil Appellate High Court misdirect itself by not considering the fact that the plaint did not contain an averment setting out the exact date on which it was let having regard to the fact that the exact date would decide the applicable law in terms of the Rent Act i.e. Section 22(1)(b) or 22(1)(bb)?

(ii) Did the Civil Appellate High Court misdirect itself by not considering the fact that the Respondent has failed to establish the fact that a notice was sent to the Commissioner of National Housing, which is a mandatory requirement in terms of Section 22(1A) of the Rent Act?

Before considering the above questions of Law on which leave to appeal has been granted by this Court, it is necessary to consider the relevancy of the date of commencement of tenancy for the purpose of determining this appeal.

Relevance of date of commencement of tenancy

It is to be noted that the Rent Act No. 7 of 1972 has been amended by Law No. 34 of 1976, Law No. 10 of 1977, Act No. 55 of 1980 and Act No. 26 of 2002. As expressly provided in Section 1(1) of the Rent Act, the provisions of the Act (other than the provisions of Sections 15, 16 and 17 thereof with respect to which Section 1(3) made specific provision regarding the date of commencement), came into operation on 1st March, 1972.

For the purpose of deciding this case, the date of commencement of the admitted tenancy between the Appellant and the Respondent was crucial in view of the provisions of Section 22 (1)(bb) and Section 22 (1A) of the Rent Act, which had been introduced by the amending Law No. 10 of 1977. Prior to the said amendment, action for the ejectment of a tenant from any premises the standard monthly rent of which did not exceed one hundred rupees, could have been lawfully instituted on the basis of the four grounds set out in Section 22(1) of the Rent Act. One such ground, set out in sub-paragraph (b) of that section, is that the premises, having been let on or *after* the date of commencement of the Rent Act, was reasonably required for the occupation as a residence for the landlord or any member of the landlord's family, or for purposes of the trade, business, profession, vocation or employment of the landlord. Although there was no provision in the Rent Act for the ejectment of a tenant on the ground of reasonable requirement of the landlord where the tenancy had commenced *prior* to the coming into operation of the Rent Act, by the amending Law introduced in 1977, provision was made for this eventuality by Section 22 (1)(bb) which applies to "premises which have been let to the tenant *prior* to the date of commencement of this Act" (Italics added).

It is of significance to note that a greater degree of protection was provided to the latter category of tenants (i.e. tenants of premises which have been let prior to the date of commencement of the Rent Act) by Section 22 (1A) of the Act, which provided as follows :-

> "Notwithstanding anything in subsection (1), the landlord of any premises referred to in paragraph (bb) of that subsection shall not be entitled to institute any action or proceedings for the ejectment of the tenant of such premises on the ground that such premises are required for occupation as a residence for himself or any member of his family, if such landlord is the owner of more than one residential premises and *unless such landlord has caused notice of such action or proceedings to be served on the Commissioner for National Housing*." (Italics added.)

Section 22 (1B) of the Act specially provides that any action filed in terms of Section 22 (1)(bb) should be given priority over all other business of court, and Section 22 (1C) of the Act provided that where a decree for the ejectment of the tenant of any premises referred to in Section 22 (1)(bb) is entered, "no writ in execution of such decree shall be issued by such court until after the Commissioner for National Housing has notified to such court that he is able to provide alternative accommodation for such tenant." By the Rent (Amendment) Act No. 26 of 2002, the provisions of Sections 22 (1)(bb), 22 (1A) and 22 (1C) have been repealed and replaced with provisions which make it much easier to have a tenant ejected from rented premises on the ground of reasonable requirement of the landlord by serving notice of proposed action on the Commissioner for National Housing and depositing with him prior to the institution of an action a sum equivalent to ten years' rent or Rs. 150,000/-, whichever is higher. As the date of institution of the action from which this appeal arises is 15th May 2000, it is only the provisions of the Rent Act No. 7 of 1972, as amended up to that date, which would have applied to the Appellant tenant. Therefore, the provisions of the amending Act No. 26 of 2002 will have no application with respect to the Appellant tenant.

Adequacy of pleadings

It is clear that, as the law stood at the time of the institution of the action from which this appeal arises, no landlord could sue for the ejectment of his tenant unless he has caused notice of action to be served on the Commissioner for National Housing, where the tenant in question had commenced *prior* to the date on which the Rent Act came into operation, which was 1st March, 1972. It is in this context, and having regard to the fact that the *exact date* on which the premises was let would decide whether Section 22(1)(b) or 22(1)(bb) of the Rent Act is applicable to the determination of this case, that this Court granted leave to appeal on the question whether the Civil Appellate High Court misdirected itself by not considering the fact that the plaint did not contain an averment setting out the *exact date* on which the premises was let. As already noted, the Respondent has averred in paragraph 3 of the plaint that the Appellant was the tenant of the premises in suit from about 1979 (1979 පමණ සිට), which position has been denied by the Appellant in paragraph 5 of the answer, where she has stated that the tenancy commenced in the year 1969. Neither party has specified the *exact* date on which the tenancy is alleged to have commenced, and have been content to disclose only the particular year in which they contend the tenancy commenced.

Sections 40, 75 and 79 of the Civil Procedure Code set out the essential requisites of the plant, the answer and further pleadings respectively, and Section 40(d) of the Code specifically provides that a plaint must contain a "plain and concise statement of the circumstances constituting each cause of action, and where and when it arose." It is not the contention of the Appellant that the plaint did not disclose a cause of action or the averments in the plaint fall short of setting out one or more cause of action. If that be the case, it is trite law that the correct procedure is for the defendant, before filing answer, to move court as contemplated by Section 46(2) of the Code to return the plaint to the plaintiff for amendment. *See, Mudali Appuhamy v. Tikarala* 2 Ceylon Law Recorder 35; *Actalina Fonseka v. Dharshani Fonseka* [1989] 2 Sri LR 95. As His Lordship K.M.M.B Kulatunga, J., observed in the course of his judgement in the latter case, at page 100-

> "The law does not require that the plaint should make out a prima facie case which is what the Defendants-Appellants appear to insist on, nor are the Plaintiffs required to state their evidence by which the claim would be proved. The plaint in the action discloses a cause of action and if as it appears to me, the real grievance is that it does not contain sufficient particulars, the defendants should, before pleading to the merits, move to have the plaint taken off the file for want of particulars…."

Adherence to this procedure is both sensible and pragmatic, as without sufficient particulars of the cause of action in the plaint, there will be nothing for the defendant to plead by way of defence.

Learned President's Counsel for the Appellant, however, submits with some force, that as the question whether it is Section 22(1)(b) or 22(1)(bb) of the Rent Act which is applicable to the tenancy in question, would depend on the *exact date* of the commencement of the tenancy, and as such, the failure to disclose such date is fatal to the maintainability of the action from which this appeal arises. I do not see any merit in this submission. In the first place, as was observed by His Lordship G.P.S de Silva CJ in *Hanaffi v. Nallamma* [1998] 1 Sri LR 73 at page 77, "since the case is not tried on the pleadings, once issues are raised and accepted by the court, the pleadings recede to the background." There was no admission in regard to the date of commencement of the tenancy, nor had either party put the matter in issue. Even the defendant, who was obliged by Section 75(d) of the Civil Procedure Code to plead all matters of fact and law on which she relies for her defence, has not averred in her answer the *exact date* on which she alleges that her tenancy commenced, except to say that it was in the year 1969. Secondly, it is plain that the only year in which the *exact date* of commencement of tenancy would have been material to the decision of a case of this nature was 1972, as it will be crucial to determine whether the tenancy commenced prior or subsequent to the date on which the Rent Act came into operation, which was, as already noted, the 1st day of March 1972. Since neither party in this case has alleged that the tenancy in question commenced in the year 1972, the *exact date* of commencement would not have been a material fact on which the right decision of this case would have depended, even assuming that at the commencement of the trial or at a later stage an issue had been formulated in regard to the requirement of the service of a notice on Commissioner for National Housing as contemplated by Section 22(1A) of the Rent Act.

Accordingly, I answer substantive question (i) on which leave had been granted in this case, in the negative, and hold that the Civil Appellate High Court had not misdirect itself by not considering the fact that the plaint did not contain an averment setting out the *exact date* on which the premises in suit was let out.

Failure to give notice of action to Commissioner for National Housing

The other substantive question on which leave to appeal has been granted is whether the Civil Appellate High Court misdirected itself by not considering the fact that the Respondent has failed to establish that "a notice was sent to the Commissioner of National Housing, which is a mandatory requirement in terms of Section 22(1A) of the Rent Act."

Learned President's Counsel for the Appellant has referred to two decisions of our courts for the proposition that causing a notice to be issued on the Commissioner for National Housing is a mandatory requirement in terms of Section 22(1A) of the Rent Act. The first of these is the decision of the Supreme Court in *Miriam Lawrence v. Arnolda* [1981] 1 Sri LR 232, and the other is the decision of the Court of Appeal in *Wiesinghe v. Nadarajah Eswaran* [1984] 1 Sri LR 33. In the course of his judgement in *Miriam Lawrence v. Arnolda,* His Lordship Ismail, J., observed at page 234 as follows:-

> "It will be noted that under sub-section (1A) there had to be two essential pre-requisites before institution of any action or proceedings for ejectment of a tenant. These are, firstly, that the said landlord will not be entitled to institute any action or proceedings for ejectment of a tenant if he is the owner of more that one residential premises and secondly, the said

landlord had caused notice of such action or proceedings to be served on the Commissioner of National Housing."

That case turned on the alleged failure on the part of the landlord in that case to plead in the plaint that he was not the owner of more than one residential premises, and in regard to that omission in the pleadings Ismail J observed at page 235 that "if this is clearly pleaded only, would the Court have jurisdiction to entertain and proceed with the case instituted under the provisions of this Law." This reasoning was followed by the Court of Appeal in *Wiesinghe v. Nadarajah Eswaran* in setting aside a settlement reached by the parties in a case which had been filed by a landlord against his tenant who had commenced his tenancy *prior* to the date the Rent Act came into operation, for the simple reason that the plaintiff had *failed to plead* in the plaint that notice in terms of Section 22 (1A) of the Act had been served on the Commissioner for National Housing. H.A.G de Silva J at page 41 of his judgement described this as "an essential requirement as by sub-section (1C) the Court is precluded from issuing a writ of execution until the Commissioner of Housing has notified the Court that he is able to provide alternate accommodation for such tenant." His Lordship noted that "in the absence of such an averment that such notice has been given to the Commissioner of National Housing the plaint is prima facie bad and could have been rejected by Court."

Learned Counsel for the Respondent, has in my opinion very rightly, refrained from making any serious attempt to controvert the correctness of the propositions of law laid down in the aforesaid decisions of our courts. Instead, he has strenuously contends that Section 22 (1A) of the Rent Act is irrelevant in the circumstances of this case insofar as the Appellant has, by her conduct, repudiated the tenancy, and thereby deprived herself of the protection of the Rent Act. He relies on two decisions of this Court for this proposition of law, namely, *Kanthasamy v. Gnanaekeram and Another,* [1983] 2 Sri LR 1 and *Ranasinghe v. Premadharma and Others,* [1985] 1 Sri LR 63. Before discussing these decisions, it is necessary to advert to a long line of decisions commencing with *Muthu Natchia v. Pathuma Natchia,* (1895) 1 NLR 21 that held that a tenant who disclaims to hold of his landlord and puts him at defiance was not entitled to have the action dismissed for want of a valid notice to quit. *See, Sundrammal v. Jusey Appu***,** (1934) 36 NLR 40; *Pedrick v. Mendis,* (1959) 62 NLR 47**;** *Hassun.* ***v.*** *Nagaria,* (1969) 75 NLR 335. In *Edirisinghe v. Patel and Two Others* **(**1973) 79(1) NLR 217, the Supreme Court refused to extended the principle enunciated in *Muthu Natchia v. Pathuma Natchia* to a case of a tenant who is entitled to the protection of the Rent Restriction Act No 29 of 1948, as subsequently amended. Pathirana, J., at page 220 of his judgement stated that-

> "Under the Rent Restriction Act the common law right of the landlord to institute an action for the ejectment of the tenant of any premises to which the Act applies is fettered. He cannot institute any action nor will such an action be entertained by a Court unless he obtains the written authorization of the Rent Control Board. The authorization of the Board is, however, not necessary on the grounds stated in section 13 (1)(a), (b) (c) and (d)……. The resulting position, therefore, is that when a landlord institutes an action against a tenant to have him ejected from the premises on any one or more of the grounds set out above, in my view, once the landlord comes to Court on the averment that the person in occupation of the premises is his tenant and establishes this fact, then such a person cannot be ejected from the premises unless the landlord satisfies the requirements of any one of the grounds set out in section 13 or on the ground of sub-letting under section 9 of the Act. A tenant may deny tenancy for a number of reasons. He may do so in order to avoid payment of rent. But once it is proved that he is tenant ***ipso*** *facto* he is entitled to the protection of the Rent Restriction Act as he is a protected tenant. A reading of section 13 of the Act makes it also clear that the denial or repudiation of a tenancy is not one of the grounds on which the landlord can institute an action in Court."

In *Kanthasamy v. Gnanaekeram and Another* [1983] 2 Sri LR 1, on which learned Counsel for the Respondent to this appeal has placed great reliance, the factual circumstances as well as the strategies adopted by Counsel were somewhat similar to the action from which this appeal has

arisen. The Plaintiffs-Respondents in that case, who were landlords of premises No. 115, Rosmead Place, Colombo 7, filed action to terminate the tenancy of the Defendant-Appellant on the ground of reasonable requirement as a residence as set out in Section 22(b) of the Rent Act. The Defendant-Appellant filed answer admitting his residence in part of the said premises but denying that he occupied the said portion as the tenant of the Plaintiff-Respondents stating that he had been paying rent as an agent of one Sittampalam and not as the tenant of the said Plaintiffs-Respondents. When issues were raised, the learned Queen's Counsel for the Plaintiff-Respondents abandoned the cause of action grounded on reasonable requirement and simply framed an issue as to whether the Plaintiff-Respondents were entitled to a writ of possession against the Defendant-Appellant by reason of his denial of the tenancy. Thereupon, learned Queen's Counsel for the Defendant-Appellant raised issues as to whether the premises in suit were reasonably required for the residence of the Plaintiff-Respondents, and if that issue is answered in the negative, whether Plaintiff-Respondents can have and maintain the action for ejectment. The Defendant-Appellant did not testify at the trial or call any witnesses, but throughout the course of the trial and particularly in the cross-examination of the witnesses of the Plaintiff-Respondents, consistently took up the position that he occupied part of the premises only as the licensee of Sittampalam. The learned District Judge held that the Defendant-Appellant was indeed the tenant of the Plaintiff-Respondents, but that he was liable to be ejected as he had in his answer and conduct repudiated the said tenancy. Despite the fact that the Plaintiff-Respondents had abandoned their cause of action based on reasonable requirement, he also answered the issue raised by Queen's Counsel for the Defendant-Appellant as to whether the premises were reasonably required for the residence of the Plaintiff-Respondents, in the affirmative.

On appeal, the Court of Appeal affirmed the decision of the District Court on the latter issue, and left open "the interesting but not altogether easy question whether a defendant who denied a tenancy in his answer is entitled to plead the benefits of the Rent Act."When the matter ultimately reached the Supreme Court on appeal, Victor Perera, J., (with whom Wimalaratne, J., and Colin Thome, J., concurred), held that the finding of the learned District Judge affirmed by the Court of Appeal in regard to reasonable requirement cannot be sustained on the evidence, and went on to consider the question whether a defendant who denied the tenancy in his answer was entitled to the protection of the Rent Act. In answering this question in the negative, His Lordship at pages 13 and 14 of his judgement, quoted with approval the following *dictum* of Sirmianne, J., in *Edirisinghe v. Patel and Two Others* (1973) 79 (1) NLR 217 at page 228 seeking to explain the reasoning behind the line of decisions commencing with *Muthu Natchia v. Pathuma Natchia* -

> "The reason why such notice is not necessary and why a defendant who denies a tenancy cannot take up such a plea is because by his denial he repudiates the contract of tenancy and *thus terminates* it. It is therefore not open to the defendant who has himself terminated the contract to say that the plaintiff has not terminated it by a valid notice. *A contract of tenancy can be terminated not only by a valid notice, but also by a repudiation of that contract*". (Italics added.)

Accordingly, His Lordship Victor Perera, J., concluded at page 15 of his judgement that -

> "If that was the correct legal position, the defendant in that case was not the tenant on his own plea and therefore could not invoke the protection of the Rent Restriction Ordinance then in force."

The conflict between the decisions of this Court in *Edirisinghe v. Patel and Two Others* (supra) and *Kanthasamy v. Gnanaekeram and Another* (supra) was finally resolved by a Bench of 5 Judges of the Supreme Court in *Ranasinghe v. Premadharma and Others,* [1985] 1 Sri LR 63. The facts of that case were not very complicated. The plaintiff instituted action against the defendants, claiming arrears of rent, damages and ejectment of the defendants, from the premises in suit, which were admittedly governed by the provisions of the Rent Act. The plaintiff had averred in her plaint that she had rented out the premises to the defendants at a monthly rental of Rs. 16 and that they had failed to

pay rent since August 1972 and that by notice dated 27th November 1976 she had requested them to quit and deliver possession of the premises on or before the end of February 1977. The defendants in their answer took up the position that they had constructed the house standing on the premises at a cost of Rs. 5,000 and that they were entitled to remain in occupation thereof free of rent until the said amounts are set off. The defendants thus based their right to occupation of the premises not on any tenancy under the plaintiff but on an independent title of their own - namely *jus retentionis*. By way of reconvention they claimed this amount for the improvements effected by them. They also denied both the receipt and the validity of the notice to quit pleaded by the plaintiff. By majority decision, the Supreme Court overruled the Court of Appeal and restored the decision of the District Court that the defendants were not entitled to the protection of the Rent Act in the circumstances of the case. Sharvananda, C.J., (with whom Wimalaratne, J., Colin-Thome, J., and Ranasinghe, J., concurred, Wanasundera, J., dissenting) observed at page 69 of his judgement that-

> "The court in *Edirisinghe v. Patel* had adopted a very literal interpretation of the language of section 9 and 13 of the Rent Restriction Act. In doing so it had not taken into consideration a very relevant principle of law "which has its basis in common sense and common justice, that a man should not be allowed to blow hot and cold, to affirm at one time and deny at another" as stated by Victor P.erera, J. in *Kandasamy v. Gnanasekeram* (supra). It does not appear to me to be sound law to permit a defendant to repudiate a contract and thereupon specifically to rely upon a statutory defence arising on the contract which he repudiates."

Further elaborating this line of reasoning, His Lordship clarified at page 71 of the judgement that -

> "Where the defendant by his conduct or pleading makes it manifest that he does not regard that there exists the relationship of landlord and tenant between the plaintiff and him, it will not be reasonable to include him in the concept of "tenant" envisaged by section 22 of the Rent Act although the court may determine, on the evidence before it, that he is in fact the tenant of the plaintiff. Since such a person had by his words or conduct disclaimed the tenancy which entitles him to the protection of the Rent Act, it will be anomalous to grant him the protection of a tenancy, which, according to him, does not exist. *Invito beneficium non datur* (Digest 50. 17. 69) said the Romans - the law confers upon a person no right or benefit which he does not desire. Whoever abandons or disclaims a right will lose it. The defendant has to blame himself for this consequence.
>
> The decision in *Edirisinghe v. Patel* (supra) has erred in overlooking the above principles and in holding the conduct of the defendant as irrelevant. Hence it was not correctly decided and should not be followed."

While the Rent Act as much as its predecessor, the Rent Restriction Act, has created what Wanasundera J in *Ranasinghe v. Premadharma and Others,* [1985] 1 Sri LR 63 at page 72 quite rightly described as "a statutory relationship between landlord and tenant ……designed to ensure a great measure of security and protection to the tenants", in my considered opinion, no tenant who has by his own conduct repudiated the contract of tenancy could seek shelter under the salutary provisions of the Rent Act which are only attracted by a contract of tenancy, whether express or implied. Conversely, as the Supreme Court decided in *Imbuldeniya v. D. de Silva* [1987] 1 Sri LR 367 the Rent Act does not give any protection to a tenant against a person who is not the landlord, even if it be shown that he is the true owner of the property which is subject to the tenancy.

Not only did the Appellant in the instant case very clearly repudiate the tenancy and thereby renounce the protection afforded by the Rent Act, she has also failed to prove the ingredients necessary to bring the protective provision of Section 22 (1A) of the Rent Act into play. The condition that a landlord seeking to have his ejected on the ground of reasonable requirement should cause notice of the proposed action or proceeding served on the Commissioner for National Housing, applies only to a landlord of any premises referred to in Section 22 (1)(bb) of the Rent Act, namely a "premises which have been let to the tenant *prior* to the date of commencement of this

Act". As already noted, the Respondent in this case has averred in his plaint that the Appellant was the tenant of the premises in suit from about 1979, whereas the Appellant stated in her answer that the tenancy commenced in the year 1969. Although at the commencement of the trial, the fact of the tenancy was admitted by the parties, the date of commencement of the tenancy was not so admitted, nor was any issue raised by either of the parties in regard to the date of commencement of the tenancy, to enable the District Court to make any determination in this regard. If the Appellant was relying on the salutary provision of Section 22 (1A) of the Rent Act, issues should have been raised on her behalf as to the date of the commencement of tenancy and as to whether the Respondent can have and maintain the action in the absence of evidence to show that she has caused the requisite notice to be served on the Commissioner for National Housing as averred in terms of such 22 (1A). As reflected in issue 8 raised at the trial, the defence of the Appellant in the District Court was based on her alleged right to occupy the premises in suit under the Lease Agreement bearing No. 2961 dated 27th August 1979 signed with the Basnayake Nilame of the Sri Naatha Devalaya, Kandy, which the Appellant sought to further fortify through three consequential issues to follow. These issues, along with the conduct of the Appellant in challenging the title of the Respondent through the institution of D.C Kandy case No. 2054/L, in my opinion clearly constituted a repudiation of the very tenancy agreement on which the Appellant was seeking to found her claim for protection under the Rent Act.

In this context, it may be of some importance to note that the learned District Judge has in his judgement proceeded to answer issue 8 raised by the learned Counsel for the Appellant, despite the objection taken on behalf of the Respondent to this issue on the basis that it has not been pleaded. The learned District Judge has noted in the course of his judgement, that although he had made order rejecting the said issue on the basis that it had not been pleaded in the answer, this order has not been duly recorded by the court stenographer. However, he has taken the said issue into consideration in his judgment and answered the same, in view of the fact that the court stenographer has recorded the said issue as having been admitted, which entry has not been corrected in the course of the trial. The learned District Judge has also noted that the learned Counsel for the Respondent had later withdrawn his objection to the said issue. This is well and good, as the duty imposed on the Court by Section 146(2) of the Civil Procedure Code in cases where learned Counsel are not agreed on the issues, is to ascertain upon what material propositions of fact or law the parties are at variance and record issues on which the right decision of the case appears to the Court to depend, "upon the allegations in the plaint, *or in answer to interrogatories delivered in the action, or upon the contents of documents produced by either party, and after such examination of the parties as may appear necessary*". There is no express reference to the answer in the above quoted provision, but it has been the inveterate practice of our courts to be guided by the averments of the plaint, answer and replication as well as the other pleadings for the purpose of formulating the issues. However, our courts are not restricted to such pleadings, and it is clear from the above provision of the Civil Procedure Code that there is an obligation cast on the court to look beyond the pleadings for ascertaining the issues, provided that the essential character of the action is not fundamentally changed in the process. It is abundantly clear from the documents produced at the trial, particularly the Lease Agreement bearing No. 2961 dated 27th August 1979 executed by the Basnayake Nilame of the Sri Naatha Devalaya, Kandy, in favour of the Appellant and the plaint in D.C. Kandy Case No. 2054/L, that issue 8 (and its consequential issues 9, 10 and 11) raised questions of vital importance, and to strike down the said issue would have been to render the Appellant issueless.

It is significant that the submission that the Respondent cannot have and maintain the action from which this appeal arises in view of non-compliance with the mandatory requirement of Section 22 (1A) of the Rent Act was put forward on behalf of the Appellant for the first time in the written submissions tendered to the District Court after the closing of all evidence. This stand was not only contradictory to the positions taken by the Appellant in her issues and throughout the conduct of the trial, but also the belatedness of the submission precluded the possibility of the Respondent leading evidence to show that Section 22 (1A) had no application because the tenancy in fact

commenced in 1979, or alternatively, that she had caused the service of notice on the Commissioner for National Housing as contemplated by that provision, if that be the case.

For all these reasons, I am of the opinion that substantive question (ii) on which leave to appeal had been granted by this Court should also be answered in the negative, and I hold that the Civil Appellate High Court did not misdirect itself by not considering the fact that the Respondent has failed to establish the fact that a notice was sent to the Commissioner for National Housing, as contemplated by Section 22 (1A) of the Rent Act.

Conclusions

Accordingly, I answer both substantive questions for determination on this appeal in the negative. The appeal is dismissed and the decisions of the lower courts are affirmed, with costs payable to the Plaintiff-Respondent-Respondent by the Defendant-Appellant-Appellant in a sum of Rs. 25,000/-.

JUDGE OF THE SUPREME COURT

HON. AMARATUNGA, J.
I agree.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128 (2) of the Constitution read with the Supreme Court Rules of 1990.

Timberlake International Pvt. Ltd.,
351 Pannipitiya Road,
Thalawathugoda.

PETITIONER

S.C. APPEAL NO: 06/2008
S.C. (SPL) L.A. NO: 04/2008
C. A. APPLICATION NO: 866/2007

VS.

1. M.P.A.U.S. Fernando,
   The Conservator General of Forests,
   Forest Department,
   P.O.Box 03,
   Sampathpaya,
   Battaramulla.

2. P.G. Wickramasinghe,
   Range Forest Officer,
   Forest Department,
   Nawalapitiya.

3. Divisional Forest Officer,
   Forest Department,
   Kandy.

4. Pussellawa Plantations Ltd.,
   Alfred Tower,
   16, Alfred House Gardens,
   Colombo 03.

RESPONDENTS

AND NOW BETWEEN

1. M.P.A.U.S. Fernando,
   The Conservator General of Forests,
   Forest Department,
   P.O.Box 03,
   Sampathpaya,
   Battaramulla.

2. P.G. Wickramasinghe,
   Range Forest Officer,
   Forest Department,
   Nawalapitiya.

3. Divisional Forest Officer,
   Forest Department,
   Kandy.

RESPONDENTS-PETITIONERS

VS.

1. Timberlake International Pvt. Ltd.,
   351 Pannipitiya Road,
   Thalawathugoda.

PETITIONER–RESPONDENT

2. Pussellawa Plantations Ltd.
   Alfred Tower,
   16, Alfred House Gardens,
   Colombo 03.

4TH RESPONDENT - RESPONDENT

BEFORE : R. A. N. G. Amaratunga, J.,
Saleem Marsoof, P.C., J., and
P. A. Ratnayake, P.C., J.

COUNSEL : A. Gnanathasan, P.C., Add. SG with S. Balapatabendi, SSC and N. Wigneswaran, SC for Respondent-Petitioners.

Manohara de Silva, P.C. with Arienda Wijesurendra instructed by Bandara Thalagune for Respondents

ARGUED ON : 26-01-2009

WRITTEN SUBMISSIONS : 06-03-2009

DECIDED ON : 02-03-2010

MARSOOF, J.

This is an appeal from the order of the Court of Appeal dated 28th November 2007 staying, until the final hearing and determination of CA Application No. 866/2007, the operation of the letter of the 2nd Respondent-Petitioner, the Range Forest Officer, Nawalapitiya, dated 3rd August 2007 (P28) addressed to the Petitioner-Respondent Timberlake International Pvt Ltd., (hereinafter referred to as "Timberlake IPLtd") intimating to the latter that the issue of permits for the transport of pine timber is suspended until further instructions are received from the 3rd Respondent-Petitioner, the Divisional Forest Officer, Kandy. By the said interim order, the Court of Appeal also directed the 1st Respondent-Petitioner, the Conservator-General of Forests and his subordinates, the said 2nd and 3rd Respondent-Petitioners (hereinafter sometimes collectively referred to as the "Forest Conservators") "to issue transport permits forthwith to enable the petitioner (Timberlake IPLtd) to transport the timber already felled from blocks G, U, V, W and X." The said blocks are depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002 made by P. Gnanapragasam, Licenced Surveyor, and referred to in the Agreement dated 31st August 2004 (P9) entered into between Timberlake IPLtd and the 4th Respondent-Respondent Pussellawa Plantations Ltd., (hereinafter referred to as "Pussellawa PLtd").

When the application for special leave to appeal against the said order of the Court of Appeal was supported before this Court on 21st January 2008, it granted special leave to appeal on the substantive questions of law set out in paragraph 14(a) to (k) of the Petition dated 5th January 2008, and was also pleased to grant interim relief as prayed for in prayers (e), (f) and (g) of the said Petition, which *inter alia* had the effect of staying the operation of the impugned order of the Court of Appeal dated 28th November 2007 until the final determination of this appeal. The substantive questions on which special leave to appeal was granted, are as follows:

(a) Did the Court of Appeal misdirect itself and err in law in its interpretation of the scope and objective of the Gazette Notification No. 1303/17 dated 28.08.2003 marked P1?

(b) Did the Court of Appeal misdirect itself and err in law in holding that the 1st Respondent-Petitioner was bound by the Gazette Notification marked P1 in so far as is relevant to the matters set out in the application?

(c) Did the Court of Appeal misdirect itself and err in law in holding that the 1st Respondent-Petitioner was bound to charge stumpage fees in accordance with P1?

(d) Did the Court of Appeal misdirect itself and err in law by failing to consider the fact that the Pine plantations in question were planted and maintained by the Department of Forest Conservation (hereinafter referred to as the "Forest Department") from public funds since the 1980s?

(e) Did the Court of Appeal misdirect itself and err in law in failing to consider that if the 1st Respondent-Petitioner had no authority to charge the stumpage fees then the entire transaction is null and void and cannot be sanctioned by Court?

(f) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent cannot approbate and reprobate the charging of stumpage fees as agreed upon?

(g) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent was entitled to seek relief before Their Lordships of the Court of Appeal, having agreed to a settlement in the High Court?

(h) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner-Respondent should first seek to set aside the settlement arrived at in the High Court?

(i) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the transaction was amenable to writ jurisdiction?

(j) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner could have maintained the application, as only the 4th Respondent-Respondent (Pussellawa PLtd) had standing in this matter, if any?

(k) Did the Court of Appeal misdirect itself and err in law in failing to consider the serious lack of *uberrima fides* on the part of the Petitioner-Respondent?

Factual Matrix

Before examining the above questions in detail, it is necessary to outline in brief the facts from which the said questions may be considered to arise. In terms of the Indenture of Lease bearing No. 61 dated 5th November 1993 (P2) and attested by Oshadi

Jeewa Kottage, Notary Public, the 4th Respondent-Respondent Pussellawa Plantations Ltd., (Pussellawa PLtd) became the lessee of the Janatha Estate Development Board (JEDB) on a 99 year lease of the Delta Estate, situated in Pupuressa, within the Gampola Division in the Kandy District in the Central Province of Sri Lanka. In 2003, Pussellawa PLtd, which apparently believed that the said estate consisted of a *pinus carribaea* forestry plantation in addition to its tea plantation, submitted a detailed forestry management plan for harvesting the forest produce from the said forestry plantation through the Ministry of Plantation Industries to the Conservator-General of Forests. The Conservator-General of Forests, by his letter dated 3rd September 2003 (P4), indicated that he had no objection to the implementation of the said plan subject to certain guidelines, which included a condition that Pussellawa PLtd should obtain clearance under Section 21 of the National Environmental Act No. 47 of 1980, as subsequently amended, for such activities of the plan that may require environmental clearance, and that all clear felled areas, except coppice areas, should be replanted during the same year or the year following. Thereafter, by his letter dated 18th February 2004 (P5), the Managing Director of Pussellawa PLtd applied to the Conservator-General of Forests through the Director of the Plantation Management Monitoring Division (PMMD) of the Ministry of Plantation Industries for his approval for harvesting the *pinus* forestry plantation at Delta Estate, and the said letter was forwarded to the Conservator-General of Forests by the Director of PMMD with his letter dated 19th March 2004 (P6). The said letter reveals that the Director of PMMD too believed that "the extent of 74.15 hectares belongs to Delta Estate" and that Pussellawa PLtd is "paying lease rental covering this extent".

By his letter of 20th May 2004 (P7), the Conservator General of Forests informed Pussellawa PLtd that for the granting of permission for the harvesting of the pine plantation in question, the valuation of the plantation is essential, and this would require a "comprehensive enumeration" of the plantation to be carried out, but the process can be expedited through a "sample enumeration of the plantation". After the Director of Natural Resources of the Ministry of Environment and Natural Resources signified his approval for the harvesting of the *pinus* forestry plantation, and environmental clearance obtained, on 31st August 2004, Pussellawa PLtd entered into an Agreement with Timberlake IPLtd (P9) *inter alia* to facilitate the harvesting of the said pine plantation in an expeditious manner. Under and by virtue of the said Agreement (P9), Pussellawa PLtd sold to the purchaser Timberlake IPLtd approximately 42,438 *pinus* trees planted on the 25 blocks of land depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002 and made by P.Gnanapragasam, Licenced Surveyor, for a sum of Rs. 850 per tree "exclusive of dead, rotten, damaged trees or trees with a girth of less than 0.45 meters below the bark".

It is noteworthy in this context that the Agreement (P9) provided that the consideration for the 42,438 *pinus* trees sold thereby shall be paid by Timberlake IPLtd to Pussellawa PLtd in the manner set out in Clause 7 of the Agreement. Clause 7 provided that in addition to the sum of Rs. 1 million already paid by Timberlake IPLtd and

acknowledged in sub-paragraph (a) of the said clause, the latter shall pay Pussellawa PLtd a sum of Rs. 9 million at the time of execution of the Agreement, (clause 7 (b) of P9), a further sum of Rs. 10 million within 60 days of the execution of the said Agreement (clause 7 (c) of P9) and the balance consideration after the harvesting and removal of the trees as provided in detail in clause 7(e). These provisions did not give rise to any dispute, but what is in controversy in this case is the meaning of clause 7(d) of the Agreement P9, in which Timberlake IPLtd, as the "purchaser" of the trees from the vendor, Pussellawa PLtd, agreed to "pay the *stumpage fees* as stipulated by the Conservator-General of Forests for each block, *prior to the harvesting of each block*." It is significant to note that the under the above quoted clause, "stumpage" was payable by Timberlake IPLtd to the Conservator-General of Forests *through* Pussellawa PLtd. It is also significant to note that on the very same date the said Agreement P9 was entered into, namely 30th August 2004, the General Manager, Forestry of Pussellawa PLtd wrote the letter marked P10 to the Conservator General of Forests, in which he stated as follows:-

> "We particularly refer to the copy of the letter dated the 21st July 2004 from the Director, Natural Resources of the Ministry of Environment and Natural Resources, sent to you under cover of our letter of the 4th August 2004, wherein we received approval for harvesting and removal of the Pinus plantation of 74.15 hectares at Delta estate. We thank you for your concurrent approval.
>
> We are now pleased to inform you that we have in consequence, sold the said trees to the firm, Timberlake International Pvt Ltd of 351, Pannipitiya Road, Thalawatugoda, and the harvesting and removal of the said trees would be carried out by them in accordance with the attached harvesting schedule, as required by the Director Natural Resources.
>
> *We confirm that Timberlake International Pvt Ltd, will, on our behalf, make to you the stumpage payment for each block, on your enumeration and will harvest each block only after such payment and your approval.*
>
> We also advise that we have authorized Timberlake International Pvt Ltd to act on our behalf directly with your Department in relation to any matters pertaining to the harvesting, removal and transportation of the said trees from Delta estate" *(italics added).*

It is clear from the above that Timberlake IPLtd., having purchased approximately 42,438 *pinus* trees planted on the 25 blocks of land depicted in Plan Nos. 7115 and 7116 dated 22nd October 2002, stepped into the shoes, so to speak, of Pussellawa PLtd as far as the *obligation to pay stumpage* to the Conservator-General of Forests was concerned. It is also apparent from the correspondence including the letter dated 29th July 2004 (P11 X1) addressed to Pussellawa PLtd by the Conservator-General of Forests that he himself was under the impression that the *pinus* plantation belonged to Pussellawa PLtd and

that the pine trees were planted by the Forest Department. On this basis, for the 1,146 *pinus* trees that stood *Block 01A* with total volume of 528.158 cubic meters as enumerated by him, he ordered that a sum of Rs. 753,755.62 be paid as stumpage. I quote below the last paragraph of the said letter which is most revealing.

> "Please make arrangements to pay this amount. However I request you to provide documentation to prove that this area has been released to you by LRC. Furthermore, as this activity amounts to clear felling of forest plantations in more than I hectare, Please obtain the environmental clearance as per the National Environmental Act before undertaking felling."

There is no material to show whether Pussellawa PLtd did produce any documentary evidence as to whether Block 01A of the forest plantation was released to Pussellawa PLtd, but that was not a stumbling block to the harvesting having proceeded with as contemplated by the said Agreement (P9). By the letters dated 7th November 2004, 22nd December 2004, 14th February 2005, 5th May 2005, 27th July 2005 and 13th October 2005 marked respectively as P11 X2 to X7, all addressed to Pussellawa PLtd., the Conservator-General of Forests determined the aggregate stumpage fees payable with respect to the pine trees to be removed from *blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P* of the pine plantation as set out in the following table embedded into paragraph 17 of the Petition filed in the Court of Appeal by Timberlake IPLtd:

Table I

Block No.	Volume in cubic meters (m^3)	Total Stumpage	Stumpage Rate
01 A	528.158	Rs. 753,755.62	Rs. 1,427.4
01 B	673.79	Rs. 690,253.40	Rs. 1,024.43
01 C	1082.381	Rs. 1,009,535.62	Rs. 932.70
17 Q	1453.959	Rs. 1,618,450.10	Rs. 1,113.13
04 D	1064.465	Rs. 1,200,147.06	Rs. 1,296.58
06 F	1659.599	Rs. 1,760,520.50	Rs. 1,060.81
16 P	1444.982	Rs. 1,671,524.45	Rs. 1,330.30
All 7 blocks	7907.334	Rs. 8,704,186.75	Rs. 1,169.30

According to Timberlake IPLtd the stumpage rate on the basis of which the stumpage in the third column of Table I was computed is the rate shown in the fourth column of the said Table and the average stumpage rate was Rs. 1,169.30 per cubic meter. This is a premise which is contested by the Forest Conservators and needs closer examination, but it is common ground that neither Pussellawa PLtd nor Timberlake IPLtd, disputed the said enumerated stumpage, which were paid in due course.

The first real dispute between the parties arose when by his subsequent letter addressed to Pussellawa PLtd dated 25th November 2005 (P14a), the Conservator General of Forests claimed an aggregate of Rs. 29,672,224.00 as advanced payment of stumpage for *a further 17 blocks*. It is revealed in this letter that the aforesaid amount was arrived at using a sampling method and it is also stated specifically in the letter that Pussellawa PLtd will be required "to pay the difference once the actual felled volumes are calculated after the felling of all trees." It is alleged by Timberlake IPLtd that the said stumpage was worked out at the much higher rate of Rs. 1,184.00 per cubic meter, which was higher than the average rate of Rs. 1,169.30, shown in Table 1, by Rs. 14.30 per cubic meter. Although Pussellawa PLtd by its letter dated 5th December 2005 (P14b) protested that the rate of Rs. 1,184.00 "seems to be high", it nonetheless agreed with the said stumpage unit price of Rs. 1,184.00, but sought permission to make the payments "block-wise" as in the past prior to harvesting each block, and not at once. In view of the issues that arise for decision in this case, it is important to note at this stage that the Conservator General of Forests in his response dated 26th January 2006 (P15a) sent to Pussellawa PLtd, reiterates very clearly that the timber volume of these 17 blocks was calculated *using sample data instead of total enumeration* as Pussellawa PLtd requested the estimates very urgently. It was also categorically stated that although the selling price of the State Timber Corporation had previously been used in the computation of stumpage fees on the assumption that it reflected the current market price, it has been revealed that the selling price fixed for pine logs by the State Timber Corporation is significantly lower than the prevailing market price for *pinus* timber. The Conservator General of Forests stated in this letter that the Forest Department is compelled to use the new methodology developed for stumpage calculation *based on the market price* for logs, and as a result of the above changes the stumpage value for remaining pine blocks will have to be revised, and will be intimated to Pussellawa PLtd in due course. The Conservator General of Forests further stated that as requested by Pussellawa PLtd the valuation will be done block-wise giving priority to the next block to be harvested.

It would also appear that the Conservator of Forests, considering an urgent request made by Pussellawa PLtd to harvest *block 01R*, having made a *very approximate estimate* of the "*timber volume*" of that block and using the test of "market price", computed the *estimated stumpage fee* for that block at Rs. 4,534,139.00 and requested Pussellawa PLtd to pay a sum of Rs. 5,214,259.85 inclusive of value added tax for the grant of permission to harvest that block. However, considering representations made on behalf of Pussellawa PLtd, this amount was subsequently revised by the Conservator-General of Forests using the "Timber Corporation sale rates", who requested Pussellawa PLtd by his letter dated 9th February 2006 (P17) to pay a stumpage of Rs. 1,405,850.00 *as an "interim payment" pending the enumeration of the block to ascertain the actual volume of timber*. Pussellawa PLtd while objecting to the computation on the basis that it was erroneous and not in accordance with the law, nonetheless paid a sum of Rs. 1,616,727.50 inclusive of value added tax, with respect to block 01R and commenced harvesting. However, when Pussellawa PLtd made default in the payment of the enumerated stumpage fees prior to harvesting each of the *17 blocks* referred to in the letter dated 25th November

2005 (P14a) in contravention of the promise it made in its letter of 5th December 2005 (P14b), matters came to a head. The result was the letter dated 6th April 2006 (P18) sent by the Conservator-General of Forests directed the General Manager – Forestry of Pussellawa PLtd to stop with immediate effect, the felling of pine trees "belonging to the Forest Department in Delta Estate, Pupuressa." It is this order that prompted Pussellawa PLtd and Timberlake IPLtd to invoke the writ jurisdiction of the Provincial High Court in this connection.

The High Court Writ Application

On 19th April 2006, Pussellawa PLtd and Timberlake IPLtd filed HC WA Application No. 07/06 in the High Court of the Western Province citing the Conservator-General of Forests and other officials as respondents, seeking in terms of Article 154P of the Constitution *inter alia* a writ of *certiorari* to quash the said decision of the Conservator-General of Forests contained in the letter dated 6th April 2006 (P18).

During the pendency of the said application, the parties had a number of discussions with a view to setting the dispute. Certain proposals were made in writing by the General Manager – Forestry of Pussellawa PLtd by his letter dated 6th July 2006 (P21) addressed to the Conservator-General, who responded with his letter in reply dated 27th July 2006 (P22) which suggested the following terms of settlement formulated with the advice of the Attorney-General:-

1. Pussellawa PLtd to pay stumpage for the excess volume of *pinus* timber already removed by Timberlake IPltd *prior to Block 01-R* on the basis of the rates already calculated. (*The excess volume will be calculated by using the measurements of logs indicated on the transport permits issued in this context)*;

2. Pussellawa PLtd to pay stumpage on the basis of *actual volume* once the felling of Block 1-R is completed;

3. Pussellawa to abide by the *new sale rates to be fixed by the Committee* appointed by the Secretary of the relevant Ministry, and until such time the current State Timber Corporation prices to be used for calculation of stumpage. *(italics added)*

Pussellawa PLtd and Timberlake IPLtd, having accepted the said settlement in respect of the felling of trees *up to block 01R*, withdrew the aforementioned writ application on 28th July 2006, and by his letter dated 16th August 2006 (P23), the Conservator-General of Forests allowed Pussellawa PLtd to re-commence harvesting block 01R subject to the conditions set out above.

Giving Effect to the Settlement

In pursuance of the settlement reached by the parties as aforesaid, the Conservator General of Forests calculated the *actual volume of timber removed from blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P* referred to in Table I based on the *actual measurements* of logs indicated on the relevant transport permits as contemplated by condition 1 of the terms of settlement set out in P22, and by his letter dated 7th November 2006 (P24) addressed to Pussellawa PLtd, demanded an aggregate of Rs. 9,836,853.61 as the balance stumpage payable with respect to these lots. The particulars relevant to this claim were set out in the said letter as tabulated below:

Table II

Block	Actual Value of Timber removed (m^3)	Estimated Volume of Timber for which stumpage is already paid (m^3)	Difference in Volume (m^3)	Stumpage for Actual Volume Rs.	Stumpage already paid Rs.	Stumpage to be paid Rs.
01 A	1,119.426	528.158	591.27	1,408,680.85	753,755.62	654,925.23
01 B	868.889	673.790	195.10	1,289,319.41	690,255.40	599,064.01
01 C	1,564.444	1,082.381	482.06	2,185,104.14	1,009,535.62	1,175,568.52
17 Q	2,115.773	1,453.959	661.81	2,840,167.92	1,618,450.10	1,221,717.82
04 D	1,687.582	1,064.465	623.12	2,394,652.42	1,200,147.06	1,194,505.36
06 F	2,268.729	1,659.599	609.13	3,941,235.83	1,530,887.40	2,410,348.43
16 P	2,267.731	1,444.982	822.75	4,252,248.69	1,671,524.45	2,580,724.24
Total	11,892.574	7,907.334	3,985.24	18,311,409.26	8,474,555.65	9,836,853.61

It is to be noted that the stumpage fees demanded by the said letter dated 7th November 2006 (P24) and set out in the above table were exclusive of value added tax. Pussellawa PLtd responded to this demand by its letter dated 20th November 2006 (P24a) and while not contesting the *volume figures, upon which the difference in the quantity of timber amounting to 3,985.24 cubic meters was arrived at* for the purpose of computing the aggregate amount of Rs. 9,836,853.61 demanded by P24, nevertheless conceded that only a sum of Rs. 4,778,573.00 was payable as balance stumpage for blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P. Pussellawa PLtd disputed the amount claimed by P24 mainly on the basis that the Conservator-General had used a *higher rate of stumpage* from what had been originally used, in violation of the law as well as the settlement reached in the High Court. In paragraph 44 of its Petition filed in the Court of Appeal, Timberlake IPLtd has alleged that "even though it was agreed to pay the *same rate* as before for the said blocks (vide P20, P21, P22), *the 1st Respondent (Conservator-General of Forests) has increased the unit price per cubic meter* for blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P in respect of the excess volume removed." In paragraph 44 of the Petition,

Timberlake IPLtd sought to highlight the *difference in the rate of stumpage* using the following table:

Table III

Block	Stumpage / m^3 (earlier rate)	Stumpage for the excess volume/ m^3	Difference
01 A	Rs. 1,427.4	Rs. 1,258.40	Rs. (168.74)
01 B	Rs. 1,024.43	Rs. 1,483.87	Rs. 459.44
01 C	Rs. 932.70	Rs. 1,396.73	Rs. 464.03
17 Q	Rs. 1,113.13	Rs. 1,342.38	Rs. 229.25
04 D	Rs. 1,296.58	Rs. 1,631.83	Rs. 335.25
06 F	Rs. 1,060.81	Rs. 1,997.78	Rs. 936.97
16 P	Rs. 1,330.30	Rs. 2,156.38	Rs. 826.08

In paragraph 45 of its Petition filed in the Court of Appeal, Timberlake IPLtd has referred to the several appeals alleged to have been made by Pussellawa PLtd against the stumpage computation in P24, and has stated that as the said appeals were turned down, a settlement was reached to pay the said sum of Rs. 9,836,853.61 in 12 monthly installments commencing January 2007 "notwithstanding the severe economic hardship" faced by Timberlake IPLtd. If the contention of Timberlake IPLtd is correct, this would result in an overpayment of Rs. 5,058, 280.61 as stumpage fees with respect to blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P. However, it needs to be observed that the contention of Timberlake IPLtd that as shown in Table III the Conservator-General of Forests had computed the sum of Rs. 9,836,853.61 as balance stumpage due with respect to the said blocks adopting a *higher rate of stumpage* is altogether unfounded, amounts to a gross misrepresentation of facts. It will be seen from Table IV below that the rate adopted with respect to each block has been the same, and the difference in the stumpage fees claimed with respect to each block in P11 X1 to X7 (as estimates set out in Table II) and P24 (on the basis of actual volume) has been *due to the difference in the volume of timber.*

Table IV

Block	Estimated Stumpage as per Table II			Actual Stumpage as per P24		
	Volume m^3	Rs.	Rate per m^3	Volume m^3	Rs.	Rate per m^3
1A	528.158	753,755.62	1427.140401	1119.426	1597577.62	1427.139999
2B	673.79	690,253.40	1024.434022	868.889	890115.96	1024.430002
3C	1082.381	1,009,535.62	932.700000	1564.444	1459156.92	932.700000
17Q	1453.959	1,618,450.10	1113.133245	2115.773	2355130.4	1113.133245
4D	1064.465	1,380,169.12	1296.584782	1687.582	2188085.07	1296.584782
6F	1659.599	1,760,520.50	1060.810774	2268.729	2406692.17	1060.810776
16P	1444.982	1,922,253.11	1330.295542	2267.731	3016752.44	1330.295542

Meanwhile, there had been some discussions in regard to the modalities of payment of stumpage, and it appears that in order to facilitate the harvesting of blocks 01R, 02S, 03T and 05E without disruption, by the letter dated 28th August 2006 (P25a) Pussellawa PLtd suggested to the Forest Department that it will deposit a sum of Rs. 2 million upfront with respect to each of the said block, and as the deposit is reduced as the logs are harvested and removed, it will "replenish the deposit back to Rs. 2mn." It was further stated in the said letter that "the transport permits issued by the forest officer at site will allow us to calculate the volume removed by us from the site." This was readily agreed to, as reflected in the response of the Conservator-General of Forests dated 7th September 2006 (P25b). It is important to note the sense of urgency in the last paragraph of the said letter in which the Conservator-General states as follows:-

> "Once the amount of Rs. 250,000 is reached, you have to replenish the deposit back to 2 million before continuing with the removal of logs. I shall inform you when the deposit reaches Rs. 250,000."

There is no dispute that the initial deposit of Rs. 2 million with respect to each block was duly made. However, It was the failure on the part of Pussellawa PLtd to consistently replenishing the initial deposit to Rs. 2 million as undertaken by its letter dated 28th August 2006 (P25a), while large quantities of the *pinus* timber from blocks 01R, 02S, 03T and 05E were being removed by Timberlake IPLtd, that prompted the Conservator-General to insist in his letter dated 2nd August 2007 (P27) addressed to Pussellawa PLtd that for harvesting the remaining *blocks of G, U, V and W*, a total of Rs. 12 million should be paid as deposit upfront.

This situation also led to the decision to suspend the issue of transport permits with immediate effect until further instructions in this regard are issued by the Divisional Forest Officer, Kandy, which was communicated to the Site Manager of Tiberlake IPLtd by the Range Forest Officer, Nawalapitiya by his letter dated 3rd August 2007 (P28). It was this decision to suspend the issue of transport permits to clear the harvested timber that was the immediate cause for the filing, by Timberlake IPLtd., of the writ application from which this appeal arises, seeking *inter alia* to quash by way of *certiorari* and stay the decisions contained in P28.

When the harvesting of *blocks 01R, 02S, 03T and 05E* were completed, the Conservator-General of Forests, by his letter dated 7th August 2007 (P26) initially demanded an aggregate of Rs. 33,343,620.05 as stumpage from Pussellawa PLtd., based on the market value prevailing in 2007. However, it appears that the Conservator-General of Forests took the initiative to revise the stumpage fees having realized that the harvesting of blocks 01R and 02S had taken place by the end of 2006. Accordingly, the stumpage claimed in regard to these blocks were reduced by applying the 2006 market value, and by his letter dated 6th September 2009 (P29), the Conservator-General claimed an aggregate of Rs 29,345,157.13 as stumpage fees for blocks 01R, 02S, 03T and 05E. After

setting off the total initial payments /deposits aggregating to Rs. 7,616,727.50 and adding to the balance due the applicable value added tax, the balance payment demanded by the Conservator-General of Forests was Rs. 26,130,203.20, a breakdown of which was given in the said letter as follows:

Table V

Block No	Extracted Volume in cubic meters	Stumpage Rs.	Initial Payment Rs.	Balance due Rs.
01R	1,623.91	7,640,670.97	1,616,727.50	6,023,943.47
02S	979.64	4,518,815.56	2,000,000.00	2,518,815.56
03T	1,565.40	10,152,570.96	2,000,000.00	8,152,570.96
05E	1,881.10	11,434,873.21	2,000,000.00	9,434,873.21
Total	6,050.05	33,746,930.70	7,616,727.50	26,130,203.20

It is necessary to observe that though Timberlake IPLtd has stated that to the best of its knowledge no committee has been appointed to implement the settlement reached before the High Court, it is pertinent to note that Timberlake IPLtd has not sought the enforcement of such settlement by seeking the appointment of such a committee to determine stumpage. Timberlake IPLtd has also failed to annex any letter by which it or Pussellawa PLtd addressed the Conservator-General of Forests challenging the stumpage rates on the grounds that it had not been determined by a committee as envisaged in the High Court settlement. In the light of the settlement reached before the High Court, if such committee had in fact not been appointed, it would be reasonable to expect that such non-appointment would be the first complaint that would be preferred by Timberlake IPLtd. It has also failed to go before the High Court to complain of such alleged reneging on the settlement arrived at. Furthermore, Timberlake IPLtd had consistently claimed that not only the Conservator-General of Forests, but other public officers also had intimated valuation and rates. In these circumstances, it is difficult to accept Timberlake IPLtd's position that no committee had in fact been appointed to advise the Conservator-General on the formula for valuation of stumpage fees as agreed in the High Court.

The Court of Appeal Writ Application

On 8th October 2007, Timberlake IPLtd filed CA Application No. 866/2007 against the Forest Conservators, citing Pussellawa PLtd also as 4th Respondent, seeking under Article 140 of the Constitution *inter alia* a writ in the nature of *certiorari* to quash the decisions relating to the payment of stumpage made by the Forest Conservators, a writ in the nature of *mandamus* directing the Conservator-General of Forests to charge stumpage for the pine wood harvested at a rate not exceeding Rs. 500 per cubic meter which is the "royalty" applicable to *pinus* timber under the law, and for certain interim relief to stay the operation of P28 and to compel the issue of transport permits. The basis

of this application was that in terms of the Notification issued by the Conservator-General dated 28th August 2003 by virtue of power vested in him under Regulation 5(2) of the Forest Regulations No. 1 of 1979 made under Section 8 of the Forest Ordinance (Cap. 451), as subsequently amended, and by Rule No. 20 of the Forest Rules, No. 1 of 1979 framed under Section 20 (1) of the Forest Ordinance, and published in the Gazette Extraordinary bearing No. 1303/17 dated 28th August 2003 (P1) the royalty prescribed for *pinus* timber under the category of "Class II Timber" was Rs 500 per cubic meter. It was expressly averred by Timberlake IPLtd in paragraph 5 of the application filed in the Court of Appeal that the royalty prescribed in P1 "apply in respect of Reserved Forests and *any other forest* other than Reserved or Village Forests." In paragraph 7 of the said Petition, Timberlake IPLtd claimed that "the calculation and demand of stumpage in excess of the prescribed rate is unlawful." In other words, the basis of the writ application was that the action of the Conservator-General of Forests in imposing and demanding stumpage fees inconsistent with or exceeding such royalty was *ultra vires* his powers under the Forest Ordinance and regulations and rules made thereunder.

When the application was supported in the Court of Appeal on 18th October 2007, learned President's Counsel appearing for Timberlake IPLtd contended that the two terms "royalty" and "stumpage" were synonymous and that it was illegal to charge any stumpage inconsistent with or exceeding such royalty prescribed in P1, while the learned Deputy Solicitor-General argued that "stumpage" was distinct and different in nature and character from "royalty" and that unlike the latter, the former was a proprietary charge that can be imposed based on the market value of the timber less certain expenses. After hearing the submissions of learned Counsel, the Court granted interim relief by staying the operation of P28, the letter by which Timberlake IPLtd was intimated of the decision to temporarily suspend the issue of permits to transport *pinus* timber from the site at Delta Estate, Pupuressa.

Thereafter, on 26th November 2007 the Court of Appeal took up for inquiry the motion dated 9th November 2007 filed by Timberlake IPLtd seeking further interim relief directing that the Forest Conservators to issue permits to enable Timberlake IPLtd to transport timber from blocks G, U, V, W and X of the pine plantation without any further payment of stumpage. The Court of Appeal, having heard submissions of learned Counsel, made the impugned order on 28th November 2007 holding *inter alia* that in terms of the Notification P1, the Conservator-General of Forests is empowered to prescribe the fees, royalties or other payments in respect of the collection of forest produce; that the royalty so prescribed in P1 for *pinus* timber is Rs. 500 per cubic meter; and that it is expressly provided in Article 148 of the Constitution that no public authority can impose taxes, rates or any other levy except by or under the authority of a law enacted by Parliament. Referring to submissions made by the learned Deputy Solicitor-General who appeared for the Forest Conservators, the Court observed as follows-

> "Learned DSG urged that stumpage fee is paid for the right to severe the trees from their stumps and to remove them from the forest. Thus, the learned DSG argued that the rules framed under Section 20(1) of the Forest Ordinance do not apply to the Petitioner and that stumpage fee is determined by the 1st Respondent as shown in P27.
>
> It is to be observed that when the status imposes a pecuniary burden on a citizen, it has to be interpreted on the basis of the language used therein, and according to the proper meaning and intent of the Legislature. Between a tax and a fee, there is no generic difference because in a sense both are compulsory extractions of money from a citizen. Such power of imposition of a tax or a fee must be very specific and there is no scope of implied authority for recovering such tax or fee. The 1st Respondent must act strictly within the parameters of the authority given to him under the Forest Ordinance and it will not be proper to bring the theory of implied intent or the concept of incidental or ancillary power in exercising such authority.

Accordingly the Court concluded that the rules framed under the existing law do not permit the Conservator-General of Forests to impose a stumpage fee that exceeds the royalty prescribed in P1, and that the stumpage fees set in P26, P27 and P29 was illegal, unreasonable and *ultra vires*. On this basis the Court of Appeal made order staying, until the final hearing and determination of the case, the operation of the letter of the Range Forest Officer, Nawalapitiya, dated 3rd August 2007 marked P28 purporting to suspend the issue of permits for the transport of pine timber, and further directed the Conservator-General of Forests and his subordinate officers to issue transport permits forthwith to enable Timberlake IPLtd to take away the timber already felled from blocks G, U, V, W and X of Plan Nos. 7115 and 7116 dated 22nd October 2002. It is this order of the Court of Appeal that is the subject matter of this appeal, in regard to which special leave to appeal has been granted.

The Question of Standing

In regard to the numerous questions on which special leave to appeal has been granted by this Court, it needs to be observed that there are two which are rather preliminary in nature, and should therefore be considered first. The first amongst them is the question of *locus standi*, which has been raised as question (j) in the following manner:

> (j) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the Petitioner could have maintained the application, as only the 4th Respondent-Respondent (Pussellawa PLtd) had standing in this matter, if any?

Learned Additional Solicitor General has submitted that since it was Pussellawa PLtd that had submitted a forestry management plan and obtained permission to harvest the forestry plantation in question, and since Timberlake IPLtd had entered the arena as a purchaser of the timber intended to be harvested on the basis of a purely commercial

relationship embodied in the Agreement dated 30th August 2004 (P9) which had been entered into between Pussellawa PLtd and Timberlake IPLtd, the latter had no legal standing to have and maintain the application filed in the Court of Appeal. The gist of his submission was that insofar as Pussellawa PLtd has agreed to pay the stumpage as stipulated by the Conservator-General of Forests, Timberlake IPLtd, being a mere purchaser of the trees, had no standing to question such arrangement.

Learned President's Counsel for Timberlake IPLtd has responded to these submissions by inviting the attention of Court to Clause 7(d) of the Agreement P9, wherein it is expressly provided that Timberlake IPLtd, as the purchaser of the *pinus* trees from the vendor, Pussellawa PLtd, should pay the "stumpage fees" to be stipulated for each block to the Conservator-General of Forest *through* Pussellawa PLtd. He also emphasized that as contemplated by clause 08 of the Agreement P9, on the very day P9 was executed, Pussellawa PLtd sent the letter dated 30th August 2004 (P10) to the Conservator-General of Forests informing him that Timberlake IPLtd has been authorized to deal with the Forest Department for and on behalf of Pussellawa PLtd "in relation to the subject matter of this Agreement". The following passage from the said letter is worthy of note:-

> "We confirm that Timberlake International Pvt Ltd, will, on our behalf, make to you the stumpage payment for each block, on your enumeration and will harvest each block only after such payment and your approval. *We also advise that we have authorized Timberlake International Pvt Ltd to act on our behalf directly with your Department in relation to any matters pertaining to the harvesting, removal and transportation of the said trees from Delta estate." (italics added)*

It will be seen that Timberlake IPLtd is not a mere purchaser of trees, and it has also been authorized to act on behalf of Pussellawa PLtd in relation to any matters pertaining to the harvesting, removal and transportation of the trees from Delta Estate. Apart from this, it is also relevant to note that the letter dated 3rd August 2007 (P28) by which the Range Forest Officer, Nawalapitiya intimated his decision to suspend the issue of permits for the transport of *pinus* timber was in fact addressed to the Site Manager, Timberlake IPLtd, and this is clearly because even the officials of the Forest Department were aware that any suspension of the issue of transport permits would directly affect the rights of Timberlake IPLtd.

Although the learned Additional Solicitor-General chose to argue the question of standing on first principles and did not cite any case law, he could easily have relied on the classic decision in *Durayappa v. Fernando* 69 NLR 265, in which the Privy Council held that the Mayor of a Municipal Council does not have standing to seek redress from the courts with respect to a legal wrong or injury caused to a Municipal Council. However, the Learned President's Counsel for Timberlake IPLtd has submitted that our law relating to *locus standi* has developed a great deal from the days of *Durayappa v. Fernando,* and in view of the liberal attitude towards standing adopted by the courts,

Timberlake IPLtd has standing to have and maintain the writ application filed by it. He submitted that the law has moved forward and become progressive, and relies on the following *dictum* of Lord Denning, in *R v Paddington Valuation Office* [1966] 1 QB 380-

> "The Court would not listen, of course to a mere busybody who was interfering in things which did not concern him. But it will listen to anyone whose interests are affected by what has been done. "

As H. W. R. Wade and C. F. Forsyth note in their celebrated work *Administrative Law* Ninth Edition, page 684, "prerogative remedies, being of a 'public' character as emphasized earlier, have always had more liberal rules about standing than the remedies of private law." Sri Lankan courts have shown an increasing willingness to open out their jurisdiction to whoever whose interests are affected by administrative action, and in *Premadasa v. Wijewardena and others* [1991] 1 Sri LR 333 at 343 Tambiah, C.J. observed that –

> "The law as to *locus standi* to apply for *certiorari* may be stated as follows: The writ can be applied for by an aggrieved party who has a grievance or by a member of the public. If the applicant is a member of the public, he must have sufficient interest to make the application."

There can be no doubt that Timberlake IPLtd is not a mere busy body, and its interests are indeed affected by the actions of the Forest Conservators. I therefore hold that Timberlake IPLtd had standing to invoke the jurisdiction of the Court of Appeal in regard to this matter, and proceed to answer question (j) in the negative.

Commercial Nature of the Transaction and its Amenability to Writ Jurisdiction

The other question which has the character of a preliminary objection is the question of the amenability of the transaction embodied in P9 to writ proceedings. This question takes the following form:

> (i) Did the Court of Appeal misdirect itself and err in law in failing to consider whether the transaction was amenable to writ jurisdiction?

The main thrust of the submissions of the learned Additional Solicitor-General on this question was that since the transaction between Pussellawa PLtd and Timberlake IPLtd was purely commercial in nature, it was not amenable to the writ jurisdiction of the Court of Appeal. In other words, this contract was in the realm of private law and did not attract public law remedies such as the writ of *certiorari* or *mandamus*. As against this, learned President's Counsel for Timberlake IPLtd has pointed out that neither the Conservator-General of Forests nor any other governmental agency was party to the Agreement P9 which has been an agreement between Pussellawa PLtd and Timberlake IPLtd only, and that as far as the Forest Department is concerned, there has been absolutely no contractual nexus. This is not entirely correct, since as learned Additional

Solicitor General has ventured to stress, the Conservator-General of Forests is entitled, under our common law principle of *stipulatio alteri*, to benefit from any stipulation contained in a contract between two other persons. As Keuneman, J. observed in *De Silva v Margaret Nona* 40 NLR 251 at page 253, a person is "entitled under the Roman-Dutch law to enforce by action the pact in his favour, although he was not one of -the contracting parties (*vide* ***Perezius on Donations, Bk. VIII; tit. 55,*** s, 5)." Learned Presdient's Counsel for Timberlake IPLtd, has however contended that the writ application from which this appeal arises was filed by Timberlake IPLtd in the Court of Appeal to challenge the validity of the "stumpage fee" sought to be levied by the Conservator-General of Forests on the basis that it was far in excess of the royalty that can be lawfully levied in terms of the Notification bearing No. 1303/17 dated 28th August 2003 (P1) made by the Conservator-General of Forest, and the wrongful action taken by the Range Forest Officer, Nawalapitiya to suspend the issue of transport permits to take out the harvested timber.

As Wade and Forsyth observe in their work *Administrative Law* Ninth Edition, page 668 "contractual and commercial obligations are enforceable by ordinary action and not by judicial review." While this principle is illustrated by many judicial decisions such as *University Council of Vidyodaya University v. Linus Silva* 66 NLR 505, which have had the effect of excluding contractual disputes from the pale of judicial review through prerogative remedies, our courts have nevertheless provided relief through prerogative remedies in statutory contexts where the contractual or commercial character of a particular transaction is overshadowed by some administrative or regulatory malady that needs to be remedied.

In the writ application filed by Timberlake IPLtd, what was sought to be remedied are the allegedly wrongful actions of the Conservator-General of Forests and his subordinates in the context of their regulatory functions. The writ application from which this appeal arises was filed by Timberlake IPLtd in the Court of Appeal to challenge the validity of the "stumpage fee" sought to be levied by the Conservator-General of Forests on the basis that it was far in excess of the royalty that can be lawfully levied in terms of the Notification bearing No. 1303/17 dated 28th August 2003 (P1) made by the Conservator-General of Forest, by virtue of power vested in him under Regulation 52 of the Forest Regulations No. 1 of 1979 and Rule No. 20 of the Forest Rules, No. 1 of 1979. The writ application was prompted by the action taken by the Range Forest Officer, Nawalapitiya by his communication dated 3rd August 2007 (P28), which had the effect of suspending the issue of transport permits for the transport of the harvested timber which was required in view of the provisions of Section 25 of the Forest Ordinance read with Regulation 2 of the Forest Regulations, No. 01 of 2005 made by the Minister of Environment and Natural Resources in terms of Section 24 of the Forest Ordinance and published in the Gazette Extraordinary bearing No. 1380/30 dated 18th February 2005. Since, *pinus* timber has not been specifically excluded by Column II of the Schedule to the said Regulation, the transport of the harvested timber without a permit, out of the Administrative District of Kandy, within which Delta

Estate is situated, was a punishable offence. In all these circumstances, I have no doubt that the Court of Appeal did not misdirect itself or err in law in seeking to exercise its beneficial writ jurisdiction in the circumstances of this case, and therefore answer question (i) in the negative.

Authority to Recover Stumpage

Questions (a) to (e) upon which special leave to appeal has been granted by this Court relate to the alleged authority of the Conservator-General of Forests to charge and recover "stumpage" for the *pinus* timber sold by Pussellawa PLtd to Timberlake IPLtd by the Agreement marked P9. It has been contended by the learned Additional Solicitor-General that the *pinus carribaea* forestry plantation in Delta Estate, Pupuressa is State owned, and was in any event not included in the extent of land leased out by the JEDB to Pussellawa PLtd by the Indenture of Lease bearing No. 61 dated 5th November 1993 (P2). He submitted that as explicitly stated in the letter dated 19th March 2004 sent by the Director of the Plantation Management Monitoring Division of the Ministry of Plantation Industries with copy to the Managing Director of Pussellawa PLtd, the *pinus* trees of the said plantation "were planted by the Forest Department in the early 80s, whilst the estate was under the management of JEDB".

Learned Additional Solicitor-General has submitted that the "stumpage" in question was claimed in terms of the provisions of the Agreement (P9) entered into between Pussellawa PLtd and Timberlake IPLtd, Clause 7 (d) of which contemplated the payment of such "stumpage" to the Conservator-General of Forests as the trees in question from which the timber was produced belonged to the State. He stressed that the Notification bearing No. 1303/17 dated 28th August 2003 (P1) had no application in this case, and in any event, the Forest Conservators were not bound in law to compute "stumpage" on the basis of the rates set out in the said notification. He argued with great force that the "stumpage" claimed by the Forest Department was distinguishable from "royalty" chargeable in terms of P1 which he stressed was not applicable to the matter in dispute in this appeal. He submitted therefore that the Court of Appeal had misdirected itself and erred in law in its interpretation of the scope and objective of P1 and had misdirected itself in holding that the Conservator-General of Forests was bound by it in giving effect to Clause 7(d) of P9.

Learned President's Counsel for Timberlake IPLtd contested the position that the forestry plantation in Delta Estate belonged to the State, and pointed out that in the recital to the Agreement (P9) for the sale of the pine trees in question it was expressly stated that Pussellawa PLltd "is the title holder and is well and sufficiently seized and possessed of or otherwise well and truly entitled to the *pinus carribaea* cultivation at Delta Estate in Pupuressa and containing in extent 74.15 hectares". He submitted that even if the trees had been planted by the Forest Department, the common law principle encapsulated in the maxim *superficies solo cedit* (Gaius, II.73) had the effect of conferring the ownership of the trees to the owner of the land, that "stumpage" is a proprietary

charge available by virtue of ownership of the trees, and in the absence of such ownership, the only payment the Conservator-General of Forests and his subordinates are entitled to is the "royalty" computed at the rate of Rs. 500 per cubic meter applicable to Class II Timber under the Notification P1. Learned President's Counsel for Timberlake IPLtd submitted with great respect that the Court of Appeal was correct in holding that "stumpage" sought to be recovered from Pussellawa PLtd is in essence a compulsory extraction of money by the State which in terms of Article 148 of the Constitution, can only be imposed under the authority of a valid law. Accordingly, he argued that the much higher rates of "stumpage" claimed by the Forest Conservators is *ultra vires* the powers of the said Conservators, and that the decision to suspend the issue of permits for the transport of pine timber harvested under and by virtue of the Agreement (P9) by Timberlake IPLtd from the said forestry plantation, is unlawful.

The most fundamental issue this Court has to address is in regard to the nature and character of the stumpage fee sought to be recovered by P26, P27 and P29. An important question in this context is whether "stumpage", which is not mentioned anywhere in the Forest Ordinance or in any regulation made thereunder, is in essence a tax, as contended by Timberlake IPLtd., or a proprietary charge sought to be imposed under a contract, as urged by the Appellants. Learned Additional Solicitor-General for the Appellants submitted that "stumpage" is a payment made to the owner of the forest land, irrespective of whether it is State owned or owned privately, as the consideration for purchase of the timber. He has invited the attention of Court to the following passage from William A. Leuschner's work *Introduction to Forest Resource Management* page 67:

> "Stumpage is defined as the trees, standing on the forest, unsevered from their stumps. The stumpage price is the price paid for the right to sever the trees from their stumps and remove them from the forest. Stumpage is valued by estimating its market value."

No doubt, this is in accord with the natural meaning of the term "stumpage" which has been defined in *Black's Law Dictionary*, 6th Edition at page 1424, as "the sum agreed to be paid to an owner of land for trees standing (or lying) upon his land." It is essentially in this sense that the word "stumpage" has been used in the legislation and regulations of other jurisdictions where forest resources have been prudently managed and carefully exploited. For instance, Section 2(q) of the Nova Scotia Crown Lands Act. R.S., c. 114, s. 1, provides that "stumpage" means "the amount….which is payable to the Crown for timber harvested on Crown lands", and the New York Environmental Conservation Law § 71-0703, Section 6 (c) defines "stumpage value" as the "current fair market value of a tree as it stands prior to the time of sale, cutting, or removal." While it is clear from the foregoing that "stumpage" is a proprietary charge and not a tax, it must also be remembered that stumpage payments can also give rise to tax liability, as for example, under Section 5 of the New York Real Property Tax Law, § 480-A, which imposes a tax

of 6 per centum of the "certified stumpage value of the merchantable forest crop" proposed to be felled by the owner of the forest land.

Learned President's Counsel for Timberlake IPLtd has submitted that only an owner of the trees is entitled to claim stumpage, and has argued with great force that the fee sought to be recovered by P26, P27 and P29 cannot be regarded as a proprietary "stumpage fee" as the forest plantation from which the timber was cut belongs to Pussellawa PLtd., and not to the State. Unfortunately, Timberlake IPLtd which filed HC WA Application No. 07/06 in the High Court of the Western Province, jointly with Pussellawa PLtd, has chosen not to file the application from which this appeal arises in the Court of Appeal jointly with Pussellawa PLtd, and instead cited the latter as a Respondent. While Pussellawa PLtd had no opportunity of filing objections in the Court of Appeal, it has not appeared before this Court at any stage in the course of this appeal, though noticed. While the learned President's Counsel for Timberlake IPLtd has heavily relied on the recital in P9 which claims that Pussellawa PLtd is the title holder to the *pinus carribaea* cultivation at Delta Estate, the learned Additional Solicitor-General has submitted that the Conservator-General of Forests and the State, not being parties to the said Agreement, cannot in law be bound by it. The question arises as to what extent the State can disassociate itself from the statement regarding title found in P9 while at the same time claiming the benefit of the "stumpage fee" stipulated therein.

However, it is not necessary to answer this question as it is manifest from the early correspondence such as P7 which led to the Agreement P9 and the provisions of Clause 7(d) and (e) of the Agreement P9 itself that the arrangement to pay stumpage is in effect an acknowledgement of State title to the said plantation and its trees. It is significant that the "stumpage fee" sought to be recovered has been claimed in terms of clauses 7(d) and (e) of the said Agreement, which are quoted below:

> "The *consideration for the sale* of the aforesaid trees shall be paid by the Purchaser (Timberlake IPLtd) to the Vendor (Pussellawa Pltd) in the following manner:
>
> (a)……
>
> (b)……
>
> (c)…….
>
> (d) The purchaser agrees to also pay the *stumpage fees* as stipulated by the Conservator-General of Forests for *each block*, prior to the harvesting of each block. *The purchaser will pay such stumpage fees through the vendor*."
>
> (e) *Balance consideration* will be paid by the Purchaser to the Vendor in the following manner:

> The purchaser shall proceed with the harvesting and the removal of the said trees from *each block* after the confirmation of payment of stumpage fees to the Forest Department for each block by the purchaser. A copy of the receipt of payment of stumpage will be handed over to the vendor by the purchaser and the purchaser shall proceed to harvest and remove the said trees within fourteen (14) days from date hereof." *(italics added by me)*

It is clear from the above quoted clauses of the Agreement that the "stumpage fee" was envisaged as *part of the consideration* for the sale of the trees in question, and it is also noteworthy that the said clauses sought to create a *contractual obligation* on the part of Tiberlake IPLtd to pay to the Conservator-General the stumpage fees for *each block* to be stipulated by him. I am firmly of the opinion that Timberlake IPLtd, which has agreed to these clauses and to the stipulation for the payment of stumpage fees, cannot now rely on the recital in the said Agreement to dispute the title of the State to the timber in question. It is trite law that where a recital to a contract is in conflict with one or more of its operative clauses, the operative clause or clauses will override the recital. *See, Senathiraja v Brito* 4 C. L. Rec. 149; *Kumarihamy v. Maitripala* 44 NLR 153. In fact, the conduct of the parties in the course of implementing the Agreement P9 and the settlement reached by the parties in the Provincial High Court based on the terms contained in the letter in reply dated 27th July 2006 (P22) would appear to be rational only if one assumes that the forestry plantation in question as well as its produce belonged to the State or a State agency. Such an assumption will be consistent with the presumption contained in Section 52 of the Forest Ordinance that in proceedings taken under the said Ordinance or in consequence of anything done under the Ordinance any "timber or produce shall be presumed to be the property of the Crown until the contrary is proved."

It is also important to observe in this context that it appears from the order dated 15th February 1982 made by the Minister of Agricultural Development and Research under Section 27A read with Section 42H of the Land Reform Law No. 1 of 1972, as subsequently amended, and published in the Gazette bearing No. 183/10 dated 12th March 1982, that the entirety of Delta Estate in extent 724.94 hectares was vested thereby in the JEDB. It needs to be mentioned that a copy of the said Gazette was made available to this Court marked X4, only with the written submissions of the Conservator-General of Forests, but since it is a public document this Court takes judicial notice thereof. However, it is relevant to note that under the Indenture of Lease bearing No. 61 (P2), JEDB leased out to Pussellawa PLtd only an extent of 639.8 hectares out of the extent of 724.94 hectares of the said Estate. It is evident from the Schedule to the said Indenture of Lease that the discrepancy in the land extent was caused by the exclusion from the purview of the lease, "the land given to the Forest Department and Janasaviya project". It is therefore manifest that the *pinus carribaea* forest plantation from which Timberlake IPLtd is seeking to remove the timber in question, in fact belongs to the JEDB. The reference to the Forest Department in the said Schedule also gives credence to the assertion made by the Director of the Plantation Management

Monitoring Division (PMMD) of the Ministry of Plantation Industries in his letter dated 19th March 2004 (P6) addressed to the Conservator-General of Forests with copy to Pussellawa PLtd that the *pinus* trees in question were "planted by the Forest Department in the early 80s". Even if the principle embodied in the maxim *superficies solo cedit* is applied to this situation, the resulting position would be that the pine trees belong to the JEDB, which is a State agency, and not to Pussellawa PLtd as asserted by Timberlake IPLtd.

However, learned President's Counsel for Timberlake IPLtd has contended that the only provision of law that authorizes the imposition of any levy to remove trees from their stumps in any reserved forest is Section 8(3) of the Forest Ordinance, and that in the case of a forest which is not a reserved or village forest, similar powers have been conferred by Section 20(1)(h) of the Forests Ordinance. He has submitted that the Notification marked P1 has been issued pursuant to Regulation 5(2) of the Forest Regulations No. 1 of 1979 and Rule No. 20 of the Forest Rules No. 1 of 1979 framed in terms of the aforesaid sub-sections of the Forest Ordinance, and by the said Notification the royalty for various types of timber has been prescribed, but there is no provision therein to charge "stumpage fees", or any other such levy. It is his contention that in view of Article 148 of the Constitution, which precludes the imposition of any tax rate or any other levy "except by or under the authority of a law passed by Parliament or of any existing law", the Conservator-General of Forests cannot in law demand any payment for the felled *pinus* trees in excess of Rs. 500 per cubic meter, which is the applicable royalty for Class II timber under the said Notification. He has further submitted that even if it be the case that the "stumpage" fee sought to be recovered by P26, P27 and P29 is proprietary in nature, still the amount that can be recovered cannot exceed Rs. 500 per cubic meter in view of P1.

It is therefore necessary to examine at the outset whether there is statutory authority to charge a "stumpage fee", particularly with respect to timber harvested from the *pinus carribaea* forestry plantation at Delta Estate. In the absence of any material to show that the said forestry plantation was part of a reserved forest, and in view of the uncontradicted averment in paragraph 5 of the Petition filed by Timberlake IPLtd in the Court of Appeal that the said forestry plantation has not been declared as a village forest under Section 12 of the Forest Ordinance, it is safe to presume that the said forestry plantation is governed by the Forest Rules, No. 1 of 1979, which apply to "forests not included in a reserved or village forest". It is important to note that the said Rules seek to prohibit or regulate activities such as felling, cutting, girdling, lopping, tapping, sawing, converting, damaging, collecting, removing and transporting trees or forest produce in *any forest not being a reserved forest or village forest.* The Rules also authorize such activity to be carried out in accordance with the conditions of a permit (Rule 7) and also allow villagers to *collect* "dead or fallen sticks"(Rule 19) or other forest produce in certain circumstances. In the Notification P1, the Conservator-General of Forests has prescribed the royalty for various types of timber and other forest produce

as a rate per cubic meter or kilogram, and at the very end of the notification it is stated that-

> "The Royalty rates given above are a privilege *allowed to the villagers* who have the *rights of collection* of these materials from the forests."

It is obvious that the royalty rates set out in P1 are *ex facie* not applicable to the transaction relevant to this appeal, as Timberlake IPLtd and Pussellawa PLtd have been involved in the commercial felling of *pinus* trees, and neither of these companies can claim any privilege conferred to villagers who have the right of collection of timber produce from the forest under the said Forest Rules. The rates of royalty prescribed in P1 are clearly inapplicable to the commercial exploitation of timber of the magnitude envisaged by P9.

It is also significant to note that the Forest Rules No. 1 of 1979 have been framed under Section 20(1)(h) of the Forests Ordinance, which *inter alia* empowers the Minister to make rules to-

> "h) prescribe, or *authorize any forest officer to prescribe*, subject to the sanction of the Minister, *the fees, royalties, or other payments* for such timber or other forest produce, and the manner in which such fees, royalties or other payments shall be levied whether in transit, partly in transit or otherwise." *(Italics added)*

It is noteworthy that Rule 20 of the Forest Rules No. 1 of 1979, provides as follows:-

> "The Conservator-General of Forests may, with the sanction of the Minister, *prescribe the fees, royalties, or other payments* in respect of the collection of forest produce and the manner in which such fees, royalties or other payment shall be made."

In terms of Regulation 3 read with the Schedule of the Forest Regulations, No. 4 of 1979 published in the Gazette Extraordinary bearing No. 68/14 dated 26th December 1979, the power to prescribe fees, royalties and other payments as specified in Section 20(1)(h) of the Forests Ordinance has been conferred on the Conservator-General of Forests as well as on the Deputy Conservators-General of Forests and the Senior Assistant Conservators-General of Forests.

The fact that in the Notification P1 the Conservator-General of Forest has prescribed royalty that can be recovered from villagers who have the right to collect forest produce as a matter of privilege, does not preclude him from seeking to prescribe *other payments* in accordance with the procedure laid down by law for this purpose. Although neither the Forest Ordinance nor any regulation or rule made thereunder contain any provision as to how any such fees, royalties or other payments may be prescribed, by the Conservator-General of Forests, it is expressly laid down in Section 2(f) of the Interpretation Ordinance No. 21 of 1901 as subsequently amended, that in "every

written law, whether made before or after the commencement of this Ordinance, unless there be something repugnant in the subject or context, "prescribed" shall mean prescribed by the enactment in which the word occurs or *by any rule, regulation, by-law, proclamation or order* made thereunder". It is in this connection, necessary to consider whether the method by which the royalty was prescribed in the Notification P1 has necessarily to be followed in stipulating "stumpage fees" as contemplated by Clause 7(d) and (e) of the agreement marked P9.

It is clear from Section 2(f) of the Interpretation Ordinance that where anything that could lawfully be prescribed is not prescribed in the relevant enactment itself, then it may be prescribed *by any rule, regulation, by-law, proclamation or order* made thereunder. This provision has to be understood in the context of Section 17(1)(e) to (f) and 17(2) of the Interpretation Ordinance which are quoted below :

> 17 (1) Where any enactment, whether passed before or after the commencement of this Ordinance, confers power on any authority to make rules, the following provisions shall, unless the contrary intention appears, have effect with reference to the making and operation of such rules :-
>
> (a) to (d) …….
>
> (e) all rules shall be published in the Gazette and shall have the force of law as fully as if they had been enacted in the enactment of the Legislature; and
>
> (f) the production of a copy of the Gazette containing any rule, or of any copy of any rule purporting to be printed by the Government Printer, shall be prima facie evidence in all courts and for all purposes whatsoever of the due making and tenor of such rule.
>
> (2) *In this section the expression "rules" includes rules and regulations, regulations, and by-laws*. (*italics added)*

Applying the above provisions to the question of the method by which stumpage fees may be prescribed, it is very clear that if they are prescribed by regulations, rules, or by-laws, such regulations, rules and by-laws must be published in the Gazette. However, if such stumpage fees are to be prescribed by a *mere order* made by the Conservator-General of Forests, his deputy or senior assistant, as contemplated by Section 2(f) of the Interpretation Ordinance, then the requirement of publishing the same in the Gazette would not apply.

Accordingly, it may be concluded that the stumpage fees stipulated in the letters of the Conservator-General of Forests in marked P26, P27 and P29 as contemplated by Clause 7(d) and (e) of the Agreement P9, have been lawfully enumerated, computed and prescribed as a proprietary charge based on the value of the timber. In this context it is useful to refer to the recent decision of the Court of Appeal for Ontario in *Boniferro Mill*

Works ULC v. Ontario [2009] ONCA 75 in which an argument similar to the one made in this case by Learned President's Counsel for Timberlake IPLtd was made to the effect that even a proprietary charge may in essence be a tax. That was an appeal from a decision of the Superior Court of Justice holding that a charge imposed on timber based on the value of timber in terms of the Crown Forestry Sustainability Act, 1994, S.O. 1994, c. 25 is a tax. In arriving at this decision, the Superior Court of Justice was influenced by the decision of the Supreme Court of Canada in *Canadian Industrial Gas & Oil Ltd. v. Government of Saskatchewan*, [1978] 2 S.C.R. 545 *(CIGOL)* holding that a royalty surcharge was in effect a tax. In overruling the decision of the Superior Court of Justice, the Court of Appeal for Ontario stressed the proprietary nature of the impugned charge. Justice MacFarland, J.A. sought to distinguish the Canadian Supreme Court decision in *CIGOL* by pointing out that in that case the court was concerned with a royalty surcharge, imposed not only on those producers who had existing leases with the Crown but also on those who were producing on private lands and whose rights in that regard were expropriated by the same legislation. Justice MacFarland had no doubt that proprietary charges are different from regulatory charges or taxes, and quoted the following *dicta* of Rothestein, J. in *620 Connaught Ltd. v. Canada (Attorney General)*, [2008] S.C.C. 7 at para. 49:

> "I agree that proprietary charges for goods and services supplied in a commercial context are distinct from either regulatory charges or taxes and may be determined by market forces. As explained by Professor Hogg in *Constitutional Law of Canada* (5th ed. 2007) at pp. 870-71:
>
> > "Proprietary charges are those levied by a province in the exercise of proprietary rights over its public property. Thus, a province may levy charges in the form of licence fees, rents or royalties *as the price for the private exploitation of provincially-owned natural resources;* and a province may charge for the sales of books, liquor, electricity, rail travel or other goods or services which it supplies in a commercial way."

Though the provincial context of the above quoted *dicta* may not fit the Sri Lankan scenario, they are of immense persuasive value in understanding the nature and character of a "stumpage fee" such as the one stipulated by the orders of the Conservator-General of Forests in the letters P26, P27 and p29 as contemplated by Clause 7(d) and (e) of P9, which is entirely proprietary in nature, and for the purpose of distinguishing such a fee from a revenue measure that may be imposed as a levy on timber or other forest produce harvested from a private forest. I am of the opinion that since the stumpage fee is not such a levy, its quantum is not subject to the rates specified in the Notification P1, and Article 148 of the Constitution has no relevance. I therefore, hold that the Court of Appeal of Sri Lanka misdirected itself in this case in failing to appreciate the proprietary nature of the said stumpage fee and the vital distinction between a proprietary charge and a tax or other revenue levy.

Learned President's Counsel for Timberlake IPLtd has not been able to cite any provision of the Forest Ordinance or any regulation or rules made there under that may not have been complied with in determining the aforesaid stumpage fee, nor did he take up the position that the stumpage fees in question had been prescribed without the sanction of the relevant Minister. In my opinion, the rates of royalty set out in P1 cannot, and were not intended to, apply to a commercial exploitation of the forest plantation by an export oriented company, and there is nothing in the Forest Ordinance and the regulations and rules made there under which render the stumpage fees sought to be charged on the basis of a commercial transaction such as Clause 7(d) and (e) of the Agreement P9 *ultra vires* the powers of the Conservator-General of Forests. This position is buttressed by the relevant budget estimates tendered by the Additional Solicitor General, which specify under the "Non-Tax Revenue" category that the Forest Conservator is the Revenue Accounting Officer for "Rent on Crown Forests" (vide Code 20.02.10.02). The Sinhala version of the budget estimates, which use the phrase "rcfha le,E j,ska Wmhk wdodhu", clearly shows that the word "rent" in the English version is used in the sense of revenue or income

Accordingly, I answer questions (a) to (e) on which special leave to appeal has been granted in the affirmative, and hold that the Court of Appeal has misdirected itself and erred in law in its interpretation of the scope and objective of the notification P1, in deciding that the Conservator General of Forests was bound by it, to charge stumpage fees in accordance with it. I am of the opinion that the Court of Appeal misdirected itself and erred in law by failing to consider the fact that the *pinus* forestry plantation at Delta Estate was planted and maintained by the Forest Department since the 1980s. I also hold that the Court of Appeal misdirected itself and erred in law in failing to consider that by its decision that the Conservator-General of Forests had no authority to charge the stumpage fees, it nullified the transaction in P9 in so far as it related to the stumpage fees referred to in Clause 7(d) and (e) which constituted part of the consideration for the said transaction.

Conduct of Timberlake IPLtd

Questions (f) to (h) and (k) relate to the conduct of Timberlake IPLtd in relation to the matters that are relevant to the application for the writs of *certiorari* and *mandamus* filed by it in the Court of Appeal. They are of great relevance because such writs, being prerogative remedies, are not issued as of right, and are dependent on the discretion of court. It is trite law that such discretionary relief may be withheld where a party has "disentitled himself to the discretionary relief by reason of his own conduct"(*per* Sharvananda, J. in *Biso Menika v Cyril de Alwis* [1982] 1 Sri LR 368 at page 377). A party seeking prerogative relief must come to court "with clean hands"(*ibid.,* page 381) and the sanction for the failure to do so is the dismissal *in limine* of the application for relief without going into the merits of the case. *See, Alphonse Appuhamy v. Hettiarachchi,* 77 NLR 131. As Bandaranayake, J. observed in *Finnegan v. Galadari Hotels (Lanka) Ltd.*,

[1989] 2 Sri LR 272 at page 278, this is a "rule based on public policy designed to prevent abuse of procedure of court when court was dealing with a matter *ex parte*."

Timberlake IPLtd derives its right to harvest timber from the Agreement P9 which it has entered with Pussellawa PLtd, and in fact has stepped into "its shoes" in its dealings with the Forest Department. It is necessary to observe that the forestry plantation from which the timber was harvested belonged to the JEDB, which is an agency of the State, though Pussellawa PLtd had stated the contrary in a recital to P9. Furthermore, it appears from Clause 2(a) of the Indenture of Lease marked P2 that the rent paid by the Pussellawa PLtd for the lease of the tea plantation of Delta Estate was a meager Rs.500 per annum for the entire 639.8 hectares (which did not include the forestry plantation in question). It would have been inimical to all notions of justice, and a substantial loss of revenue for the State, if this paltry sum could be said to permit Pussellawa PLtd to dispose of extremely valuable *pinus* timber, without any consideration of the fact that these plantations were made and maintained by the Forest Department using public funds. This in fact is the justification for the imposition of the stumpage fees in question.

This Court is not unmindful of the fact that Timberlake IPLtd has paid substantial amounts of money to Pussellawa PLtd to acquire the right to harvest the timber, and the payment of stumpage fees to the Conservator-General of Forests was only part of the consideration. Unfortunately, in my opinion, the conduct of Timberlake IPLtd, has fallen short of what is expected of a deserving litigator seeking prerogative relief. After entering into the Agreement P9 in which it expressly agreed with Pussellawa PLtd to pay the entire stumpage fee on the basis of actual enumerated volume of timber *prior to harvesting* (clause 7(d) of P2), it questioned the "interim payment" of Rs. 1,616,727.50 claimed by the Conservator-General of Forest by P17 with respect to block 01R and delayed the payment of the full stumpage fee based on actual volume amounting to Rs. 7,640,670.97 (*vide supra* Table V) with respect to the said block, even after removing the timber from the forest plantation. When by P18, the felling of trees was sought to be suspended, it joined hands with Pussellawa PLtd to challenge that decision in HC WA Application No. 07/06 filed in the High Court of the Western Province. After settling this case on the basis of certain and clear terms, it went back on the settlement, and filed the writ application in the Court of Appeal from which this appeal arises, again challenging the legality of the stumpage fees which it had expressly agreed to pay not only in the Agreement P9 but also in the settlement reached in the High Court. As Scrutton, L.J. observed in *Verschures Creameries v. Hull & Netherland Steamship Co. Ltd.* [1921] 2 KB 608 at 612)-

> "A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. This is to approbate and reprobate the transaction."

In *Visuvalingam v. Liyanage* [1983] 1 Sri LR 203 at page 227, Samarakoon, C.J. using more descriptive language to bring home the essence of denying parties the freedom to "approbate and reprobate", commented that one "cannot blow hot and cold." As Sharvananda, C.J. observed in *Ranasinghe v. Premadharma* [1985] 1 Sri LR 63 at page 70, the concept has "stood the test of time and has been accepted as part of our law."

Based on its own prior performance, the well established principles of estoppel applied in the context of basic principles of contract law, would deem Timberlake IPLtd as being barred from claiming relief in a manner that is starkly opposite to its manner of conduct at prior times and from which it gained pecuniary and other benefits. There is in effect a legitimate expectation created not only in the other party to the contract, namely Pussellawa PLtd, but also in the Conservator-General of Forests on whose behalf the stipulations contained in Clause 7(d) and (e) of the Agreement P9 were made, that Timberlake IPLtd has wholly accepted the contractual obligations as well as subsequent undertakings such as those flowing from the settlement reached in connection with the matter before the High Court of the Western Province, and intends to act accordingly. This court cannot in its binding commitment to doing equity deny the realization of such rights.

In addition to the conduct described above, which itself demonstrates the lack of *bona fides* in Timberlake IPLtd's conduct, I find it has also misrepresented material facts in its Petition to the Court of Appeal. It is trite law that any person invoking the discretionary jurisdiction of the Court of Appeal for obtaining prerogative relief, has a duty to show *uberrima fides* or ultimate good faith, and disclose all material facts to this Court to enable it to arrive at a correct adjudication on the issues arising upon this application. As observed previously, even though the Petition in paragraph 44 seeks to demonstrate a difference in the stumpage charged in respect of Blocks 01A, 01B, 01C, 17Q, 04D, 06F and 16P (vide Table III), the change in the aggregate stumpage charged is due to the difference in the volume of timber and not the rate charged. This is evident on a perusal of Table IV included in this judgement above. Timberlake IPLtd has sought to portray in its Petition to the Court of Appeal a difference due to the actual volume of timber extracted as an arbitrary change of rate, which is altogether misleading. Furthermore, the fact that Timberlake IPLtd did not go back to the High Court despite alleging a reneging on the settlement reached before that court further undermines its *bona fides*. In my considered opinion, the circumstances outlined above alone would be sufficient to disentitle Timberlake IPLtd to any discretionary relief, even if it was otherwise entitled to such relief.

I therefore hold that questions (f), (g), (h) and (k) must be answered in the affirmative. I am of the opinion that the Court of Appeal has misdirected itself and erred in law in failing to consider whether Timberlake IPLtd can be permitted to approbate and reprobate and go back on its obligation to pay stumpage fees as stipulated by the orders of the Conservator-General of Forests in the letters P26, P27 and P29 as contemplated by Clause 7(d) and (e) of the Agreement P9. It is also my considered opinion that the

Court of Appeal misdirected itself and erred in law in failing to consider whether Timberlake IPLtd was entitled to invoke the writ jurisdiction of the Court of Appeal, having settled HC WA Application No. 07/07 in the High Court of the Western Province on 28th July 2006, in a manner grossly inconsistent with the said settlement. I also hold that the Court of Appeal misdirected itself and erred in law in failing to consider the serious lack of *uberrima fides* on the part of Timberlake IPLtd. In my considered opinion, the conduct of Timberlake IPLtd in this case has been such that it was not entitled to any form of discretionary relief, and in all the circumstances of this case, the Court of Appeal should have dismissed its application *in limine*.

Conclusion

For the aforementioned reasons, I answer questions (i) and (j) on which special leave to appeal was granted in the negative, and questions (a) to (h) and (k) in the affirmative. Accordingly, I allow this appeal and vacate the order of the Court of Appeal dated 28th November 2007, and further hold that the application filed by Timberlake IPLtd in the Court of Appeal should stand dismissed. I do not make an order for costs, in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.

I agree

JUDGE OF THE SUPREME COURT

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

1. W.A. Fernando,
"Milan Christina",
Thoduwawe South,
Thoduwawe.

2. W.J.E. Fernando,
C/o.K.A. Newton Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya, alpitiya.

3. W.R. Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya

4. W.J.W. Fernando,
"Nuwan",
Thoduwawe North,
Thoduwawe.

-Substituted Plaintiffs-

S.C. Appeal No. 81/09

Vs.

1. W. Francis Fernando,
"Sameera",
No. 588/1, Pitipana North,
Pitipana.

2. M. Dona Mary Jeanette Muriel Francis,
No. 238, Embaraluwa,
Weliweriya.

- Defendants -

And between

1. W.A. Fernando,
"Milan Christina",
Thoduwawe South, Thoduwawe.

2. W.J.E. Fernando,
C/o.K.A. Newton Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya, Kalpitiya.

3. W.R. Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya

4. W.J.W. Fernando,
"Nuwan",
Thoduwawe North, Thoduwawe.

-*Substituted Plaintiff Appellants*

Vs.

1. Francis Fernando,
"Sameera",
No. 588/1, Pitipana North,
Pitipana.

2. Dona Mary Jeanette Muriel Francis,
No. 238, Embaraluwa,
Weliweriya.

- *Defendant Respondentss*

And now between

1. W. Francis Fernando,
"Sameera",
No. 588/1, Pitipana North, Pitipana.

2. Dona Mary Jeanette Muriel Francis,
No. 238, Embaraluwa,
Weliweriya.

- *Defendants Respondents Appellants-*

Vs.

1. W.A. Fernando,
"Milan Christina",
Thoduwawe South, Thoduwawe.

2. W.J.E. Fernando,
C/o.K.A. Newton Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya.

3. W.R. Fernando,
"Milan Christina Wadiya",
Close to the Fisheries Corporation,
Kandakuliya,
Kalpitiya

4. W.J.W. Fernando,
"Nuwan",
Thoduwawe North,
Thoduwawe.

-Substituted Plaintiff Appellants-Respondents-

Before J.A.N. de Silva, C. J.

K.Sripavan, J.

S.I. Imam, J.

Counsel : Sanjeewa Jayawardane for the Defendants-Respondents-Appellants.

Ms. Chamantha Weerakoon Unmboowe for the substituted Plaintiff-Appellant-Respondents

Argued on : 09.02.2010

Written Submissions
Filed on : 15.03.2010

Decided on : 30.04.2010

SRIPAVAN. J.

When this appeal was taken up for hearing on 9th February 2010, Learned Counsel for the substituted-Plaintiff-Appellants-Respondents (hereinafter referred to as the Respondents) took up a preliminary objection to the effect that the Defendants-Respondents –Appellants (hereinafter referred to as the Appellants) had failed to serve a copy of their written submissions on the Respondents as required by Rule No. 30(6) of the Supreme Courts Rules 1990 and that the Appellants' appeal should be dismissed *in limine* in terms of Rule 34 thereof.

It is not in dispute that five copies of the Appellants' written submissions were duly lodged in the Registry of this Court on 4th August 2009, in terms of Rule 30(1), read with Rule 30(6). However, the only matter to be considered is whether the Appellants' failure to serve the said written submissions on the Respondents would amount to a failure to exercise due diligence as provided in Rule 34.

It is a well known principle in the construction of the Rules, that effect must be given to the language irrespective of the consequences. No doubt when the intention is clear it must unquestionably be so construed in order to achieve the result which has been manifested in express words. One of the tests for determining the nature of a Rule is to see whether it entails any penal consequences and in cases where the disobedience of a Rule carries a sanction it could safely be said that said rule is mandatory. In the case of Rules framed by Court for regulating its own procedure, I am of the view that one should look for a greater degree of reasonableness and fairness.

It should be borne in mind that Rule 30(1) mandates that no party to an appeal shall be entitled to be heard unless he has previously lodged five copies of his written submissions complying with the provisions of this Rule. Rule 30(5) further provides that submissions not in substantial compliance with the "foregoing provisions" may be struck out by the Court, whereupon such party shall not be entitled to be heard.(emphasis added)

The use of the words "foregoing provisions" in Rule 30(5) by necessary implication shuts out imposition of any sanction in the subsequent provisions to Rule 30(5). (emphasis added). In the event of non-compliance of the said provisions of the Rules, the only sanction imposed by Rule 30(1) is that such party shall not be entitled to be heard. However, in an appropriate case, the Court may consider the dismissal of an appeal or application under Rule 34 for failure to show due diligence in prosecuting the appeal or application.

In this appeal, both Counsel agreed that the Appellants have lodged their written submissions within six weeks of the grant of Special Leave to Appeal as provided in Rule 30(6). However, inadvertently or otherwise, a copy of the Appellants' written submissions had not been served on the Respondents prior to the first date of hearing. On the first date of the hearing of the appeal, namely, on 08th October 2009, an application was made on behalf of the Counsel for the Appellants to have the appeal re-fixed for hearing as the learned Counsel for the Appellants was indisposed. Accordingly, the hearing of the appeal was postponed for 9th February 2010. The learned Counsel for the Respondents, in their written submissions, have taken up the position that the written submissions of the Appellants was served on the Respondents by registered post after the first date of hearing. Counsel for the Respondents also submitted that under Rule 34, the Court has discretion to proceed with the hearing of the appeal after considering the circumstances of non-compliance and whether the Appellants have rectified any omission as soon as they became aware of it. Counsel for the Respondents relied on the case of *Muthappan Chettiar* vs. *Karunanayake and Others,*(2005) 3SLR 327. It may be relevant to reproduce below the observations made by Shirani Bandaranayake, J. (at page 334) in the said application –

> *"According to the aforementioned Rules, the appellant should have filed his written submissions on or before 05.11.2003. Although the matter was fixed for argument on 29.01.2004, on a motion filed by the learned President's Counsel for the respondents dated 10.10.2003, this matter was re-fixed for hearing on 03.03.2004. On 03.03.2004, on an application made on behalf of the learned President's Counsel for the appellant, the hearing was again re-fixed for 01.07.2004. On 01.07.2004, it was not possible for the appeal to be taken up for hearing as the*

Bench comprised of a judge who had heard this matter in the Court of Appeal and this was re-fixed for hearing on 01.11.2004. On that da,y it was once again re-fixed for hearing for 17.02.2005. By that time one year and four months had lapsed from the date special leave to appeal was granted. It is not disputed that even on the day this appeal was finally taken up for hearing, viz. on 17.02.2005, the appellant had neither filed his written submissions nor had he given an explanation as to why it was not possible to file such written submissions in accordance with the Rules." (emphasis added)

It is observed that in *Muthappan Chettiar*'s case , the delay in filing written submissions ran to several months. Notwithstanding such delay, even thereafter the appellant had not taken any interest to comply with the Rules relating to filing of written submissions. On 17.02.05 when the matter was taken up for hearing, the written submissions were not before Court. When the learned President' Counsel for the respondents took up the preliminary objection, appellant moved to file written submissions on the question of the said preliminary objection. The Court directed the respondents to file their written submissions on or before 07.03.2005 and the appellant to file their written submissions on the said preliminary objections on or before 01.04.2005. The respondents however filed their written submissions on 04.03.2005 and the appellant failed to file his written submissions on or before 01.04.2005. The appellant finally filed his written submissions only on 10.05.2005.

All the abovementioned events, clearly indicate that the appellant had been consistent in not showing due diligence in prosecuting his appeal. I am therefore of the view that *Muthappan Chettiar's* case is easily distinguishable from the instant appeal.

In the case of *Priyani de Soyza* vs. *Arsacularatne,* (1999) 2 S.L.R. 179 at 202, Wijethunga, J. referred to the case of *Piyadasa and Others* vs. *Land Reform Commission,* S.C. Appeal No. 30/97 - Minutes of 8th July 1998 where a preliminary objection was taken by the learned Counsel for the Petitioners that the Respondents had filed their written submissions 197 days after the date of which they were required by Rule 30(7) to be filed, and it was contended that the Respondents belated submissions should not be accepted and that the Respondents

should not be heard even though there was no explanation tendered regarding the delay. Amerasinghe, J. overruled the preliminary objection stating that "*In my view, Rule 30 is meant to assist the Court in its work and not to obstruct the discoveryy of the truth. There were numerous documents that had to be considered; and in our view, we needed the assistance of learned Counsel for the Petitioner as well as the Respondents, including their written submissions to properly evaluate the information that we had before us. It was therefore, decided that the preliminary objection should be overruled."*

It may be relevant to consider the observations made by Court in the cae of *Union Apparels (Pvt) Ltd.* vs. *Director General of Customs and Others* (2000) 1 S.L.R. 27. The petitioner Company in this case filed its application on 03.06.1999. Hearing was fixed for 20.08.1999, and the written submissions of the petitioner were filed on 19.08.1999.The objection of the respondents was that the petitioner had failed to comply with Rule 45(7) which required the written submissions to be filed at least one week before the date of hearing. The respondents therefore moved Court that the application must stand dismissed in terms of the Supreme Court Rules of 1990. The Court having considered the purpose of Rule 45(7) in comparison with Rule 30, the object of Rule 34 and specially the surrounding circumstances of the case decided that it could not be said that the petitioner had failed to show due diligence in taking all necessary steps for the purpose of prosecuting the application and overruled the preliminary objection. Amerasinghe, J. commented that *the question whether an application should be rejected for the failure to comply with a rule of the Court depends on whether, having regard to the words of the relevant rule , the Court has a discretion to entertain or reject the application, and whether having regard to the object of the rule and the circumstances of the case the Court is justified in arriving at its decision."*

Considering the above cases, I am of the view that the Appellants in this appeal have tendered their written submissions to the Respondents once the failure to tender written submissions had been brought to their notice. I am of the view that this is an appropriate case for the preliminary objection to be overruled and the application for special leave to appeal to be set down for hearing in due course. I therefore make order accordingly. There will be no costs.

JUDGE OF THE SUPREME COURT

J.A.N. DE SILVA, CJ.,

I agree.

CHIEF JUSTICE

S.I. IMAM, J.,

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 82/2008
S.C. (H.C.) C.A. L.A. No. 47/2008
NCP (Anuradhapura) HC CA/ARP 36/2007
D.C. Polonnaruwa No. 6330/L

Palate Gedera Gunadasa,
Pradeshiya Sabawa,
Medirigiriya.

Plaintiff-Respondent-Appellant

Vs.

Palate Gedera Marywathy,
Parana Pola Asala,
Diyasenpura.

Defendant-Appellant-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Chandra Ekanayake, J.

COUNSEL : P. Wickramasekera for Plaintiff-Respondent-Appellant

J.P. Gamage for Defendant-Appellant-Respondent

ARGUED ON: 13.10.2009

WRITTEN SUBMISSIONS
TENDERED ON: Defendant-Respondent: 23.08.2010

DECIDED ON: 26.10.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the order of the High Court of Civil Appeal of the North Central Province (hereinafter referred to as the High Court) dated 07.05.2008. By that order learned Judges of the High Court had set aside the judgment of the District Court of Polonnaruwa dated 24.10.2001 and had granted relief to the defendant-appellant-respondent (hereinafter referred to as the respondent). The plaintiff-respondent-appellant (hereinafter referred to as the appellant) sought leave to appeal from this Court, which was granted on the following question:

> "Have the learned Judges of the Civil Appeal High Court erred by failing to consider and apply section 60 of the Land Development Ordinance to the facts of this case?"

The facts of this appeal as submitted by the appellant, *albeit* brief, are as follows:

The appellant and the respondent are siblings and were the children of one Palate Gedera Jamis, who was the original permit holder of the land morefully described in the amended Plaint dated 06.03.1996. The appellant submitted that his father, the said Palate Gedera Jamis had given him half share of the land in question and the other half had been given to the respondent. The respondent had been in possession of the entire land and therefore the appellant in his amended plaint, filed before the District Court had prayed that,

(1) a declaration that the documents marked P_1, P_2 and P_3 are valid documents;

(2) a declaration that the appellant is the lawful successor/permit holder to the land morefully described in the second schedule to the Plaint; and

(3) to evict the respondent from the said corpus.

The respondent had claimed that the said Palate Gedera Jamis had changed his earlier disposition of the property in question prior to his death, which was registered on 22.11.1994 (P_5) and had given the entirety of the land to the respondent.

After the trial, the District Court had made order in favour of the appellant stating that the registration of the document P_5 on 22.11.1994 does not come within the provisions of section 60 of Land Development Ordinance. The respondent appealed to the High Court, which had set aside the judgment of the District Court.

In the District Court, the parties had admitted that the original permit holder of the land was Palate Gedera Jamis, who had died on 25.05.1994. It was also admitted that the said Jamis had by document marked P_4 dated 17.06.1993 named the appellant and the respondent as successors.

Learned Counsel for the respondent, submitted that on the basis of a letter written by Jamis, the father of the appellant and the respondent on 05.04.1994 (V_1), the ownership of the said land was transferred to the respondent and the Register of Permits/Grants under the Land Development Ordinance was amended accordingly on 22.11.1994 (P_5).

The said Register of Permits/Grants issued under the Land Development Ordinance had recorded the transfer in the following terms:

> "පො/ප්‍ර/2298 දරණ දීමනා පත්‍රයෙහි ප්‍රධාන ලාභියා වූ පලාතේ
> ගෙදර ජේමිස් මිය ගොස් ඇති බැවින් එකි දීමනා පත්‍රයේ මූල් අයිතිය
> ඔහුගේ දරුවා වන පලාතේ ගෙදර මේරිවති නමින් පැවරීම."

Learned Counsel for the respondent contended that he is relying on the document marked P_5 and by that document the respondent has been recognized as the permit holder of the land in question. Since the respondent is in possession of the said land and that the permit marked P_5 was issued by the Divisional Secretary, Medirigiriya, learned Counsel for the respondent submitted that section 60 of the Land Development Ordinance would not be applicable in such a situation.

One of the questions that arose before the District Court was whether the said document marked as P_5 was a valid document in terms of the Land Development Ordinance.

The Land Development Ordinance was introduced in 1935 to provide for the systematic development and alienation of State land in the country. This Ordinance clearly specifies *inter alia*, how permits and grants are to be issued, how dispositions are to be made and how succession takes place.

It is not disputed that the deceased Palate Gedera Jamis was the original permit holder and that the land in question was alienated under and in terms of the Land Development Ordinance on 25.01.1982 (P_3). Accordingly, succession to such land would be decided on the basis of the provisions laid down under the Land Development Ordinance. Chapter VII of the Land Development Ordinance deals with the successors to any land alienated on a permit or a holding and section 60 refers to nomination or cancellation of such alienation.

It is therefore evident that the learned District Judge of Polonnaruwa was correct when he had decided that the question of succession and the validity of the document marked P_5 should be considered on the basis of section 60 of the Land Development Ordinance.

The documents marked as P_4 dated 17.06.1993, V_1 dated 05.04.1994 and P_5 which was registered on 22.11.1994 all refer to the nomination of a successor to the original grant holder's property.

In **Madurasinghe v Madurasinghe** ([1988] 2 Sri L.R. 142), it was held that the successor under the Land Development Ordinance has to be considered in terms of section 60 of the said Ordinance. Accordingly it is apparent that the succession of the property alienated on a permit in terms of the Land Development Ordinance has to be considered and decided on the basis of section 60 of the said Ordinance. The said section 60 is in the following terms:

> "No nomination or cancellation of the nomination of a successor shall be valid unless the document (other than a last will) effecting such nomination or cancellation is duly registered

before the date of the death of the owner of the holding or the permit-holder."

It is not disputed that Palate Gedera Jamis had nominated the appellant and the respondent as his successors by his application made to the Divisional Secretary, Medirigiriya. On 17.06.1993 (P_9), the Divisional Secretary, Medirigiriya had forwarded the said application to the District Land Registrar, Polonnaruwa to take necessary action. The said application clearly states that its purpose was to 'appoint a successor'. Based on that application the names of the appellant and the respondent were entered as successors of the said Jamis by P_4 dated 17.06.1993. It is also not disputed that the said Jamis had died on 25.05.1994 (P_{10}). The contention of the learned Counsel for the respondent was that by letter dated 05.04.1994 (V_1), the said Jamis had written to the Divisional Secretary, Medirigiriya requesting to nominate the respondent as his successor to the land in question. On the basis of this document, the said respondent's name had been entered in to the Register of Permits/Grants under the Land Development Ordinance (P_5). The said registration has been effected on 22.11.1994.

According to section 60 of the Land Development Ordinance, referred to above, a nomination would become effective, only if such nomination or cancellation is duly registered before the date of the death of the owner of the holding or the permit-holder. It is therefore quite obvious that the nomination of the respondent had been registered on a date several months after the death of the said Jamis, who was the permit-holder.

It is therefore evident that it is necessary to apply the provisions contained in section 60 of the Land Development Ordinance to the facts of this case and the learned Judges of the High Court had erred by failing to consider and apply section 60 of the said Ordinance.

The question on which leave to appeal was granted by this Court is therefore answered in the affirmative.

For the reasons aforementioned this appeal is allowed. The order of the High Court dated 07.05.2008 is set aside and the judgment of the District Court of Polonnaruwa dated 24.10.2001 is thereby affirmed.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

In The Supreme Court of the Democratic Socialist Republic of Sri Lanka

SC Appeal 87/2008
SC(HCCA)LA 78/2008
SP/HCCALA 01/2007
DC Ratnapura 2129/L

In the matter of an appeal with leave to appeal granted by the Supreme Court.

Kodituwaku Arachchige Somapala,
Karapincha, Hidallana.
Petitioner-Respondent-Appellant

Vs.

Nanda Pethiyagoda Wanasundara,
96/1, No.4, 5th Lane, Colombo 7.
Substituted Plaintiff-Respondent-Petitioner-Respondent

1. K.A.Piyadasa,
   Karapincha Pahala Korale, Hidallana.
2. Kodituwakku Arachchige Podimahattaya.
   Karapincha, Hidellana.
3. O.B. Punchi Menike,
   Karapincha, Hidellana.

Defendants-Respondents-Respondents

Before : Amaratunga J.
Marsoof J.
Ekanayake J.

Counsel : Wijeyadasa Rajapakshe P.C. with
Rasika Dissanayake for the Petitioner-Respondent-Appellant.
Gamini Marapana PC. with R.Y.D. Jayasekera for the
Substituted Plaintiff-Respondent-Petitioner-Respondent.

Argued on : 18. 05. 2010
Decided on : 04. 11. 2010

Gamini Amaratunga J.

This is an appeal, with leave to appeal granted by this Court, against the Judgment of the Civil Appellate High Court of the Sabaragamuwa Province dated 19.6.2008 in a leave to appeal application filed in that Court by the Substituted Plaintiff Respondent (hereinafter referred to as Substituted Plaintiff). Before I set out the questions of law on which leave to appeal was granted by this Court, it is relevant and necessary to set out in brief the factual background relevant to the present appeal and the matters this Court would eventually take into account in dealing with this appeal.

The original plaintiff (who died during the pendency of the action) in the District Court, Ratnapura case No.2129/L sought a declaration of title in his favour to an undivided 1/3 of the land described in the schedule to his amended plaint dated 24.2.1983 and an order to eject the defendants, their servants and agents from the said land. The land referred to in the said amended plaint was 7A-2R-30P in extent, depicted as lots 1, 2, 3 and 4 in Plan No. 388 dated 16th October 1978 made by D.W. Ranatunga Licensed Surveyor.

The plaintiff's action was finally decided by the Supreme Court by its judgment dated 28.03.2003 declaring that the substituted plaintiff is entitled to an undivided 1/3 share of the land described in the schedule to the amended plaint dated 24.02.1983 which is in extent A7-R2-P30, depicted in Plan No.388 of Surveyor D.W. Ranatunga.

Thereafter on the application made by the substituted plaintiff, the District Court issued writ to eject the defendants from the land in suit. The Fiscal in executing the writ obtained the services of a licensed surveyor to demarcate on the ground the boundaries of lots 1, 2, 3 and 4 depicted in plan No.388 of

Surveyor Ranatunga. After the Surveyor marked the boundaries of the land referred to in the writ the 1st and the 3rd defendants vacated the land and possession of the land was then handed over to the authorized representative of the substituted plaintiff.

At the time of handing over possession of the land, the petitioner-appellant, who is a son of 1st and 2nd defendants (but not a party to D.C. case No.2129/L) complained to the Fiscal that the Surveyor in marking the boundaries of the land in suit had included a part of the land belonging to him in the land to be delivered to the substituted plaintiff in terms of the writ. The fiscal had then informed him that he (Somapala, the appellant) could persue his legal remedy to obtain relief. This is recorded in the Fiscal's Report.

Thereafter the petitioner-appellant filed an application in the District Court of Ratnapura under and in terms of section 328 of the Civil Procedure Code alleging that in executing the writ relating to the substituted plaintiff's land, he was dispossessed and evicted from the land he held and possessed on his own right. After filing the said application, the appellant moved for a commission to survey the land claimed by the appellant and the land described in the plaint of the substituted plaintiff's case. The learned District Judge allowed the application for the commission and decided to proceed with the inquiry into the 328 application filed by the appellant.

The substituted plaintiff then filed a leave to appeal application in the Civil Appellate High Court of the Sabaragamuva Province against the order of the learned District Judge to issue a commission and to proceed with the inquiry into the 328 application of the appellant. The Civil Appellate High Court issued an interim order suspending the execution of the Commission and holding the inquiry into the 328 application. Thereafter having granted leave to appeal and

after hearing arguments, the Civil Appellate High Court allowed the substituted plaintiff's appeal and set aside the order of the learned District Judge issuing the commission and fixing the 328 application for inquiry.

The order of the Civil Appellate High Court dated 19.6.2008 allowing the substituted plaintiff's appeal indicates that the said court came to the conclusion that the appellant had failed to establish that he was dispossessed of or ejected from any land in executing the writ and that dispossession of or ejectment from any land other than the land referred to in the writ did not fall within the purview of section 328 of the Civil Procedure Code and that the appellant's proper remedy is to file a separate action to vindicate his rights.

On 31st July 2008, the appellant filed a leave to appeal application in this Court seeking leave to appeal against the Order of the Civil Appellate High Court allowing the appeal of the substituted plaintiff.

On 01.08.2008 (the day after the filing of the leave to appeal application in the Supreme Court) the 328 application was called in the District Court of Ratnapura with notice to the parties to announce the order made by the Civil Appellate High Court on 19.06.2008. The certified copy of the journal entry of the District Court Record on 01.08.2008 (Document W2 filed by the substituted plaintiff) indicates that on 01.08.2008, the District Judge terminated the proceedings in the 328 inquiry on the basis that in terms of the order in appeal (of the Civil Appellate High Court) an inquiry under and in terms of section 328 is not relevant. There is nothing in the journal entry of 01.08.2008 to indicate that at the time the District Court made order terminating the proceedings in the 328 inquiry, the Court was informed that an application for leave to appeal against the order of the Civil Appellate High Court has already been filed in the Supreme Court on the previous day i.e.31.7.2008.

There is another journal entry dated 12.8.2008 which states that an Attorney-at-law filed the appellant Somapala's petition and affidavit and moved to have the case called on 14.8.2008 for support. There is nothing before this Court to indicate the purpose or the contents of the petition referred to in this journal entry.

According to the journal entry of 14.08.2008 when the case was called on that day the Court was informed by the Attorney-at-law for the appellant that an application had been made to the Supreme Court against the decision of the Provincial High Court. In the said journal entry there is no record of any order made by the District Court on that date.

The appellant thereafter filed in this Court an amended petition dated 21.8.2008. In paragraph 20 of the amended petition it is stated that "on 1st August 2008 the learned District Judge made order terminating the proceedings on the basis of the said judgment of the Civil Appellate High Court. The petitioner states that consequent upon the same, the petitioner lodged an application to the District Court under section 839 of the Civil Procedure Code but the same was not supported in view of this application pending before Your Lordships' Court."

From the above quoted averment in the amended leave to appeal application it is clear that the petition of the appellant referred to in the journal entry of 12.08.2008 was not supported in the District Court and as such the District Court has not made any order thereon.

The amended leave to appeal application contained a prayer "that the order made on 01.08.2008 by the learned District Judge be set aside".

The leave to appeal application was supported in this Court on 16.10.2008 and the journal entry of that date indicates that what was supported on that date was the original leave to appeal application dated 30.07.2008 and not the amended leave to appeal application filed subsequently which included a prayer to set aside the Order of the District Court dated 1.8.2007. This Court has granted leave to appeal on the following questions of law set out in the leave to appeal application dated 30.7.2008.

(i) Whether the Honourable Judges of the Civil Appellate High Court have erred in law by failing to take into consideration that a commission can be issued in any action or proceeding in which the court deems a local investigation to be a requisite or proper for the purpose of elucidating any matter in dispute?

(ii) Whether the Honourable Judges of the Civil Appellate High Court have erred in law when arriving at a conclusion that in an instance where a person is ejected at the time of executing a decree no need arises for a survey plan?

(iii) Whether the Honourable Judges of the Civil Appellate High Court have misinterpreted the provisions of section 328 of the Civil Procedure Code?

(iv) Whether the Honourable Judges of the Civil Appellate High Court have erred in law by arriving at a conclusion that the petitioner has not been dispossessed when the plan or the sketch submitted by the Commissioner clearly shows the fact that the respondent has been placed in possession in land in extent more than 9 acres instead of 7 acres 2 roods and 30 perches?

In addition to the above questions of law this Court has granted leave to appeal on the following additional questions of law.

(v) In view of the amendment to section 328 of the Civil Procedure Code by omitting the words "that it was not comprised in the decree" and in view of the omission of the said words in the current section 328 of the Civil Procedure Code can a person claiming to be ejected from a land other than the land that was the subject matter of the decree come to court in terms of section 328 claiming that he was ejected from such land.

(vi) In view of the fact that this leave to appeal application has been made in respect of an order made in a proceeding which is incidental to the main 328 application and since the main 328 application has now been terminated in the District Court can the petitioner maintain this appeal.

Both parties have filed written submissions on the aforesaid questions of law and at the hearing both learned President's Counsel made oral submissions.

The last question to be considered in this appeal is with regard to the maintainability of this appeal. As already stated, in view of the decision of the Provincial Appellate High Court that the appellant’s remedy is not under section 328 of the Civil Procedure Code the District Court of Ratnapura on 01.08.2008 terminated the proceedings in the application filed by the appellant in terms of section 328 of the Civil Procedure Code. The appellant has not taken steps by way of an appeal or revision to get the order dated 01.08.2008 set aside and to have his application restored as a pending case. Thus for all intents and purposes, there is no pending application to which the decision of this appeal would be of any practical importance. Even if this Court allows the appellant's

appeal and restores the Order made by the District Court on 8.3.2007 (which was the subject matter of the leave to appeal application filed in the Provincial Appellate High Court) yet there is no application in the District Court which can be proceeded with as a result of the decision of this appeal.

This Court, in an appeal will not consider and pronounce its decision on a question of law unless such decision has a practical significance to a pending case or a concluded case. (Which in law is subject the decision of this Court in appeal) This Court will not decide a question of law merely as an academic exercise when such decision has no relevance to a legal proceeding pending in any other court as a live legal proceeding not deemed to have been finally concluded until the decision of this Court in appeal is delivered.

In the course of the argument this Court pointed out to the learned President's Counsel for the appellant that in view of the termination of the proceedings relating to the 328 application filed by the appellant in the District Court of Ratnapura, this appeal has become a mere academic exercise without any practical effect.

The learned President's Counsel agreed, that as the matters now stand there is no application pending in the District Court of Ratnapura. However the learned President's Counsel submitted that if the appeal is decided in favour of the appellant, then he moves this Court to make an order (in order to prevent great prejudice that would otherwise result in to the detriment of the appellant) setting aside the order of the District Court of Ratnapura on 01.08.2008 terminating the proceedings in relation to the application filed by him in that Court under and in terms of section 328 of the Civil Procedure Code.

This Court is not in a position to consider the submission made by the learned President's Counsel for the appellant relating to the consequential order to set aside the order of the District Court of Ratnapura dated 01.08.2008 for several reasons. Firstly, it is not an order the appellant has sought from this Court. Even if the appellant has sought such an order from this Court, it is an order this Court cannot make in this appeal as the matter before this Court is the correctness of the decision of the Civil Appellate High Court and not the order made by the District Court of Ratnapura on 01.08.2008.

In the amended petition filed in this Court on 21.08.2008, there was a prayer, among other reliefs, to set aside the order of the District Court of Ratnapura on 01.08.2008. However this amended petition was not supported before this Court, perhaps for the reason that the appellant was aware that it was not a relief he could seek from this Court in these proceedings. Secondly the appellant has not moved the appropriate Court by way of appeal or revision to have the order of the District Court of Ratnapura dated 01.08.2008 set aside. He has not given any reason for his
failure to exercise his right to have the Order of the District Court set aside. Without pursuing his legal remedies he cannot now urge that if that order is not set aside by this Court great prejudice would be caused to him. He himself is responsible for the consequences flowing from his own failure to assert his rights available to him under the law to have the order dated 1.8.2008 set aside.

In view of the appellant's failure to pursue his legal remedies to have the Order of the District Court of Ratnapura dated 01.08.2008 set aside, there is no legal proceeding now in existence and as such the appellant has no right to maintain this appeal as a mere academic exercise devoid of any practical result to flow from the decision of this appeal.

In view of this finding I answer question No.(VI) in the negative and in consequence the necessity to decide and pronounce upon questions No.(I) to (v) on which leave to appeal has been granted does not arise. Accordingly the appeal is dismissed without costs.

Judge of the Supreme Court

Marsoof J.

I agree.

Judge of the Supreme Court

Ekanayake J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 101^{A}/2009
S.C. H.C. (C.A.) L.A. No. 174/2008
H.C. Appeal WP/HCCA/COL No. 83/2008 (L.A.)
D.C. Colombo No. 428/T

2. S. Rajendran Chettiar,
10/1, Station Road,
Colombo 06.

3 S. Chithambaram,
339/5, 1/1, Galle Road,
Bambalapitiya,
Colombo 04.

4. Rm. Chockalingam Chettiar,
General Manager,
East-West Textiles (Pvt.) Ltd.,
No. 34-2/1, Bristol Street,
10/1, Station Road,
Colombo 01.

Defendants-Respondents-Appellants

Vs.

S. Narayanan Chettiar,
No. 266, Sea Street,
Colombo 11.

Plaintiff-Petitioner-Respondent

1. S. Subramaniam Chettiar,
No. 4/3, Seagull Apartments,
4th Floor,
Rohini Road,
Colombo 04.

Defendant-Respondent-Respondent

S.C. (Appeal) No. 101^{B}/2009
S.C. H.C. (C.A.) L.A. No. 175/2008
H.C. Appeal WP/HCCA/COL No. 83/2008 (L.A.)
D.C. Colombo No. 428/T

S. Subramaniam Chettiar,
No. 4/3, Seagull Apartments,
4th Floor,
Rohini Road,
Colombo 04.

1st Defendant-Respondent-Appellant

Vs.

1. S. Narayanan Chettiar,
No. 266, Sea Street,
Colombo 11.

Plaintiff-Petitioner-Respondent

2. S. Rajendran Chettiar,
10/1, Station Road,
Colombo 06.

3. S. Chithambaram,
339/5, 1/1, Galle Road,
Bambalapitiya,
Colombo 04.

4. Rm. Chockalingam Chettiar,
General Manager,
East-West Textiles (Pvt.) Ltd.,
No. 34-2/1, Bristol Street,
10/1, Station Road,
Colombo 01.

Defendants-Respondents-Respondents

BEFORE : J.A.N. de Silva, CJ.
Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J.
Saleem Marsoof, PC., J. &
P.A. Ratnayake, PC., J.

COUNSEL : Romesh de Silva, PC, with N.R. Sivendran,
Sugath Caldera, K. Pirabakaran and
Eraj de Silva for 2nd, 3rd and 4th defendants-respondents-appellants in 101A/2009

P. Nagendran, PC, with A. Muthukrishnan and Pathmanathan for 1st defendant-respondent in 101A/2009 and 1st defendant-respondent-appellant in 101B/2009

K.Kanag-Iswaran, PC, with Avindra Rodrigo, Lakshman Jayakumar and H. Jayamal for plaintiff-petitioner-respondent

ARGUED ON: 03.03.2010

DECIDED ON: 10.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the order of the Provincial High Court of Civil Appeal of the Western Province (Holden in Colombo) (hereinafter referred to as the High Court) dated 21.11.2008. By that order learned Judges of the High Court overruled the preliminary objection raised by the 2nd to 4th defendants-respondents-appellants (hereinafter referred to as the appellants) on the basis that the plaintiff-petitioner-respondent's (hereinafter referred to as the plaintiff) leave to appeal application filed in the High Court was misconceived and that the respondent was only entitled to file a final appeal and fixed the case for support on the question of whether leave should be granted. The appellants preferred an application before this Court for which leave to appeal was granted and this appeal relates to the rejection of the aforesaid preliminary objection as to whether the order dated 14.05.2008 of the District Court of Colombo was a final order in terms of section 754 of the Civil Procedure Code.

At the time leave to appeal was granted, this Court had noted that the appeal relates to a matter in respect of which there are two decisions of this Court given by numerically equal Benches of this Court, viz., **Siriwardena v Air Ceylon Ltd.** ([1984] 1 Sri L.R. 286) and **Ranjit v Kusumawathi** ([1998] 3 Sri L.R. 232).

Accordingly at that stage both learned President's Counsel had invited this Court that in order to resolve the apparent conflict between the aforesaid two judgments, that this appeal be

referred to a Bench of five (5) Judges. That Bench had also considered that this appeal to be a fit matter to be heard by a Bench numerically superior to the Benches, which had pronounced two lines of authority referred to in the aforementioned decisions. The Registrar was accordingly directed to submit the said decision to His Lordship the Chief Justice for an appropriate order.

His Lordship the Chief Justice had nominated a Bench of five Judges to hear this matter and the appeal was thereafter fixed for hearing.

The 1st defendant-respondent-appellant (hereinafter referred to as the 1st respondent) had also filed a leave to appeal application under Number S.C. H.C. (C.A.) L.A. 175/2008 against the order of the learned High Court Judge dated 21.11.2008, for which leave to appeal was granted by this Court along with the application under Number S.C. H.C. (C.A.) L.A. 174/2008, which is the present appeal.

At the time S.C. (Appeal) No. 101A/2009 was taken for hearing it was agreed that the decision in this appeal would be binding on S.C. (Appeal) No. 101B/2009.

The facts of Appeal No. 101A/2009, as submitted by the appellants, *albeit* brief, are as follows:

The plaintiff, by Plaint dated 11.12.2007, filed District Court case No. 428/T in the District Court of Colombo having prayed for the reliefs against the Trustees of the Hindu Temple known as "Sri Kathirvelayuthan Swami Kovil" in terms of section 101 of the Trusts Ordinance.

On 07.02.2008, the 2nd and 3rd appellants, by way of a motion, brought to the attention of Court that the plaintiff's action is barred by positive rule of law and that the Plaint ought to be rejected and the plaintiff's action be dismissed *in limine*, in view of section 46(2) of the Civil Procedure Code. By motion dated 11.02.2008 the 1st respondent also brought to the notice of Court that plaintiff's action is barred by positive rule of law and the 4th appellant also associated himself with the said objections.

By his order dated 14.05.2008, learned Additional District Judge upheld the preliminary objections and dismissed the action of the plaintiff.

On 02.06.2008 the plaintiff having titled 'Petition of Appeal', filed a leave to appeal application in terms of section 757 of the Civil Procedure Code. On 30.05.2008, the plaintiff had also filed Notice of Appeal in the Provincial High Court (A).

On 19.09.2008, when that matter was taken up for support, learned Counsel for the plaintiff admitted that the said plaintiff had taken steps to file the Final Appeal against the order dated 14.05.2008. At the same time both learned Counsel for the appellants raised a preliminary objection that the plaintiff is not entitled to maintain the leave to appeal application, as the order dated 14.05.2008 is an order having the effect of a Judgment and that the application of the plaintiff seeking leave to appeal in terms of section 757 of the Civil Procedure Code is misconceived in law.

Thereafter having heard the submissions of learned Counsel for the parties, on the question as to whether the order dated 14.05.2008 is a Final order or an Interlocutory Order, the Provincial High Court had delivered its order dated 21.11.2008 holding that the order dated 14.05.2008 was an interlocutory order and that in view of the test laid down by Sharvananda, J., (as he then was) in **Siriwardena v Air Ceylon Ltd.** (supra), the order of the learned Additional District Judge was not an order having the effect of a Final order. Accordingly the application was fixed for support for 24.03.2009 (Z).

The Provincial High Court of Civil Appeal, on its order dated 24.03.2009 had held that,

1. the impugned order in the present case is not in a special proceeding;

2. it is an order made in terms of section 46 of the Civil Procedure Code;

3. the rights of the parties have not yet been considered and therefore the rights of the parties have not yet been determined;

4. learned Additional District Judge had rejected the Plaint under section 46(2) of the Civil Procedure Code;

5. under section 46(2) of the Civil Procedure Code, the plaintiff is not precluded from presenting a fresh Plaint in respect of the same cause of action; and

6. in view of the test laid down by Sharvananda, J., (as he then was) in **Siriwardena v Air Ceylon Ltd.** (supra) the order of the learned Additional District Judge is not an order having the effect of a final order.

Being aggrieved by the said order of 21.11.2008 of the Provincial High Court, the appellants sought leave to appeal from the Supreme Court.

The main contention of the learned President's Counsel for the appellants was that the order of the learned Additional District Judge dated 14.05.2008 is an order having the effect of a Final Judgment in terms of sections 754(1) and 754(5) of the Civil Procedure Code and therefore since the plaintiff's action has been dismissed, he could only make a final appeal and not a leave to appeal application. In support of this contention it was submitted that there can only be one judgment in a case and the other orders made would therefore be incidental orders. It was also submitted that the phraseology used in section 754(5) of the Civil Procedure Code stating that 'order having the effect of a Final Judgment' is only applicable in cases, where no judgments are given and that those are cases, which have been instituted under summary procedure. Accordingly the contention was that the term 'judgment' would mean judgments and decrees entered in terms of section 217 of the Civil Procedure code and orders having the effect of a Final judgment in terms of sections 387 and 388 of the Civil Procedure Code. Accordingly it was contended that a final appeal is only possible against a judgment (decree) entered in terms of section 184 read with section 217 of the Civil Procedure Code and final orders in terms of sections 387 and 388 of the Civil Procedure Code. The contention put forward therefore by the learned President's Counsel for the appellants was that as there could only be one judgment in a case, the definition of the decision of the Judge could be based on the procedure of an action. Accordingly it was contended that if the procedure is regular, then the decision given could be a judgment and when the procedure followed is summary, such a decision should be regarded as an order of Court.

Chapter LVIII of the Civil Procedure Code deals with Appeals and Revisions and section 753 to section 760 are contained in this Chapter. Section 754 refers to the modes of preferring appeals and the relevant sub-sections of section 754 are as follows:

> "754(1) Any person who shall be dissatisfied with any judgment, pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.
>
> (2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.
>
> (3) . . . .
>
> (4) . . . .
>
> (5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this Chapter –
>
> "Judgment" means any judgment or order having the effect of a final judgment made by any civil court; and

> "order" means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment."

Sections 754(1) and 754(2) of the Civil Procedure Code defines the effect of a judgment and an order pronounced by any original Court. Whilst section 754(1) refers to any person, who is dissatisfied with any judgment pronounced by any original Court, section 754(2) refers to a situation, where a person is dissatisfied with an order made by such an original Court. In the first instance such a person could prefer an appeal to the Court of Appeal against such a judgment, where if it is against an order, he could prefer an appeal to the Court of Appeal with the leave of the Court of Appeal first had and obtained. The difference enumerated in section 754 of the Civil Procedure Code thus is between a judgment and an order given by the original Court.

In terms of section 754(5) of the Civil Procedure Code a judgment would mean any judgment or order having the effect of a 'final judgment' made by any Civil Court and an order would mean the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

Although section 754(5) of the Civil Procedure Code had laid down the meaning of the judgment and order, it had not been easy to give a comprehensive definition of the term 'final judgment' (**Viravan Chetty v Ukka Banda** ((1924) 27 N.L.R. 65).

The question of the test that should be applied to decide as to whether an order has the effect of a final judgment was considered by the Supreme Court in **Siriwardena v Air Ceylon Ltd.** (supra) **and Ranjit v Kusumawathi and another** (supra).

In **Siriwardena v Air Ceylon Ltd.** (supra), the appellant had filed an application for leave to appeal from an Order of the District Judge made under section 189 of the Civil Procedure Code directing the amendment of a decision and the question was whether the order of the District Judge dated 10.05.1982 amending the judgment and the decision dated 13.03.1980, is a 'judgment' within the meaning of sections 754(1) and 754(5) of the Civil Procedure Code or

an 'order' within the meaning of section 754(2) and section 754(5) of the Civil Procedure Code. In his judgment Sharvananda, J. (as he then was) had referred to the decisions in **Salaman v Warner** ((1891) 1 Q.B. 734), **Bozson v Altrincham Urban District Council** ((1903) 1 K.B. 547), **Isaacs & Sons v Salbstein** ((1916) 2 K.B. 139), **Abdul Rahman and others v Cassim & Sons** (A.I.R. 1933 P.C. 58), **Settlement Officer v Vander Poorten** ((1942) 43 N.L.R. 436), **Fernando v Chittambaram Chettiar** ((1949) 49 N.L.R. 217), **Krishna Pershad Singh v Moti Chand** ((1913) 40 Cal. 635), **Usoof v The National Bank of India Ltd.** ((1958) 60 N.L.R. 381), **Subramaniam v Soysa** ((1923) 25 N.L.R. 344), **Onslow v Commissioners of Inland Revenue** ([1890] 25 Q.B.D. 465) and **Exparte Moore** ([1885] 14 Q.B.D. 627).

After an examination of the aforementioned decisions, Sharvananda, J., (as he then was) had held that for an 'order' to have the effect of a final judgment and to qualify to be a 'judgment' under section 754(5) of the Civil Procedure Code,

> "1. it must be an order finally disposing of the rights of the parties;
>
> 2. the order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way;
>
> 3. the finality of the order must be determined in relation to the suit;
>
> 4. the mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final one."

The meaning of "Judgment' for the purpose of appeal was also examined by Dheeraratne, J., in **Ranjit v Kusumawathi and others** (supra).

In that decision attention was paid to examine the test to determine a 'final judgment or order' or an 'order' within the meaning of section 754(5) of the Civil Procedure code.

Justice Dheeraratne in **Ranjit v Kusumawathi** (supra) had examined several cases including those which were referred to by Sharvananda, J., (as he then was) in **Siriwardena v Air Ceylon Ltd.** (supra), (**Subramanium Chetty v Soysa** (supra), **Palaniappa Chetty v Mercantile Bank of India et.al.** ((1942) 43 N.L.R. 352), **Settlement Officers v Vander Pooten** (supra), **Fernando v Chittambaram Chettiar** ((1948) 49 N.L.R. 217), **Usoof v Nadarajah Chettiar** ((1957) 58 N.L.R. 436), **Usoof v The National Bank of India Ltd.** (supra), **Arlis Appuhamy et. al v Simon** ((1947) 48 N.L.R. 298), **Marikar v Dharmapala Unanse** ((1934) 36 N.L.R. 201), **Rasheed Ali v Mohamed Ali and others** ([1981] 1 Sri L.R. 262) and **Siriwardena v Air Ceylon Ltd.** (supra)), and had come to the conclusion that the determination whether an order in a civil proceeding is a judgment or an order having the effect of a final judgment has not been an easy task for Courts.

An analysis of the English cases, further strengthens the point that the question of determining the status of a judgment or an order had not only been difficult, but many judges in different jurisdictions for centuries had been saddled with the complexity of the problem in differentiating a judgment from an order having effect of a final judgment and an interlocutory order. For instance in **Salaman v Warner** ((1891) Q.B.D. 734) the question before Court was to decide as to whether an order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial, is a final order.

Considering the test that should be adopted to decide a 'final judgment or order' or an 'order' in terms of section 754(5) of the Civil Procedure Code, Justice Dheeraratne in **Ranjit v Kusumawathi and others** (supra) had referred to the two tests, which was referred to as the 'Order approach' and the 'application approach' by Sir John Donaldson MR., in **White v Brunton** ([1984] 2 All E.R. 606).

The order approach had been adopted in **Shubrook v Tufnell** ((1882) 9 Q.B.D. 621) whereas the application approach was adopted in **Salaman v Warner** (supra). Later in **Bozson v Altrincham Urban District Council** (supra), the Court had considered the question as to whether an order made in an action was final or interlocutory and reverted to the order approach. In deciding so, Lord Alverstone, C.J., stated thus:

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order: but if it does not, it is then, in my opinion, an interlocutory order."

The watershed in the long line of decisions, which considered the test to determine a 'final judgment or order' or an 'order', in my view, was the decision of Lord Denning, MR., in **Salter Rex and Co. v Ghosh** ([1971] 2 All ER 865). After considering the decisions in **Bozson** (supra), **Hunt v Allied Bakeries Ltd.** ([1956] 3 All E.R. 513) and **Salaman v Warner** (supra), Lord Denning, MR., had held that in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order, which the Court eventually makes and since an application for a new trial if granted would clearly be interlocutory and where it is refused it is still be interlocutory. Examining the question at issue, Lord Denning, MR, not only described the difficulties faced, but also pointed out the test to determine such issues. According to Lord Denning MR.,

> "There is a note in the Supreme Court Practice 1970 under RSC Ord. 59, r 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In **Standard Discount Co. v La Grange** and **Salaman v Warner**, Lord Esher MR said that the test was the nature of the application to the Court and not the nature of the order which the Court eventually made. But in **Bozson v Altrincham Urban District Council,** the Court said that the test was the nature of the order as made. Lord Alverstone C.J. said that the test is: 'Does the judgment or order, as made, finally

dispose of the rights of the parties?' Lord Alverstone C.J. was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord. 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14 days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory: See **Hunt v Allied Bakeries Ltd.**, so I would apply Lord Esher MR's test to an order refusing a new trial. **I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory**. It was so held in an unreported case, **Anglo-Auto Finance (Commercial) Ltd. V Robert Dick**, and we should follow it today.

This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way" (emphasis added).

In **Ranjit v Kusumawathi and others**, (supra), Dheearatne, J. specifically stated that, Sharvananda, J. (as he then was) in **Siriwardena v Air Ceylon** (supra) had followed the decision in **Bozson** (supra), which had clearly reverted to the order approach. Justice Dheeraratne, in **Ranjit v Kusumawathi and others** (supra) had carefully considered the decision of Lord Denning, MR., in **Salter Rex. and Co. v Gosh** (supra) and had applied the test stipulated by Lord Esher in **Standard Discount Co. v La Grange** ((1877) 3 CPD 67) and **Salaman v Warner** (supra), that is known as the nature of the application made to the Court (application approach) in deciding the question, which was at issue in that case.

Considering the two approaches, based on the order made by Court, and the application made to the Court, one cannot ignore the comment made by Lord Denning, MR., in **Salter Rex and Co.** (supra) that Lord Alverstone, who preferred the test based on the nature of the order as made (**Bozson v Altrinchem Urban District Council** (supra), although was correct in logic, the test applied by Lord Esher (**Standard Discount Co. v La Grange** (supra) and **Salaman v Warner** (supra)) is a test that had always been applied in practice.

It is to be borne in mind that both the words 'Judgment' and 'order' are defined in section 5 of the Civil Procedure Code. Section 5 begins by stating thus:

> "The following words and expressions in this Ordinance shall have the meanings hereby assigned to them, unless there is something in the subject or context repugnant thereto."

Section 754(5) of the Civil Procedure Code however is specific about the meaning that should be given to the words 'Judgment' and 'order' as it has clearly specified that,

> "Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter –
>
> 'Judgment' means any judgment or order having the effect of a final judgment made by any civil court;
>
> and
>
> 'order' means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment."

It is therefore quite obvious that a final judgment or order should be interpreted for the purpose of Chapter LVIII of the Civil Procedure Code not according to the meaning given in section 5 of the Civil Procedure Code, but that of the definition given in section 754(5) of the Civil Procedure Code.

Considering the provisions contained in section 754(5) of the Civil Procedure Code, it is abundantly clear that a decision of an original civil Court could only take the form of a judgment or an order having the effect of a final judgment or of the form of an interlocutory order. It is also vital to be borne in mind that clear provision had been made in section 754(5) in defining a judgment and an order made by any civil Court to be applicable only to the Chapter in the Civil Procedure Code dealing with Appeals and Revisions. Accordingly in terms of section 754(5) there could be only a judgment, order having the effect of a final judgment and an order, which is not a judgment and therefore only an interlocutory order.

In these circumstances, it is abundantly clear that, in interpreting the words, Judgment and Order in reference to appeals and revisions, it would not be possible to refer to any other section or sections of Civil Procedure Code, other than section 754(5), and therefore an interpretation based on the procedure of an action cannot be considered for the said purpose.

Therefore to ascertain the nature of the decision made by a civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test defined by Lord Esher MR in **Standared Discount Co. v La Grange** (supra) and as stated in **Salaman v Warner** (supra) which reads as follows:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

In **Salaman v Warner** (supra), Fry, L.J., also had expressed his views regarding an appropriate interpretation that had to be given to final and interlocutory decisions. Considering the difficulties that had been raised regarding the correct interpretation for final and interlocutory orders, it was stated that the attention must be given to the object of the distinction drawn in

the rules between interlocutory and final orders on the basis of the time for appealing. Fry, L.J. had accordingly stated thus:

> "I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."

Considering all the decisions referred to above, the aforesaid statement clearly has expressed the true meaning that could be given to a judgment and an order in terms of section 754(5) of the Civil Procedure Code.

The order made by the Additional District Judge on 14.05.2008, was in terms of section 46(2) of the Civil Procedure Code and it is not disputed that the rights of the parties were not considered by the District Court. In such circumstances it would not be probable to state that the said order made by the District Court had finally settled the litigation between the appellants and the plaintiff. Considering the circumstances of the appeals it is abundantly clear that at the time the said order was made by the District Court, the litigation among the parties had just begun as the plaintiff as a Trustee of the 'Puthiya Sri Kathiravelayuthan Swami Kovil' and its temporalities had instituted action before the District Court of Colombo, seeking *inter alia*,

1. the appointment of Receiver under section 671 of the Civil Procedure Code for the preservation and maintenance of the Trust property;

2. the removal of the 2nd to 4th appellants and the 1st respondent as trustees of the Trust;

3. the 2nd to 4th appellants and the 1st respondent to account for Rs. 34,000,000/- of Trust money which had been illegally and immorally appropriated by the 2nd to 4th appellants and the 1st respondent for their personal use.

It must also be borne in mind that the District Court had accepted the Plaint in terms of section 46 of the Civil Procedure Code and had issued summons on the 2nd to 4th appellants and the 1st respondent returnable on 02.01.2008. The 2nd and 3rd appellants and the 1st respondent had filed their proxy on 02.01.2008 and had sought time to file their objections and Answer and the 4th appellant had not appeared before Court as summons had not been served on him. On 08.02.2008 without notice to the plaintiff, an ex-parte application had been made on behalf of the 2nd and 3rd appellants by way of a motion dated 07.02.2008 stating that the plaintiff's action was not maintainable and Court had issued notice on the plaintiff returnable on 13.02.2008. On 13.02.2008 learned Counsel for the plaintiff had made submissions stating that the application of the 2nd and 3rd appellants was misconceived in law and therefore the order made by Court was *per incuriam*. The District Court had directed the parties to file written submissions. Thereafter learned Additional District Judge had delivered his order dated 14.05.2008 rejecting the Plaint.

Considering all the abovementioned it cannot be said that the decision given by the District Court could have finally disposed the matter in litigation. In **Ranjit v Kusumawathi** (supra), Dheeraratne, J. after considering several decisions referred to earlier and the facts of that appeal had stated thus:

> "The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim."

Considering the decision given by Dheeraratne, J., in **Ranjit v Kusumawathi** (supra) it is abundantly clear that the order dated 14.05.2008 is not a final order having the effect of a judgment within the meaning of sub-sections 754(1) and 754(5) of the Civil Procedure Code, but is only an interlocutory order.

For the reasons aforesaid, both appeals (S.C. (Appeal) No. 101^{A}/2009 and S.C. (Appeal) No. 101^{B}/2009), are dismissed and the judgment of the High Court dated 21.11.2008 is affirmed.

I make no order as to costs.

Judge of the Supreme Court

J.A.N. de Silva, CJ.

I agree.

Chief Justice

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, PC., J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, PC., J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 101^{A}/2009
S.C. H.C. (C.A.) L.A. No. 174/2008
H.C. Appeal WP/HCCA/COL No. 83/2008 (L.A.)
D.C. Colombo No. 428/T

2. S. Rajendran Chettiar,
10/1, Station Road,
Colombo 06.

3 S. Chithambaram,
339/5, 1/1, Galle Road,
Bambalapitiya,
Colombo 04.

4. Rm. Chockalingam Chettiar,
General Manager,
East-West Textiles (Pvt.) Ltd.,
No. 34-2/1, Bristol Street,
10/1, Station Road,
Colombo 01.

Defendants-Respondents-Appellants

Vs.

S. Narayanan Chettiar,
No. 266, Sea Street,
Colombo 11.

Plaintiff-Petitioner-Respondent

1. S. Subramaniam Chettiar,
No. 4/3, Seagull Apartments,
4th Floor,
Rohini Road,
Colombo 04.

Defendant-Respondent-Respondent

S.C. (Appeal) No. 101^{B}/2009
S.C. H.C. (C.A.) L.A. No. 175/2008

H.C. Appeal WP/HCCA/COL No. 83/2008 (L.A.)
D.C. Colombo No. 428/T

S. Subramaniam Chettiar,
No. 4/3, Seagull Apartments,
4th Floor,
Rohini Road,
Colombo 04.

1st Defendant-Respondent-Appellant

Vs.

1. S. Narayanan Chettiar,
No. 266, Sea Street,
Colombo 11.

Plaintiff-Petitioner-Respondent

2. S. Rajendran Chettiar,
10/1, Station Road,
Colombo 06.

3. S. Chithambaram,
339/5, 1/1, Galle Road,
Bambalapitiya,
Colombo 04.

4. Rm. Chockalingam Chettiar,
General Manager,
East-West Textiles (Pvt.) Ltd.,
No. 34-2/1, Bristol Street,
10/1, Station Road,
Colombo 01.

Defendants-Respondents-Respondents

BEFORE : J.A.N. de Silva, CJ.
Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J.
Saleem Marsoof, PC., J. &
P.A. Ratnayake, PC., J.

COUNSEL : Romesh de Silva, PC, with N.R. Sivendran, Sugath Caldera, K. Pirabakaran and Eraj de Silva for 2nd, 3rd and 4th defendants-respondents-appellants in 101A/2009

P. Nagendran, PC, with A. Muthukrishnan and Pathmanathan for 1st defendant-respondent in 101A/2009 and 1st defendant-respondent-appellant in 101B/2009

K.Kanag-Iswaran, PC, with Avindra Rodrigo, Lakshman Jayakumar and H. Jayamal for plaintiff-petitioner-respondent

ARGUED ON: 03.03.2010

DECIDED ON: 10.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the order of the Provincial High Court of Civil Appeal of the Western Province (Holden in Colombo) (hereinafter referred to as the High Court) dated 21.11.2008. By that order learned Judges of the High Court overruled the preliminary objection raised by the 2nd to 4th defendants-respondents-appellants (hereinafter referred to as the appellants) on the basis that the plaintiff-petitioner-respondent's (hereinafter referred to as the plaintiff) leave to appeal application filed in the High Court was misconceived and that the respondent was only entitled to file a final appeal and fixed the case for support on the question of whether leave should be granted. The appellants preferred an application before this Court for which leave to appeal was granted and this appeal relates to the rejection of the aforesaid preliminary objection as to whether the order dated 14.05.2008 of the District Court of Colombo was a final order in terms of section 754 of the Civil Procedure Code.

At the time leave to appeal was granted, this Court had noted that the appeal relates to a matter in respect of which there are two decisions of this Court given by numerically equal Benches of this Court, viz., **Siriwardena v Air Ceylon Ltd.** ([1984] 1 Sri L.R. 286) and **Ranjit v Kusumawathi** ([1998] 3 Sri L.R. 232).

Accordingly at that stage both learned President's Counsel had invited this Court that in order to resolve the apparent conflict between the aforesaid two judgments, that this appeal be referred to a Bench of five (5) Judges. That Bench had also considered that this appeal to be a fit matter to be heard by a Bench numerically superior to the Benches, which had pronounced two lines of authority referred to in the aforementioned decisions. The Registrar was accordingly directed to submit the said decision to His Lordship the Chief Justice for an appropriate order.

His Lordship the Chief Justice had nominated a Bench of five Judges to hear this matter and the appeal was thereafter fixed for hearing.

The 1st defendant-respondent-appellant (hereinafter referred to as the 1st respondent) had also filed a leave to appeal application under Number S.C. H.C. (C.A.) L.A. 175/2008 against the order of the learned High Court Judge dated 21.11.2008, for which leave to appeal was granted by this Court along with the application under Number S.C. H.C. (C.A.) L.A. 174/2008, which is the present appeal.

At the time S.C. (Appeal) No. 101^{A}/2009 was taken for hearing it was agreed that the decision in this appeal would be binding on S.C. (Appeal) No. 101^{B}/2009.

The facts of Appeal No. 101^{A}/2009, as submitted by the appellants, *albeit* brief, are as follows:

The plaintiff, by Plaint dated 11.12.2007, filed District Court case No. 428/T in the District Court of Colombo having prayed for the reliefs against the Trustees of the Hindu Temple known as "Sri Kathirvelayuthan Swami Kovil" in terms of section 101 of the Trusts Ordinance.

On 07.02.2008, the 2nd and 3rd appellants, by way of a motion, brought to the attention of Court that the plaintiff's action is barred by positive rule of law and that the Plaint ought to be rejected and the plaintiff's action be dismissed *in limine*, in view of section 46(2) of the Civil Procedure Code. By motion dated 11.02.2008 the 1st respondent also brought to the notice of Court that plaintiff's action is barred by positive rule of law and the 4th appellant also associated himself with the said objections.

By his order dated 14.05.2008, learned Additional District Judge upheld the preliminary objections and dismissed the action of the plaintiff.

On 02.06.2008 the plaintiff having titled 'Petition of Appeal', filed a leave to appeal application in terms of section 757 of the Civil Procedure Code. On 30.05.2008, the plaintiff had also filed Notice of Appeal in the Provincial High Court (A).

On 19.09.2008, when that matter was taken up for support, learned Counsel for the plaintiff admitted that the said plaintiff had taken steps to file the Final Appeal against the order dated 14.05.2008. At the same time both learned Counsel for the appellants raised a preliminary objection that the plaintiff is not entitled to maintain the leave to appeal application, as the order dated 14.05.2008 is an order having the effect of a Judgment and that the application of the plaintiff seeking leave to appeal in terms of section 757 of the Civil Procedure Code is misconceived in law.

Thereafter having heard the submissions of learned Counsel for the parties, on the question as to whether the order dated 14.05.2008 is a Final order or an Interlocutory Order, the Provincial High Court had delivered its order dated 21.11.2008 holding that the order dated 14.05.2008 was an interlocutory order and that in view of the test laid down by Sharvananda, J., (as he then was) in **Siriwardena v Air Ceylon Ltd.** (supra), the order of the learned

Additional District Judge was not an order having the effect of a Final order. Accordingly the application was fixed for support for 24.03.2009 (Z).

The Provincial High Court of Civil Appeal, on its order dated 24.03.2009 had held that,

1. the impugned order in the present case is not in a special proceeding;

2. it is an order made in terms of section 46 of the Civil Procedure Code;

3. the rights of the parties have not yet been considered and therefore the rights of the parties have not yet been determined;

4. learned Additional District Judge had rejected the Plaint under section 46(2) of the Civil Procedure Code;

5. under section 46(2) of the Civil Procedure Code, the plaintiff is not precluded from presenting a fresh Plaint in respect of the same cause of action; and

6. in view of the test laid down by Sharvananda, J., (as he then was) in **Siriwardena v Air Ceylon Ltd.** (supra) the order of the learned Additional District Judge is not an order having the effect of a final order.

Being aggrieved by the said order of 21.11.2008 of the Provincial High Court, the appellants sought leave to appeal from the Supreme Court.

The main contention of the learned President's Counsel for the appellants was that the order of the learned Additional District Judge dated 14.05.2008 is an order having the effect of a Final Judgment in terms of sections 754(1) and 754(5) of the Civil Procedure Code and therefore since the plaintiff's action has been dismissed, he could only make a final appeal and not a leave to appeal application. In support of this contention it was submitted that there can only be one judgment in a case and the other orders made would therefore be incidental orders. It was also submitted that the phraseology used in section 754(5) of the

Civil Procedure Code stating that 'order having the effect of a Final Judgment' is only applicable in cases, where no judgments are given and that those are cases, which have been instituted under summary procedure. Accordingly the contention was that the term 'judgment' would mean judgments and decrees entered in terms of section 217 of the Civil Procedure code and orders having the effect of a Final judgment in terms of sections 387 and 388 of the Civil Procedure Code. Accordingly it was contended that a final appeal is only possible against a judgment (decree) entered in terms of section 184 read with section 217 of the Civil Procedure Code and final orders in terms of sections 387 and 388 of the Civil Procedure Code. The contention put forward therefore by the learned President's Counsel for the appellants was that as there could only be one judgment in a case, the definition of the decision of the Judge could be based on the procedure of an action. Accordingly it was contended that if the procedure is regular, then the decision given could be a judgment and when the procedure followed is summary, such a decision should be regarded as an order of Court.

Chapter LVIII of the Civil Procedure Code deals with Appeals and Revisions and section 753 to section 760 are contained in this Chapter. Section 754 refers to the modes of preferring appeals and the relevant sub-sections of section 754 are as follows:

> "754(1) Any person who shall be dissatisfied with any judgment, pronounced by any original court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of Appeal against such judgment for any error in fact or in law.
>
> (2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to

the Court of Appeal against such order for the correction of any error in fact or in law, with the leave of the Court of Appeal first had and obtained.

(3) . . . .

(4) . . . .

(5) Notwithstanding anything to the contrary in this Ordinance, for the purposes of this Chapter –

"Judgment" means any judgment or order having the effect of a final judgment made by any civil court; and

"order" means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment."

Sections 754(1) and 754(2) of the Civil Procedure Code defines the effect of a judgment and an order pronounced by any original Court. Whilst section 754(1) refers to any person, who is dissatisfied with any judgment pronounced by any original Court, section 754(2) refers to a situation, where a person is dissatisfied with an order made by such an original Court. In the first instance such a person could prefer an appeal to the Court of Appeal against such a judgment, where if it is against an order, he could prefer an appeal to the Court of Appeal with the leave of the Court of Appeal first had and obtained. The difference enumerated in section 754 of the Civil Procedure Code thus is between a judgment and an order given by the original Court.

In terms of section 754(5) of the Civil Procedure Code a judgment would mean any judgment or order having the effect of a 'final judgment' made by any Civil Court and an order would mean the final expression of any decision in any civil action, proceeding or matter, which is not a judgment.

Although section 754(5) of the Civil Procedure Code had laid down the meaning of the judgment and order, it had not been easy to give a comprehensive definition of the term 'final judgment' (**Viravan Chetty v Ukka Banda** ((1924) 27 N.L.R. 65).

The question of the test that should be applied to decide as to whether an order has the effect of a final judgment was considered by the Supreme Court in **Siriwardena v Air Ceylon Ltd.** (supra) **and Ranjit v Kusumawathi and another** (supra).

In **Siriwardena v Air Ceylon Ltd.** (supra), the appellant had filed an application for leave to appeal from an Order of the District Judge made under section 189 of the Civil Procedure Code directing the amendment of a decision and the question was whether the order of the District Judge dated 10.05.1982 amending the judgment and the decision dated 13.03.1980, is a 'judgment' within the meaning of sections 754(1) and 754(5) of the Civil Procedure Code or an 'order' within the meaning of section 754(2) and section 754(5) of the Civil Procedure Code. In his judgment Sharvananda, J. (as he then was) had referred to the decisions in **Salaman v Warner** ((1891) 1 Q.B. 734), **Bozson v Altrincham Urban District Council** ((1903) 1 K.B. 547), **Isaacs & Sons v Salbstein** ((1916) 2 K.B. 139), **Abdul Rahman and others v Cassim & Sons** (A.I.R. 1933 P.C. 58), **Settlement Officer v Vander Poorten** ((1942) 43 N.L.R. 436), **Fernando v Chittambaram Chettiar** ((1949) 49 N.L.R. 217), **Krishna Pershad Singh v Moti Chand** ((1913) 40 Cal. 635), **Usoof v The National Bank of India Ltd.** ((1958) 60 N.L.R. 381), **Subramaniam v Soysa** ((1923) 25 N.L.R. 344), **Onslow v Commissioners of Inland Revenue** ([1890] 25 Q.B.D. 465) and **Exparte Moore** ([1885] 14 Q.B.D. 627).

After an examination of the aforementioned decisions, Sharvananda, J., (as he then was) had held that for an 'order' to have the effect of a final judgment and to qualify to be a 'judgment' under section 754(5) of the Civil Procedure Code,

> "1. it must be an order finally disposing of the rights of the parties;
>
> 2. the order cannot be treated to be a final order if the suit or action is still left a live suit or action for the purpose of determining the rights and liabilities of the parties in the ordinary way;
>
> 3. the finality of the order must be determined in relation to the suit;
>
> 4. the mere fact that a cardinal point in the suit has been decided or even a vital and important issue determined in the case, is not enough to make an order, a final one."

The meaning of "Judgment' for the purpose of appeal was also examined by Dheeraratne, J., in **Ranjit v Kusumawathi and others** (supra).

In that decision attention was paid to examine the test to determine a 'final judgment or order' or an 'order' within the meaning of section 754(5) of the Civil Procedure code.

Justice Dheeraratne in **Ranjit v Kusumawathi** (supra) had examined several cases including those which were referred to by Sharvananda, J., (as he then was) in **Siriwardena v Air Ceylon Ltd.** (supra), (**Subramanium Chetty v Soysa** (supra), **Palaniappa Chetty v Mercantile Bank of India et.al.** ((1942) 43 N.L.R. 352), **Settlement Officers v Vander Pooten** (supra), **Fernando v Chittambaram Chettiar** ((1948) 49 N.L.R. 217), **Usoof v Nadarajah Chettiar** ((1957) 58 N.L.R. 436), **Usoof v The National Bank of India Ltd.** (supra), **Arlis Appuhamy et. al v Simon** ((1947)

48 N.L.R. 298), **Marikar v Dharmapala Unanse** ((1934) 36 N.L.R. 201), **Rasheed Ali v Mohamed Ali and others** ([1981] 1 Sri L.R. 262) and **Siriwardena v Air Ceylon Ltd.** (supra)), and had come to the conclusion that the determination whether an order in a civil proceeding is a judgment or an order having the effect of a final judgment has not been an easy task for Courts.

An analysis of the English cases, further strengthens the point that the question of determining the status of a judgment or an order had not only been difficult, but many judges in different jurisdictions for centuries had been saddled with the complexity of the problem in differentiating a judgment from an order having effect of a final judgment and an interlocutory order. For instance in **Salaman v Warner** ((1891) Q.B.D. 734) the question before Court was to decide as to whether an order dismissing an action made upon the hearing of a point of law raised by the pleadings before the trial, is a final order.

Considering the test that should be adopted to decide a 'final judgment or order' or an 'order' in terms of section 754(5) of the Civil Procedure Code, Justice Dheeraratne in **Ranjit v Kusumawathi and others** (supra) had referred to the two tests, which was referred to as the 'Order approach' and the 'application approach' by Sir John Donaldson MR., in **White v Brunton** ([1984] 2 All E.R. 606).

The order approach had been adopted in **Shubrook v Tufnell** ((1882) 9 Q.B.D. 621) whereas the application approach was adopted in **Salaman v Warner** (supra). Later in **Bozson v Altrincham Urban District Council** (supra), the Court had considered the question as to whether an order made in an action was final or interlocutory and reverted to the order approach. In deciding so, Lord Alverstone, C.J., stated thus:

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it

> ought to be treated as a final order: but if it does not, it is then, in my opinion, an interlocutory order."

The watershed in the long line of decisions, which considered the test to determine a 'final judgment or order' or an 'order', in my view, was the decision of Lord Denning, MR., in **Salter Rex and Co. v Ghosh** ([1971] 2 All ER 865). After considering the decisions in **Bozson** (supra), **Hunt v Allied Bakeries Ltd.** ([1956] 3 All E.R. 513) and **Salaman v Warner** (supra), Lord Denning, MR., had held that in determining whether an application is final or interlocutory, regard must be had to the nature of the application and not to the nature of the order, which the Court eventually makes and since an application for a new trial if granted would clearly be interlocutory and where it is refused it is still be interlocutory. Examining the question at issue, Lord Denning, MR, not only described the difficulties faced, but also pointed out the test to determine such issues. According to Lord Denning MR.,

> "There is a note in the Supreme Court Practice 1970 under RSC Ord. 59, r 4, from which it appears that different tests have been stated from time to time as to what is final and what is interlocutory. In **Standard Discount Co. v La Grange** and **Salaman v Warner**, Lord Esher MR said that the test was the nature of the application to the Court and not the nature of the order which the Court eventually made. But in **Bozson v Altrincham Urban District Council,** the Court said that the test was the nature of the order as made. Lord Alverstone C.J. said that the test is: 'Does the judgment or order, as made, finally dispose of the rights of the parties?' Lord Alverstone C.J. was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice. For instance, an appeal from a judgment under RSC Ord. 14 (even apart from the new rule) has always been regarded as interlocutory and notice of appeal had to be lodged within 14

days. An appeal from an order striking out an action as being frivolous or vexatious, or as disclosing no reasonable cause of action, or dismissing it for want of prosecution – every such order is regarded as interlocutory: See **Hunt v Allied Bakeries Ltd.**, so I would apply Lord Esher MR's test to an order refusing a new trial. **I look to the application for a new trial and not to the order made. If the application for a new trial were granted, it would clearly be interlocutory. So equally when it is refused, it is interlocutory**. It was so held in an unreported case, **Anglo-Auto Finance (Commercial) Ltd. V Robert Dick**, and we should follow it today.

This question of 'final' or 'interlocutory' is so uncertain, that the only thing for practitioners to do is to look up the practice books and see what has been decided on the point. Most orders have now been the subject of decision. If a new case should arise, we must do the best we can with it. There is no other way" (emphasis added).

In **Ranjit v Kusumawathi and others**, (supra), Dheearatne, J. specifically stated that, Sharvananda, J. (as he then was) in **Siriwardena v Air Ceylon** (supra) had followed the decision in **Bozson** (supra), which had clearly reverted to the order approach. Justice Dheeraratne, in **Ranjit v Kusumawathi and others** (supra) had carefully considered the decision of Lord Denning, MR., in **Salter Rex. and Co. v Gosh** (supra) and had applied the test stipulated by Lord Esher in **Standard Discount Co. v La Grange** ((1877) 3 CPD 67) and **Salaman v Warner** (supra), that is known as the nature of the application made to the Court (application approach) in deciding the question, which was at issue in that case.

Considering the two approaches, based on the order made by Court, and the application made to the Court, one cannot ignore the comment made by Lord Denning, MR., in **Salter Rex and Co.** (supra) that Lord Alverstone, who preferred the test based on the nature of the order

as made (**Bozson v Altrinchem Urban District Council** (supra), although was correct in logic, the test applied by Lord Esher (**Standard Discount Co. v La Grange** (supra) and **Salaman v Warner** (supra)) is a test that had always been applied in practice.

It is to be borne in mind that both the words 'Judgment' and 'order' are defined in section 5 of the Civil Procedure Code. Section 5 begins by stating thus:

> "The following words and expressions in this Ordinance shall have the meanings hereby assigned to them, unless there is something in the subject or context repugnant thereto."

Section 754(5) of the Civil Procedure Code however is specific about the meaning that should be given to the words 'Judgment' and 'order' as it has clearly specified that,

> "Notwithstanding anything to the contrary in this Ordinance, for the purpose of this Chapter –
>
> 'Judgment' means any judgment or order having the effect of a final judgment made by any civil court;
>
> And
>
> 'order' means the final expression of any decision in any civil action, proceeding or matter, which is not a judgment."

It is therefore quite obvious that a final judgment or order should be interpreted for the purpose of Chapter LVIII of the Civil Procedure Code not according to the meaning given in section 5 of the Civil Procedure Code, but that of the definition given in section 754(5) of the Civil Procedure Code.

Considering the provisions contained in section 754(5) of the Civil Procedure Code, it is abundantly clear that a decision of an original civil Court could only take the form of a judgment or an order having the effect of a final judgment or of the form of an interlocutory

order. It is also vital to be borne in mind that clear provision had been made in section 754(5) in defining a judgment and an order made by any civil Court to be applicable only to the Chapter in the Civil Procedure Code dealing with Appeals and Revisions. Accordingly in terms of section 754(5) there could be only a judgment, order having the effect of a final judgment and an order, which is not a judgment and therefore only an interlocutory order.

In these circumstances, it is abundantly clear that, in interpreting the words, Judgment and Order in reference to appeals and revisions, it would not be possible to refer to any other section or sections of Civil Procedure Code, other than section 754(5), and therefore an interpretation based on the procedure of an action cannot be considered for the said purpose.

Therefore to ascertain the nature of the decision made by a civil Court as to whether it is final or not, in keeping with the provisions of section 754(5) of the Civil Procedure Code, it would be necessary to follow the test defined by Lord Esher MR in **Standared Discount Co. v La Grange** (supra) and as stated in **Salaman v Warner** (supra) which reads as follows:

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory."

In **Salaman v Warner** (supra), Fry, L.J., also had expressed his views regarding an appropriate interpretation that had to be given to final and interlocutory decisions. Considering the difficulties that had been raised regarding the correct interpretation for final and

interlocutory orders, it was stated that the attention must be given to the object of the distinction drawn in the rules between interlocutory and final orders on the basis of the time for appealing. Fry, L.J. had accordingly stated thus:

> "I think that the true definition is this. I conceive that an order is "final" only where it is made upon an application or other proceeding which must, whether such application or other proceeding fail or succeed, determine the action. Conversely I think that an order is "interlocutory" where it cannot be affirmed that in either event the action will be determined."

Considering all the decisions referred to above, the aforesaid statement clearly has expressed the true meaning that could be given to a judgment and an order in terms of section 754(5) of the Civil Procedure Code.

The order made by the Additional District Judge on 14.05.2008, was in terms of section 46(2) of the Civil Procedure Code and it is not disputed that the rights of the parties were not considered by the District Court. In such circumstances it would not be probable to state that the said order made by the District Court had finally settled the litigation between the appellants and the plaintiff. Considering the circumstances of the appeals it is abundantly clear that at the time the said order was made by the District Court, the litigation among the parties had just begun as the plaintiff as a Trustee of the 'Puthiya Sri Kathiravelayuthan Swami Kovil' and its temporalities had instituted action before the District Court of Colombo, seeking *inter alia*,

1. the appointment of Receiver under section 671 of the Civil Procedure Code for the preservation and maintenance of the Trust property;

2. the removal of the 2nd to 4th appellants and the 1st respondent as trustees of the Trust;

3. the 2nd to 4th appellants and the 1st respondent to account for Rs. 34,000,000/- of Trust money which had been illegally and immorally appropriated by the 2nd to 4th appellants and the 1st respondent for their personal use.

It must also be borne in mind that the District Court had accepted the Plaint in terms of section 46 of the Civil Procedure Code and had issued summons on the 2nd to 4th appellants and the 1st respondent returnable on 02.01.2008. The 2nd and 3rd appellants and the 1st respondent had filed their proxy on 02.01.2008 and had sought time to file their objections and Answer and the 4th appellant had not appeared before Court as summons had not been served on him. On 08.02.2008 without notice to the plaintiff, an ex-parte application had been made on behalf of the 2nd and 3rd appellants by way of a motion dated 07.02.2008 stating that the plaintiff's action was not maintainable and Court had issued notice on the plaintiff returnable on 13.02.2008. On 13.02.2008 learned Counsel for the plaintiff had made submissions stating that the application of the 2nd and 3rd appellants was misconceived in law and therefore the order made by Court was *per incuriam*. The District Court had directed the parties to file written submissions. Thereafter learned Additional District Judge had delivered his order dated 14.05.2008 rejecting the Plaint.

Considering all the above mentioned it cannot be said that the decision given by the District Court could have finally disposed the matter in litigation. In **Ranjit v Kusumawathi** (supra), Dheeraratne, J. after considering several decisions referred to earlier and the facts of that appeal had stated thus:

> "The order appealed from is an order made against the appellant at the first hurdle. Can one say that the order made on the application of the 4th defendant is one such that whichever way the order was given, it would have finally determined the litigation? Far from that, even if the order was

given in favour of the appellant, he has to face the second hurdle, namely the trial to vindicate his claim."

Considering the decision given by Dheeraratne, J., in **Ranjit v Kusumawathi** (supra) it is abundantly clear that the order dated 14.05.2008 is not a final order having the effect of a judgment within the meaning of sub-sections 754(1) and 754(5) of the Civil Procedure Code, but is only an interlocutory order.

For the reasons aforesaid, both appeals (S.C. (Appeal) No. 101^{A}/2009 and S.C. (Appeal) No. 101^{B}/2009), are dismissed and the judgment of the High Court dated 21.11.2008 is affirmed.

I make no order as to costs.

Judge of the Supreme Court

J.A.N. de Silva, CJ.

I agree.

Chief Justice

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, PC., J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, PC., J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 105A/2008
S.C. (Spl.) L.A. No. 166/2008
H.C.A. No. 131/2005
M.C. No. 61770

The Finance Company PLC,
No. 97, Hyde Park Corner,
Colombo 02.

Claimant-Appellant-Appellant

Vs.

1. Agampodi Mahapedige Priyantha Chandana,
   Chandana Stores,
   Ginneliya,
   Urubokke.

2. Officer-in-Charge,
   Beliatta Police Station,
   Beliatta.

3. Godagama Kumarasinghe Arachchige Jayadasa,
   Dammane Watta,
   Talawa,
   Kariyamaditthta.

4. Jasinghe Pathiranage Jinadasa,
   Kudagal Ara Gedara,
   Kuda Bibula,
   Julampitiya,
   Weeraketiya.

5. Weerasinghe Arachchige Suranga Namal,
   No. 9, Udagama,
   Attanayala,
   Medamulana,
   Weeraketiya.

6. Hon. The Attorney-General,
   Attorney General's Department,
   Colombo 12.

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Chandra Ekanayake, J.

COUNSEL : I. S. de Silva with Suren de Silva for Claimant-Appellant-Appellant

Riyaz Hamza, SSC, for 6th Respondent

ARGUED ON: 02.07.2009

WRITTEN SUBMISSIONS
TENDERED ON: Claimant-Appellant-Appellant : 16.07.2009
6th Respondent-Respondent-Respondent : 15.07.2010

DECIDED ON: 30.09.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the order of the High Court dated 30.06.2008. By that order the High Court had dismissed the appeal instituted by the claimant-appellant-appellant (hereinafter referred to as the appellant) and had affirmed the order of the learned Magistrate dated 25.08.2005.

The appellant came before this Court against the order of the High Court on which special leave to appeal was granted on the following question:

> "Has the learned High Court Judge misdirected himself in fact and in law in failing to appreciate that in view of the fact that there was no dispute between the parties that the appellant was the absolute owner of the vehicle bearing registration No.

227-8130, the scope of the inquiry in terms of Chapter XXXVIII of the Code of Criminal Procedure Act before the Magistrate's Court, was limited to ascertain whether or not the appellant was aware or that the said vehicle has been used in connection with or participated in the commission of the offence."

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant is a Registered Finance Company and is *inter alia* involved in providing leasing facilities in connection with motor vehicles at the request of its customers. The appellant is the registered absolute owner of the vehicle bearing registration No. 227-8130, which forms the subject matter of this appeal.

On 12.06.2000 at the request of the 1st respondent-respondent-respondent (hereinafter referred to as the 1st respondent) the appellant had purchased and provided on lease the vehicle, bearing registration No. 227-8130 to the 1st respondent. Unknown to the appellant, on 20.08.2000, the Beliatta Police had arrested the 3rd and/or 4th and/or 5th respondents-respondents-respondents (hereinafter referred to as the 3rd and/or 4th and/or 5th respondent) for transporting timber without a lawful permit, in terms of section 24(1)(b) and section 25(2) of the Forest Ordinance. The Beliatta Police also seized the said vehicle bearing registration No. 227-8130, which had been used by the 3rd and/or 4th and/or 5th respondent to transport the said timber. Thereafter the 2nd respondent-respondent-respondent (hereinafter referred to as the 2nd respondent), had filed action in the Magistrate's Court, Tangalle against the 3rd, 4th and 5th respondents in connection with the said offence. The 3rd respondent had pleaded guilty to the charges, where the 4th and 5th respondents had pleaded not guilty and the case was fixed for trial against the 4th and 5th respondents.

On 16.08.2001 the 1st respondent, as the registered owner of the vehicle in question had made an application for the release of the said vehicle to the 1st respondent pending the final determination of the trial. The appellant, being the absolute owner, agreed to the said application of the 1st respondent in view of the undertaking by the 1st respondent to pay a

sum of Rs. 150,000/- to the appellant in respect of the rentals outstanding under the Lease Agreement. The said vehicle was released to the 1st respondent on the undertaking given by him to pay the appellant Rs. 150,000/- on or before 25.08.2001.

The 1st respondent had failed to pay the said sum of Rs. 150,000/- and on 22.11.2001, pursuant to the appellant bringing the said matter before the Magistrate's Court, learned Magistrate had directed the 1st respondent to handover possession of the vehicle in question to the appellant, subject to certain terms and conditions. The vehicle in question was accordingly handed over to the appellant and the said vehicle remains in the custody of the appellant.

A confiscation inquiry had been held regarding the lorry bearing registration No. 227-8130 in terms of Chapter XXXVIII of the Code of Criminal Procedure Act and after inquiry, by his order dated 25.08.2005, learned Magistrate had ordered the confiscation of the said lorry. Aggrieved by this order, the appellant filed an application in revision (HCA/113/2005) in the High Court of the Southern Province, holden in Hambantota. The appellant had also filed an appeal in the High Court of Hambantota (HCA/131/2005). On 30.06.2008, learned Judge of the High Court made order dismissing the revision application (HCA/113/2005) and affirmed the order of the learned Magistrate dated 25.08.2005. The learned Judge of the High Court also made order dismissing the appeal (HCA/131/2005) for the same reasons given in the order made on the Revision application. Being aggrieved by the order made by the learned Judge of the High Court of Hambantota in the appeal (HCA/131/2005), the appellant came before this Court whereas with regard to the revision application he had filed an appeal in the Court of Appeal, simultaneously.

When the application for special leave to appeal came up for support before this Court on 03.12.2008, this Court had taken into consideration that there were two orders made by the High Court of the Provinces, in the exercise of its appellate jurisdiction and its revisionary jurisdiction. The Court also took notice of the fact that the appellant had filed applications before the Court of Appeal regarding the order made in the revisionary application and before this Court on the basis of the High Court in the exercise of its appellate jurisdiction. At that stage, learned Senior State Counsel had brought to the notice of this Court the necessity to avoid multiplication of proceedings, as the appeal before the Court of Appeal

could also come up for consideration in the Supreme Court by way of appeal. Accordingly, learned Counsel for the appellant had given an undertaking to withdraw the application filed in the Court of Appeal regarding the order of the Provincial High Court on the basis of the revision application (HCA/113/2005).

Thereafter special leave to appeal had been granted by this Court on the basis of the order made by the Provincial High Court in the exercise of its appellate jurisdiction (HCA/131/2005).

The facts of this appeal were not disputed and it was common ground that the Beliatta Police had instituted proceedings in the Magistrate's Court of Tangalle against the 3rd, 4th and 5th respondents for transporting 63 logs of satinwood timber (*Burutha*) valued at Rs. 39,691.65 on 05.08.2001 without a lawful permit and thereby committing an offence punishable in terms of section 24(1)b read with sections 25(2) and 40 of the Forest Ordinance, No 16 of 1907, as amended.

Section 40 of the Forest Ordinance, as amended by Act Nos. 13 of 1966, 56 of 1979, 13 of 1982 and 23 of 1995 states as follows:

> "(1) upon the conviction of any person for a forest offence –
>
> a) all timber or forest produce which is not the property of the State in respect of which such offence has been committed; and
>
> b) all tools, boats, carts, cattle and motor vehicles, trailers, rafts, tugs or any other mode of transport motorised or otherwise and all implements and machines used in committing such offence whether such tools, boats, carts, cattle, motor vehicles, trailers, rafts, tugs, or other modes of transport motorised or otherwise are owned by such person or not

shall, by reason of such conviction be forfeited to the State.

(2) Any property forfeited to the State under sub- section (1) shall –

a) if no appeal has been preferred to the Court of Appeal against the relevant conviction, vest absolutely in the State with effect from the date on which the period prescribed for preferring an appeal against such conviction expires;

b) if an appeal has been preferred to the Court of appeal against the relevant conviction, vest absolutely in the State with effect from the date on which such conviction is affirmed on appeal.

In this sub-section 'relevant conviction' means the conviction in consequence of which any property is forfeited to the State under sub-section (1)".

Learned Magistrate had considered the provisions laid down in section 40 of the Forest Ordinance as amended and had come to the conclusion that the Court has a discretion to confiscate a vehicle after an inquiry, on the basis that the registered owner had given his consent for the offence which had been committed and that the registered owner had the knowledge of such an offence. In considering the provisions of section 40 of the Forest Ordinance and the decided cases, the learned Magistrate had been of the view that the absolute owner had not been able to take every possible step to prevent the committing of the offence in question.

It is common ground that the absolute owner is a Finance Company and that the registered owner had purchased the lorry in question on a Hire Purchase Scheme.

In **Manawadu v Attorney-General** ([1987] 2 Sri L.R.) 30) Sharvananda, CJ., had considered the applicability of sections 24(1)(b), 25(1) and section 40 of the Forest Ordinance, in a matter where a load of rubber timber was transported in a lorry without a permit from an authorised officer. After sentencing the accused, who had pleaded guilty, the learned Magistrate in that matter had ordered the confiscation of the lorry in which the timber was alleged to have been transported. In considering the confiscation of the said lorry used for the transport of illicit timber, in view of section 7 of the Act, No. 13 of 1982, by which section 40 of the Forest Ordinance was amended, Sharvananda, CJ., in **Manawadu v Attorney-General** (supra) had held that,

> "By section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused. The amended sub-section 40 does not exclude by necessary implication the rule of '*audi alteram partem*'. The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.
>
> The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him."

Sharvananda, C.J., in **Manawadu v Attorney-General** (supra) had considered several decisions pertaining to the matter in question. Reference was made to the decision in **Inspector Fernando v Marther** ((1932) 1 CLW 249), where Akbar, J., in construing section 51 of the Excise Ordinance that corresponds to section 40 of the Forest Ordinance had quoted with approval a statement by Schneider, J., in **Sinnetamby v Ramalingam** ((1924) 26 NLR 371), which was in the following terms:

> "Where an offence has been committed under the Excise Ordinance, no order of confiscation should be made under section 51 of the Ordinance as regards the conveyance used to commit the offence, e.g. a boat or motor car unless two things occur.
>
> (1) That the owner should be given an opportunity of being heard against it; and
>
> (2) Where the owner himself is not convicted of the offence, no order should be made against the owner, unless he is implicated in the offence which render the thing liable to confiscation.

In **Inspector Fernando v Marther** (supra) the vehicle in question did not belong to the accused, but was a vehicle, which was hired under a Hire Purchase Agreement. It was held by Akbar, J., in **Inspector Fernando v Marther** (supra) that since the registered owner was not implicated in the commission of the offence, no order confiscating the car could be made.

In **Mudankotuwa v Attorney-General** ([1996] 2 Sri L.R. 77) the Court of Appeal had referred to the decision in **Manawadu v Attorney-General** (supra) with approval and had stated that the owner of the vehicle, who is not a party to the case is entitled to be heard on the question of forfeiture of the vehicle and if he satisfies the Court that the accused committed the offence without his knowledge or participation, then his vehicle will not be liable to forfeiture. Reference was also made in **Mudankotuwa v Attorney-General** (supra) to the

decisions in **Nizer v I.P. Wattegama** ((1978-79) 2 Sri L.R. 304) and **Faris v OIC, Police Station, Galenbindunuwewa** ([1992] 1 Sri L.R. 167).

In **Nizer v I.P. Wattegama** (supra) Vythyalingam, J., considered the implications of the proviso to section 3A of the Animals Act, No. 29 of 1958 as amended. Section 3A of the Animals Act states as follows:

> "Where any person is convicted of an offence under this Part or any regulations made there under, any vehicle used in the commission of such offence shall, in addition to any other punishment prescribed for such offence, be liable, by order of the convicting Magistrate, to confiscation:
>
> Provided however, that in any case where the owner of the vehicle is a third party, no order of confiscation shall be made, if the owner proves to the satisfaction of the Court that he has taken all precautions to prevent the use of such vehicle or that the vehicle has been used without his knowledge for the commission of the offence."

Vythyalingam, J., had observed that in view of this proviso, an order for confiscation could be made only if the owner was present at the time of the detection or there was evidence suggesting that the owner was privy to the said offence. This decision was referred to with approval in **Faris v OIC, Police Station, Galenbindunuwewa** (supra), where it was stated that in terms of the proviso to section 3A of the Animals Act, an order for confiscation cannot be made if the owner establishes one of the following:

a) that he has taken all precautions to prevent the use of the vehicle for the commission of the offence;

b) that the vehicle had been used for the commission of the offence without his knowledge.

It is also worthy of note that in **Faris**, it was categorically stated that, in terms of the proviso to section 3A of the Animals Act, if the owner establishes any one of the above matters on a balance of probability, an order for confiscation should not be made.

In **Rasiah v Thambiraj** ((1951) 53 NLR 574), the Court had considered the applicability of section 40 of the Forest Ordinance with regard to an order made by a Magistrate in the confiscation of a cart. Referring to the issue of confiscation, Nagalingam, J., in **Rasiah v Thambiraj** (supra) had stated thus:

> "In these cases where the accused person convicted of the offence is not himself the owner of the property seized, an order of confiscation without the previous inquiry would be tantamount to depriving the person of his property without an opportunity being given to him to show cause against the order being made."

In **Manawadu v Attorney-General** (Supra), Sharvananda, C.J., referring to the decisions by Justice Akbar and Justice Nagalingam in **Fernando V Marther** (supra) and **Rasiah v Thambiraj** (supra) respectively, had come to the conclusion that the owner of the vehicle would only have to show that the offence was committed without his knowledge and without his participation.

> "Justice Akbar and Justice Nagalingam founded their decision on fundamental principles of constitutional importance and not on the narrow ground 'shall be liable to confiscation'. **They emphasised that where the owner can show that the offence was committed without his knowledge and without his participation in the slightest degree, justice demanded that he should be restored his property**" (emphasis added).

Sharvananda, C.J., in **Manawadu v Attorney-General** (supra) had finally expressed the view that,

> "But if the owner had no role to play in the commission of the offence and is innocent, then forfeiture of his vehicle will not be penalty, but would amount to arbitrary expropriation since he was not a party to the commission of any offence."

The appellant, as referred to earlier, is the absolute owner of the vehicle in question. The appellant had leased it to the 1st respondent on a Hire Purchase Agreement. Section 433A of the Code of Criminal Procedure Act, as amended, deals with possession of property, which is the subject of a Hire Purchase Agreement. This section reads as follows:

> "(1) In the case of a vehicle let under a hire purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter.
>
> (2) In the event of more than one person being registered as the absolute owner of any vehicle referred to in sub-section (1), the person who has been so registered first in point of time in respect of such vehicle shall be deemed to be the person entitled to possession of such vehicle for the purposes of this Chapter."

The scope of section 433A of the Code of Criminal Procedure Act was considered in **Mercantile Investments Ltd. V Mohamed Mauloom and others** ([1998] 3 Sri L.R. 32), where it was stated that in terms of the said section 433A, an absolute owner is entitled to possession of the vehicle, even though the respondent had been given its possession on the Lease Agreement.

On a consideration of the *ratio decidendi* of all the aforementioned decisions, it is abundantly clear that in terms of section 40 of the Forest Ordinance, as amended, if the owner of the vehicle in question was a third party, no order of confiscation shall be made if

that owner had proved to the satisfaction of the Court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence. The *ratio decidendi* of all the aforementioned decisions also show that the owner has to establish the said matter on a balance of probability.

It is common ground that the learned Magistrate had held a confiscation inquiry in respect of the lorry in question in terms of Chapter XXXVIII of the Code of Criminal Procedure Act. It is also common ground that the learned Magistrate had given an opportunity for the representation of the appellant, being the absolute owner, to give evidence at the said inquiry and to tender to Court any relevant documents. At that inquiry, although the representative of the appellant had taken the position that the vehicle in question was given to the 1st respondent on a Hire Purchase Agreement, he had not tendered the said agreement to Court. Accordingly no steps were taken to mark the said document.

Learned Counsel for the appellant contended that the appellant, being the absolute owner had neither participated nor had any knowledge of the commission of the offence in which the vehicle was confiscated. Learned Counsel for the appellant referred to the evidence given by witness Percy Weeraratne, Assistant Manager (Matara Branch) of the appellant Company. The said Assistant Manager had stated that the appellant Company had no knowledge of the use of the vehicle and that the vehicle was in the Urubokka area and not within the control of the appellant.

> "මෙම වාහනය නීති විරෝධී ක්‍රියාවකට පාවිච්චි කිරීමට අනුමැතිය දිල තිබුනේ නැහැ.
>
> ප්‍රග මෙම මූල්‍ය ආයතනයට මෙම නීති විරෝධී දැව ප්‍රවාහනය සම්බන්ධයෙන් යම්කිසි දැනීමක් තිබුනද?
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> W. keye.
>
> . . . .

මෙම නීති විරෝධී ක්‍රියාවට මෙම මණ්ඩලය අනුමැතිය දුන්නේ නැහැග මෙම සමාගමෙන් අනුබලයක් දීල නැහැග මෙම වාහනය මගේ පාලනය යටතේ තිබුනේ නැහැග මෙම වාහනය තිබුනේ ඌරුබොක්ක ප්‍රදේශයේග එම නිසා මෙම රියදුරු විසින් කරන ක්‍රියාවක් ගැන දන්නේ නැහැ."

Considering the provisions laid down in section 40(a) read with section 25(2) of the Forest Ordinance, would it be sufficient to merely state that the vehicle in question was not under the control of the representative of the appellant? The answer to this question is purely in the negative for several reasons.

As has been clearly illustrated by several decisions referred to above, it would be necessary for the owner of the vehicle to establish that the vehicle that had been used for the commission of the offence had been so used without his knowledge and that the owner had taken all precautions available to prevent the use of the vehicle for the commission of such an offence.

Several measures could have been taken in this regard. For instance, there could have been a clause to that effect in the agreement between the appellant and the 1st respondent. Similarly if the 1st respondent had authorised others to use the said vehicle, he too could have had a written agreement inclusive of specified conditions. It is therefore quite clear that it would be necessary for the owner to show that he has taken all possible precautions to prevent the use of the vehicle for the commission of the offence.

Learned Counsel for the appellant submitted that the burden is only on the registered owner to satisfy Court that the accused has committed the offence without his knowledge or participation and this will not be applicable to an absolute owner.

As stated earlier, in **Mercantile Investments Ltd. V Mohamed Mauloom and others** (supra), consideration was given to the rights of the absolute owner as well as the registered owner. In that matter the learned Magistrate had not given an opportunity to the absolute owner to show cause before he made the order to confiscate the vehicle. On a consideration of the said question, the Court of Appeal had held that it is not only the registered owner, but

the absolute owner also should be given notice on the inquiry in relation to the confiscation of the vehicle.

It is therefore apparent that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privileges offered to an absolute owner, such as a Finance Company in terms of the applicable law in the country. Accordingly, it would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge.

On a consideration of the aforementioned it is evident that the learned Magistrate had not erred when he held that the appellant had not satisfied Court that he had taken every possible step to prevent the commission of the offence.
As stated earlier, the High Court had affirmed the order made by the learned Magistrate.

For the reasons aforesaid the question on which special leave to appeal was granted is answered in the negative.

The judgment of the High Court dated 30.06.2008 is therefore affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal from the Judgement of the High Court of Civil Appeal, Colombo in Case No. WP/HCCA/COL. 77/2007 (LA) dated 3rd December 2007 marked DP (Y4) with the Petition.

In the matter of an Application made in terms of Section 18 of the Civil Procedure Code.

Sena Ranjith Fernando of No. 130/09,
Nawala Road,
Nugegoda.
Defendant-Respondent-Petitioner-Appellant

SC Appeal No. 19/2008
SC (HC) CALA No. 44/2007
WP/HCCA/COL No. 77/2007 (LA)
DC Mt. Lavinia Case No. 951/06/Spl

-Vs-

1. Tennakoon Mudiyanselage Ranjith Tennakoon
   No. 65, Medawelikada,
   Rajagiriya
   and presently at
   Bellbird Tires,
   No. 160,
   Main Street,
   Blacktown,
   NSW 2148, Sydney,
   Australia.
   Intervenient Petitioner-Respondent-Respondent

1. E. V. T. De Silva
   No. 134/3,
   Stanley Tillekeratne Mawatha,
   Nugegoda.

2. Geetha Amarasinghe
   No. 23/30,
   Devala Lane,
   Pagoda,
   Nugegoda.
   Plaintiff-Respondent-Respondent-Respondents

BEFORE : Shiranee Tilakawardane, J;
R. A. N. G. Amaratunga, J; and
Saleem Marsoof, P.C., J.

COUNSEL	:	Nihal Fernando, P.C., with Rejindra Jayasinghe and Ranil Angunawela, instructed by Ms. Iresha soysa for the Defendant-Respondent-Petitioner-Appellant. Rohan Sahabandu with Ranjith Perera for the Intervenient-Petitioner-Respondent-Respondent. Chathura Galhewa instructed by Upendra Gunasekara for the Plaintiff-Respondent-Respondent-Respondents.
ARGUED ON	:	17-06-2008
DECIDED ON	:	22-07-2010

MARSOOF, J.

This is an appeal against the decision of the High Court of Civil Appeal of the Western Province dated 3rd December 2007 refusing leave to appeal from the order of the District Court of Mount Lavinia dated 25th May 2007. By the said order, the learned District Judge permitted the Intervenient Petitioner-Respondent-Respondent, Tennakoon Mudiyanselage Ranjith Tennakoon (hereinafter referred to as Tennakoon) to intervene into an action instituted by Edirimuni Vijith Thejalal de Silva and Geetha Amarasinghe, who are respectively the 1st and 2nd Plaintiff-Respondent-Respondent-Respondents to this appeal against one Sena Ranjith Fernando, the Defendant-Respondent-Petitioner-Appellant, seeking to enforce a partnership agreement. This was an action for the dissolution and winding up of an alleged partnership between the said Edirimuni Vijith Thejalal de Silva (hereinafter referred to as E.V.T de Silva), Geetha Amarasinghe (hereinafter referred to as Geetha Amarasinghe) and Sena Ranjith Fernando (hereinafter referred to as Fernando) which has been registered under the Business Names Ordinance, No. 6 of 1918 as subsequently amended, in the name and style of 'General Trade Agency'.

The facts relevant to this appeal may be briefly outlined as follows. It appears from the Certificate of Registration dated 21st June 1983 annexed to the Plaint marked 'P1', which was issued under the Business Names Ordinance, that the said Tennakoon and one Rangoda Liyanarachchige Udaya Silva (who is now deceased and who was the husband of Geetha Amarasinghe, the 2nd Plaintiff- Respondent-Respondent-Respondent to this appeal) commenced a business of repairing of motor vehicles and distribution of merchandise in partnership under the name and style of 'General Trade Agency' on 17th May 1983. It also appears that prior to migrating to Australia, the said Tennakoon executed the Power of Attorney bearing No. 176 dated 6th November 1988 and attested by K. A. Wijayadasa, Attorney-at-Law and Notary Public (A4), appointing the said E.V.T de Silva as his Attorney to operate certain bank accounts he held in Sampath Bank, Colombo and to act for him in relation to the said partnership. By the said Power of Attorney, the said E.V.T de Silva was authorized by Tennakoon "to act for me and on my behalf in all matters pertaining to the Partnership called and known as 'General Trade Agency'".

It is evident from the extracts of the Business Names Register produced as DP(Y2) that on 7th February 1989 the said Udaya Silva made a statement of change, under oath, purportedly under Section 7 of the Business Names Ordinance, to the effect that the said Tennakoon ceased to be a partner on that date and that the said E.V.T de Silva was admitted as a new partner in his place. It also appears from the said extract that the Registrar of Business Names, Western Province, relying on the said Statement of Change has accordingly altered the Register by the inclusion of

the name of the said E.V.T de Silva in substitution of the name of Tennakoon. However, nowhere in the Register is there an indication as to the circumstances in which Tennakoon ceased to be a partner. Thereafter in 1992, the Defendant-Respondent–Petitioner-Appellant, Fernando was admitted as a partner. In 2004, the existing business lines were expanded to include a mechanical workshop, the import, sale and distribution of motor vehicles, machinery, spare parts, electrical items, drugs and chemicals, transport and tourism, insurance, and manpower services, and the partnership was re-registered (*vide* - Certificate of Registration dated 29th November 2004 marked 'P4'). After the death of Udaya Silva, his wife namely, Geetha Amarasinghe entered the partnership with E. V. T de Silva and Fernando, and a new firm was registered in June 2005. It is noteworthy that the only record of Tennakoon's alleged partnership in the Business Names Register is in the Certificate of Registration dated 21st June 1983 marked 'P1', and in none of the subsequent registration of the partnership business Tennakoon's name is reflected as a partner.

Although the original partnership business commenced in 1983, and there is little or no evidence that the initial partner Tennakoon, who left Sri Lanka in 1988, had any role to play in the partnership business after his departure, no legal proceedings had been commenced in this regard till 31st May 2006, when E.V.T de Silva and Geetha Amarasinghe commenced action against Fernando in the District Court of Mount Lavinia seeking to have the partnership dissolved and wound-up. It is to this action that Tennakoon, acting through his Attorney Ranjith Amarasinghe, sought to intervene by his Petition dated 2nd February 2007, which was made in terms of Section 18 of the Civil Procedure Code No. 2 of 1889, as subsequently amended. The said application for intervention was made on the basis that the business called "General Trade Agency" was started by Tennekoon on 17th May 1983 with one Udaya Silva and that the agreement between the partners was later reduced into writing, which was the Partnership Agreement dated 30th June 1988 purportedly signed by Rangoda Liyanarachchige Udaya Silva and Tennakoon in the presence of two witnesses, a copy of which was produced by Tennakoon marked 'A3' with his application for intervention.

The said Partnership Agreement expressly provides in clause 10 thereof that without the consent of all the other partners no rights of the partners may be transferred or alienated or any new partners admitted into the partnership. In paragraph 5(c) of the said application for intervention, it has been pleaded that the partnership between the said Rangoda Liyanarachchige Udaya Silva and Tennakoon came to an end by the death of the former which occurred on or about 5th June 2005, and that as the surviving sole partner, the said Tennakoon is entitled to all the assets and capital of the partnership subject to the rights of the heirs of the said Rangoda Liyanarachchige Udaya Silva. In paragraph 6 of the said application, it has been pleaded that the original plaintiffs, E.V.T de Silva and Geetha Amarasinghe and the defendant Fernando are seeking to divide the capital and assets of the partnership exclusively amongst themselves, and that by reason of the prejudice that would thereby be caused to Tennakoon, he is a necessary party to this action, and should be added as an intervenient party.

The learned District Judge who inquired into the application for intervention after the other parties filed their respective objections thereto, has by his order dated 25th May 2007, concluded that Tennakoon is a necessary and material party and should be added. By its order dated 3rd December 2007, the High Court of Civil Appeal of the Western Province affirmed the said order of the learned District Judge and refusing leave to appeal. This Court has on 22nd February 2008 granted special leave to appeal against the order of the High Court of Civil Appeal on the following substantial questions of law:-

(a) Has the High Court of Civil Appeal (Colombo) erred in not considering the delay of almost 18 years and the fact that different partnerships came into being during the period of 18 years?

(b) Whether the High Court of Civil Appeal (Colombo) erred in dismissing the application for leave to appeal of the Defendant-Petitioner (Fernando)?

(c) Whether the High Court of Civil Appeal (Colombo) erred in holding that the Intervenient Petitioner (Tennakoon) is a necessary party to enable the court of effectually and completely adjudicate upon and settle all the questions involved in the said action?

(e) Whether the High Court of Civil Appeal (Colombo) has erred by not considering the fact that the Intervenient Petitioner (Tennakoon) is in any event not entitled to any relief as he is guilty of laches and/or inordinate delay?

(f) Whether the High Court of Civil Appeal (Colombo) has erred in not holding that the any alleged claim of the Intervenient Petitioner (Tennakoon) is prescribed in law and as such the Intervenient Petitioner (Tennakoon) is not entitled to intervene?

The primary question for determination by this Court is whether Tennakoon has slept over his rights, and if so, whether his delay and / or laches would disentitle him to intervene into the action in the District Court. In order to deal with the questions arising on this appeal, it is necessary to go into the facts in some depth. However, since the trial has not commenced and at the Interim Injunction Inquiry no oral evidence was led, the facts can be only be gathered from the affidavits of the parties filed in the original court and in the course of the appellate proceedings.

It may be noted at the outset that the Plaint dated 31st May 2006 filed in the original court did not disclose the existence of any partnership agreement "in writing and signed by the party making the same" which is necessary for "establishing a partnership where the capital exceeds one thousand rupees" as provided in Section 18 (c) of the Prevention of Frauds Ordinance No. 7 of 1840 as subsequently amended, and in fact, the original court has refused the grant of interim-injunction by its order dated 30th June 2006, mainly on the ground that despite the initial capital exceeding one thousand rupees, no written partnership agreement has been produced in evidence. The Application for leave to appeal against the said order dated 30th June 2006 filed in the Court of Appeal bearing No. CA LA 274/06 is pending in that Court, and appears to have been kept in abeyance until the present appeal is disposed of by the Supreme Court. However, with his application for intervention, Tennakoon has produced in court marked 'A3', a copy of the Partnership Agreement dated 30th June 1988 purportedly signed by Rangoda Liyanarachchige Udaya Silva and himself in the presence of two witnesses, which expressly provides in clause 10 thereof that without the consent of all the other partners no rights of the partners may be transferred or alienated or any new partners admitted into the partnership. Furthermore, it is provided in clause 11 of the Agreement that upon the death or resignation of any partner, any part of the capital or any profits payable to such partner shall be paid to him or his legal representative or heir before the last day of the ensuring financial year. Clause 12 expressly provides that 6 months prior written notice must be by a partner of intent to resign from the partnership firm.

It has been submitted by the learned President's Counsel for the Defendant-Respondent-Petitioner-Appellant Fernando, that the original action is a nullity *ab initio* and should be dismissed *in limine,* inasmuch as the dispute relates to a partnership business of which

admittedly the capital exceeds one thousand rupees and no written partnership agreement has been produced with the plaint. As such, he submits, it is not unnecessary to add the Intervenient-Petitioner who claims to have been a partner but who resigned in 1989. I find it difficult to agree with this submission as the case is still pending in the District Court, and the fortunes of the parties cannot be predicted or prejudged at a stage when its trial has not even commenced. In any event, as far as the Intervenient Petitioner-Respondent-Respondent Tennakoon is concerned, there is no difficulty in this respect as he has produced the purported Partnership Agreement signed by the original partner Rangoda Liyanarachchige Udaya Silva, who is the deceased husband of the 2nd Plaintiff-Respondent-Respondent-Respondent Geetha Amarasinghe.

I also have a great deal of difficulty with the submission that Tennakoon resigned from the partnership, which submission is in fact based on an averment in paragraph 6 of the Plaint dated 31st May 2006 and paragraph 7 of the affidavit of the same date filed in the District Court by E.V.T de Silva and Geetha Amarasinghe, as the only document relied for this purpose, which is the extract of the Business Names Register dated 7th February 1989 marked DP(Y2) which is merely a Statement of Change made under Section 7 of the Business Names Ordinance unilaterally by the said Rangoda Liyanarachchige Udaya Silva, and there is nothing to suggest that due notice of intention to resign had been given by Tennakoon as contemplated by Clause 12 of the Partnership Agreement dated 30th June 1988 (marked A3). Furthermore, the Statement of Change marked DP(Y2) does not contain the signature of Tennakoon and cannot be construed as a notice of resignation, and in the circumstances, there is insufficient material to establish that Tennakoon had resigned from the partnership or his Attorney E.V.T de Silva has been properly added as a partner of the firm. In terms of Clause 10 of the Partnership Agreement produced by Tennakoon, no new partner could be introduced without the express consent of all other partners, and the evidence at this stage is very much suggestive of a fraud having been perpetrated by the Tennnakoon's Attorney E.V.T de Silva and his other partner Rangoda Liyanarachchige Udaya Silva. If that be so, no amount of delay and laches can defeat the claim of a person whose has been defrauded by his agent and / or partner both of who stand in a fiduciary relationship with him.

The question has also been raised by learned President's Counsel as to whether the application for intervention should be deemed to be in effect an action by Tennakoon to assert his rights, and if so whether it has been prescribed in terms of Section 6 of the Prescription Ordinance which lays down a time limit of 6 years for filing any action to "establish" a partnership. However, the prescriptive period stipulated in that section begins to run only from "the date of the breach of such partnership deed", and Tennakoon has come to court on the basis that the partnership between Rangoda Liyanarachchige Udaya Silva and himself came to an end by operation of law upon the death of the former, on or about 5th June 2005. In terms of clause 11 of the Partnership Agreement marked 'A3' partnership accounts have to be settled after the occurrence of any event that would *ipso jure* terminate the partnership such as death or resignation of a partner, and Tennakoon may well be within the prescriptive period. In any event, in my considered opinion, these are matters that can only be considered after trial in the light of all the evidence led, and it is in my view premature to deny intervention to an aggrieved party on the basis of pre-judgment.

It is in this context, necessary to refer to Section 18 of the Civil Procedure Code No. 2 of 1889, as subsequently amended, in terms of which the Intervenient Petitioner-Respondent-Respondent Tennakoon sought to intervene into the action filed by E.V.T de Silva and Geetha Amarasinghe against Fernando. The said section provides as follows:

> "(1) The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that……any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added.
>
> (2) Every order for such amendment or for alteration of parties shall state the facts and reasons which together form the ground on which the order is made. And in the case of a party being added, the added party or parties shall be named, with the designation " added party ", in all pleadings or processes or papers entitled in the action and made after the date of the order."

It is noteworthy that Section 19 of the Code expressly provides that no person shall be allowed to intervene in a pending action otherwise than "pursuance of, and in conformity with, the provisions of the last preceding section." The aforesaid provisions have been considered and commented upon in a large number of judgments of this Court, and learned Counsel representing the contesting parties in this appeal have invited the attention of Court to several of these decisions. However, it is not necessary to refer to all these decisions for the purpose of disposing of this appeal, except to refer to the "narrow view" on intervention as elucidated by Lord Coleridge, C.J. in *Norris v. Beazley* (1877) 2 CPD 80 which was to the effect that the words of the corresponding statute in England "plainly imply that the defendant to be added must be a defendant against whom the plaintiff has some cause of complaint which ought to be determined in the action, and that it was never intended to apply where the person added as a defendant is a person against whom the plaintiff has no claim and does not desire to Prosecute any." On this reasoning, learned President's Counsel for the Defendant-Respondent-Petitioner-Appellant, Fernando submitted that the original plaintiffs de Silva and Amarasinghe had no issue with Tennakoon, as they had sued Fernando on an altogether different partnership to the one that Tennakoon claimed to be a party to. He further submitted that similarly, Fernando too had no grouse with Tennakoon, as his partnership relationship with E.V.T de Silva and Amarasinghe was one that was much more recent in origin, and was very much different in character.

Learned Senior Counsel for Intervenient Petitioner-Respondent-Respondent, Tennakoon, however, submitted that his client will be affected by any decision the court might make in the original action, and in particular that he was aggrieved by the conduct of E.V.T de Silva and Amarasinghe as well as that of Fernando. He relied on the "wider construction" placed on the very same English provision by Lord Esher in *Byrne v. Browne and Diplock* (1889) 22 QBD 657 in the following terms:-

> "One of the chief objects of the Judicature Act was to secure that, whenever a Court can see in the transaction brought before it that rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the Court shall have power to bring all the parties before it, and determine the rights of all in one proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same: it is sufficient if the main evidence and the main inquiry will be the same, and the Court then has the power to bring in the new parties and adjudicate in one proceeding upon the rights of all parties before it. Another great object was to diminish the cost of litigation. That being so, the Court ought to give the largest construction to those acts in order to carry out as far as possible the two objects I have mentioned."

It is important to note that the conflicting views expressed by the English courts on this question were considered by Ranasinghe, J., (as he then was) in the course of his seminal judgment of in *Arumugam Coomaraswamy v. Andiris Appuhamy and others* (1985) 2 Sri LR 219. As his Lordship observed at page 229 of the said judgment -

> "On a consideration of the respective views . . . which have been expressed by the English courts in regard to the nature and the extent of the construction to be placed upon the rule regulating the addition of a person as a party to a proceeding which is already pending in Court between two parties, the "wider construction" placed upon it by Lord Esher, which has been set out above commends itself to me. The grounds which moved Lord Esher to take a broad view, viz: to avoid a multiplicity of action and to diminish the cost of litigation, seem to me, with respect, to be eminently reasonable and extremely substantial. Lord Esher's view though given expression to more than a century ago, is even today as constructive and acceptable."

It is relevant to note that the above approach has been sanctioned by subsequent decisions of this Court such as *Hilda Enid Perera v. Somawathie Lokuge and Another* (2000) 3 Sri LR 200 and a large number of decisions of the Court of Appeal, and I have no hesitation in following the wider construction expounded by Lord Esher. On that reasoning, it is abundantly clear that the lower courts were justified in permitting the intervention in question and adding Tennakoon as a party Defendant in all the circumstances of this case.

For the foregoing reasons, I am inclined to answer questions (a) to (f) on the basis of which special leave to appeal was granted by this Court in the negative, and affirm the order of the High Court of Civil Appeal dated 3rd December 2007. I do not make any order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

TILAKAWARDANE, J

I agree.

JUDGE OF THE SUPREME COURT

AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal in terms of Article 128(2) of the Constitution of Sri Lanka.

1. Jamaldeen Abdul Latheef,

2. Koya Mohideen Nizardeen,
   Nachchaduwa.

DEFENDANT-APPELLANT-APPELLANTS

S. C. Appeal No. 104/05
S. C. (SPL) L. A. No. 5/05
C. A. No. 908/94 (F)
D. C. Anuradhapura Case No. 12863/L

-VS-

1. Abdul Majeed Mohamed Mansoor,

2. Abdul Majeed Mohamed Nizar,
   Of No. 1, Dharga Road,
   Govijana Mandiraya,
   Nachchaduwa.

PETITIONER-RESPONDENT-RESPONDENTS

BEFORE	:	Hon. J.A.N. de Silva, C.J., Hon. Saleem Marsoof, P.C., J., and Hon. P. A. Ratnayake, P.C., J.
COUNSEL	:	Faisz Musthapha, P.C., with N. M. Shaheed for the Defendant-Appellant-Appellants. W. Dayaratne, P.C., with R. Jayawardane for the Petitioner-Respondent-Respondents.
ARGUED ON	:	18.03.2009 and 30.07.2009
WRITTEN SUBMISSIONS:		1.09.2009 and 23.10.2009
DECIDED ON	:	27.10.2010

SALEEM MARSOOF, J.

This appeal arises from an action for declaration of title filed in the District Court of Anuradhapura in December 1989 by the Petitioner-Respondent-Respondents (hereinafter referred to as "Respondents"), who claimed title to the four acre land named "Palugahakumbura" situated in Mahawela (Pahalabaage) in the Pandiyankulama village, in Nachcha Tulana of Ulagalla Korale in Hurulu Palata in Anuradhapura District in the North Central Province of Sri Lanka, more fully

described in the schedule to the joint petition filed by them. They claimed title by virtue of the Deed bearing No. 6165 dated 9th February 1987 (P1) and attested by Lionel P. Dayananda, Notary Public. The said Deed was executed by one Ibrahim Lebbe Noor Lebbai, the purported Attorney for Meydeen Sadakku Mohideen Abdul Cader, under the Power of Attorney bearing No. 7598 dated 30th October 1981 (P7), attested by S.M.M Hamid Hassan, Advocate & Notary Public in the Ramanathapuram District in Tamil Nadu, India. The Respondents alleged that they had purchased the said property for a sum of Rs. 20,000/-, but the 1st and 2nd Defendant-Appellant-Appellants (hereinafter referred to as the "Appellants") disputed their title and attempted to prevent their *ande* cultivator from working on the said paddy land. The Respondents sought a declaration of title in their favour and a permanent injunction to restrain the Appellants and their servants or agents from disturbing the Respondents, their *ande* cultivators and/or servants or agents from working on the paddy field which formed part of the said land. It is significant that the petition filed by the Respondents in the District Court did not contain a prayer for the ejectment of the Appellants or for damages.

In the joint answer filed in the District Court by the Appellants, it was expressly denied that they disturbed or obstructed the Respondents in the enjoyment of their land or cultivation carried out thereon. From the said answer it appears that while the 2nd Defendant-Appellant-Appellant did not make any claim to the land in question as owner, the 1st Defendant-Appellant-Appellant (hereinafter also referred to as the "1st Appellant") laid claim to a land named "Nilaththu Patti Wayal" in extent 3 acres 2 roods and 26 perches, which was alleged to have been possessed without interruption by the predecessors-in-title to the said Appellant for a period exceeding fifty years. It is also stated therein that although the said property was gifted by the said Appellant to his wife Noor Nisa, he had continued to be in uninterrupted possession thereof. In their joint answer, the Appellants prayed that the action be dismissed, and a sum of Rs. 22,000/- be awarded as damages for the loss of 200 bushels of paddy, but they have not prayed for a declaration of title to the land claimed by them, or that they be placed in possession thereof.

Although, as already noted, neither the Respondents nor the Appellants had sought any order of ejectment in their respective petition and answer, in paragraph 5 of the replication filed by the Respondents, it was averred as follows:

> 5 . විත්තිකරුවන් විසින් පැමිනිලිකරුවන්ට අයිති කුඹුරු ප්‍රමානය වැරදි සහගතව සහ නීති විරෝධීව භුක්ති වඳිමන් සිටින හෙයින්, පැමිනිලිකරුවන්ට 1989/90 මහ කන්නය සඳහා රු. 33,000/- ක අලාභයක් සිදුවී ඇති අතර, එකී මුදල සහ පැමිනිලිකරුවන්ට පැමිනිල්ලේ උපලේඛණයේ සඳහන් කුඹුරු ප්‍රමානය සාමකාමී භුක්තිය දෙනතුරු සෑම කන්නයකට පවතින අලාභය වශයෙන් රු. 33,000/-ක් විත්තිකරුවන්ගෙන් අයකර ගැනීමට පැමිනිලිකරුවන්ට නඩු නිමිත්තක් උපවයවී ඇත.

On the basis of the above averment, the Respondents have in payers (1) and (2) of the replication prayed for damages in a sum of Rs. 33,000/- for every cultivation season (කන්නය), until the quiet and peaceful possession of the land described in the schedule to the petition is restored to the Respondents. I quote below the relevant prayers (1) and (2) of the replication:

> (1) පැමිණිල්ලේ ඉල්ලා ඇති සඟනයන් සහ මෙම ප්‍රති උත්තරයේ ඉල්ලා ඇති පරිදි 1989/90 මාස් කන්නය සඳහා රු. 33,000/- ක අලාභයක් විත්තිකරුවන් විසින් සාමුහිකව සහ වෙන්, වෙන්ව පැමිණිලිකරුවන්ට ගෙවන මෙන් නඩු තීන්දුවක් ලබාදෙන ලෙසද,

(2) තවද, පැමිණිල්ලේ උපලේඛනයේ සඳහන් ඉඩමේ සාමකාමී සහ නිරවුල් බුක්තිය පැමිණිලිකරුවන්ට ලැබෙනතුරු සෑම කන්නයකටම රු. 33,000/- බැගින් පවතින අලාභය විත්තිකරුවන්ගෙන් පැමිණිලිකරුවන්ට ලබාදෙන ලෙසද,

At the commencement of the trial, no admissions were recorded, and the following five issues were formulated by court, which revealed that there was a dispute regarding the identity of the *corpus*. Accordingly, on the application of the Respondents, court issued a commission on D. M. G. Dissanayake, Licensed Surveyor, to survey the land referred to in the schedule to the petition filed by the Respondents as well as the land described in the schedule to the answer filed by the Appellants, and report whether they were the same. After his Plan bearing No. 1176 dated 10th October 1990 and the accompanying report was furnished to court, at the instance of the Appellants, a further commission was issued on K. V. Somapala, Licensed Surveyor, to survey the land claimed by the two contending parties to the case, and his Plan No. 2025 dated 16.04.1991 was also filed of record. Thereafter, on 12.08.1991, the following further issues were framed by court, issues 6, 7, 13 and 14 on the suggestion of learned Counsel for the Respondents, and issues 8 to 12 as suggested by learned Counsel for the Appellants:-

<u>පැමිනිල්ලෙන්</u>

6. පැමිණිල්ලේ උපලේඛණයේ සහ ඩී. එම්. ජී. දිසානායක මානක තැනගේ මැනුම් වාර්ථාවේ සවිස්තර කරන ලද ඉඩම පලුගහකුඹුර නැමති ඉඩම වේද?

7. එම ඉඩම පැමිණිලිකරුට සහ ඔහුගේ පෙර උරුමකරුවන්ට හිමිවීද ?

<u>විත්තියෙන්</u>

8. විත්තිකරු මෙම නඩුවට අදාල ඉඩම අවු. 50 කට අධික කාලයක සිට නොකඩවා භුක්ති වඳ තිබෙද ?

9. එසේ නම් කාල සීමා ආඥා පනතේ විධි විධාන යටතේ වරප්‍රසාද ඔහුට හිමිවෙද ?

10. පැමිනිලිකරු විසින් විත්තිකරුවන්ට විරුද්ධව වාරණ නියෝගයක් ලබා ගැනීමෙන් විත්තිකරුවන් විසින් වගා කරන ලද මෙම කුඹුර සම්පූර්ණයෙන් විනාශ වූයේද ?

11. පැමිනිල්ලෙන් ලබා තිබුන වාරන නියෝගය මෙම අධිකරණය විසින් විසුරුවා හැර තිබෙද ?

12. මෙම 10 සහ 11 යන විසඳනාවන්ට විත්තිකරුවන්ගේ වාසියට පිලිතුරු ලැබෙන්නේ නම් උත්තරයෙන් ඉල්ලා ඇති අලාභ විත්තිකරුට අයකර ගත හැක්කේද?

<u>පැමිනිල්ලෙන්</u>

13. පැමිනිලිකරුවන්ගේ ප්‍රති උත්තරයේ 5 වෙනි ඡේදයේ ප්‍රකාර විත්තිකරුවන් විසින් පැමිනිලිකරුට අයිත් කුඹුරු ප්‍රමානය වැරදි සහගත ලෙස භුක්තිවඳිමන් සිටින හෙයින් 1989/90 මහා කන්නය සඳහා රු. 33,000/- ක් අලාභයක් සිදුවී ඇත්තේද?

14. පැමිනිලිකරුවන්ට අයිති මෙම ඉඩමේ නිරවුල් භුක්තිය ලැබෙන තුරු පවතින අලාභය වශයෙන් කොපමන මුදලක් ලැබිය යුතුද?

On behalf of the Respondents, Abdul Majeed Mohamed Mansoor, the 1st Plaintiff-Respondent-Respondent, Mohomad Ibrahim Lebbai Noor Lebbai, the alleged Attorney under Power of Attorney bearing No. 7598 dated 30th October 1981 (P7), Vijitha Ellawala, Provincial Govi Jana Sewa Officer, Anuradhapura, D. M. G. Dissanayake, Licensed Surveyor, and Ranathunga Herath, Grama Seva Officer, Tulana, Nachchaduwa, testified at the trial. For the Appellants, Jamaldeen Abdul Lathif, the 1st Defendant-Appellant-Appellant, Vidana Arachchige Premadasa, a

cultivator in an adjoining paddy field, Ulludu Hewage Karunaratne, Registrar of Lands, Anuradhapura, and K.V. Somapala, Licensed Surveyor gave evidence.

On the conclusion of witness testimony, and after considering the submissions made by learned Counsel for the contending parties, on 5th October 1994 the learned District Judge entered judgement in favour of the Respondents, answering *inter alia* issues 6, 7 and 11 in the affirmative, and issues 8, 9, 10, 12 and 13 in the negative, with the answer to issue 14 being "රු 15,000 කි". The essence of the decision of the learned District Judge is contained in the following passage of his judgement:-

> පැමිනිල්ල සහ විත්තිකරු ඉදිරිපත් කර ඇති සියලු සාක්ෂි සහ ලේඛන සුපරීක්ෂාකාරීව විශ්ලේෂණය කර බැලුවෙමි. අදාල විෂය වස්තුව පැමණිල්ලේ උපලේඛණයේ සඳහන් විෂය වස්තුව හා මානක දිසානායක මහතාගේ වාර්තාවේ සඳහන් විෂය වස්තුව එකක් බව තීරණය කරමි. අදාල විෂය වස්තුව සඳහා පැමණිල්ල ඉදිරිපත් කර ඇති ඔප්පුවලට අනුව පැමණිල්ලේ පැමිනිලිකරුවන් හිමිකම් ලබා ඇති බව තීරණය කරමි.

The final order embodied in the judgement of the learned District Judge, if my conjecture be correct, was for the ejectment of the Appellants from the land described in the schedule to the petition, presumably on the basis of a declaration of title to the said land in favour of the Respondents, and damages in a sum of Rs. 15,000 until the quiet and peaceful possession of the land is delivered to the Respondents, with no order for costs, expressed by the learned District Judge in cryptic precision in the following manner:-

> මේ අනුව පැමන්ල්ලට නිරවුල් බුක්තියක් මේ දක්වා කන්නයක් වෙනුවෙන් රු. 15,000- ක වන්දියක් හිමිවන බව තීන්දු කරමි. නඩු ගාස්තු පැමිනිල්ල සහන ලබන නිසා අවශ්‍ය නැත.
>
> මේ අනුව පැමිනිල්ලේ වාසියට තීන්දු කරමි. තීන්දු ප්‍රකාශය ඇතුලත් කරන්න

By its judgement dated 1st December 2004, the Court of Appeal has affirmed the aforesaid decision of the District Court, observing that it is "abundantly clear that the land claimed by the Defendants (Defendant-Appellants-Appellants) is the same land which is described in the schedule to the plaint (petition)". It is important to note that the Court of Appeal concluded as follows:-

> Since this is an action for declaration of title it would be pertinent to consider the decision in *Wanigaratne vs Juwanis Appuhamy* (1962) 65 NLR 167 where in the Supreme Court has held that, "in action *rei vidicatio* the Plaintiff must prove and establish his title." This legal principle has been followed in our Courts right along. In the instant case the learned Judge has duly considered the un-contradicted evidence of the 1st Plaintiff in relation to acquisition of title and has arrived at the finding according to the deeds produced by the 1st Plaintiff, the Plaintiffs had acquired title to the subject matter. I conclude that this is a correct finding on the evidence which had been available before the District Court.

This Court has granted special leave to appeal on several substantial questions of law, but before setting out these questions, it may be useful to mention that in upholding the title of the Respondents to the land described in the schedule to the petition, the District Court and Court of Appeal relied on Deed No. 6165 dated 9th February 1987 (P1) and the prior deeds respectively bearing Deed No. 6024 dated 29th February 1944 (P3), Deed No. 6121 dated 12th May 1944 (P4), Deed No. 6468 dated 10th December 1944 (P5) and Deed No. 7167 dated 8th August 1946(P6) produced in evidence, which admittedly establish that the ownership of the aforesaid four acre land had been transmitted from the original owner Alavapillei Sanarapillai through some

intermediate transferees to one Muhammad Mohideen Cader Saibu Mohideen Sadakku (hereinafter referred to as Sadakku), who died in 1948. The courts below also relied on the Power of Attorney bearing No. 7598 (P7) dated 30th October 1981, purported to have been executed by Sadakku's son Mohideen Abdul Cader appointing one Mohomad Ibrahim Lebbai Noor Lebbai as his Attorney with power to look after and to alienate the land described in the schedule to the petition. It is by virtue of the power alleged to have been vested in him by the said Power of Attorney that the said Noor Lebbai purported to transfer by Deed No. 6165 (P1) dated 9th February 1987 and attested by Lionel P. Dayananda, Notary Public, the entirety of the land described in the schedule to the petition to the Respondents Abdul Majeed Mohomed Mansoor and Abdul Majeed Abdul Nizar.

The substantial questions on the basis of which special leave to appeal has been granted by this Court, are set out below:-

1. (a) Is the Power of Attorney produced marked P7 proved?

   (b) Does the Deed produced marked P1 operate to convey the title of Mohideen Abdul Cader, to the Respondents?

   (c) If not, was the Court of Appeal in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to the subject matter of the action?

2. Did the Court of Appeal err in failing to consider that the Learned District Judge had not duly evaluated the evidence on the question of prescription?

At the instance of W. C. Dayaratne, P.C., who appeared for the Respondents, the following additional questions were also formulated for the consideration of this Court, which are set out below:-

3. Has the issue regarding the validity of the Power of Attorney marked P7 and the deed produced marked P1, been raised for the first time in the Supreme Court at the stage of application for leave?

4. Are the Appellants entitled to take up the said issue at the stage of application for Special Leave to Appeal?

5. Is it mandatory to read the documents in evidence of the Respondents at the conclusion of the trial?

Certain Preliminary Matters

Before dealing with the substantive questions on which special leave to appeal has been granted by this Court, all of which relate to the title of the contending parties to the land described in the schedule to the petition of the Respondents, it is necessary to dispose of the two preliminary questions 3 and 4 raised by learned President's Counsel for the Respondents when special leave was granted. These questions focus on the alleged belatedness in taking up the positions covered by questions 1(a) and (b) above.

Mr. Dayaratne, has strenuously contended that the aforesaid questions relating to "the validity of the Power of Attorney marked P7 and the deed produced marked P1", have been raised for the first time in the Supreme Court at the stage of application for special leave, and that these being mixed questions of law and fact, they cannot be raised for the first time on appeal. He has invited our attention to the decision of a Five Judge Bench of this Court in *Rev. Pallegama Gnanarathana v. Rev. Galkiriyagama Soratha* [1988] 1 Sri LR 99 in which it was held that a question which is not a pure question of law, but a mixed question of fact and law, cannot be taken up for the first time on appeal, and stressed that the apex court, which does not have the benefit of the findings and reasoning of a lower court, should not be compelled to go into a question of fact or mixed question of fact and law, raised for the first time on appeal.

Mr. Faisz Mustapha, PC., did not contest the correctness of the proposition of law urged by Mr. Dayaratne, but submitted that that the questions raised are pure questions of law, and that in any event, they had arisen for consideration in the District Court itself. In this connection, it is necessary to observe at the outset that question 1(a) and (b) on which special leave to appeal has been granted in this case, do not raise the question of *validity* of the Power of Attorney marked P7 and the deed produced marked P1 as stated in question 3, but the first of these deals with the *proof* of the said Power of Attorney and second with the *construction* and *legal implications* of the Deed marked P1. It is also necessary to observe that these questions arise from the very first issue raised at the trial, which was as follows:-

1. පැමිනිල්ලේ උපලේඛණයේ විස්තර කොට ඇති ඉඩම පැමිනිල්ලේ 2 සිට 10 දක්වා ඡේදයන් ප්‍රකාර පැමිනිලිකරුන්ට අයිතිවේද ?

It is this issue which was subsequently reformulated as issues 6 and 7 (quoted in full earlier in this judgement) in the light of the plans and reports furnished by the commissioned surveyors.

It is noteworthy that paragraphs 2 to 10 of the petition filed by the Respondents in this case narrate the alleged chain of title of the Respondents, all of which have been denied in the Answer of the Appellants, and in particular paragraph 7 refers to the Power of Attorney P7 and paragraph 8 to the Deed P1. Furthermore, the Power of Attorney P7 was marked "subject to proof", and Mr. Mustapha, has stressed that it has never been proved, and that therefore the Deed P1 could not have conveyed any title to the Respondents. He has submitted further that the action from which this appeal arises, being an action for declaration of title which has been treated by both the District Court and the Court of Appeal as a *rei vindicatio* action, the onus was clearly on the Respondents to prove the aforesaid instruments and demonstrate how the Respondents derived title to the land described in the schedule to the petition. Mr. Dayaratne, has contended that an action for declaration of title is distinguishable from a *rei vindicatio* action which required stricter standards of proof, and that the instant case is only an action for declaration of title in which the Respondents would succeed if the Appellants cannot establish a stronger title or a right to possess.

A curious feature of this case is that it commenced as an action for declaration of title in which ejectment was not prayed for by either of the contending parties in their initial pleadings, and a new prayer was introduced into the replication without any express prayer for ejectment for additional relief by way of damages in a sum of Rs.

33,000/- for every cultivation season (කන්නය) *until the quiet and peaceful possession of the land described in the schedule to the petition is restored to the Respondents*. At the trial, no issue was formulated which could justify an order for ejectment, but the learned District Judge by his judgement dated 5th October 1994 ordered ejectment without any express declaration of title in favour of the Respondents. After the Appellants lodged their appeal to the Court of Appeal, the District Court proceeded to issue writ pending appeal for the ejectment of the Appellants from the land described in the schedule to the petition, which order and the subsequent orders reissuing writ of possession made by the District Court, have been stayed by the Court of Appeal from time to time in connected revisionary and appellate proceedings.

The affinity between the action for declaration of title and an action *rei vindicatio* has been considered in several landmark decisions in Sri Lanka and South Africa, which seem to suggest that they are both essentially actions for the assertion of ownership, and that the differences that have been noted in decisions such as *Le Mesurier v. Attorney General* (1901) 5 NLR 65 are differences without any real distinction. In the aforementioned case, Lawrie, J., at page 74 compared an action for the recovery of land in the possession of the Crown to the English prerogative remedy of petition of rights, and observed that-

> I call the action one for declaration of title which, I take it, is not the same as an action *rei vindicatio*.

Similarly, in *Pathirana v. Jayasundara* (1955) 58 NLR 169 where a plaintiff sued an over-holding lessee by attornment for ejectment, and upon the defendant pleading that the land was sold to him by its real owner who was not one of the lessors, the plaintiff moved to amend the plaint to add a prayer for declaration of title, in refusing such relief in circumstances where this could prejudice the claim of the defendant to prescriptive title, Gratiaen, J., observed at page 173 that-

> A decree for a declaration of title may, of course, be obtained by way of additional relief either in a *rei vindicatio* action proper (which is in truth an action *in rem*) or in a lessor's action against the over-holding tenant (which is an action *in personam*). But, in the former case, the declaration is based on proof of ownership; in the latter, on proof of contractual relationship which forbids a denial that the lessor is the true owner.

The above quoted *dictum* does not, of course, mean that a lessor or landlord is confined to the contractual remedy against an over-holding lessee or tenant or that he cannot sue *in rem* to vindicate his title and recover possession. All it means is that if he chooses the latter remedy, he cannot succeed just because the over-holding lessee or tenant fails to prove his right to possess, or simply rely on the rule of estoppel that a tenant cannot contest the title of his landlord, and must be able to establish his title against the whole world.

Clearly, the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei*), which had its origins in Roman Law. The *actio rei vindicatio* is essentially an action *in rem* for the recovery of property, as opposed to a mere action *in personam*, founded on a contract or other obligation and directed against the defendant or defendants personally, wherein it is sought to enforce a mere personal right (*in personam*). The *vindicatio* form of action had its origin in the *legis actio* procedure which symbolized the claiming of a corporeal thing *(res)* as property

by laying the hand on it, and by using solemn words, together with the touching of the thing with the spear or wand, showing how distinctly the early Romans had conceived the idea of individual ownership of property. As Johannes Voet explains in his *Commentary on the Pandects* (6.1.1) "to vindicate is typically to claim for oneself a right in *re.* All actions *in rem* are called vindications, as opposed to personal actions or conductions." Voet also observes that-

> From the right of ownership springs the vindication of a thing, that is to say, an action *in rem* by which we sue for a thing which is ours but in the possession of another. (*Pandects* 6.1.2)

It is in this sense that the *rei vindicatio* action is often distinguished from "actions of an analogous nature" (*per* Withers, J., in *Allis Appu v. Edris Hamy* (1894) 3 SCR 87 at page 93) for the declaration of title combined with ejectment of a person who is related to the plaintiff by some legal obligation (*obligatio*) arising from contract or otherwise, such as an over-holding tenant (*Pathirana v. Jayasundara* (1955) 58 NLR 169) or an individual who had ousted the plaintiff from possession (*Mudalihamy v. Appuhamy* (1891) CLRep 67 and *Rawter v. Ross* (1880) 3 SCC 145), proof of which circumstances would give rise to a presumption of title in favour of the plaintiff obviating the need for him to establish title against the whole world (*in rem)* in such special contexts. These are cases which give effect to special evidentiary principles, such as the rule that the tenant is precluded from contesting the title of his landlord or a person who is unlawfully ousted from possession is entitled to a rebuttable presumption of title in his favour. Burnside CJ., has explained the latter principle in *Mudalihamy v. Appuhamy* (1891) CLRep 67 in the following manner-

> Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep the property against the whole world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his *de facto* possession at the time of the ouster.

The action from which this appeal arises is not one falling within these special categories, as admittedly, the Respondents had absolutely no contractual nexus with the Appellants, nor had they at any time enjoyed possession of the land in question. Of course, this is not a circumstance that would deprive the Respondents to this appeal from the right to maintain a vindicatory action, as it is trite law in this country since the decisions of the Supreme Court in *Punchi Hamy v. Arnolis* (1883) 5 SCC 160 and *Allis Appu v. Edris Hamy* (1894) 3 SCR 87 that even an owner with no more than bare paper title (*nuda proprietas*) who has never enjoyed possession could lawfully vindicate his property subject to any lawful defence such as prescription. Nor would the failure to pray for the ejectment of the Appellants (an omission which has been supplied by the learned District Judge by his decision) affect the maintainability of the action for declaration of title (which declaration the learned District Judge has not granted expressly, although he may have done so by way of implication) or change the complexion of the case, which is essentially an *actio rei vindicatio.* The District Court and Court of Appeal, as has been seen, in their respective judgments have correctly assumed that the action from which this appeal arises is an *actio rei vindicatio.* They have also awarded the Respondents relief by way of ejectment despite the absence of a prayer for ejectment in their petition or even in their replication, the correctness of which award is hotly contested by the Appellants.

An important feature of the *actio rei vindicatio* is that it has to necessarily fail if the plaintiff cannot clearly establish his title. Wille's *Principles of South African Laws* (9th Edition – 2007) at pages 539-540 succinctly sets out the essentials of the *rei vindicatio* action in the following manner:-

> To succeed with the *rei vindicatio*, the owner must prove on a balance of probabilities, first, *his or her ownership in the proper*ty. Secondly, *the property must* exist, *be clearly identifiable* and must not have been destroyed or consumed. Thirdly, the defendant must be in possession or detention of the thing at the moment the action is instituted. The rationale is to ensure that the defendant is in a position to comply with an order for restoration. *(emphasis added).*

In *Abeykoon Hamine v. Appuhamy* (1950) 52 NLR 41, Dias, SPJ. quoted with approval, the decision of a Bench of four judges in *De Silva v. Goonetilleke* (1931) 32 NLR 27 where Macdonell, C.J., had occasion to observe that-

> There is abundant authority that a party claiming a declaration of title must have title himself. "To bring the action *rei vindication* plaintiff must have ownership actually vested In him"- 1 Nathan p.362, s. 593……..This action arises from the right of *dominium*…….The authorities unite in holding that plaintiff must show title to the *corpus* in dispute, and that if he cannot, the action will not lie".

In *Dharmadasa v. Jayasena* [1997] 3 Sri LR 327 G.P.S de Silva, C.J., equated an action for declaration of title with the *rei vindicatio* action, and at page 330 of his judgement, quoted with approval the *dictum* of Heart, J., in *Wanigaratne v. Juwanis Appuhamy* (1962) 65 NLR 167, for the proposition that the burden is on the plaintiff in a *rei vindicatio* action to clearly establish his title to the *corpus,* echoing the following words of Withers, J., in the old case of *Allis Appu v. Endris Hamy* [1894] 3 SCR 87 at page 93-

> In my opinion, if the plaintiff is not entitled to revindicate his property, he is not entitled to a declaration of title,…..If he cannot compel restoration, which is the object of a *rei vindicatio*, I do not see how he can have a declaration of title. I can find no authority for splitting this action in this way in the Roman-Dutch Law books, or decisions of court governed by the Roman-Dutch Law.

As Ranasinghe, J., pointed out in *Jinawathie v. Emalin Perera* [1986] 2 Sri LR 121 at page 142, a plaintiff to a *rei vindicatio* action "can and must succeed only on the strength of his own title, and not upon the weakness of the defence." In *Wanigaratne v. Juwanis Appuhamy,* (1962) 65 NLR 167 at page 168, Heart, J., has stressed that "the defendant in a *rei vindicatio* action need not prove anything, still less his own title." Accordingly, the burden is on the Respondents to this appeal to establish their title to the land described in the schedule to their petition, and they can only succeed by showing that Mohamed Ibrahim Lebbai Noor Lebbai had the power and authority to convey the title (*dominium*) of the said land to the Respondents by executing Deed No. 6165 (P1). It is for this purpose vital to prove the Power of Attorney marked P7 by which, it is claimed, that Sadakku's son Mohideen Abdul Cader appointed Noor Lebbai as Attorney for executing the Deed marked P1 and that the said deed operated to convey the alleged title of Mohideen Abdul Cader to the Respondents. These were clearly not matters raised for the first time at the stage of grant of special leave to appeal, and ought to have engaged the attention of the learned District Judge in view of issue 1, 6 and 7 framed at the commencement of the trial.

For the aforesaid reasons, I am of the opinion that substantive questions 3 and 4 should be answered in favour of the Appellants. Accordingly, I answer question 3 in the negative and question 4 in the affirmative, and hold that substantive questions 1(a) and (b) have to be addressed in determining this appeal.

Proof of the Power of Attorney

Substantive question 1(a) on which special leave has been granted by this Court, is whether the Power of Attorney marked P7 has been duly proved. As already noted, this question is of extreme importance for establishing the chain of title of the Respondents, as it is by virtue of the power vested in him by the said power of attorney that the Attorney named therein, Noor Lebbai, purported to execute the Deed marked P1, by which the Respondents claimed to have derived their title to the land described in the schedule to the petition. In this connection, it is relevant to note that when the said Power of Attorney was first mentioned in the course of his testimony on 12th August 1991 by the 1st Petitioner-Respondent-Respondent, Abdul Majeed Mohamed Mansoor, the tender in evidence of a photocopy of the said power of attorney was objected to by learned Counsel for the Appellants, and the said photocopy was marked subject to proof.

When a document is marked subject to proof, it is essential for the said document to be proved through witness testimony. The procedure for tendering a document in evidence in the course of witness testimony is dealt with in Section 154 of the Civil Procedure Code, and what is most relevant to this case is the first sentence of Section 154(1), which provides that-

> Every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness.

The explanation to this section is very useful in understanding this provision, and in particular understanding how a document marked subject to proof is to be proved. The said explanation is reproduced below, in full:-

> If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it. *If, however, on the document being tendered the opposing party objects to its being admitted in evidence*, then commonly two questions arise for the court:-
>
> > Firstly, whether the document is *authentic* – in other words, is what the party tendering it represents it to be; and
> >
> > Secondly, whether, supposing it to be authentic, it constitutes legally *admissible* evidence as against the party who is sought to be affected by it.
>
> The latter question in general is matter of argument only, but *the first must be supported by such testimony as the party can adduce.* If the court is of opinion that the testimony adduced for this purpose, developed and tested by cross-examination, makes out a *prima facie case of authenticity* and is further of opinion that the authentic *document is evidence admissible against the opposing party,* then it should admit the document as before. (*emphasis added*).

The question therefore is whether the authenticity and admissibility of the Power of Attorney (P7), which was marked subject to proof, has been established through subsequent testimony and analytical reasoning.

In Sri Lanka, the rules for the proof of documents are contained in Chapter 5 of the Evidence Ordinance No. 14 of 1895, as subsequently amended. Of particular, relevance to the proof of the Power of Attorney in question are Sections 67 to 73 of the Evidence Ordinance. The Power of Attorney marked P7 is alleged to have been executed and attested in India, but the purported executant Mohamed Mohideen Abdul Cader, was not called to testify regarding its execution, nor was any attempt made to show that the signature of the purported executant appearing on P7 was that of Abdul Cader. Sections 68 to 71 of the Evidence Ordinance deal with the proof of documents which are required by law to be attested, while Section 67 and 72 of the Ordinance deal with the proof of documents which are not required by law to be attested. Section 68 of the Ordinance provides that-

> If a document is required by law to be attested, it shall not be used as evidence until *one attesting witness at least* has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the court and capable of giving evidence. (*emphasis added*).

Mr. Faisz Musthapha, P.C., has submitted on behalf of the Appellants that in terms of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840, as subsequently amended, any "sale, purchase, transfer, assignment, or mortgage of land or other immovable property" is of no force or avail in law unless the same is notarially attested. He has further submitted that, just as much as Deed bearing No. 6165 dated 9th February 1987 (P1) was required by the aforesaid provision to be notarially attested, even the Power of Attorney (P7), by virtue of which Mohomad Ibrahim Lebbai Noor Lebbai, the executant of P1, purported to have the authority or power to make the same, was required by law to be attested. He based this submission on the premise that the conferment of authority or power to another to enter into any sale, purchase, transfer, assignment, or mortgage of land or other immovable property, was a contract or agreement for "establishing any security, interest, or incumbrance affecting land" within Section 2 of Ordinance No. 7 of 1840, and was governed by the same formalities. It was Mr. Musthapha's contention that just as much as the Deed marked P1 was required by law to be attested, so was the Power of Attorney marked P7, and at least one attesting witness thereof should have been called for the purpose of proving its execution.

The question as to who is an attesting witness has been considered in several leading judgements of our courts, and the gist of the decisions such as *Kirihanda v. Ukkuwa* [1892] 1 S.C.R. 216, *Somanather v. Sinnetamby* [1899] 1 Tambiah 38, and *Seneviratne v. Mendis* 6 C.W.R. 211 is that as a general rule, the witnesses who were present at the time the deed, last will or other instrument was executed are attesting witnesses competent to testify, and even the notary public before whom it was executed is deemed to be an attesting witness *if he knew the executants personally*. However, it is also relevant to note that in *Baronchy Appu v. Poidohamy* 2 Browns's Reports 221, *Hilda Jayasinghe v. Francis Samarawickrame* [1982] 1 Sri LR 249 and *Samarawickrema v. Jayasinghe and Another* [2009] BLR 85, it has been held that where the execution of such an instrument is challenged *on the ground that it had been signed before it was written*,

and at least one of the attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant, is not sufficient and at least one of the attesting witnesses should also be called to testify. Such stringent proof is insisted upon in view of the solemnity that is attached to such a document and the need to prevent fraud. The Power of Attorney marked P7 was purportedly executed in the Ramanathapuram District of Tamilnadu, India before B. M. M. Hamid Hasan, Advocate & Notary Public. It is clear from the certification of the notary in the attestation clause of P7 that the notary did not know the executants Abdul Cader personally and depended on the "information" given by the two attesting witnesses, namely M. Shayeed, son of Mohamed Asanalabai, and V. Ravindran, son of C. Velusamy, both of Ramanathapuram District, India, neither of whom were called to testify in proof of its execution, and no explanation was given for the omission to do so. There was also no evidence in regard to whether or not the aforesaid power of attorney was registered in India in terms of the Indian Registration Act, 1908, and it is clear from the testimony of Ulludu Hewage Karunaratne, Registrar of Lands, Anuradhapura, that the said power of attorney was not registered in Sri Lanka nor was it tendered to the Registry with the second copy of the Deed marked P1 for registration. There is also no evidence to show that P7 was registered in terms of the Notaries Ordinance No. 4 of 1902, as subsequently amended, and what has been produced as P7 is not a certified copy issued under Section 8 of the said Act.

For the Respondents, Mr. Dayaratne has argued with great force that P7 was not a document that required attestation. In particular, he referred to the provisions of the Powers of Attorney Ordinance No. 4 of 1902, as subsequently amended, which provides for the registration of written authorities and powers of attorney. He pointed out that in Section 2 of the said Ordinance, the term "power of attorney" is defined so as to "*include* any written power or authority other than that given to an attorney-at law or law agent, given by one person to another to perform any work, do any act, or carry on any trade or business, and executed before two witnesses, or executed before or attested by a notary public or by a Justice of the Peace, Registrar, Deputy Registrar, or by any Judge or Magistrate, or Ambassador, High Commissioner or other diplomatic representative of the Republic of Sri Lanka", and relied on this inclusive definition for his contention that the law did not insist that a power of attorney must necessarily be in writing or should be registered. He submitted that a person may be appointed as attorney to deal with immovable property through a video recording, voice mail or telephone communication.

Mr. Dayaratne also submitted that the question whether the power or authority given for a person to execute a deed for dealing with immovable property on behalf of its owner should itself be executed in a similar manner had engaged our courts in the late nineteenth and early twentieth century in several cases, and heavily relied on the decisions in *Meera Saibo v. Paulu Silva* (1899) 4 NLR page 229, *Sinnathamby v. John Pulle* (1914)18 NLR 273, *Beebee v. Sittambalam* (1920) 2 CLRec 72 and *Pathumma v. Rahimath* (1920) 22 NLR 159, which have held that the grant of authority to execute a notarial document does not itself require notarial execution. Mr. Dayaratne pointed out that in *Sinnathamby v. John Pulle,* it was argued on the authority of *Hunter v. Parker* 7 M&W 322 that a power of attorney to execute a deed can only be given by an instrument under seal, but Ennis, J., brushed aside this argument stating at page 276 that-

> The laws of Ceylon, however, do not provide for the distinction found in English Law between deeds, *i.e.*, documents signed, sealed, and delivered, and documents under

> hand only. Deeds in the sense in which the word is used in English Law do not exist in Ceylon, and the English Rule cited applies in England to deeds only.

Mr. Dayaratne also stressed that in *Pathumma v. Rahimath* Bertram, CJ., at page 160 referred to the decision in *Meera Saibo's* case and observed that "that was decided more than 20 years ago, and, I think, it must be taken to be now settled law", a view that has been endorsed by Justice Dr. C.G. Weeramanty, in his *Law of Contracts*, Vol. I page 184.

Mr. Musthapha who appears for the Appellants, has submitted that logic and policy demanded a more cautious approach, and contended that a power of attorney by virtue of which a person such as Noor Lebbai claims that he had the power to execute any writing, deed, or instrument for effecting the sale or transfer of any land or other immovable property such as Deed No. 6165 dated 9th February 1987 (P1), should be executed in the same manner in which such writing, deed or instrument is required to be executed. He also drew attention to the decision of the Supreme Court in the case of *Dias v. Fernando* (1888) 8 SCC 182 which supported his submission, and I quote below a passage from the judgement of Burnside, C.J., in this case which I consider very pertinent:-

> Now it is manifest that the object of the (Prevention of Frauds) Ordinance was to secure the most solemn proof of the contract, and not to let it depend upon the very fallible proof which parol evidence would, more especially in this country, afford. It would be, in the language of Lord Eldon, the most mischievous evasion of the Ordinance, if, whilst the instrument of lease itself must be of the solemn character prescribed, yet the authority to execute it and thus bind a party to it might depend upon the weakest and most unsatisfactory of all proof. The English statute requires a mere writing: our Ordinance requires a most solemn writing, which has all of, and more than, the solemnity of the execution of a deed by English Law, and in this material particular the two enactments differ, and open the way to a decision based on the well recognized principle of English Law, that the authority to execute a deed must be by deed.

Of course, the opinion of Burnside, C.J., was not followed by the Supreme Court in *Meera Saibo's* case and the subsequent decisions, but the Chief Justice's hindsight in decrying the possibility of authorizing execution of a deed by a non-notarial conferment of power as "the most mischievous evasion" of the Prevention of Frauds Ordinance, can be more readily appreciated in the context of changing circumstances and developments of the law in Sri Lanka and abroad. In particular, it is necessary to consider the rapid increase in land related frauds in Sri Lanka, which have generally contributed to a sense of lawlessness and social instability leading to murder and other serious crimes.

It is necessary to stress that Withers, J., in his judgement in *Meera Saibo,* quoted the above *dictum* of Burnside, C.J., with some concern, but was persuaded to follow the reasoning of Mr. Berwick, the much celebrated and long standing District Judge of Colombo, set out in his judgement in *Nama Sivaya v. Cowasjie Eduljie* (DC Colombo Case No. 61, 545 decided on 21st January 1873), which he chose to add as an attachment to his judgement in its entirety and has been reproduced in 4 NLR pages 232 to 235.

Mr. Berwick's celebrated judgement in the *Nama Sivaya* case, may for convenience summarized as follows:-

(a) Mere "solemnities" (as the Civil Law calls them), however essential they may be to give validity to an act, and to whatever extent they may have been devised with a view to better authentication and proof under the English law, have not been introduced in Ceylon by virtue of the introduction of the English Law relating to evidence;

(b) It therefore does not follow that, even if in the English Law a power of attorney to execute an instrument must be evidenced by an instrument of equal solemnity, the same is the Law of Ceylon;

(c) The delegation of authority to enter into a deed is a personal act; the execution of the personal delegation is a "real" act. The latter must, in the present case, be done in conformity with the *lex loci citæ*; it may be that the former is to be governed by the law of the place where the delegation is made, viz., England, where the law does not require the conferment of such authority shall be attested either by a notary or by witnesses.

(d) The Roman-Dutch Law authorities are silent as to the necessity of any special solemnities for the valid constitution of the mandate of an attorney, and nowhere in his *Treatise on the Contract of Mandate* does Pothier advert to the necessity for notarial attestation for this purpose;

(e) Van Leeuwen, in his *Censura Forensis* (*part 1, lib. 4, cap. 24*) divides powers of attorneys into general and special, and also into express and tacit; and while he points out that there are many things which cannot be done under a general power of attorney (among others, sales and alienations), but which require a special power, he indicates no such difference under the further division into express (*Quod expressum verbis sit [aut literis]*) and tacit mandates, which is part of the law relating to agents; and

(f) The contention in the context of Ordinance No. 7 of 1840 that the power of attorney itself establish an "interest affecting land" cannot be sustained because the power of attorney does not establish or convey any interest in land; it only authorizes another person to convey such an interest by all legal form and solemnities which the law of the Island may require.

If we have to apply to this case the principles of the Roman-Dutch law so authoritatively enunciated by Mr. Berwick in the aforesaid judgement, the Respondents will necessarily fail simply because the Power of Attorney marked P7 is not a special power of attorney which is requisite for empowering another to enter into a sale or alienation as explained by Van Leeuwen, in his *Censura Forensis* (part 1, lib. 4, cap. 24). I quote below the operative paragraph of P7 which makes it abundantly clear that this was definitely not a special power of attorney:-

5. To superintend, manage and control the aforesaid land or any other landed property which I now or hereafter may become entitled to, possessed of or interested in and to sell and dispose of the said land which now or hereafter I may become entitled to possessed of or interested in by private contract or to enter into any agreement for sale thereof for such price or prices and upon such terms and conditions as my said Attorney shall think fit.

Furthermore, as the distinguished District Judge of Colombo has observed (*vide* sub-paragraph (c) of the above summary), the form of delegation is governed by the law of the place where the delegation is made, which in this case is India, and the Respondents have failed to discharge the burden placed on them by law to prove the applicable legal principles and formalities in force in that country at the relevant period.

It is trite law that in terms of Section 45 of the Evidence Ordinance, the law of a foreign country has to be proved through the evidence of experts, or as outlined in the first proviso to Section 60, through other means such as the production in court of treatises on law where the author is dead or whose presence cannot be reasonably procured, and no expert testimony of the law in force India has been tendered in evidence or other material produced in court. The decision of this Court in *Sreenivasaraghava Pyengar v. Jainambeebe Ammal* (1947) 48 NLR 49 in this regard should be understood in the light of the fact that at the time of that decision, British India was part of Her Majesty's realm as much as Ceylon was, and was not a foreign country. In that case, the Supreme Court refused to rely on a document purporting to be a "true copy" of the original power of attorney, which had been copied by a registering officer in a book kept under the Indian Registration Act, 1908, and held that this was not in itself sufficient to establish the fact of execution of the original power of attorney. In the case before us, what has been produced is a mere photocopy, with no evidence in regard to how the photocopy was obtained, and in this case too there is no evidence to show that the power of attorney had been registered under the Indian Registration Act, 1908.

It was in these circumstances that Mr. Dayaratne sought to rely on the presumption in Section 85 of the Evidence Ordinance in regard to the Power of Attorney marked P7. In my considered opinion, the Respondents cannot invoke the assistance of this presumption, as the "authentication" required to attract the said presumption must be clear, specific and decisive. It has been held in *Mohanshet v. Jayashri* AIR (1979) Bom. 202, that "authentication" for this purpose is something more than execution, and cannot be based on the identification by a third person who is not called to testify in the case, in circumstances where the executant was not personally known to the Magistrate before whom the power of attorney in question was executed. As Desai, J., observed in the course of his judgement at pages 204 to 205 –

> It is now well settled that authentication is more than mere execution before one of the persons designated in Section 85……
>
> As far as the identity of the executant is concerned, the Magistrate in fact indicates that he is personally unaware of the executants but puts his signature on the basis of identification made by an Advocate. It is true that such identification by the advocate is mentioned in the rubber stamp, and one may presume that it is on the basis of such identification that the Magistrate proceeded to put the rubber stamp. But will this amount to authentication by the Magistrate? Section 85 contains a presumption, a presumption which may operate in favour of the party relying on a document and to the prejudice of the party alleging that the document is not a genuine one. For the purpose of such presumption to operate, particularly in the background of the facts above ascertained, the authentication must be clear, specific and decisive, and bereft of the features which I have indicated earlier. If there is the slightest doubt, then the Court must be loathe to rely on the presumption contained in S. 85 and must be

equally loathe in applying such presumption in favour of the party relying on the document.

The case at hand is similar, as it is evident from the attestation clause of P7 that the Notary Public relied on the "information" provided by the two attesting witnesses with regard to the identity of the executant, who was otherwise not known to him. In these circumstances, I am of the opinion that the Respondents have failed to furnish sufficient evidence to satisfy court that the applicable formalities of the law have been complied with in executing the power of attorney, or to show, as contemplated by Section 69 of the Evidence Ordinance, which is applicable to proof of any document executed abroad, that the "attestation of one attesting witness at least is in his handwriting, and that the signature of the person executing the document is in the handwriting of that person."

It is also pertinent to note that Mr. Berwick had in his judgement in the *Nama Sivaya* case very correctly analyzed the question of the form of delegation of authority as one falling within the law relating to agents, but it does not appear whether he considered the question as to whether the insertion by Ordinance No. 22 of 1866, of *inter alia* the words "principals and agents" into the Introduction of English Law Ordinance (Civil Law Ordinance) No. 5 of 1852 had the effect of making the English law applicable on this subject applicable in Sri Lanka. Of course, that would not have made any difference to the decision in that case, as Mr. Berwick himself had concluded, as will be seen from sub-paragraph (c) of my summary of the reasoning of Mr. Berwick, that the Statute of Frauds of 1677 did not require attestation for conferment of authority for executing a deed.

However, it is important to note that the relevant provisions of the Statute of Frauds have been replaced in the United Kingdom by Sections 74(3) to 74(5) and Sections 123 to 129 of the Law of Property Act 1925 (c 20) and Section 219 of the Supreme Court of Judicature (Consolidation) Act 1925 (c 49), which in turn have given way to Section 1 of the Powers of Attorney Act of 1971 (c 27). The latter Act has been amended by the Law of Property (Miscellaneous Provisions) Act of 1989 (c 34), and as so amended, Section 1(1) of the Powers of Attorney Act of 1971 would read as follows:-

> 1(1) An instrument creating a Power of Attorney shall be *executed as a deed*, or by direction and in the presence of, the donor of the power. (*emphasis added*).

It is noteworthy that the Law of Property (Miscellaneous Provisions) Act of 1989 generally abolished the prior law which required a seal for a valid execution of a deed by an individual, and substituted for the words "signed and sealed by" which were found in Section 1(1) of the Powers of Attorney Act of 1971 the words "executed as a deed". Section 1(3) of the 1989 Act also provided that-

An instrument is validly executed as a deed by an individual if, and only if—

(a) it is *signed*—

(i) *by him in the presence of a witness who attests the signature*; or

(ii) at his direction and in his presence and the presence of two witnesses who each attest the signature; and

(b) it is *delivered as a deed* by him or a person authorized to do so on his behalf.

A question of some difficulty that could arise in Sri Lanka in view of these developments in the United Kingdom is whether the above quoted English statutory provisions would become applicable in Sri Lanka through Section 3 of the Introduction of English Law Ordinance which seeks to incorporate into our legal fabric in regard to "principals and agents", and certain other specified subjects, the law that "would be administered in England in the like case, at the corresponding period, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any enactment now in force in Ceylon or hereinafter to be enacted." Although there does not appear to be a decision of the Supreme Court on this point, it must be pointed out that the decision of the Court of Appeal in *Wright and Three Others v. People's Bank* [1985] 2 Sri LR 292 would appear to suggest an affirmative response to this question. In that case, the Court of Appeal affirmed the decision of the District Judge that Section 2(1) of the English Factors Act of 1889 was part of our law, and it is noteworthy that in the course of his judgement at page 300, G.P.S de Silva, J., (as he then was) observed that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." The Sri Lankan Powers of Attorney Ordinance No. 4 of 1902, as subsequently amended, may not be a stumbling block to an argument in favour of applying the English provisions relating to the *execution* of a power of attorney by an individual, as the local Powers of Attorney Ordinance is confined, as clearly set out in its preamble, to the "*registration* of written authorities and powers of attorney" and there is no contrary provision in regard to the execution of powers of attorney either in that Ordinance or in the Prevention of Frauds Ordinance.

It is, however, unnecessary for the purpose of this case to express an opinion in regard to this question, since as already noted, the Power of Attorney marked P7 was allegedly executed in India and would attract the Indian law relating to form, and furthermore, even if it is regarded as a document that does not require attestation as urged by Mr. Dayaratne, the Respondents would still fail. This is mainly because, according to Section 72 of the Evidence Ordinance, "an attested document not required by law to be attested may be proved as if it was unattested", and Section 67 of the same Ordinance provides that –

> If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting.

Admittedly, P7 does not purport to contain Abdul Cader's handwriting, but it contained a signature which is alleged by the Respondents to be his. It is noteworthy that none of the witnesses who spoke about P7 testified that the signature purporting to be that of Abdul Cader was placed thereon in the presence of such witness, nor was any effort made by the Respondents to show by comparison of other documents that may have contained the signature of Abdul Cader, that the signature on P7 was that of Abdul Cader. The Attorney named in the said Power of Attorney, Noor Lebbai has testified in the case, and has stated that in 1972 Sadakku left Sri Lanka leaving the land in his charge, and that much later and after the demise of Sadakku, his son Abdul Cader who lived in India, executed the Power of Attorney marked P7 authorizing him to look after the land and also to alienate it if the need arises.

Although he has placed reliance on P7, he did not state that he was personally present in India when the executant placed his signature on it, or seek to identify the signature as that of the executant Abdul Cader. He also did not explain how P7 came into his hands, or why only a photocopy thereof was tendered in evidence. No doubt, as Widham, J., observed in *King v. Peter Nonis* (1947) 49 NLR 16 at page 17, the so called 'best evidence' rule "has been subjected to a whittling down process for over a Century" and it is not always necessary today to produce in court the original of a document on which he relies. However, the non-production of the original document without any explanation as to why the original is not being produced, is certainly a matter for comment and may affect the weight to be attached to the evidence which is produced in its stead. *See,* the observations of L.H. de Alwis, J., in *Vanderbona v. Justin Perera* [1985] 2 Sri LR 62 at page 68, and A.R.B. Amarasinghe, J., in *Stella Perera & Others v. Margret Silva* [2002] 1 Sri LR 169 at page 173.

It is therefore clear that applying the test of proof of a document that was not required by law to be attested, there was no *prima facie* evidence to prove its authenticity, and the question of its admissibility did not even arise. I am therefore of the opinion that the contention of the learned President's Counsel for the Appellants that the Power of Attorney marked P7 has not been proved as required by law has to be upheld.

There remains, however, one more matter on which learned Counsel for the contending parties have made submissions, which was raised in the context that the usual practice of reading in evidence the documents that were marked and produced at the trial in the course of witness testimony was not followed when the case for the Respondents was closed on 27th April 1993. This is substantive question 5, which specifically focuses on this issue, namely: is it mandatory to read the documents in evidence at the conclusion of the trial? There is no provision in the Civil Procedure Code that mandates the reading in of the marked documents at the close of the case of a particular party. However, learned and experienced Counsel who have appeared in the original courts in civil cases from time immemorial developed such a practice, which has received the recognition of our courts. For instance, in *Sri Lanka Ports Authority and Another v. Jugolinija – Boat East* [1981] 1 Sri LR 18 Samarakoon, C.J., commented on this practice, and ventured to observe at pages 23 to 24 of his judgement that if no objection to any particular marked document is taken when at the close of a case documents are read in evidence, "they are evidence for all purposes of the law." It has been held that this is the *cursus curiae* of the original courts. *See, Silva v. Kindersle* [1915-1916] 18 NLR 85*; Adaicappa Chettiar v. Thomas Cook and Son* [1930] 31 NLR 385 *Perera v. Seyed Mohomed* [1957] 58 NLR 246*; Balapitiya Gunananda Thero v. Talalle Methananda Thero* [1997] 2 Sri LR 101; *Cinemas Limited v. Sounderarajan* [1998] 2 Sri LR 16; *Stassen Exports Ltd., v. Brooke Bond Group Ltd., and Two Others* [2010] BLR 249.

It would therefore follow that even though the Power of Attorney marked P7 had in fact not been proved as required by law, if the learned Counsel for the Respondents had read in P7 in evidence with the other marked documents at the close of the case for the Respondents without any objection being taken on behalf of the Appellants, P7 would have been deemed to be good evidence for all purposes of the law. However, that is not what actually happened in this case. A photocopy of the power of attorney allegedly granted by Abdul Cader to Noor Lebbai was marked P7 subject to proof, no proof whatsoever was adduced to prove the aforesaid photocopy, and

none of the marked documents were read in evidence at the conclusion of the Respondents' case.

For all these reasons, I hold that the Power of Attorney marked P7 has not been duly proved, and cannot be acted upon as evidence. I therefore hold that question 1(a) on which special leave to appeal has been granted in this case, should be answered in the negative.

Title of the Respondents

The other connected substantive question on which leave has been granted, which relate to the title of the Respondents to the land described in the schedule to the petition, has been split up into two sub-questions which are reproduced below:

1. (b) Does the Deed produced marked P1 operate to convey the title of Mohideen Abdul Cader, to the Respondents?

   (c) If not, was the Court of Appeal in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to the subject matter of the action?

Mr. Musthapha has submitted on behalf of the Appellants that Deed No. 6165 (P1) does not operate to convey the title of Mohideen Abdul Cader, to the Respondents. He has contended in so far as the procedure set out in Section 31 of the Notaries Ordinance No. 1 of 1907, as subsequently amended, has not been complied with in respect to the execution of Deed No. 6165 (P1), it is a nullity. The said procedure is found in rule 30, which provides that-

> If he (a notary) attest any deed or instrument executed before him by means of an attorney, he shall preserve a true copy of the power of attorney with his protocol, and shall forward a like copy with the duplicate to the Registrar of Lands

I also note that the Registrar of Land, Anuradhapura, Ulluduhewage Karunaratne, who was called to give evidence on behalf of the Appellants, has stated in his testimony that a copy of P7 has not been forwarded along with the duplicate of the deed marked P1 in compliance with the procedure set out in Section 31 of the Notaries Ordinance. However, in my view this contention cannot be sustained as Section 33 of the Notaries Ordinance clearly enacts that-

> No instrument shall be deemed to be invalid by reason only of the failure of any notary to observe any provision of any rule set out in section 31 in respect of any matter of form: provided that nothing hereinbefore contained shall be deemed to give validity to any instrument which may be invalid by reason of non-compliance with the provisions of any other written law.

Mr. Musthapha has further submitted that a plain reading of Deed No. 6165 marked P1 reveals that the alleged attorney Noor Lebbai has purported to convey the land described in its schedule as its owner, and not as the holder of the Power of Attorney mared P7. He has also stressed that the notary before whom the aforesaid deed was executed has not mentioned in his attestation, in what other capacity Noor Lebbai signed the deed in question. Mr. Dayaratne has, in his response, relied very much on

the language used in the operative part of the deed, wherein Noor Lebbai refers to the Power of Attorney marked P7, and states that-

> ඉබ්‍රාහිම් ලෙබ්බෙගේ පුත්, මොහොමඩ් ඉබ්‍රාහිම් ලෙබ්බේ නුර් ලෙබ්බේ වන මට දකුණු ඉන්දියාවේ තමිල්නාඩු ප්‍රාන්තයේ රාමනාතපුරම් දිස්ත්‍රික්කයේ කීලක්කරෙයි උතුරු වීදියේ එස්. එම්. එම්. හමීඩ් හසන් ප්‍රසිඩ නොතාරිස් තැන විසින් වෂී 1981 ක්වූ ඔක්තෝම්බර් මස 30 වෙනි දින සහතික කළ මදාර් කනී, මොහොම්මදු මොහිදීන් කාදර් සායිබු, මොහිදීන් සදක්කු, මොහිදීන් අබ්දුල් කාදර් යන අයගේ අංක 2633 දරණ ඇටෝර්නි බලපත්‍රයේ අයිතිය පිට අයිතිය නිරවුල්ව බුක්ති විඳ එන මෙහි පහත උපලේඛණයෙහි විස්තර කෙරෙණ දේපල ලංකාවේ වලංගු මුදලින් රුපියල් විසිදාහ (රුපි. 20000.00) කට අංක 01, තක්කියා පාර, තුසව, නාච්චාදුව යන ලිපිනය ඇති අබ්දුල් මජීඩ් අබ්දුල් නිසාර් මහත්මයාද 2. අබ්දුල් මජීඩ් මොහොමඩ් මන්සූර් මහත්මයාද යන දෙදෙනාට මෙයින් වකුණා අයිතිය පවරා භාරදී එම මුදල සම්පූර්ණයෙන් ගැන භාරගතිම්

It is not at all clear from the above quoted words that Noor Lebbai purported to act as an Attorney on behalf of his principal. In fact, in the below quoted words, he even describes himself as the vendor (වකුණුම්කාර), and purports to sell the property in question and also to defend title:-

> එහෙයින් එකී දේපල සහ ඊට අයිති සියළු දේත් ඒ පිළිබඳව එකී වකුණුම්කාර මා සහ උරුම කරුම හිමකම් හා බලතලත් එකී ගැණුම්කාර අබ්දුල් මජීඩ් අබ්දුල් නිසාර් මහත්මයාද 2. අබ්දුල් මජීඩ් මොහොමඩ් මන්සූර් මහත්මයාද යන දෙදෙනාට සහ ඔවුන්ගේ උරුමක්කාර පොල්ම: අද්මනිස්ත්‍රාසිකාර බලකාරාදීන්ටත් සදහටම නිරවුල්ව බුක්ති විඳීමට හෝ මනාපයක් කර ගැනීමට පුළුවන් මුළු බලය මෙයින් සලසා දුනිම්. තවද එකී දේපල මෙසේ අන්සතු කිරීමට නීති ප්‍රකාර සම්පූර්ණ බලය මට ඇති බවද එම දේපලවලත් ඉන් කොටසක් හෝ එල ප්‍රයෝජනාදී කිසිවක් අන් සතුවීමට හේතුවන ක්‍රියාවක් මීට ප්‍රථම නොකල බවටද සහතික වෙමින් මෙම වකුණුම්කරය සියලු අයුරින් සවිකර දීමට හා ඊට වරුද්ධව පැමිණෙන යම් ආරාවුලක් වේ නම් ඊට වගඋත්තර කියා නිරවුල් කරදීමටද මෙය වැඩිදුරටත් ස්ථිර කරගැනීම පිණිස අවශ්‍ය වන්නාවු මීටම අදාල වෙනයම් ඔප්පු තිරප්පු ආදයක් එකී ගැණුම්කාර පක්ෂයේ වියදමෙන් සාදවා දෙන ලෙස එකී ගැනුම්කාරයන් විසින් හෝ ඔවුන්ගේ ඉහත උරුමක්කාරාදීන් විසින් ඉල්ලා සිටිනු ලැබුවහොත් එසේ කරදීමටද එකී වකුණුම්කාර මම මා වෙනුවට සහ මගේ උරුමක්කාර පොල්ම: අද්මනිස්ත්‍රාසිකාර බලකාරාදීන් වෙනුවටත් මෙයින් වැඩිදුරටත් පොරොන්දුව බැඳුනෙම්.

I am of the opinion that in the circumstances, the Deed marked P1 does not purport to be a conveyance of the title allegedly vested in Abdul Cader through the instrumentality of an alleged agent, and is in effect a purported conveyance of title and possession which Noor Lebbai never enjoyed, and which he cannot in law dispose of.

Apart from this, there is also considerable doubt as to whether Abdul Cader himself had title to the said four acre land, as there is inadequate material before court to conclude that the admitted ownership of Sadakku had devolved on Abdul Cader. I find that the Respondents have failed to establish the devolution of title to Abdul Cader. Although it appears from the testimony of Respondents' witness Mohamed Ibrahim Lebbai Noor Lebbai that there was a testamentary case with respect to the estate of Sadakku, no documentary evidence whatsoever has been produced at the trial in regard to how the ownership of the land described in the schedule to the petition devolved on the heirs of Sadakku. It transpires from the testimony of Noor Lebbai, that Sadakku's brother Kachchi Mohideen succeeded to a 2/10th share of the land described in the schedule to the petition and that Sadakku's two sons Mohomadu Mohideen and Abdul Cader, also inherited undivided shares in the land, the proportions of which have not been clearly established. Therefore, it is evident from the testimony of the Respondents' witnesses themselves that Abdul Cader was not the *sole* owner of the land described in the schedule to the petition. It follows that, even if the Power of Attorney marked P7 was proved, the evidence led in regard to the devolution of title from Sadakku to Abdul Cader cannot be said to have establish the title of Abdul Cader to the entirety of the land on the standard of proof that is required in a *rei vinidicatio* action. It is also important to bear in mind that, for

the reasons already advanced, in so far as the execution of the Power of Attorney marked P7 has not been duly proved, Noor Lebbai did not have any power or authority to bind Abdul Cader, and for that reason alone, Deed No. 6165 (P1) cannot operate to convey any title to the Respondents.

I therefore have no difficulty in answering the substantive question 1(b) in the negative and holding that the Deed produced marked P1 does not operate to convey the admitted title of Muhammad Mohideen Cader Saibu Mohideen Sadakku, or the alleged title of Mohideen Abdul Cader, to the Respondents.

Sub-question 1(c) was of course intended to be consequential upon question 1(b) being answered in the negative, and requires some attention, because it raises the question, in that event, whether the Court of Appeal was in error in holding that the Learned District Judge had correctly arrived at the finding that the Respondents had established title to *the subject matter of the action*. It is in this case somewhat difficult to fathom what is meant by the words "the subject matter of the action", as there has been a great deal of confusion in this regard. It was in view of this confusion that this Court specifically invited learned Counsel to make submissions on the question of the identity of the *corpus*, even though none of the substantive questions on which special leave had been granted by this Court, directly raised any issue in regard to the identity of subject matter of the action from which this appeal arises.

It is trite law that the identity of the property with respect to which a vindicatory action is instituted is as fundamental to the success of the action as the proof of the ownership (*dominum*) of the owner (*dominus*). The passage from Wille's *Principles of South African Laws* (9th Edition – 2007) at pages 539-540, which I have already quoted in this judgement, stresses that to succeed with an action *rei vindicatio*, which this case clearly is, the owner must prove on a balance of probabilities, not only his or her ownership in the property, but also that the property exists and is *clearly identifiable.* It is also essential to show that the defendant is "in possession or detention of the thing at the moment the action is instituted." Wille also observes that the rationale for this "is to ensure that the defendant is in a position to comply with an order for restoration."

The identity of the subject matter is of paramount importance in a *rei vindicatio* action because the object of such an action is to determine ownership of the property, which objective cannot be achieved without the property being clearly identified. Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership, and furthermore, the ultimate objective of a person seeking to vindicate immovable property by obtaining a writ of execution in terms of Section 323 of the Civil Procedure Code will be frustrated if the fiscal to whom the writ is addressed, cannot clearly identify the property by reference to the decree for the purpose of giving effect to it. It is therefore essential in a vindicatory action, as much as in a partition action, for the *corpus* to be identified with precision.

Doubts in regard to the identity of the land sought to be vindicated in this case arise from the fact that while the Respondents in their petition laid claim to a four acre land known as "Palugahakumbura", in Mahawela, Pahalabaage situated in the village of Pandiyankulama in Nachcha Tulana of Ulagalla Korale in Hurulu Palata of

the Anuradhapura District, by virtue of Deed bearing No. 6165 (P1), the 1st Appellant asserted prescriptive title to a land described as "Nilattu Patti Wayal" falling within LD 2 Ela in the village of Pandiyankulama in Nachchadoova Tulana of Ulagalla Korale in Hurulu Palata in extent 3 acres 2 roods and 26 perches.

In the schedule to the petition filed by the Respondents, which closely followed the schedules to the deeds marked P1 to P6, there was no reference to any survey plan and the four acre land claimed by the Respondents was described in the following manner:-

> All that field called Palugaha Kumbura situated in the Pahala Bagaya of the Mahawela at Nachchaduwa Pandiankulama in Nachcha Tulana of Ulagalla Korale in Hurulu Palata in the District of Anuradhapura of the North Central Province, bounded on the North by the field of Nawuran Lebbe Mohiyadeen Pitcha and Others, East presently by Welle and the property of Yusoof Lebbe one of the vendors hereof, South by the property of Ali Tamby Lebbe Sharibu and the Others and West presently by the property of Sultan Unus containing in extent Four Acres (4A-0R-0P) more or less together with the paddy crops that are growing now on the land.

In the schedule to the answer filed by the Appellants, which too made no reference to any survey plan, the land claimed by the 1st Appellant was described as follows:-

> The land known as Nilattu Patti Wayal, in extent 3 acres, 2 roods and 26 perches (A3-R2-P26) situated within the LD 2 Ela of the village of Pandiyankulama in Nachchadoowa Tulana of Ulagalla Korale in Hurulu Palata in the District of Anuradhapura of the North Central Province, bounded on the North by the paddy fields belonging to Y. M. Ismail and M. P. Kairun Nisa, on the East by the LD 2 Ela on the South by the paddy field of D. C. M. Wijesinghe and on the West the paddy field of U. Cader Beebee and T. C. M. Munesinghe, together with all things from therein.

It was perhaps in view of the differences in extent and description of the lands claimed by the contending parties, and the circumstance that neither the schedule to the petition nor the schedule to the answer described the land in suit by reference to a survey plan, that the District Court issued a commission on D. M. G. Dissanayake, Licensed Surveyor, to survey the land referred to in the schedule to the petition filed by the Respondents as well as the land described in the schedule to the answer filed by the Appellants, and report whether they were the same. Plan bearing No. 1176 dated 10th October 1990 and the accompanying report prepared by Surveyor Dissanayake after the survey of a land pointed out by the contending parties as the land in dispute, showed that the land which the parties were contending for was only 2 acres, 3 roods and 07.5 perches in extent and was situated in the village of Madawalagama (Final Village Plan 520) within the Nachchadoova GS Division in Kandu Tulana of Kanadara Korale in Nuwaragam Palata, in the Anuradhapura District, which according to the Surveyor Dissanayake, was an altogether different locality from the area where the land described in the respective schedules to the petition and the answer was situated.

It was in these circumstances, that the District Court issued a further Commission on K. V. Somapala, Licensed Surveyor, to survey the land claimed by the two contending parties to the case. Surveyor Somapala prepared Plan No. 2025 dated 16.04.1991, which revealed that the land surveyed by him, the boundaries of which had also been pointed out by the contending parties, was in extent 2 acres 3 roods and 31 perches

and was situated in the village of Pandiyankulama, in Nachchadoova Tulana of Ulagalla Korale in the Hurulu Palata in the Anuradhapura District. Although falling short of the four acres claimed by the Respondents in their petition by approximately 1 acre, 1 rood and 9 perches as well as the land claimed by the 1st Appellant in the answer by 2 roods and 35 perches, the location and boundaries of the land depicted in Plan No. 2025 were somewhat consistent with the description of the land set out in the schedule to the petition of the Respondents as well as the description of the land set out in the schedule to the answer.

It is remarkable that although a comparison of the schedules to the petition and answer filed in this case give the impression that they refer to two distinct and different lands with two different names and dimensions and boundaries having nothing in common except that they were situated in the village of Pandiyankulama in Nachchadoova Tulana of Ulagalla Korale in Hurulu Palata, in the Anuradhapura District, the boundaries of Plan No. 2025 prepared by Surveyor Somapala almost perfectly tally with the boundaries of the land described in the schedule to the answer filed by the Appellant. According to both the aforesaid Plan and the schedule to the answer, on the northern boundary of the land depicted therein are the paddy fields belonging to Y. M. Ismail and M. P. Kairun Nisa, and on the eastern boundary is the LD 2 Ela. The southern boundary of the said Plan and the schedule to the answer, is the paddy field belonging to D. C. M. Wijesinghe and on the western boundary is the paddy field belonging to U. Cader Beebee and T. C. M. Munasinghe. It is relevant to note that in the aforesaid Plan, Surveyor Somapala has also endeavoured to indicate the names of the previous owners of the paddy fields mentioned above, but he does not in his report or testimony in court, disclose how he got these particulars, and it is a reasonable inference that he had got these particulars from Plan No. 1176 and report prepared by Surveyor Dissanayake, which I shall advert to presently.

It is of some significance that Plan No. 1176 prepared by Surveyor Dissanayake, though placing the surveyed land in a different village called Madawalagama in Kandu Tulana of Kandara Korale in the Nuwaragama Division, shows that the northern and eastern boundaries of the land surveyed by Dissanayake substantially tally with the northern and eastern boundaries of the land described in the schedule to the answer of the Appellants. In Plan No. 1176, the northern boundary is shown as the paddy field previously owned by Nawuran Lebbe Mohiyadeen and presently owned by Y. M. Ismail. No reference is made to any paddy field belonging to M. P. Kairun Nisa in Plan No. 1176, although in the schedule to the answer that paddy field too is said to be on the northern boundary. Similarly, the eastern boundary of the land depicted in Plan No. 1176 is the irrigation canal and reservation while in the schedule to the answer it is described as LD 2 Ela.

However, it would appear that the southern and western boundaries of Plan No. 1176 are substantially different from the corresponding boundaries of the land described in the schedule to the answer. In Plan No. 1176, the paddy field on the southern boundary is indicated as previously owned by Ana Ali Thambi Lebbe and presently claimed by D. S. Gunesekera whereas according to the schedule to the answer, the southern boundary consists of the paddy field belonging to D. C. M. Wijesinghe. In Plan No. 1176, the western boundary is shown as the paddy field previously owned by Lebbe Thambi Yusuf and presently claimed by D. S. Gunesekara and P. Jainul Abdeen while in the schedule to the answer, the land described in the schedule to the

petition is bounded on the west by the paddy field of U. Cader Beebee and T. C. M. Munesinghe.

It is interesting to note that Surveyor Dissanayake has endeavoured to show the boundaries of Plan No. 1176 in a manner as to be consistent with the boundaries of the land described in the schedule to the petition filed by the Respondents. Thus, the northern boundary of the said land, is the paddy field of Nawuran Lebbe Mohiyadeen Pitcha and others which is sought to be substantiated in Plan No. 1176 by referring to the Y. M. Ismail as the claimant to the paddy field on the northern boundary as the successor in title of Nawuran Lebbe Mohiyadeen and others. Similarly, the southern boundary in the aforesaid Plan is described as the paddy field claimed by D. S. Gunasekere and previously owned by Ana Ali Thambi Lebbe, while in the schedule to the petition the corresponding boundary is the paddy field belonging to Ali Thambi Lebbe Sharibu. However, there is some inconsistency as far as the eastern and western boundaries are concerned. According to the schedule to the petition, on the eastern boundary of the land described therein is the "wélle" (වැල්ල) and the property of Yusoof Lebbe, whereas in the Plan No. 1176 and report, on the eastern boundary of the land is the irrigation canal and reservation, but there is no reference to the property of Yusoof Lebbe. Of course, the "the irrigation canal" on the eastern boundary of the aforesaid plan does not give rise to much of an issue, as the Sinhalese term "wélle" (වැල්ල) refers to an embankment or mound of a canal or a paddy field, but no light was shed by any of the surveyors or witnesses in regard to the reference to Yousoof Lebbe in the schedule to the petition. Similarly, according to Plan No. 1176 and its report, on the western boundary of the land surveyed is the paddy field claimed by D. S. Gunasekere and C. Jainul Abdeen and originally owned by Lebbe Thambi Yusoof, but the schedule to the petition states that on the western boundary is the property of Sultan Yunoos, which is entirely a different name, and there is no basis on which these boundaries can be said to be consistent.

It is also important to empahsise that neither Surveyor Dissanayake nor any other witness who testified at the trial, including the 1st Petitioner-Respondent-Respondent, the 1st Defendant-Appellant-Appellant and Surveyor Somapala, placed before court any documentary or other evidence to substantiate the alleged succession to title to the fields or paddy fields on the northern and southern boundaries of the land described in the schedule to the petition, which information had been used by Surveyor Dissanayake for the purpose of synchronising the boundaries of the land described in the schedule to the petition with the land depicted in Plan No. 1175 and the accompanying report, and uncritically adopted by Surveyor Somapala in Plan No. 2025 and report annexed thereto. In the absence of such evidence, there is no justification to conclude that the boundaries of the land surveyed by these surveyors as the land in dispute, tally with the land described in the schedule to the petition of the Respondents. To illustrate this point, the statement in the aforesaid survey plans and reports to the effect that the paddy field situated on the northern boundary of the land subjected to the survey was claimed by one Y.M. Ismail is an empirical fact reported and testified to by both surveyors which they were competent to make, but the statement to the effect that the previous owners of the said paddy field were Nawuran Lebbe Mohiyadeen Pitcha and others, is clearly hearsay, in the absence of any documentary or other evidence to substantiate the accuracy of that statement. So also, the statement on the said plans and reports to the effect that the paddy field on the southern boundary originally belonged to one Ali Thambi Lebbe, which substantially tallies with the name of the owner of the property described in the

schedule to the petition, namely Ali Thambi Lebbe Sharibu, is at best hearsay, in the absence of any evidence to relate the aforesaid original owner or owners to the respective claimants of the said property at the time of the survey.

Furthermore, despite the superficial similarity between the lands depicted in Plan No. 1175 and Plan No. 2025, particularly, the bifurcation of the land by two canals, one close to the northern boundary and the other almost at the centre of the land, the said two plans seek to locate the lands by reference to two distinct villages, tulanas, korales and palatas and even the location and description of the land described in the schedule to the petition does not tally with the village, tulana, korale and palata of Surveyor Dissanayake's Plan No. 1175. In any event, this superficial similarity could only be used to show that the lands surveyed by Dissanayake and Somapala were substantially similar, but there is no reference to any such bifurcations of canals in the schedule to the petition.

Despite these obvious differences, the parties did not appear to have any difficulty in identifying the *corpus* at the stage of formulating the issues after the return of the commission to survey the land or lands in dispute. It is unfortunate that neither the learned District Judge, nor the learned Counsel for the contending parties, realized that issue 6 sought to describe the land in dispute by reference to the schedule to the petition of the Respondents as well as Plan No. 1176 and the accompanying report prepared by Surveyor Dissanayake despite their mutual inconsistency in regard to not only the extent of the land but also with respect to the village, the tulana, the korale and the palata in which the land is situated. It is also significant that issue 8 raised on behalf of the Appellants did not seek to describe the land claimed by them by reference to the schedule to their answer or the plan and report prepared by Surveyor Somapala, and that in the aforesaid said issue they had assumed that the bone of contention in the case was one and the same land, which they ventured to describe as "මෙම නඩුවට අදාල ඉඩම".

It is manifest that issues 6 to 8, thus formulated have only confounded the confusion in regard to the identity of the land in dispute, which the testimony of the two surveyors in this case has in no way helped to reduce. Surveyor Dissanayake was unable to explain the differences in the village name, tulana, korale and palata between the schedule to the petition and his Plan bearing No. 1176, although the name of the land and some of the boundaries specified in the schedule to the petition tallied with his plan. On the other hand, Surveyor Somapala was clear in his testimony that the land surveyed by him could not be the same as the land surveyed by Surveyor Dissanayake as the village, tulana, korale and palata within which the two lands were situated were different, although the structure and the bifurcations of the canals on the two plans were similar.

To sum up, from the issues raised by the contending parties as well as the documentation and evidence led in this case, it would appear that despite serious doubts regarding the location of the lands surveyed by the commissioned surveyors, the Respondents as well as the 1st Appellant were claiming title to substantially the same land. It is also material to note that the extracts of the Register of Agricultural Lands produced by respectively the Respondents marked P2 and the Appellants marked "පි1", describe the land described in the schedule to the petition as "Palugahakumbura" in extent 3 acres, 2 roods and 26 perches, under serial No. 15/353 in Cultivation Officer Division of 42A Tulana up to the year 1987, and in the

year 1988 the description of the land was changed to "Nilattu Pattiya" in extent 4 acres, under Serial No. 19/459 in the same Cultivation Officer Division. Of course, the surveys conducted on commissions issued by court disclosed a much smaller land, the earlier plan bearing No. 1176 depicting an extent of 2 acres, 3 roods and 7.5 perches, which was less than the land extent shown in Plan No. 2025 prepared by Surveyor Somapala by approximately 24.5 perches, possibly due to the shifting of the northern boundary due to some encroachments.

In these circumstances, in my opinion, the learned District Judge was justified in concluding that the lands claimed by the contending parties are one and the same and is substantively depicted in the survey plan prepared by Surveyor Dissanayake, a finding which has been affirmed by the Court of Appeal. However, what the lower courts have failed to realize is that this does not necessarily mean that the land depicted by Surveyor Dissanayake, in his Plan No. 1176 is identical with the land described in the schedule to the petition and the title deeds P1 and P3 to P6. Such identification is vital to a vindicatory action such as this in which a declaration of title and ejectment of the Appellants has been sought by the Respondents by virtue of the said title deeds. It is unfortunate that neither the learned District Judge nor the Court of Appeal has taken into consideration the inconsistencies fully outlined above, that exist in identifying the boundaries of the land described in the schedule to the petition with the land actually surveyed by the two surveyors on commissions issued by the court.

The learned District Judge was not helped by the obvious confusion in issue 6 which, as already noted, sought to describe the land claimed by the Respondents by reference to the schedule to the petition filed by them as well as by reference to Plan No. 1176 depicted by Surveyor Dissanayake. The learned District Judge uncritically answered the issue in the affirmative, causing great ambiguity in identifying the land, with respect to which a declaration of title was sought by the Respondents. The learned District Judge had in his judgement purported to make an express order of ejectment, based no doubt, on an implicit declaration of title to land claimed by the Respondents, ignoring the fact that the schedule to the petition referred to in the said issue 6, placed the land in the village of Pandiankulama in Nachcha Tulana in the Ulagalla Korale in Hurulu Palata of the Anuradhapura District, while Plan No. 1176 dated 10th October 1990 prepared by Surveyor Dissanayake placed it in the village of Madawalagam in Kandu Tulane within the Kanadara Korale in Nuwaragam Palata of the same District. The learned District Judge has also failed to make any finding pertaining to the extent of the land described in the schedule to the petition, which was four acres according to the schedule to the petition, while it was only 2 acres, 3 roods and 7.5 perches according to Surveyor Dissanayake's Plan No. 1176. He has also not arrived at any finding in regard to which of the two survey plans that had been prepared on commissions issued by court, depicted the land described in the schedule to the petition accurately, particularly in the context that Plan No. 2025 was more in accord with the location of the land as set out in the schedule to the petition, but depicted a slightly larger land in extent 2 acres, 3 roods and 31 perches.

The learned District Judge has come to the conclusion that the bone of contention between the contending parties is the same as the land described in the schedule to the petition of the Respondents as well as the schedules to the title deeds marked P1 and P3 to P6. In doing so, he has totally lost sight of Section 187 of the Civil Procedure Code, which provides that the judgement "shall contain a concise statement of the

case, the points for determination, the decision thereon, and the reasons for such decision…." It is obvious that bare answers to issues without reasons are not in compliance with the requirements of the said provision of the Civil Procedure Code, and the evidence germane to each issue must be reviewed or examined by the Judge, who should evaluate and consider the totality of the evidence. This, the learned District Judge has failed to do, and the Court of Appeal has overlooked in affirming the decision of the District Court.

It is the primary duty of a court deciding a case involving ownership of land, whether it is a partition action or *rei vindicatio* action, to consider carefully whether the relevant land (*corpus*) has been clearly identified. As already stressed, identity of the land is fundamental for the purpose of attributing ownership, and for ordering ejectment. In order to make a proper finding, it is necessary to formulate the issues in a clear and unambiguous manner to assist the reasoning process of court. In my considered opinion, the learned District Judge has seriously misdirected himself in the manner in which he formulated issue 6, which makes reference to the schedule to the petition and the plan and report prepared by Surveyor Dissanayake, which differ drastically form each other with respect to the location, boundaries and extent of the land described or depicted therein. By answering the issue in the affirmative without clarifying whether he was going by the schedule to the petition or on the basis of one of the survey plans prepared on the commissions issued by court, and if so which one, the learned District Judge has altogether begged the question of identity of the *corpus* which is so vital to a vindicatory action, which negates the possibility of deciding on the question of title that arises in this case. The resulting judgement, which unfortunately has been affirmed by the Court of Appeal, is fatally flawed, and the finding that title to the land claimed by the Respondents devolved on them by virtue of Deed No. 6165 marked P1 is altogether unfounded.

For all these reasons, I hold that substantive question 1(c) has to be answered in the affirmative, and that the Court of Appeal was indeed in error in affirming the decision of the learned District Judge that the Respondents had established title to the subject matter of the action

Prescription

In view of my answers to the 3 sub-questions of substantive question 1 on which special leave has been granted by this Court, it is unnecessary to decide question 2, which is whether the Court of Appeal erred in failing to consider that the learned District Judge has not duly evaluated the evidence on the question of prescription. I therefore do not propose to go into this question in depth. In a *rei vindicatio* action, it is not necessary to consider whether the defendant has any title or right to possession, where the plaintiff has failed to establish his title to the land sought to be vindicated and the action ought to be dismissed without more.

However, I wish to use the opportunity to deal with a submission made by learned President's Counsel for the Respondents before parting with this judgment. He has submitted that in terms of Section 45(3) of the Agrarian Services Act No. 58 of 1979, as subsequently amended, an entry made in the Agricultural Lands Register maintained under that Act is admissible as *prima facie* evidence of the facts stated therein, and that accordingly, the entry made in the Agricultural Land Register, a certified extract from which was produced marked "P1", in which the names of the Respondents appear as

the landlords constitute *prima facie* evidence of their title to the land claimed by them as well as the fact of their possession thereof through a tenant cultivator. It is obvious that Section 45(3) of the said Act was not intended to extend to *title* to agricultural land, and that the presumption arising from the entries in "පි1" with regard to the landlord and description of land is displaced in this case by the overwhelming evidence that the Respondents had never enjoyed possession of the land "Nilaththu Pattiyal" which had been possessed exclusively by the Appellants.

It is the name Hinni Appuhamy that appears in the extract marked "පි1" as tenant cultivator for the ten years from 1979 to 1989, despite the alteration which the Respondents admittedly got done in 1988, by which the name of the 1st Appellant as landlord, and the description of the land as "Nilaththu Pattiyal" in extent 3 acres 2 roods and 26 perches, had been replaced by the names of the Respondents as landlords and description of the land as "Palugahakumbura" in extent 4 acres. Neither Hinni Appuhamy, nor any other witness, was called by the Respondents to establish that the paddy field cultivated by Hinni Appuhamy was in fact the four acre land to which the deeds P1 and P3 to P6 related, and it is manifest that the alteration to the Agricultural Land Register effected in 1989 was a calculated move by the Respondents to stake a claim to the land possessed by the Appellants on the basis that the said land was the same as what is described in the schedule to the petition and the schedules to the said title deeds, which fact however, the Respondents have failed to establish by evidence.

Conclusion

In all the circumstances of this case, I allow the appeal answering the substantive questions 1, 3, 4 and 5 on which special leave had been granted by this Court, in favour of the Appellants. I do not consider it necessary to answer substantive question 2. I would accordingly set aside the judgements of the District Court and the Court of Appeal, and make order dismissing the action filed by the Respondents in the District Court. I also award costs in a sum of Rs. 25,000/- payable to the Appellants jointly, by the Respondents jointly and severally.

JUDGE OF THE SUPREME COURT

HON. J.A.N. DE SILVA, C.J.
I agree.

CHIEF JUSTICE

HON. P.A. RATNAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Leave to Appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, read with Section 6 of the said Act, Article 128 of the Constitution and Chapter LVIII of the Civil Procedure Code (Chapter 101) against the order dated 7.10.2008 delivered in H.C. (Civil) Case No. 247/07/MR.

Elgitread Lanka (Private) Limited,
No. 9, Industrial Estate,
Dankotuwa.

DEFENDANT-PETITIONER-APPELLANT

SC (Appeal) No. 106/08
SC (HC) LA No. 37/2008
HC (Civil) No. 247/07/MR

VS.

Bino Tyres (Private) Limited,
Dankotuwa Industrial Estate,
Lihiriyagama Road,
Dankotuwa.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE : Saleem Marsoof, P.C., J.,
P. A. Ratnayake, P.C., J. &
S. I. Imam, J.

COUNSEL : M. E. Wickramasinghe for the Defendant-Petitioner-Appellant.

Rasika Dissanayaka with Chandrasiri Wanigapura for the Plaintiff-Respondent-Respondent.

ARGUED ON : 30.06.2009

WRITTEN SUBMISSIONS: 30.07.2009

DECIDED ON : 27.10.2010

SALEEM MARSOOF, J.

This is an appeal from the judgement of the Commercial High Court of Colombo dated 7th October 2008, which overruled the contention of the Defendant-Petitioner-Appellant (hereinafter referred to as the "Appellant") that the said High Court has no jurisdiction to hear and determine the action filed by the Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent") in view of Section 5 of the Arbitration Act, No.11 of 1995.

The Respondent, Bino Tyres (Pvt.) Ltd., instituted action in the Commercial High Court of Colombo for the recovery of a sum of Rupees 40,000,000/- as damages for the alleged breach of

the Franchise Agreement dated 2nd June 2005, whereby the Appellant, Elgitread Lanka (Pvt.) Ltd., had agreed to grant the Respondent a franchise to use a system for re-treading tyres in conjunction with the use of the trademark and trade name of the holding company of the Appellant, Elgitread India Ltd., and to provide technical assistance to set up a tyre re-trading plant in Dankotuwa. Clause 14 of the said agreement reads as follows:

> "Any dispute arising out of this Agreement shall be referred to the Sri Lanka Chamber of Commerce and Industry, Colombo, for arbitration, whose decision shall be binding and final".

The Appellant, in its answer, objected to the jurisdiction of the Commercial High Court on the basis that by reason of the agreement to arbitrate contained in Clause 14 of the Franchise Agreement, the Court cannot hear and determine any dispute that may arise from the said agreement, as Section 5 of the Arbitration Act No. 11 of 1995 takes away the jurisdiction of court when objection is taken to the exercise of jurisdiction by Court. At the trial, the Respondent, however, took up the position that there was no agreement to refer the dispute for arbitration, or alternatively, the agreement to refer the dispute for arbitration is frustrated, because there does not exist in Sri Lanka any entity by the name of 'the Sri Lankan Chamber of Commerce and Industry, Colombo'.

Several issues which had a bearing on the said jurisdictional objection were identified as preliminary issues at the trial, and were eventually taken up for determination by the learned Commercial High Court Judge, prior to considering the case on its merits. The said issues are reproduced below :-

Raised by the Plaintiff-Respondent-Respondent

1. Does the Agreement annexed to the Plaint marked X1 contain a valid arbitration clause / arbitration agreement?

2. In any event, has the Appellant failed every attempt by the Respondent to refer the matter to arbitration?

3. If so, does this Court have jurisdiction to hear and determine this action?

Raised by the Defendant-Petitioner-Appellant

8. (a) Is the purported cause of action pleaded by the Plaintiff based on the Franchise Agreement, a true copy whereof has been filed with the Plaint marked X1?

   (b) Does Clause 14.0 of the said Agreement contain an arbitration clause and / or an arbitration agreement within the meaning of the said term in the Arbitration Act No. 11 of 1995?

   (c) Has the Defendant objected to this Court exercising jurisdiction in this action?

   (d) In the circumstances does this Court have no jurisdiction to hear and / or determine this action?

   (e) If so, should the Plaint be rejected and / or the Plaintiff's action dismissed?

10. (a) Does Clause 14.0 of the said Agreement X1 contain an Arbitration Clause ?

(b) Has the Defendant at all times maintained that any dispute between the parties should be referred to arbitration in accordance with the said Clause?

(c) Has the Defendant objected to this Court exercising jurisdiction in respect of this matter?

The learned Judge of the Commercial High Court has in his judgement dated 7th October 2008, answered all the above issues 1, 2, 3, 8 and 10 in favour of the Respondent, on the basis that insofar as there is no entity in existence with the name 'the Sri Lankan Chamber of Commerce and Industry, Colombo', the agreement to arbitrate contained in Clause 14 of the said Franchise Agreement is incapable of being given effect to, and is therefore void *ab initio*. The Commercial High Court concluded that it had jurisdiction to proceed to trial on the other issues formulated by the parties. This appeal is against the said judgement, and leave to appeal has been granted by the Supreme Court on the following substantive questions:-

(a) Did the High Court err in law in failing to appreciate that Clause 14 of the Agreement was an 'arbitration agreement' within the meaning of the said term in Section 3 of the Arbitration Act, and the Court therefore has no jurisdiction over the matter by reason of the Appellant's objection in terms of Section 5 of the Arbitration Act?

(b) Did the High Court err in law in ignoring Section 4 of the Arbitration Act which provides that a dispute that the parties have agreed to submit to arbitration under an 'arbitration agreement' may be determined by arbitration unless the matter in respect of which the arbitration agreement was entered into is contrary to public policy or is not capable of determination by arbitration?

(c) Did the High Court fail to apply the provisions of the Arbitration Act and in particular Section 7 thereof which provides for the appointment of the arbitrators in terms of the provisions thereof in the absence of agreement between the parties for the appointment of arbitrators?

Does Clause 14 consist of an agreement to arbitrate?

The first substantive question of law that has to be decided on this appeal is whether the Commercial High Court of Colombo err in law by failing to appreciate that Clause 14 of the Agreement was an 'arbitration agreement' within the meaning of Section 3 of the Arbitration Act, 1995, and that the Court had no jurisdiction to hear and determine the action filed by the Respondent by reason of the Appellant's objection to jurisdiction taken in terms of Section 5 of the Arbitration Act. Learned Counsel for both parties concede that the existence of a valid and enforceable agreement to arbitrate was an essential pre-condition for the application of Section 5 of the Arbitration Act, which reads as follows:-

> "Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter *agreed to be submitted for arbitration* under such agreement, the Court shall have no jurisdiction to hear and determine such matter *if the other party objects* to the court exercising jurisdiction in respect of such matter." (*emphasis added*)

It is also a pre-condition that the defendant or respondent to the court action or proceeding should have objected to the exercise of jurisdiction by court in respect of the matter which the parties have agreed to resolve by arbitration. Since the Appellant has in its answer objected to the exercise of jurisdiction by court, the focus of submission of Counsel was in fact on Clause 14 of the Franchise Agreement, and whether it amounted to a valid agreement to arbitrate.

The basic elements of an agreement to arbitrate relate to (a) formal validity and (b) essential validity. As submitted by Learned Counsel for the Appellant, the formal requirements of an arbitration agreement are set out in Section 3 of the Arbitration Act of 1995, which provides that such an agreement should take the form of an arbitration clause in a contract or should consist of a separate agreement, which is popularly known as a 'submission agreement'. There is no doubt that in this case, Clause 14 of the Franchise Agreement satisfies these formal requirements, and the thrust of the submissions of Counsel was on the essential requirements for the validity of an arbitration agreement.

Learned Counsel has invited the attention of court to Section 50 of the Arbitration Act, which sheds some light in regard to the meaning of the phrase 'arbitration agreement' as used in Section 5 of the said Act. Section 50 of the Act, seeks to define an 'arbitration agreement' in the following manner:-

> "Arbitration Agreement" means *an agreement by the parties to submit to arbitration all or certain disputes* which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not." (*emphasis added*)

The question that has to be addressed in the context of this appeal is whether Clause 14 of the Franchise Agreement amounted to an agreement by the parties to submit to arbitration any dispute that may arise from the said Agreement. Just as much as there can be no arbitration without a valid arbitration agreement, there can be no agreement to arbitrate without a manifestation of consent of parties to submit to arbitration any dispute that may arise from a contract entered into by them or other defined legal relationship. Learned Counsel for the Appellant has referred us to a passage in *Russell on Arbitration,* 22nd edition by David St. John Sutton and Judith Gill page 35 paragraph 2-025, where the authors observe that "the Courts seek to give effect to the parties' intention to refer disputes to arbitration, and to allow the tribunal full jurisdiction except in cases of hopeless confusion". Counsel has cited several illustrative cases including *Astro Vencedor Compania Naviera S.A. v. Mabanaft G. M.B.H.* [1970] 2 Lloyd's Reports 267, in which when considering whether a claim of damages for tort can be brought within purview of the arbitration clause that formed part of the contract sued upon in that case, the Court in providing an affirmative answer, emphasized that at page 271 that "the decision must in every case depend upon the facts, but the Court should if the circumstances allow, lean in favour of giving effect to the arbitration clause to which the parties have agreed." Learned Counsel for the Appellant has also relied on Section 4 of the Arbitration Act of 1995, which provides that a dispute coming within the purview of an arbitration agreement may still not be capable of being resolved by arbitration if it is "contrary to public policy or, is not capable of determination by arbitration". In my view, this provision does not have a direct bearing on the issue before us, as no question of public policy or arbitrability is raised in this case. What we need to decide, is the issue whether there is an agreement between the parties to have any dispute arising from the Franchise Agreement resolved through arbitration, in the context of the omission to specify an existing arbitral institution in Clause 14 of the said Agreement.

Indeed, Learned Counsel for the Respondent did not, in the course of the hearing of this appeal, seriously contest the position that in Clause 14 of the Franchise Agreement was a clear manifestation of consent of the parties to refer any dispute that may arise under the Agreement for arbitration. On the contrary, it was his contention that the intention to refer any dispute that may arise from the said Agreement for arbitration has been defeated by physical impossibility. Learned Counsel for the Respondent submitted that an agreement to arbitrate is in essence a contract, which like all other contracts, will be frustrated and discharged by reason of any unforeseen impossibility of performance. He has, in the course of his submissions, cited the celebrated decision in *Taylor v Caldwell* (1863) 3 B & S 826 and a passage from Justice (Dr.)

C.G. Weeramanthry's *Law of Contracts*, Vol II page 747, wherein he explains that the implication of a condition exempting a party from liability in circumstances where performance is rendered impossible due to no fault of such party also extends to a situation where "the subject matter of the contract is destroyed or when the condition or state of things contemplated by the parties as the foundation of their contract has ceased to exist or not been realized". He argues that when the parties to the Franchise Agreement agreed upon Clause 14, they had mistakenly but honestly assumed that there is an institution by the name of 'the Sri Lanka Chamber of Commerce and Industry, Colombo', functioning as an arbitration centre or providing facilitates for the conduct of arbitration to which any dispute can be referred for resolution by arbitration, and the consequence of that fundamental assumption being proved to be false is that the so called 'arbitration agreement' has been discharged or is at an end. Hence, it is contended that, since one of the essential pre-conditions for the application of Section 5 of the Arbitration Act does not exist, the only available remedy for the Respondent is to resort to a court action. Learned Counsel for the Respondent has also submitted that Clause 14 is not a *Scott v Avery* clause, and reference for arbitration is therefore not a condition precedent for the institution of the action.

It is at this stage convenient to deal with the submission that Clause 14 of the Franchise Agreement is not a *Scott v Avery* clause. *Scott v Avery* (1836) 5 HL Cas 811 was a decision of a bygone era in which it was trite law that the parties cannot by contract oust the jurisdiction of the court (*See, Thompson v Charmock* (1799) 8 Term Rep 139). The refinement to that rule introduced by the House of Lords in *Scott v Avery*, was that the stipulation in an arbitration clause in a contract that the award of an arbitrator is a condition precedent to the enforcement of any rights under the contract, effectively prevented a cause of action arising to enable a party to sue under the contract until and unless a favourable award has been obtained, or the other party has by his conduct forfeited the right to rely on it. In *Hotel Galaxy (Pvt) Ltd., v. Mercantile Hotels* [1987] 1 Sri LR 5 at page 10, Sharvananda, C.J., compared the then existing statutory provisions in England with those that existed in Sri Lanka and observed that-

> "A bare agreement to arbitrate cannot be pleaded in bar of an action on the contract. But under an agreement with *Scott v. Avery* clause, the right to bring an action depends upon the result of the arbitration; arbitration followed by an award is a condition precedent to an action being instituted."

The Supreme Court in that case took the view that the absence in Sri Lanka of statutory provisions of the kind then found in England, such as Section 25(4) of the Arbitration Act, 1950 which conferred on court the jurisdiction to override even a *Scott v Avery* clause in appropriate cases, meant that "our courts are bound to give effect to the agreement of the parties that no cause of action should accrue until liability under the contract is determined by an arbitral award." At pages 10 and 11 of his judgement, Sharvananda CJ., emphasized that the mandatory reference to arbitration is not a matter of mere procedure, and affected the substantive right to resort to court.

Although the point does not directly arise in this appeal, and no post-1995 pronouncement has been cited in the course of argument, it appears to me that the distinction between a bare arbitration clause and a *Scott v Avery* clause which was drawn in the *Hotel Galaxy* judgement is altogether obliterated by Section 5 of the Arbitration Act of 1995, which expressly lays down that where legal proceedings are instituted in a court by a party to an agreement to submit any matter for arbitration against another party to such an agreement, the Court shall have no jurisdiction to hear and determine such matter *if the party against whom proceedings are instituted objects* to the court exercising jurisdiction in respect of such matter. This is because Section 5 does not purport to maintain the said distinction, and on the contrary, seeks to extend the *Scott v Avery* refinement that a court would not exercise its jurisdiction to determine the case on its merits even to a mere arbitration clause which is not couched in the *Scott v*

Avery format. Hence, in my view, it does not matter whether Clause 14 of the Franchise Agreement is a *Scott v Avery* clause or not.

As for the other submission made by learned Counsel for the Respondent that Clause 14 of the Franchise Agreement is not a valid agreement to arbitrate, it is necessary to emphasize that our courts have been increasingly supportive of the arbitral process, and readily give effect to the intention of the parties to resolve their disputes though arbitration. A striking illustration of this judicial attitude is provided by the decision in *Mangistaumunaigaz Oil Production Association v United World Trade Inc.* [1995] 1 Lloyd's Reports 617. In this case, the arbitration clause simply stated: "Arbitration, if any, by ICC Rules in London." The commencement of arbitration proceedings was resisted by one of the parties on the basis that there was no valid arbitration agreement as the said clause merely manifested an intention that, if and only if, the parties on a later date mutually decided to refer the matter for arbitration, then the ensuing arbitration proceedings would be governed by the ICC Rules. In rejecting this contention, Potter, J. at page 621 observed as follows:-

> "In my opinion the clause as a whole, read in the context of an international contract for the sale of oil, demonstrates that the parties intended to settle any dispute which might arise between them by arbitration according to I.C.C. rules in London with English law to apply. The alternative is that, by providing for arbitration "if any", the parties were merely binding themselves in advance to the arbitral rules and venue which would govern any ad hoc agreement for arbitration which they might subsequently make if a dispute arose. The terms of the written contract suggest no need or reason to take so unusual a course. I consider that the commercial sense of an agreement of this kind, and the presumed contractual intention of the parties in importing the words used, can best be effected either by treating the words "if any" as surplusage, or as being an abbreviation for the words "if any dispute arises". Any other construction appears to me to strain common sense and to breach the overall rule of construction which is to give effect to the presumed intention of the parties having regard to the context in which the words appear."

Likewise, in the Canadian case of *Onex Corp. v. Ball Corp*., [1994] 12 B.L.R. (2nd) 151, the Ontario Court had to consider whether a dispute between parties to a complex joint venture agreement concerning rectification of a contractual term ought to be submitted to the courts or to arbitration. Blair J. referred the dispute to arbitration and stayed the court action despite the ambiguity in the relevant clause observing at page 160 of his judgement that, "where the language of the arbitration clause is capable of bearing two interpretations, and only one of those interpretations fairly provides for arbitration, the courts should lean towards honouring that option". In *Star Shipping AS v. China National Foreign Trade Transportation Corporation* [1993] 2 Lloyd's Reports 445, the English Court of Appeal was called upon to determine the validity of an arbitration clause contained in Clause 35 of a charter party. The arbitration clause provided that "any dispute arising under the charter is to be referred to arbitration in Beijing or London in the defendant's option." It was argued that the arbitration clause was ambiguous, uncertain and one sided. The Court of Appeal held that the clause was a valid arbitration clause. Lloyd, L.J. emphatically stated at page 449 that despite the ambiguity of the clause, "the one thing that is clear about Clause 35 is that the parties intended to refer their dispute to arbitration. I would be very reluctant indeed to defeat that intention." In these and other cases, the courts have consistently given effect to the spirit of the arbitration agreements in question to refer disputes to arbitration. Clause 14 of the Franchise Agreement, which comes up for interpretation in this case, clearly manifests the consent of the parties to refer the dispute for arbitration, and is neither ambiguous nor capable of bearing two interpretations. The clause, in unequivocal terms refers any dispute that may arise from the said Agreement to arbitration, and that it is a clear and unambiguous manifestation of consent of the parties to resort to arbitration.

The question then is whether the agreement to refer any dispute for arbitration, has been frustrated by physical impossibility in that the intended arbitral forum does not exist. Learned Counsel for the Respondent has specifically admitted that there is no entity in existence in Sri Lanka known as 'the Sri Lanka Chamber of Commerce and Industry, Colombo', but has submitted with great force that this fact would not affect the validity of the arbitration agreement contained in Clause 14 of the Franchise Agreement. He has submitted that the essence of an arbitration clause or submission agreement is the intention manifested therein to refer the matter for arbitration, but an express provision naming the arbitrator or arbitrators or setting out some procedure for the constitution of an arbitral tribunal is not an essential element of an agreement to arbitrate.

The Arbitration Act of 1995 contains elaborate provisions to deal with the myriads of difficulties that could arise in constituting the arbitral tribunal, including the very situation that arose in this case. The Arbitration Act contains many provisions which give effect to the concept of party autonomy, which pervades the law of arbitration, and foremost amongst them are the provisions which enable the parties to choose their arbitrator or arbitrators, taking into consideration *inter alia* their special expertise in the relevant field, ability and integrity.

The composition of the arbitral tribunal with expedition is indeed critical for the success of any arbitration, and in this context, it is necessary to mention that the distinction between institutional arbitration and *ad hoc* arbitration is of some significance. Institutional rules such as those of the ICC, the AAA, and the LCIA, generally provide that where the mechanism agreed by the parties for the appointment of arbitrators does not produce results, the appointing authority of the institution to which those rules belong will act as the default authority and make the required appointment. However, where the relevant institutional rules do not provide an effective default mechanism, or in the case of *ad hoc* arbitration, courts have a role to play in the constitution of the arbitral tribunal, particularly where there are no statutory provisions to assist the parties to constitute the arbitral tribunal. Fortunately, most countries have legislative provisions which enjoin the court to facilitate the process of constituting the arbitral tribunal, and in Sri Lanka specific and elaborate provisions in this regard are found in Section 7 of the Arbitration Act of 1995. Resort to such legislative provisions will certainly prevent arbitration proceedings from being frustrated by the lack of an effective mechanism to set up the tribunal, and in the face of such elaborate legal provisions, it is not possible to sustain the argument that the agreement to arbitrate was frustrated by physical impossibility.

Accordingly, and for the above reasons, the first question of law on which leave to appeal was granted is answered in the affirmative. I hold that the Commercial High Court misdirected itself in holding the arbitration agreement contained in Clause 14 of the Franchise Agreement was void *ab initio.* I also hold that in the circumstances of this case, the Commercial High Court had no jurisdiction to hear and determine the subject matter of the action from which this appeal arises, as the Appellant has objected to the court exercising jurisdiction in respect of such matter.

Obligation to determine dispute by arbitration

The next question arising on this appeal is whether the Commercial High Court erred in law in ignoring Section 4 of the Arbitration Act of 1995. This provision reads as follows:-

> "Any dispute which the parties have *agreed to submit to arbitration* under an arbitration agreement *may* be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or, is not capable of determination by arbitration." (*emphasis added*)

There is no doubt that considerations of public policy and arbitrability will militate against the enforcement of an otherwise valid agreement to arbitrate. The dynamism inherent in these interrelated concepts has provided the law with some amount of flexibility, while at the same time creating a great deal of uncertainty, as the content of public policy as well as the parameters of arbitrability keep changing from country to country and from time to time. Recent decisions reveal a global trend of liberalizing the scope of objective arbitrability in areas such as insolvency (*See, SONATRACH v Distrigas* 80 BR 606 (D. Mass. 1987) anti-trust claims (*See, Mitsubishi Motors Corp. v. Soler Chrysler Plymouth Inc*. [1985] 473 U. S. 614. *Cf., Eco Swiss China Time Ltd v. Benetton International N.V.,* 1999 E.C.R. I-3055; *ET Plus S.A. v. Jean-Paul Welter & The Channel Tunnel Group Ltd.* [2005] EWHC 2115 (Comm.) and securities claims (*See, Rodriguez de Quijas v. Shearson/American Express* 490 US 477 (1989); *Cf., Philip Alexander Securities v Bamberger* [1997] EULR 63 (1996) CLC (1) 757), but this cannot undermine the value of these concepts, which encompass "fundamental principles of law and justice in substantive as well as procedural aspects" (*per* ShiraneeTilakawardane, J. in *Light Weight Body Armour Ltd., v Sri Lanka Army* [2007] BALR 10 at page 13).

However, the important question that arises in this context is whether the word "may", as used in Section 4, makes it mandatory for any dispute which the parties have agreed to refer for arbitration, has necessarily to be determined through arbitration, if the matter is not contrary to public policy and is capable of being resolved by arbitration. The "may" and "shall" dichotomy has oft confounded courts in the process of statutory interpretation, and as N.S.Bindra's Interpretation of Statutes (10th Edition, Butterworths, 2007) explains at page 999-

> The use of the expression "may" or "shall" in a statute is not decisive, and other relevant provisions that can throw light have to be looked into in order to find out whether the character of the provision is mandatory or directory. In such a case legislative intent has to be determined. The words "may", "shall", "must" and the like, as employed in statutes, will in cases of doubt, require examination in their particular context in order to ascertain their real meaning.

In ascertaining the legislative intent, it is permissible to look at the purpose of the legislation in which the particular provision sought to be interpreted occurs. Learned Counsel for the Appellant has referred us to the preamble to the Arbitration Act which, *inter alia* states that one of the main objects of the legislation was to "give effect to the principles of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Done at New York, 10 June 1958; Entered into force, 7 June 1959 330 U.N.T.S. 38 (1959) also know as the "New York Convention").. ……and to provide for matters connected therewith or incidental thereto". In this connection, he has also invited the attention of Court to Article II paragraph 1 of the said Convention, which provides that-

> "Each Contracting State *shall* recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration".*(emphasis added)*

While this Court has authoritatively held that in view of the dualist as opposed to monist character of the Sri Lankan legal system, no international convention or treaty is binding on a Sri Lankan court unless incorporated by implementing legislation (*See, Nallaratnam Singarasa v. Attorney General* SC Spl. (LA) No.182/99 SC Minutes dated 15.9.2006 available at: http://www.alrc.net/doc/mainfile.php/supremecourtcases/423/), this Court has in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at page 353 observed, that-

> "It is within the proper nature of the judicial process and well-established judicial functions for national courts to have regard to international obligations which a country undertakes - whether or not they have been incorporated into domestic law - for the purpose of removing ambiguity or uncertainly from national constitutions, regulation or common law."

While it axiomatic that in interpreting the provisions of the Arbitration Act, this Court has to bear in mind the national obligation cast on Sri Lanka by the above provision of the Convention, and the Court has to lean in favour of giving effect to the arbitration clause contained in Clause 14 of the Franchise Agreement despite its erroneous assumption that the institution named in the clause existed and was capable of functioning as an arbitration centre or facilitator of arbitration, it is also imperative that this Court does not lose sight of the statutory context in which Section 4 occurs in the Arbitration Act. Section 4 has to be read in conjunction with Section 5 of the said Act, which consistently with the concept of 'party autonomy', expressly confers on every party to an arbitration agreement the right to decide whether or not to object to the jurisdiction of a court where the same is invoked by the other party to the agreement. Where a party to such an agreement decides not to take up any objection to the exercise of jurisdiction by court, it is free to hear and determine the case or other proceeding, and in such as case Section 4 clearly would not make it mandatory for the matter to be determined by arbitration. However, in the action from which this appeal arises, the Appellant had in fact specifically objected to the exercise of jurisdiction by the Commercial High Court, and since there was no question of public policy or arbitrability involved, the said court had in my opinion erred in law in failing to give effect to the intent of Section 4 of the Arbitration Act.

Accordingly, I hold that the second substantive question on which leave to appeal has been granted by this Court should also be answered in the affirmative and against the Respondent.

Procedure for the appointment of an Arbitral Tribunal

This brings me to the next question on which leave has been granted by this Court, namely, whether the Commercial High Court erred in law in failing to apply the provisions of the Arbitration Act, and in particular Section 7 thereof, which provides for the appointment of the arbitrators in terms of the provisions thereof in the absence of agreement between the parties for the appointment of arbitrators. Section 7 provides as follows:

> 7. (1) The parties shall be free to agree on a procedure for appointing the arbitrators, subject to the provisions of this Act.
>
> (2) In the absence of such agreement-
>
> (a) in an arbitration with a sole arbitrator if the parties are unable to agree on the arbitrator, that arbitrator shall be appointed, on the application of a party by the High Court;
>
> (b) in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two arbitrators thus appointed shall appoint the third arbitrator; if a party fails to appoint the arbitrator within sixty days of receipt of a request to do so from the other party, or if the two arbitrators fail to agree on the third arbitrator within sixty days of their appointment, the appointment shall be made, upon the application of a party, by the High Court**.**
>
> (3) Where, under an appointment procedure agreed upon by the parties –

(a) a party fails to act as required under such procedure ; or

(b) the parties, or the arbitrators, are unable to reach an agreement required of them under such procedure ; or

(c) a third party, including an institution, fails to perform any function assigned to such third party under such procedure,

any party may apply to the High Court to take necessary measures towards the appointment of the arbitrator or arbitrators,

(4) The High Court shall in appointing an arbitrator, have due regard to any qualifications required of an arbitrator under the agreement between the parties and to such considerations as are likely to secure the appointment of an independent and impartial arbitrator.

Learned Counsel for the Appellant has invited the attention of Court to the preamble to the Arbitration Act which *inter alia* describes it as an Act "to make *comprehensive* legal provision for the conduct of arbitration proceedings and the enforcement of awards made there under". He has submitted that Section 7(1) of the Arbitration Act allows the parties to agree on a procedure for the appointment of arbitrators, and the remaining subsections of that Section set out the procedure for the appointment of an arbitrator where the parties have not agreed upon any procedure, or the agreed procedure fails for some reason or the other. Insofar as Clause 14 the Sri Lanka Chamber of Commerce and Industry, Colombo, specified in the said Clause as the institution to which the arbitration should be referred for arbitration, admittedly does not exist, and the said Clause or any other clause of the Franchise Agreement does not set out any other default authority for appointment of arbitrators or even specify the number of arbitrators to be appointed to the tribunal, it will in his submission be necessary to call in aid Section 6(2) of the Arbitration Act of 1995 which expressly provides that where the parties have not determined the number of arbitrators before whom arbitration proceedings should take place, "the number of arbitrators shall be three."

Cause 14 of the Franchise Agreement merely seeks to specify an arbitral institution without setting out a default procedure for the appointment of arbitrators. Thus, in the absence of a mutually agreed procedure for appointing arbitrators, the case clearly falls within the ambit Section 7(2) (b) of the Arbitration Act, in terms of which the parties themselves can nominate one arbitrator each and the two arbitrators will thereafter appoint the third arbitrator. If a party fails to appoint an arbitrator within the time limit specified in that time period, or the two party appointed arbitrators fail to reach agreement in regard to the appointment of the third arbitrator, the relevant appointment has to be made by the High Court.

Learned Counsel for the Respondent has of course argued, as already noted, that the non-existence of the arbitral institution specified in Clause 14 of the Franchise Agreement essentially frustrates it and renders compliance with the arbitration clause impossible. For the reasons already set out earlier in the judgement, this Court is not persuaded by this submission, and the said submission cannot stand in the face of the abovementioned provisions of the Arbitration Act, which directly apply and have in fact anticipated the very problem that had arisen in this case. It is indeed a pity that the Commercial High Court has not considered these provisions which have the beneficial effect of curing any frustrating circumstances that could arise or supervene in regard to the constitution of the arbitral tribunal.

Thus the third substantive question of law argued on this appeal, necessarily has to be answered in the affirmative. I hold that the High Court has misdirected itself by failing to consider the

provisions of Section 7 of the Arbitration Act in deciding that the arbitration agreement has been rendered void by reason of frustration due solely to the non-existence of the named arbitral institution.

Should action be dismissed or proceedings stayed?

Since all the three substantive questions on which leave to appeal has been granted by this Court have been answered in the affirmative, the judgement of the Commercial High Court dated 7th October 2008 upholding the preliminary objections taken by the Appellant based on issues 1, 2, 3, 8 and 10 has to be set aside. The Commercial High Court clearly had no jurisdiction to hear and determine the case on its merits, but a question of fundamental importance that arose in the course of the argument of this appeal, as to whether in such a situation, the action filed by the Respondent should be dismissed, or only stayed, has to be dealt with. In fact, at the conclusion of oral submissions on 30th June 2009, learned Counsel for both parties were granted further time to file further written submissions specifically on this question.

In this context, it is necessary to refer once again to Section 5 of the Arbitration Act of 1995, which provides that where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, "the Court shall have *no jurisdiction to hear and determine* such matter if the other party objects to the court exercising jurisdiction in respect of such matter." It is important to note that Section 5 does not expressly provide that, in that situation, the action shall be dismissed or alternatively that proceedings shall be stayed. Learned Counsel for the Appellant has sought to contrast Section 5 of our Act with Article II paragraph 3 of the New York Convention and Article 8(1) of the UNCITRAL Model Law on International Commercial Arbitration, which he submits, contemplated the stay or laying by of the action or proceedings until the conclusion of the arbitration.

Both the said Convention and the Model Law have had considerable influence in the legislation enacted all over the world, and almost all countries have expressly opted to provide for some form of stay of court proceedings until the dispute is resolved by arbitration. For instance, Section 9 of the English Arbitration Act of 1996, expressly provides that a party to an arbitration agreement against whom legal proceedings are brought in respect of a matter which under the agreement is to be referred to arbitration *may* apply to the court in which the proceedings have been brought, to stay the proceedings so far as they are concerned, and when such a party opts to apply for a stay of proceedings, it is expressly provided in Section 9(4) that "the court *shall grant a stay* unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed."

Learned Counsel for the Appellant has contended that the Sri Lankan legislature has departed from the formulation of Article II paragraph 3 of the New York Convention, and the procedure expressly adopted in most jurisdictions which have based their legislation on the UNCITRAL Model Law. He has submitted, with great force, that such departure cannot be unintentional, and that since the Sri Lankan provision does not expressly provide for a stay of proceedings, the action should necessarily be dismissed for lack of jurisdiction. He argues that when a court has no jurisdiction, it can proceed no further in respect of the matter, and has cited the decision of this Court in *P. Beatrice Perera v. Commissioner of National Housing and Three Others*, 77 NLR 361 for this proposition.

Learned Counsel for the Respondent has stressed that Section 5 of the Arbitration Act of 1995 does not expressly provide that the action should be dismissed, and that the court has a discretion under its inherent power, which has been expressly preserved by Section 839 of the Civil Procedure Code "to make such orders as may be necessary for the ends of justice or to prevent

abuse of the process of the court" which includes an order for stay of proceedings in the action short of dismissal. He contends that there is nothing in Section 5 that takes away the power of court to stay proceedings in appropriate cases.

It appears to me that while the language of Section 5 of the Arbitration Act of 1995 manifests a clear intention to depart from the imperative language adopted by the English Arbitration Act of requiring a stay of proceedings which is emphasized by the use of the words "*shall* grant a stay" in the English provision, it was clearly not intended to depart from the New York Convention and UNCITRAL Model Law provisions. Article II paragraph 3 of the New York Convention is rather neutral in regard to the sanction of dismissal / stay of action, and simply provides that-

> "The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, at the request of one of the parties, *refer the parties to arbitration*, unless it finds that the said agreement is null and void, inoperative or incapable of being performed." *(emphasis added)*

The words "refer the parties to arbitration" as used in the Convention seem to permit the national legislature of each contracting State to decide what sanctions should be imposed where the agreement to arbitrate is not adhered to by a party to such agreement. Similarly, Article 8 of the UNCITRAL Model Law provides as follows:

> "1. A court before which an action is brought in a matter which is the subject of an arbitration agreement *shall*, if a party so requests not later than when submitting his first statement on the substance of the dispute, *refer the parties to arbitration* unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> 2. Where an action referred to in paragraph (1) of this article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is *pending before the court.*"*(emphasis added)*

Here again, the formula uses the neutral words "refer the parties to arbitration", which are not conclusive in regard to whether the action or other proceeding commenced by the party to the arbitration agreement should be dismissed or merely stayed. Paragraph 2 of the UNCITRAL Model Law, clearly envisages a situation where notwithstanding the agreement to arbitrate and the reference by the court of the parties to arbitration, the action or proceedings commenced in court is kept pending.

The question then is whether the neutrality in regard to sanction found in the New York Convention and the UNCITRAL Model Law has been preserved in Section 5 of the Arbitration Act? A careful reading of Section 5 of the Arbitration Act would reveal that it merely provides that "the Court *shall have no jurisdiction to hear and determine such matter*", but it does not take away the power of court in appropriate circumstances of making other orders supportive of or incidental to the arbitral process, such as for the constitution of the arbitral tribunal or for providing such interim measures as may be necessary to protect or secure the claim which forms the subject matter of the arbitration agreement. Section 5 of the Act also falls short of requiring that, a court that is confronted with an agreement to arbitrate the dispute, should invariably dismiss the action or terminate any other court proceedings that may have been commenced. In my view, the Commercial High Court enjoyed the inherent power of court, which has been expressly preserved by Section 839 of the Civil Procedure Code, to decide at its discretion whether to dismiss action or stay proceedings, in the absence of any express and clear words in Section 5 or any other provision of the Arbitration Act or any other applicable legislative provision which purported to take away that discretion.

In this context, it is of some significance to note that Section 7 of the Arbitration Ordinance No. 15 of 1866, as subsequently amended, expressly provided that where a party to an agreement to arbitrate, nevertheless commenced any action against the other party to the said agreement, "*it shall be lawful for the court* in which the action is brought, on application by the defendants, or any of them, upon being satisfied that no sufficient reason exists why such matters cannot be referred to arbitration according to such agreement as aforesaid,……*to make an order staying all proceedings in such action, and compelling reference to arbitration on such terms as to costs and otherwise as to such court may seem fit*." This provision is no more in force in Sri Lanka as the Arbitration Ordinance, in its entirety, has been now repealed by Section 47(1) of the Arbitration Act of 1995, and replaced by Section 5 of the latter Act.

When interpreting a statutory provision, a court is entitled to take into consideration the law that existed prior to the enactment of such statutory provision. Section 5 of the Arbitration Act does not contain any words that manifest an intention to take away the discretion the court had prior to the enactment of that section. On the contrary, the words used in Section 5 are neutral and are in line with Article 8 of the UNCITRAL Model Law and consistent with the provisions of the New York Convention. I therefore hold that the Commercial High Court had the power to dismiss the action or stay proceedings, for the purpose of giving effect to Section 5 of the Arbitration Act.

In my opinion, the discretion to decide whether to dismiss an action or stay proceedings has to be exercised after carefully considering the facts and circumstances of each case. Of course, the pre-1995 law provided for the filing of an agreement to arbitrate in the District Court (Section 693(1) of the Civil Procedure Code, which was empowered to nominate the arbitrator, if the parties cannot agree on an arbitrator (Section 694 of the Civil Procedure Code) and also to file and enforce the ensuing arbitral award (Sections 696 to 698 read with Section 692 of the Civil Procedure Code), and it would have made sense to stay proceedings as contemplated by Section 7 of the Arbitration Ordinance in the large majority of cases filed in the District Court, as the ultimate award had to be filed in the same court for it to be enforced.

However, in this context, it is necessary to mention that the situation is not the same in Sri Lanka at present, as Sections 693 to 698 of the Civil Procedure Code have been repealed by Section 47(2) of the Arbitration Act of 1995. The resulting position is that, the Commercial High Court, which was constituted by an order made under Section 2(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, and before which this case was taken up for trial, is not the same High Court that is vested with the default authority to take measures for the appointment of arbitrators under Section 7 of the Arbitration Act of 1995 and to enforce arbitral awards under Section 31 of the said Act. The default appointing authority and enforcement court for purposes of the Arbitration Act is the High Court that is defined in Section 50 of the Arbitration Act as the "High Court of Sri Lanka, holden in the judicial zone of Colombo or holden in such other zone, as may be, designated by the Minister with the concurrence of the Chief Justice, by Order published in the Gazette." This is probably why, Parliament, in its wisdom, did not expressly provide in Section 5 of the Arbitration Act whether the action should be dismissed or merely stayed, but left it open for the court to consider what order, apart from referring the parties to proceed to arbitrate their dispute, should be made in regard to the fate of the action in the context of which the order is being made.

Of course, the vast majority of cases would be those in which it is obvious that no useful purpose would be served by staying proceedings, and a court will in the normal course dismiss the action or terminate proceedings. There can also be a few cases in which a court would readily stay proceedings, as opposed to dismissing the action or other proceeding, such as for instance, where an action has been filed on several causes of action and not all of them fall within the purview of

the agreement to arbitrate. Between these two extremes, there can be a great variety of cases in which the decision as to whether action should be dismissed or stayed will not be easy to make. In some of these cases, particularly where there is an international element, it may well be that there are concurrent judicial and or arbitral proceedings in more than one jurisdiction, and cogent reasons may be advanced to justify the continuation of such proceedings, but in making its decision, a court will also take into consideration the need to avoid multiplicity of proceedings with the accompanying risk of inconsistent judgements and arbitral awards. Many principles have been evolved by the courts all over the world to deal with such issues of great variety and complexity. Apart from such issues, difficult questions could also arise in regard to public policy and arbitrability, which have the potentiality of rendering the arbitration agreement and / or the ensuing arbitral award unenforceable, a factor which should be taken into consideration in deciding whether an action should merely be stayed or dismissed.

The court is not only entitled but also obliged to consider all material circumstances of the relevant action or proceeding and the issues they give rise to when determining whether the action or other proceeding should be stayed or dismissed. In my considered view, since in the vast majority of cases, no purpose can be served by keeping an action or other proceeding which the court has no jurisdiction to hear and determine pending before it, the action should be dismissed or other proceedings terminated, unless there are justifiable grounds for ordering that the action should be stayed. However, in the case at hand, the Respondent has not formally moved court for a stay of proceedings or furnished any material that could justify an order for the stay of the action from which this appeal arises, nor has learned Counsel adverted in his written submissions or in the course of oral submissions to any facts or circumstances that could justify an order staying the action. Although this Court may *ex mero motu* take note of any matter that could involve an issue of public policy or arbitrability, none has come up for consideration in the course of the hearing on this appeal. There does not appear to be any justification for staying the action which forms the subject matter of this appeal, and as such, I am of the opinion that the action filed by the Respondent in the Commercial High Court should stand dismissed.

Conclusions

For the foregoing reasons, this appeal is accordingly allowed and the order of the learned High Court Judge dated 7th October 2008 set aside. The action filed in the Commercial High Court by the Plaintiff-Respondent-Respondent will stand dismissed. This Court does not make an order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

P.A. RATNAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

S.I. IMAM, J.

I agree.

JUDGE OF THE SUPREME COURT

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

Ajith Upashantha Samarasundara

No 161, Pahala Naragala

Govinna

Applicant

SC Appeal No 18/2009

SCSCLA 57/2008

PHP Kalu No LT/04/2005

Kalutara LT No 18/KT/3107/03

Vs

Coats Thread Lanka (Pvt) Ltd.

P.O. Box 250, Colombo

Level 3-6, No 163, Union Place,

Colombo 02.

Respondent

And Between

Ajith Upashantha Samarasundara

No 161, Pahala Naragala

Govinna

Applicant-Appellant

Vs

Coats Thread Lanka (Pvt) Ltd.

P.O. Box 250, Colombo

Level 3-6, No 163, Union Place,

Colombo 02.

Respondent-Respondent

And now Between

Coats Thread Lanka (Pvt) Ltd.

P.O. Box 250, Colombo

Level 3-6, No 163, Union Place,

Colombo 02.

Respondent-Respondent-Petitioner

Vs

Ajith Upashantha Samarasundara

No 161, Pahala Naragala

Govinna

Applicant-Appellant-Respondent

Before : J.A.N. de Silva CJ.
P.A.Ratnayake J.
C Ekanayake J.

Counsel : Sanjeewa Jayawardana with Sandamali Chandrasekere instructed by Sudath Perera Associates for the Respondent-Respondent-Petitioner.
AP Niles with Irosha Silva instructed by Ranabahu Galhenage Applicant-Appellant-Respondent

Argued on : 11- 11-2009 , 17-02-2010 and 11-03-2010

Decided on :

J.A.N. de Silva C J

This is an appeal against an order of the High Court of the western province directing the reinstatement of the Respondent or in the alternative, payment of three years' salary as compensation. Leave was granted on the following questions set out in paragraph 10(a) to (e) and prayers (a), (b) and (c) of the petition.

(a) Did the High Court fall into error by failing to appreciate that the Respondent, by entering into a contract of employment with another organization (within 14 days of the suspension of services of the Appellant), had acted in breach of the aforesaid clause

16(c) of the contract of employment, going to the very foundation of the said contract and thereby, attracting a terminal situation?

(b) In any event did the High Court err by failing to appreciate that there was no termination by the employer as contemplated by the section 31B of the industrial disputes act and that as such, no relief could be granted?

(c) Did the High Court misdirect itself by failing to consider that the Appellant, by entering into another organization had intentionally and willfully terminated his contract of employment of his own accord and volition?

(d) Did the High Court misdirect itself by failing to appreciate that a suspension of an employee did not amount to a termination of his contract of employment and that a suspension is only a temporary measure pending investigations and further conclusive evidence?

(e) Did the High Court misdirect itself by holding that the failure of the petitioner to conduct the domestic inquiry within reasonable time amounted to "constructive termination" despite the Respondent having repudiated the contract within 14 days of the suspension of his services?

(f) Did the High Court misdirect itself by failing to consider that the Respondent had, unjustly enriched himself by accepting the payment of a half month's salary made by the Appellant company while concealing the fact that the Respondent had entered into a contract of employment with another organization?

(g) Did the High Court in any event, err in law by failing to conclusively determine the purported relief to which the workman was entitled to, if at all?

(h) Did the High Court fail to appreciate the fact that the reinstatement of the Respondent would be subversive of discipline and undermine the authority of the management and as such be prejudicial to the establishment?

The facts in so far as they are relevant are as follows.

The Respondent was employed by the Appellant Company as a work study assistant at the time of the alleged termination. The Respondent had also been elected to the post of treasurer of the staff welfare association of the Appellant Company. Due to discrepancies in the accounts of the welfare association and allegations of corruption leveled against the Respondent the

Appellant Company conducted an investigation in to the said allegations. Thereafter the Appellant Company suspended the Respondent without pay in order to conduct a full inquiry in to the allegations. During the course of the inquiry the Respondent intimated his difficulty in attending the said inquiry on Saturdays as he had obtained employment elsewhere. Upon this revelation the Appellant Company considered the Appellant as having repudiated his contract of employment of his own accord and volition. However the Appellant also informed the Respondent by a subsequent letter that his services would have been terminated in any event on the strength of the findings of the inquiry.

I first turn my attention to the question of repudiation of the contract of employment by the worker. The learned counsel for the Appellants directed our attention to clause 16(c) of the contract of employment.

"*You will not be able to enter into any activities similar to that for which you are employed by this company or* ***obtain employment elsewhere while in service with us.***

It was urged before us that the said breach was one that could be termed as a fundamental breach resulting in the repudiation of the contract by the employee.

At the outset it is necessary to note that the Respondent had admitted to obtaining employment elsewhere, namely Vinter Fashions Ltd., whom the Appellant submits is a rival business entity. The Respondent denies the said contention.

It was strenuously argued by the Respondent before the labour Tribunal that the said clause was in restraint of trade and hence illegal and void. It is pertinent to note that the Respondent had not canvassed the same in his submissions to this court. Nonetheless I would venture to weigh the merits of this submission.

The test of validity of any covenant alleged to be in restraint of trade is the test of reasonability as held in *Maxim Nordenfelt Gun Co. V. Nordenfelt (1894) AC 335.*

The law on this matter was correctly stated by Lord Macnaghten in the *Nordenfelt* case. He said:

> *"Restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public."*

In ascertaining the reasonableness the extent of the prohibition and the time period within which the prohibition is operative are important considerations. Covenants of this nature are upheld where they operate to protect the legitimate interests of the employer, for instance where there is a risk of trade secrets being divulged by an employee.

Does clause 16(c) withstand the test of reasonability? Clause 16(c) envisages a blanket prohibition whilst the worker is in the service of the employer.

Our courts have dealt with a similar issue in the *Ceylon Bank Employees Union v. The Bank of Ceylon* (79 (1) NLR 133). In the said case Sirimanne J in interpreting a clause to the effect that "*I will give my whole time and attention to the discharge of duties"* held the clause to mean that the workman must not devote any part of his time to any other gainful employment, except with respect minor dealings in his spare time.

In the said case the worker concerned was one holding a responsible position and who was privy to confidential information. In light of the above the said clause may be justified in limiting his employment and his sources of income. However I do not think that Sirimanne J intended this to be the general rule. A person is entitled to seek employment with multiple employers so as to maximize his monthly income. Where such employment impacts adversely on the quality of his work, appropriate action may be taken at that stage. Therefore I am of the view that such concerns of the employer cannot restrict a person's reasonable right to seek employment at multiple establishments.

Selwyn`s *law of Employment (*9th Ed pages 381) offers assistance on the point of an employee taking additional employment. He too suggests that it may be a ground for dismissal if such employment has an adverse effect on the employers business. The cases of Nova Plastics Ltd v. Frogatt (1982 IRLR 146) and Hall Fire Protection Ltd v Buckley ([1995] UKEAT 5_94_0606) are illustrative of this point.

Hence I hold that the second limb of clause 16(c) prohibiting employment elsewhere as being void. This position is further justified as the Appellant in this case was employed as a mere work study assistant as opposed to a manager or a similar high position in the organizational hierarchy.

The above discussion refers to the question of automatic repudiation by the operation of the contract due to the conduct of the employee.

However it yet remains to be seen whether the employee deliberately and repudiated his contract by seeking employment elsewhere. As noted earlier, the right to seek secondary employment is subject to the important condition that such employment takes place outside the usual working hours of his primary place of employment. It is pertinent to note that in the

instant case the Respondent's alternate employment by his own employment clashes with the working hours of the Appellants.

Weeramantry in his *law of contract* defines repudiation as follows.

> "*Repudiation may occur either expressly, as where a party states in so many words that he will not discharge the obligations he has undertaken, or impliedly, as whereby his own act a party disables himself from performance or makes it impossible for the other party to render performance"*

It was urged before us that the employee in the instant case had by seeking employment elsewhere, impliedly repudiated his contract of employment, in other words that he had vacated his post.

It has been held in several instances by this court, which now can be considered as trite law that for abandonment of the contract to be proved, proof of physical absence as well as the mental element of intent needs to be established (*Lanka Estate Workers union v. Superintendent Hewagam Estate* SC min 9/69, 2nd February 1970 and affirmed in *Nelson de Silva v. Sri Lanka State Engineering Corp*. 1996 (2) SLR 342)

In the instant case the employee had been "suspended" from work and therefore was required to absent himself. This form of absence does not, in my opinion satisfy the requisite absence in order to prove vacation of post.

The Appellant submits that the Respondent had admitted that he commenced work under another employer on 1st January 2003. It is from this point onwards that the aforementioned test must be applied in order to ascertain whether the employee had vacated his post.

I am of the opinion that "absence" here is a reference to the lack of presence when such presence is deemed necessary in the ordinary course of employment. In other words, where the Respondent is required to be present at the work place at a reasonable hour of the day and he absents himself and such absence continues it can be safely assumed that the first ingredient had been met.

The mental element or what is referred to as *animus non revertendi* is the intention to abandon the contract permanently.

In the present case the Respondent had been suspended and subsequently been called for inquiry. The Respondent had albeit briefly replied to the charge sheet. The inquiry was scheduled to be held on 4th September 2003. The Respondent absented himself on that day. However on the following day of inquiry the Respondent gives evidence and also cross

examines witnesses. He however absents himself from the afternoon session held on that very same day. Prior to his departure he requests that the inquiry be held on Sundays. These facts suggest that the Respondent had submitted himself to the jurisdiction of the inquiring body and expressed a willingness to continue to do so. On account of the aforesaid I do not think that the employee's physical absence could be considered as satisfying the prerequisites discussed above. It is also pertinent to note that that the employee had expressed a willingness to recommence employment under the Appellant in his evidence before the labour Tribunal. However it must be mentioned here that the Respondent's contract of employment with Vinter Fashions is not on record and unavailable for perusal. Therefore the exact nature of his employment cannot be discerned except to say that the hours of employment were from 8.00 am to 5.00 pm six days of the week. **If indeed the employment was of permanent nature, which would I think be compelling evidence of animus non revertendi.**

It was submitted to us that the Respondent was compelled to seek such alternate employment due to economic hardship suffered resulting from his suspension and other circumstances of life. This is primarily due to the nonpayment of wages during the first four months of "suspension" and half months salary since then. At this juncture I venture to consider the legality of the decision of the by the employer to suspend the employee without pay.

SR de Silva in his "law of Dismissal" states,

> "*It is settled law that the employer has no right of suspension. Ordinarily, therefore, the absence of such power either as an express term in the contract or in the rules framed under some statute would mean that the master would have no power to suspend a workman and even if he does so in the sense that he forbids the employee to work, he will have to pay wages during the so called period of suspension.*

WEM Abeysekere in his "Industrial Law and Adjudication" concurs.

> "*The right to suspend, in the sense of a right to forbid a servant to work, is not an implied term in an ordinary contract between master and servant. Such a power can only be created by statute governing the contract, or by express provision in the contract. If a master nevertheless, suspends in the sense of forbidding an employee to work,* ***he will be liable to pay wages for the period of suspension."***

Thus Sri Lankan authorities suggest that a suspended worker is entitled to full wages during suspension.

Learned counsel for the Appellant drew our attention to certain passages from Chakravarti's *Law of Industrial Disputes* which supported the proposition that suspension is allowed as a precursor to a disciplinary inquiry. This is indeed the position in India as a result of the wording in section 33 of the Industrial Disputes Act of that country. In *Management of Hotel Imperial, New Delhi & Ors. Vs. Hotel Workers Union (1959 AIR SC 1342)* it was held by the Indian Supreme Court that section 33 by implication modified the common law rules governing suspension as it stood in India. Our Industrial Disputes Act does not contain any provision similar to section 33 of the Indian act and hence the law in this country is the position held in *Hanley v. Pease (*1915 (1) KB 698).

All authorities refer to the case of Hanley v. Pease & partners to support the proposition that an employer has no right to suspend a worker under the common law. Closer scrutiny of the judgment reveals that the word suspension as referred to by the lordships in that case has somewhat of a narrower meaning than the meaning ascribed to the word generally. For convenience I refer to a portion of Lush J's judgment.

> *"assuming that there has been a* ***breach on the part of the servant*** *entitling the master to dismiss him, he may if he pleases terminate the contract, but he is not bound to do it, and if he chooses not to exercise that right but to treat the contract as a continuing contract notwithstanding* ***the misconduct or breach of duty of the servant****, then the contract is for all purposes a continuing contract subject to the masters right to claim damages against the servant for his breach of contract."*

The word "suspension" has at least two distinct meanings. It is sometimes used in a punitive sense. i.e. *punitive suspension*. This is where a workman is prohibited from work and deprived of pay as punishment for some misconduct committed by the workman. Workers are also suspended in a secondary sense. That is where the worker is prohibited from entering the work place as an interim measure pending inquiry to facilitate such inquiry.

The Hanley case refers clearly to suspensions of the first category. Their lordships correctly held that,

> "*After electing to treat the contract as a continuing one the employers took upon themselves to suspend him (worker) for one day ….****thereby assessing their own damages for the servant's misconduct*** *at the sum which would be represented by one day's wages. They have no possible right to do that."*

This is also the position of law in our country. Once an employer suspects a worker of serious misconduct it is incumbent on him to obtain evidence of such misconduct to justify termination. As such some form of inquiry is necessary for the aforementioned purpose. However such inquiries may sometimes be compromised if the alleged offender is permitted to roam free to influence witnesses. If the employee attempts to dismiss the worker summarily his *bonafides* is questioned. Thus the employer would be left with the difficult choice of either dismissing the employee summarily or conducting an inquiry whilst providing continuous work.

Hence In my view it would be within the spirit of the Hanley judgment that employers are granted the opportunity of suspending the employee pending disciplinary inquiry. This is for the purpose of ascertaining whether the worker is guilty of any misconduct in order to decide whether the contract of employment should be terminated. The worker cannot be deprived of his wages during this period. This result is further desirable as it also furthers two policy objectives. It acts as an incentive for employers to dispose of such inquiries expeditiously and also offer the worker an opportunity to vindicate himself.

I now turn to the conclusions reached by the learned High Court Judge. The learned High Court judge had formed an opinion that there was constructive termination of services in light of the delay in conducting the disciplinary inquiry and the deprivation of his salary.

The inquiry was first held on 2003-09-04 and then on 2003-09-17 on which date the Respondent gave evidence. On 2003-09-30 by letter marked “A16” the Appellant informed the Respondent that the Respondent is taken to have repudiated the contract by entering into a contract of employment with another company. On the last day further inquiry was fixed for 2003-10-01 though proceedings of such inquiry have not been placed before us. The Respondent in his evidence before the labour Tribunal stated that he did not take part in and was not summoned to any further proceedings. Presumably this is due to the Respondent being considered as not being an employee any more. Be that as it may the Respondent was found guilty by the inquiring officer.

I am also of the view that the commencement of the inquiry could have been at an earlier date than the date on which it occurred. However I am not inclined to hold that there was constructive dismissal on those grounds alone.

In my opinion termination occurs by the letter dated 26th January 2004 marked “A19” as it expresses the view that the Respondent would have been terminated in any event on the findings of the inquiry if not for the Respondent’s repudiation.

By the said letter the employer in this case has made it abundantly clear that he is not inclined to any further to offer employment to the worker due to the adverse findings made by the board of inquiry.

The Appellant Company drew our attention to the gravity of the charges preferred against the worker, of which the worker has now been found guilty of by the inquiring officer. I am satisfied that the said proceedings were conducted upon the worker been sufficiently informed of the charges against him and that he was provided an adequate opportunity to explain and establish his innocence. Therefore I see no reason to disturb the findings of the inquiring officer. Therefore under the circumstances I find that the dismissal of the Respondent worker as being justified.

The Appellant finally submits that the Respondent had unjustly enriched himself by accepting wages from the Appellant Company whilst taking employment elsewhere. As mentioned previously wages are a natural right of the worker that flows from the contract of employment. The employer may in certain circumstances (as adverted to previously) decide not to provide work to the worker and prohibit him from attending to work. Yet the employer's duty to pay wages remains. In this instance the employee was merely receiving his contractual dues. The fact that he had received other wages during his suspension from a 3rd party is beside the point.

Finally on consideration of all facts relevant in this case I hold that the dismissal was justified in light of the facts revealed at the inquiry as well as at the labour Tribunal. The Respondent is not entitled to any damages for the dismissal. However he is entitled to all wages deprived of him during the period of his suspension and to any statutory dues he may be entitled to.

Chief Justice

P.A. Ratnayake J.

I agree.

Judge of the Supreme Court

C. Ekanayake J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for Substitution under Section 760A of the Civil Procedure Code and Rule 38 of the court of appeal (Appellate Procedure) Rules of 1990.

Horagalage Sopinona
No. 400, Porikiyahena,
Pitipana South,
Homagama.

Substituted Plaintiff-Respondent-Appellant

S. C. Appeal No. 49/2003
S. C. (Spl.) L. A. No. 01/2003
C. A. No. 631/98/F
D. C. Homagama Case No. 247/P

-VS-

3(a) Kumara Ratnakeerthi Pitipanaarachchi
No. 364,
Pitipana South,
Homagama.

3(b) Ramya Chandrakumari
Pitipanaarachchi
No. 364,
Pitipana South,
Homagama.

Substituted Defendants-Appellants-Respondents

41. Matarage Menchinona,
No. 363,
Porikiyahena,
Pitipana South,
Homagama.

Defendant-Appellant-Respondent

BEFORE	:	Dr. Shirani A. Bandaranayake, J; Saleem Marsoof, P.C., J. and J. de S. Balapatabandi, J.
COUNSEL	:	Nihal Jayamanne, P.C., Noorani Amarasinghe with Dilhan de Silva for Appellant. Rohan Sahabandu for Respondents.
ARGUED ON	:	13.01.2009
WRITTEN SUBMISSIONS	:	2.2.2009
DECIDED ON	:	3.2.2010

MARSOOF, J.

Over four decades ago, on 29th January 1969 the original Plaintiff-Respondent-Appellant, Welapahala Arachchige Remanis, of Pitipana South, Homagama, instituted action in the District Court of Colombo seeking to partition a land called "Porikehena", in extent 3 roods and 11 perches and situated in the village of Pitipana in the Hewagam Korale then falling within the Colombo District. The action was contested only by the 1st, 3rd and 19th Defendants, out of the 40 persons named as Defendants in the plaint. The land sought to be partitioned was described in the schedule to the plaint by reference to Plan No. 167058 dated 2nd July 1895 authenticated by D. G. Mantale, Surveyor General, and referred to in Crown Grant No. 30258 dated 28th December 1895 (P1), by which the said land was granted to Remanis's grandfather Pitipana Achachchige Jeeris jointly with another person named Thantirige Haramanis, of the same village. The said Jeeris had four children, one of whom was Sethuhamy, who was admittedly the mother of the original Plaintiff, Remanis.

It must be mentioned at the outset that this case has had a long and checkered history, despite the fact that after the initial steps that necessarily take time in partition cases, the trial had commenced and was concluded on 24th March 1975. Since Remanis had died prior to the said trial date, his widow, Poragalage Sopinona (hereinafter referred to as "the Appellant") who had been substituted in his place, and another witness, Thantirige Carolis, testified on behalf of the Appellant. On behalf of the contesting Defendant-Appellant-Respondents (hereinafter referred to as the "Respondents"), Pitipana Arachchige Tikonis, the original 1st Defendant, and Matarage Menchinona, who had been substitued as the 41st Defendant in place her deceased husband Pitipana Arachchige Obias, gave evidence. However, before the judgement was delivered in this case, the case was transferred to the newly established District Court of Homagama and trial commenced *de novo* on 23rd April 1992.

At the commencement of the fresh trial before the District Court of Homagama on 23rd April 1992, the parties admitted that the land described in the schedule to the plaint is

shown in the Preliminary Plan No. 255 dated 6th July 1970 and certified by A.P.S Gunawardene, Licenced Surveyor, and that Emis, Sadiris, Charlis and Sethuhamy are the heirs of Jeeris. It is noteworthy that the said Preliminary Plan bearing No. 255 depicts two lots marked as 'A' and 'B' respectively in extent 2 roods and 26.8 perches and 1 rood and 30.05 perches, which add up to a land extent of 1 acre and 16.85 perches. This is far in excess of the corpus as described in the schedule to the plaint which is only 3 roods and 11.9 perches. The Respondents, although admitting that the land described in the schedule to the plaint is shown in the Preliminary Plan No. 255, had alluded to this discrepancy at paragraph 20 of their answer, and asserted that after the death of Jeeris, the land called Porikehena which he had possessed by virtue of the Crown Grant, was amalgamated with two other lands separately owned by him namely, Indipitiya and Mahakele Mukalana, and Plan No. 1868 dated 27th July 1940 certified by D.A. Goonatilleka, Licenced Surveyor (3D1) was prepared to amicably divide the amalgamated land amongst his heirs Emis, Sadiris, Charlis and Sethuhamy. It was the case of the Respondents that accordingly, lot 'A' of the said Plan was allotted to Charlis, while lots 'B' and 'E' were allotted to Emis, and lots 'C' and 'D' respectively were allotted to Sadris and Sethuhamy, and that they continued to possess the said lots as defined and divided portions of land for the exclusion of all others.

The issues that were raised at the commencement of the trial are set out below.

On behalf of the Appellant

(1) Are the parties mentioned in the plaint entitled to the land described in the schedule to the plaint by virtue of the pedigree set out in the plaint and prescription?

On behalf of the Defendant

(2) Did Jeeris Appu possess the land which is the subject matter of this case and two other lands, namely, Indipitiya and Mukalana situated adjoining the said land as one piece of land (එක ඉඩමක් වශයෙන්)?

(3) Did Jeeris Appu's children Emis, Sadiris, Charlis and Sethuhamy possess the aforesaid three lands as one piece of land?

(4) Did the aforesaid four persons after possessing the aforesaid three lands as one amicably partition of the said lands among themselves by Plan No. 1868 dated 27th June 1940?

(5) Accordingly, did Sethuhamy possess lot 'D', Sadiris possess lot 'C', Emis possess lots 'B' and 'E' and Charlis possess lot 'A' of the said Plan?

(6) Did Sethuhami sell her rights to lot 'D' to the Plaintiff (who is her son and the present Appellant) by Deed No. 1845 dated 3rd February 1950?

(7) If answer to the above question is in the affirmative, can Plaintiff act in a manner inconsistent with the amicable partition effected by Plan No. 1868?

(8) Are lots 'A' and 'E' of Plan No. 1868, the same as the lot 'A' and 'B' of Plan No. 255 prepared for this case?

(9) Are any portion of the aforesaid two lands own by the Plaintiff or other parties mentioned in his pedigree?

Apart from these issues certain additional issues were also formulated on the suggestion of Counsel for the Appellant and Counsel for the Respondents as issues (10) to (14) which seek to further clarify the matters on which parties were at variance. While at the trial *de novo* the same witnesses, Sopinona and Carolis, testified on behalf of the Appellant, since the original 1st Defendant Tikonis had passed away, the original 3rd Defendant, Pitipana Arachchige Cornelis alone gave evidence on behalf of the Respondents. The question that loomed large at the trial was whether Jeeris had possessed the land sought to be partitioned to the exclusion of Haramanis, and in particular whether the amalgamation of the said land with his other lands Indipitiya and Mahakele Mukalana, and the allotment of distinct portions of the amalgamated land to Emis, Sadiris, Charlis and Sethuhamy as set out in the Plan No. 1868 dated 27th June 1940 (3D1), constituted evidence of ouster.

The learned District Judge, held with the Appellant, and in the course of her judgement dated 4th September 1998, agreed with the submissions made on behalf of the Appellant that Jeeris or Jeeris' heirs, who are entitled only to an undivided half share of the land, cannot prescribe to the other undivided half share of Haramanis since a co-owner cannot in law prescribe against his other co-owner in the absence of proof of ouster. The learned District Judge observed that-

> "තරඟ කරන විත්තිකරුවන්ගේ හිමිකම් ප්‍රකාශයෙන් පීරිස් අප්පුට පැමිණිල්ලේ උපලේඛණයේ සඳහන් ඉඩම අයිති වූ පදනම පැහැදිලි නොකරයි. කෙසේ වෙතත් එම හිමිකම් ප්‍රකාශයේ 02 වෙනි ඡේදය අනුව පීරිස් අප්පුට පැමිණිල්ලේ උපලේඛණයේ සඳහන් ඉඩමේ එකම අයිතිකරු වශයෙන් බුක්ති විඳ කාලාවරෝධී අයිතිය ලබා ඇති අතර හරමානිස් ක්‍රියා කළා නම් ක්‍රියා කලේ පීරිස් අප්පුගේ නියෝජිතයෙක් වශයෙන් බව ප්‍රකාශ කරයි. එබැවින් හරමානිස්ටද මෙම දේපලෙන් 1/2 කොටසක අයිතිය තිබී ඇති බැවින් ඔහු එම දේපල බුක්ති විඳීමෙන් පමණක් ඔහුගේ අයිතිය පීරිස් අප්පුට පැවරෙන්නේ නැත. පීරිස්ට එම අයිතිය පැවරෙන්නේ හරමානිස් තම අයිතිය අතහැර නොගොස් එනම් හරමානිස්ට එරෙහිව කාලාවරෝධී අයිතියක් පැවරෙන්නේ නම් ***නෙරපා හැරීමක්*** (ouster) පෙන්නුම් කළ යුතුය. එනම් මෙම නඩුවේ එවැනි නෙරපා හැරීමක් මත හවුල් අයිතිය හිමිවී ඇති ආකාරයක් නොදක්වයි. එබැවින් හවුල් අයිතිය නීතිය පවතින ආකාරයට හරමානිස්ට එසේම නොබෙදූ 1/2ක කොටසකට තිබිය යුතුය. පීරිස්ගේ උරුමය සම්බන්ධයෙන් තර්කයක් නැත. තරඟ කරන විත්තිකරුවන් හරමානිස්ගේ අයිතිය ප්‍රතික්ෂේප කර ඇති අතර ඔහුගේ අයිතිය ඇත්තේ හෝ ඇත්නම් එය පීරිස්ගේ නියෝජිතයෙක් ලෙස පමණක් බව හිමිකම් ප්‍රකාශයේ සඳහන් කර ඇත."

Accordingly, the Learned District Judge answered issue No. 1 raised by the Appellant in her favour, and refrained from answering any of the other issues on the basis that they did not arise. I quote below the final paragraph of the said judgment-

> "ඒ අනුව ඉදිරිපත් කර ඇති ඔප්පු හා සාක්ෂි අනුව තන්තිරිගේ හරමානිස් මෙම ඉඩමේ හවුල් අයිතිකරුවෙකු වශයෙන් සිටි බව පිළිගත යුතුය. ඉහත පීරිස් අප්පු සමඟ මෙම බෙදීමට යෝජිත ඉඩම මුලින්ම හවුල් අයිතිකරුවෙකු වශයෙන් සිටි බව පිළිගත යුතුය. හරමානිස්ගේ එම අයිතිය ඔහු පහ කිරීමකින් නැතිවී නැත.

එබැවින් මෙම ඉඩමේ ඔප්පු සියල්ලම සළකා බැලීමේදී අධිකරණය සෑහීමකට පත් වී ඇත්තේ පැ. 1 දරණ රජයේ පත්‍රය මගින් පීරිස් අප්පුට හා හරමානිස්ට මෙම බෙදීමට යෝජිත ඉඩමෙන් නොබෙදූ 1/2 ක කොටස බැගින් හිමිවී ඇති අතරම එම බෙදීමට යෝජිත ඉඩම අංක 255 දරණ සැලැස්මෙන් පෙන්නුම් කර ඇතත් එම බෙදීම හරමානිස් ගේ එකඟත්වය ඇතිව කරන ලද බෙදීමක් නොවන අතර කම්බි ගසා වෙන් කරන ලදුව සාදන ලද බෙදීමක් ද නොවන අතර එම බෙදීමෙන් පෙන්නුම් කරන ඉඩම එනම් අංක: 1868 දරණ සැලැස්ම මෙම නඩුවට අදාළ සැලැස්ම ලෙස ඔවුන්ගේ පිළිගැනීම් වලින්ම ප්‍රතික්ෂේප වී ඇත. ඒ අනුව පාර්ශවකරුවන්ට ඔවුන්ගේ කොටස් හිමිවිය යුත්තේ පැමණිල්ලේ සඳහන් පෙළපත අනුව යැයි මම තීරණය කරමි. ඒ අනුව මෙම නඩුවේ පැමණිල්ල විසින් 15 වෙනි ඡේදයේ පෙන්නුම් කර ඇති ආකාරයට පාර්ශවකරුවන්ට තම කොටස් හිමිවිය යුතුයැයි මා තීරණය කරමි. විසඳනාවන් වලට මෙසේ පිළිතුරු දෙමි.

01. ඔව්.

ඉහත සඳහන් විසඳනාවට පැමණිල්ලේ වාසියට පිළිතුරු ලැබී ඇති බැවින් අනෙක් විසඳනාවන්ට පිළිතුරු දීම අවශ්‍යය නැත."

Aggrieved by this decision, the 3rd and 41st Respondents appealed to the Court of Appeal. It was submitted on behalf of the Respondents that the learned District judge had not considered all the documentary and other evidence tendered on behalf of the Respondents and had thereby failed to discharge her duty to properly investigate title. In allowing the appeal, Andrew Somawansa, J., in the course of his judgement dated 22nd November 2002 with which N.E. Dissanayake, J. concurred, noted that while 5 deeds were marked by the Appellant and 9 marked by the Respondents, the learned District Judge had considered only 4 of the said deeds. Somawansa, J. held that the learned District Judge had seriously erred in seeking to dispose of the whole case through his answer to issue No. 1. his Lordship observed that-

> 'Here again, I am of the view that she has erred in not answering the balance issues. For issue No. 1 is based not only on devolution of title but also on prescription. Therefore it becomes necessary to consider and analyse the evidence to ascertain whether parties disclosed in the plaint had prescribed which the learned District Judge has failed to do."

Accordingly, Somawansa, J. concluded that-

> "Had she answered them, this Court would be in a position to consider her findings on the said issues. However, as she has failed to answer the rest of the issues, though with reluctance, I am compelled to set aside the judgement of the learned District Judge and send the case back for re-trial."

This Court has granted special leave to appeal against the said judgement of the Court of Appeal on the following questions of law:-

"(a) Whether in law there was sufficient investigation of title of the parties by the original court;

(b) Whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and on prescription;

(c) Whether, if the answer to a single issue, in effect is a complete answer to all the contents in the action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues. Specially, if in arriving at the answer to the issue the Learned District Judge has considered and dealt with the matters raised in the other issues."

Identity of the Corpus

Before dealing with the first substantial question of law on which special leave has been granted by this Court in this appeal, it is necessary to deal with the question of identity of the land sought to be partitioned, which is a matter of vital importance in any partition case. Without proper identification of the corpus it would be impossible to conduct a proper investigation of title. As G.P.S. de Silva, J. (as he then was) emphasized in the course of his judgement in *Wickremaretne v. Albenis Perera* [1986] 1 Sri LR 190 at 199, in a partition action, "there are certain duties cast on the court quite apart from objections that may or may not be taken by the parties" and this includes the "supervening duty to satisfy itself as to the identity of the corpus and also as to the title of each and every party who claims title to it." In *Jayasooriya v Ubaid* 61 NLR 352 at 353 Sansoni, J. observed that "there is no question that there was a duty cast on the Judge to satisfy himself as to the identity of the land sought to be partitioned, and for this purpose it was always open to him to call for further evidence in order to make a proper investigation." This is because clarity in regard to the identity of the corpus is fundamental to the investigation of title in a partition case.

In this connection, it is necessary to observe that in the plaint filed in this case, the original Plaintiff Remanis sought to partition the land described as Porikehena in extent 3 roods and 11 perches. However, as already noted, the Preliminary Plan No. 255 covers a much larger extent of 1 acre and 16.85 perches, which is far in excess of the land described in the schedule to the plaint and covered by the Crown Grant No. 30258, dated 28th December 1895 (P1) from which the Appellant claims to have derived title. Despite the said discrepancy in the extent of land being adverted to in paragraph 20 of the answer filed by the contesting Respondents, at the commencement of the trial *de novo* on 23rd April 1992 all parties to the action admitted that the said Plan depicts the land described in the scheduled to the plaint and sought to be partitioned, and no point of contest or issue was raised in regard to the identity of the corpus. However, when Carolis Singho gave evidence on 21st August 1997 he spoke about the discrepancy in the land extent, and his Counsel moved to raise two more issues in regard to the failure to properly register *lis pendens*, which application was turned down by the learned District Judge on the ground that this aspect of the matter should have been taken up before the commencement of the trial.

There exists a lack of clarity, even amongst each of the parties themselves, with regard to the description of the corpus described in the schedule to the plaint as Porikehena in extent 3 roods and 11 perches by reference to Plan No. 167058 dated 2nd July 1895 authenticated by D. G. Mantale, Surveyor General. This Plan was not produced in court by any of the parties. It must be noted, that lots 'A' and 'E' of Plan No. 1868 dated 27th July 1940 and prepared by Licensed Surveyor M. D. A. Goonatilleka (3D1) showing parts of Porikehena which were subjected to the amicable partition amongst

Jeeris's heirs, also add up to an extent of 3 roods and 11 perches, and a superimposition of the said lots 'A' and 'E' of the said Plan on the Preliminary Plan No. 255 dated 11th October 1970 prepared by Licensed Surveyor A. P. S. Gunawardena clearly shows that the said Preliminary Plan depicts a land extent of 1 acre and 16.85 perches which *exceeds the land claimed by the Appellant as well as by the Respondents by approximately 1 rood and 5.85 perches.* The Respondents, in their evidence and submissions at the various stages of this case, have sometimes seemingly admitted the corpus as described in the plaint to be Porikehena, despite the aforesaid disparity, and at other times sought to challenge this position. The parties have not shown consistency in this regard, and failed in their preliminary duty to describe adequately and with clarity the corpus being the subject matter of these proceedings.

The identity of the corpus is also a matter of fundamental importance in ensuring that all persons who have any claim to it to participate in the partition action, which ultimately confers title *in rem*. The Partition Act No 16 of 1951, that was applicable at the time of the institution of the action in 1969, provided for the registration of *lis pendens* and other steps which had as their objective the proper investigation of title. It appears from the original record maintained in the District Court which was called for by this Court, that *lis pendens* was registered in terms of Section 6 of the Partition Act on 13th February 1969 in folio G 384/48 at the Land Registry with respect to the land referred to in the schedule to the plaint in extent 3 roods and 11 perches. However, an examination of the journal entries in the original record maintained in the District Court in this case (from 18th April 1989, being the date of the reconstruction of the record after the original record was destroyed by fire) did not show any evidence that *lis pendens* was registered for the larger extent of land depicted in the Preliminary Plan No. 255 in extent 1 acre and 16.85 perches, and the fact that learned Counsel for Carolis Singho on 21st August 1997 sought to raise two additional issues in this regard suggests that in fact that there was no such registration.

It has been expressly provided in Section 23(3) of the Partition Act of 1951 that where a survey made on a commission issued by court in a partition case "discloses that the land described in the plaint is only a portion of a larger land which should have been made the subject matter of the action, the court shall specify the party to the action by whom, and the date on or before which, an application for the registration of the action as a *lis pendens* affecting that larger land shall be filed in court" to enable the filing of *lis pendens* showing the larger land and taking other mandatory steps under the Act, which are necessary to ensure that all interested parties are before court. The District Court has ordered the partitioning of the said larger portion of land depicted in Preliminary Plan No. 255 consisting of 1 acre and 16.85 perches, which far exceeds the land described in the schedule to the plaint, and in the absence of material to show that Section 23 of the Partition Act was complied with, raises serious doubts as to the regularity and legality of the impugned decision of the District Court in this case.

Sufficiency of Investigation of Title

The first substantial question of law on which special leave to appeal was granted against the decision of the Court of Appeal is whether in law there was sufficient investigation of title by the original court. Learned President's Counsel for the

Appellant strenuously contended that there was, and learned Counsel for the Respondents argued with equal force that there was not.

It is trite law that, in a partition suit which is instituted to bring an end to co-ownership of land through a decree which is binding not only on the parties to the suit but *in rem* over the entirety of society, the dispute is not to be settled on issues alone, but on any points of interest that the court sees fit in discharging its sacred duty for the full investigation of title. As was observed by Layard, C.J. in *Mather v. Thamotharam Pillai* 6 NLR 246 at pages 250 to 251,

> "…..the question to be decided in a partition suit is not merely matters between parties which may be decided in a civil action; the Court has to decide in every such suit matters in respect of which the parties need not necessarily be in dispute and on which in this particular suit they are not at issue, viz., *that the land is held in common by the plaintiff and defendants, and they solely have title to the land sought to be partitioned*. The Court has not only to decide the matters in which the parties are in dispute, but to safeguard the interests of others who are no parties to the suit, who will be bound by a decree for partition made by the Court under the provisions of the Ordinance." *(Italics added)*

Layard, C.J. was there interpreting the *Partition Ordinance* No. 10 of 1863, which has since been repealed, but the same obligation is cast on the court by the provisions of the Partition Act No. 16 of 1951 which applied at the time of institution of the action from which this appeal arises. In fact, *dicta* from the judgement of Layard, C.J. were quoted with approval by G.P.S de Silva, C.J. in *Gnanapandithen and Another v. Balanayagam and Another* [1998] 1 Sri LR 391 which was decided under the provisions of the current legislation on the subject, namely, the *Partition Law* No. 21 of 1977, as subsequently amended, which replaced the Partition Act of 1951. A basic principle in all the enactments is that where there has been no proper investigation of title, any resulting partition decree necessarily has to be set aside.

In the context of the stringent legal provisions of the relevant legislation, learned Counsel for the Respondent submitted the Appellant has failed to establish that the land is held in common by the Appellant and Respondents, and that the Respondents solely have title to the land sought to be partitioned. He submitted that it was clear from the evidence that Haramanis never possessed Porikehena, that Jeeris and his heirs alone possessed the entirety of Porikehena along with the two adjoining lands called Indipitiya and Mahakele Mukalana and had in fact, over the course of 30 years of exclusive possession, prescribed to Porikehena as against the said Haramanis. It was submitted by learned Counsel for the Respondents that any instance at which Haramanis had acted in relation to Porikehena is explicable on the basis that he functioned as an agent of Jeeris. He explained that when Jeeris died leaving as his heirs Emis, Sadiris, Charlis and Sethuhamy who continued to possess all three lands in common, they put an end to their common ownership by amalgamating and amicably divided the said lands among themselves by Partition Plan No. 1868 dated 27th July 1940 certified by D.A. Goonatilleka, Licenced Surveyor (3D1). Learned Counsel for the Respondents submitted that the said lots 'A' and 'E' were by the said Plan marked 3D1, apportioned to Charlis and Emis respectively, and that lot 'A' was subsequently

transferred to Obies (the original 13th Defendant) whose widow Matarage Menchinona (the 41st Substituted Defendant) now contests the Appellant's case along with the issue of Pitipana Aratchige Cornelis (the 3rd Defendant) who it was submitted gained title to Lot 'E' from Emis.

It was further submitted by the learned Counsel for the Respondents that the Appellant, only had title to parts of Lot 'D' of Plan No. 1868 (3D1) through Sethuhamy and Sethuhamy's son, Welapahala Arachchige Remanis, her late husband who was the original Plaintiff. It was his contention that the exclusive, undisturbed and uninterrupted possession by the Respondents of defined and divided lots along with the other parties to the 1940 division, prior to, or at least, from the date of the said division, defeated through prescription the co-ownership established by the initial Crown Grant. It was also submitted by learned Counsel for the Respondents that the Appellant's case was doomed to fail as the identity of the corpus was in grave doubt, and additionally, as the land known as Porikehena ceased to exist as a distinct land its following amalgamation in 1940 with Indipitiya and Mahakele Mukalana. Learned Counsel for the Respondent stressed that the Appellant is legally bound by this division as Sethuhamy, the mother of Remanis, who had participated in the division had executed Deed No. 1845 marked as 3D3, whereby she conveyed lot 'D' of Plan No. 1868 (3D1) to Remanis. He contended that by accepting the said conveyance, Sethuhamy precluded herself as well as her successors-in-title, from disputing the validity of 3D1. He submitted that the Appellant, who is the widow of Remanis, by claiming title based on the said Deed No. 1845 (3D3) and her own testimony in court, had admitted the said amalgamation and division, vitiating her right to claim otherwise.

Learned President's Counsel for the Appellant submitted that the original court has adequately discharged its obligation of satisfying itself that the land described in the schedule to the plaint (1) was held in common; and (2) that that title devolved on the parties in the manner and to the extent as set out in the plaint. He submitted that by virtue of Crown Grant No. 30258, dated 28th December 1895 (P1), Pitipana Arachchige Jeeris and one Thantirige Haramanis, became entitled to equal shares in the land sought to be partitioned called Porikehena, in extent 3 roods and 11 perches. He further submitted that the said Haramanis and Jeeris owned two lands in common, namely, Porikehena, the corpus sought to be partitioned in the action which led to this appeal, and Kirigaldeniya. It was his contention that while Jeeris lived on Porikehena and Haramanis lived on Kirigaldeniya, neither did Jeeris give up his rights to Kirigaldeniya nor did Haramanis give up his rights to Porikehena. He submitted that this position is evidenced by the fact that the heirs of Jeeris had sold rights in Kirigaldeniya on Deed No. 7066 dated 15th August 1922 attested by D.T.S.S. Jayatilake, Notary Public (P4) to the heirs of Haramanis and that some heirs of Haramanis had in turn sold by Deed No. 1874, dated 17th October 1967 (P2), rights in Porikehena to the heirs of Jeeris, including the original Plaintiff, Welapahala Arachchige Remanis. He submitted that the District Court had examined all relevant evidence carefully, and was justified in upholding the claim of the Appellant for a 21/48th share of Porikehena under the said purchase from the heirs of Haramanis, and a further 1/56th share of Porikehena under the birth right of her deceased husband Remanis, as an heir of Jeeris.

Learned President's Counsel for the Appellant emphasised that Jeeris and Haramanis, being co-owners, their undivided rights cannot be prescribed by each other, in the absence of clear evidence of ouster or something equivalent to ouster. He relied on the decisions of our Court in *Corea v. Appuhamy* 15 NLR 65 and *Tillekeratne v. Bastian* 21 NLR 12, and also refered to the decision in *Maria Fernando and Another v. Anthony Fernando* (1997) 2 Sri LR 356, in which at page 360 Wigneswеran, J. observes as follows:

> "Whether ouster may be presumed from long, continued, undisturbed, and uninterrupted possession depends on all the circumstances in each case. (*vide, Siyadoris v. Simon* 30 CLW 50)."

It is a well established principle in the Roman-Dutch Law that "the possession of one co-owner is, in law, the possession of the other." G.L. Pieris, *The Law of Property in Sri Lanka Vol. 1* at p. 359. In the celebrated case of *Corea v. Appuhamy* (*supra*) the Privy Council laid down in unequivocal terms that every co-owner must be presumed to be possessing in the capacity of co-owner, and that as Lord MacNaghten put it at page 78 of his judgement -

> "His possession was in law the possession of his co-owners. It was not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

In *Tillekaratne v. Bastian* (*supra*) a Full Bench of the Supreme Court drawing from the principles of the common law in Ceylon, as it then was, and in England, from where our Prescription Ordinance has drawn much influence, Bertram, C.J. set out that our law on prescription, both in situations arising out of co-ownership and otherwise, must be approached by equating the previously unknown and abstract term "ouster" to a simple question as to whether the possession in question was or has become "adverse". At page 18 of his judgement, Betram, C.J. observed that -

> "What, then, is the real effect of the decision in *Corea v. Appuhamy* (*supra*) upon the interpretation of the word "adverse" with reference to cases of co-ownership? It is, as I understand it, that for the purpose of these cases the word "adverse" must, in its application to, any particular case, be interpreted in the light of three principles of law:-
>
> (i) Every co-owner having a right to possess and enjoy the whole property and every part of it, the possession of one co-owner in that capacity is in law the possession of all.
>
> (ii) Where the circumstances are such that a man's possession may be referable either to an unlawful act or to a lawful title, he is presumed to possess by virtue of the lawful title.
>
> (iii) A person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity."

While the first of the above principles is one of substantive law, the second and third principles are presumptions, and thus, principles of the law of evidence. It is the applicability of the third of these principles, which has been the basis of our decisions on this difficult area of law, and must decide question of the ownership of Porikehena. The effect of this principle is that, where any person's possession was originally not adverse, and he claims that it has become adverse, the onus is on him to prove it. In doing so, he is required not only to prove an intention on his part to possess adversely, but also a *manifestation of that intention to the true owner* against whom he sets up his possession. Considering recent decisions such as *Maria Fernando v. Anthony Fernando* (*supra*), authorities remain prone today as they were in 1918 as observed by Bertram, C.J., to emphasize the definite and heavy burden cast upon the assertor to prove "an overt unequivocal act."

However, it must not be forgotten that Bertram, C.J. himself acknowledged that there can be no hard and fast rules in this regard, and in particular, the evidentiary principle that a person who has entered into possession of land in one capacity is presumed to continue to possess it in the same capacity, might become unreal or "artificial" if it is accepted without qualification. In the course of his judgement in *Tillekaratne v. Bastian* (*supra*) at pages 20 to 21 he observed that-

> "…….presumptions of the law of evidence should be regarded as guides to the reasoning faculty, and not as fetters upon its exercise. Otherwise, by an argumentative process based upon these presumptions, we may in any particular case be brought to a conclusion which, though logically unimpeachable, is contrary to common sense. It is the reverse of reasonable to impute a character to a man's possession which his whole behaviour has long repudiated. If it is found that one co-owner and his predecessors in interest have been in possession of the whole property for a period as far back as reasonable memory reaches; that he and they have done nothing to recognize the claims of the other co-owners; that he and they have taken the whole produce of the property for themselves; and that these co-owners have never done anything to assert a claim to any share of the produce, it is artificial in the highest degree to say that such a person and his predecessors in interest must be presumed to be possessing all this time in the capacity of co-owners, and that they can never be regarded as having possessed adversely, simply because no definite positive act can be pointed to as originating or demonstrating the adverse possession. Where it is found that presumptions of law lead to such an artificial result, it will generally be found that the law itself provides a remedy for such a situation by means of counter-presumptions. If such a thing were not possible, law would in many cases become out of harmony with justice and good sense."

It is evident in this *dictum* that not only has this Court recognized the strong logical underpinnings for a counter-presumption of "ouster", but it has also laid down guidelines under which such a presumption may be made. With further reference to a line of cases beginning from the seminal judgement in *Corea v. Appuhamy (supra),* all of which have been analyzed in the leading decision of this Court in *Gunasekera v. Tissera and Others* [1994] 3 Sri LR 245, along with numerous references to be found in the

Roman-Dutch law authorities, the case for declaring the principle to be part of our law was well established. Accordingly, in my view it is not only legitimate but necessary, wherever long-continued exclusive possession by one co-owner is proved to have existed, to delve into the question whether it is just and reasonable in all the circumstances of the case that the parties should be treated as though it had been proved that that separate and exclusive possession had become adverse at some point of time more than ten years before action brought.

It is in this light that one has to consider the submission made with great force by the learned President's Counsel for the Appellant that the amicable partition said to have been effected by Plan No. 1868 (3D1) by the heirs of Jeeris does not bind Haramanis or his heirs as they were not aware of the said Plan, and additionally, as no Partition Deed to which all co-owners were parties had been entered into to give effect to the said Plan. In this context, learned President's Counsel invited the attention of court to the following *dictum* of Gunasekara, J. (with Gratiaen, J. concurring) in *Kobbekaduwa v. Seneviratne* 53 NLR 354, at page 359:

> "…….the mere fact that one co-owner was in occupation of the entirety of a house which is owned in common and purported to execute deeds in respect of the entirety for a period of over ten years does not lead to the presumption of an ouster in the absence of evidence to show, that the other co-owners had knowledge of the transactions."

In my opinion, while the question whether Haramanis and his heirs were aware of the partition effected by Plan No. 1868 (3D1) is most material, an important consideration that might affect the rights of the co-owners to the land is whether they acquiesced in the division effected thereby for a period of more than 10 years after it was implemented. As M.D.H. Fernando, J. in *Gunasekera v. Tissera and Others* [1994] 3 Sri LR 245 observed at page 258-

> "If the division is not by all the co-owners, but is based on a plan prepared by one co-owner without the knowledge of the other co-owners, his possession of divided allotment is not adverse *(Githohamy v. Karanagoda* 56 NLR 250, 252), but prescriptive title can be acquired by virtue of possession for such a period and in such circumstances that the counter presumption applies"

It appears from the evidence led by the parties that Haramanis and Jeeris owned two lands in common, namely, Porikehena, the corpus sought to be partitioned in the action which led to this appeal, and Kirigaldeniya which was situated about half a mile away from Porikehena. The version of the Responents' that there existed an arrangement between Haramanis and Jeeris for the former to hold Kirigaldeniya and the latter to possess Porikehena exclusively, if accepted, would explain the logic behind the amicable partition alleged to have been effected in 1940 through Plan No. 1868 (3D1) whereby Porikehena along with Indiketiya and Mahakele Mukalana owned by Jeeris were put together and divided amongst his heirs. It is clear from the evidence led by both parties, that in 1940 when Porikehena was amalgamated with the said two adjacent lands and divided into 5 distinct lots, a significant *de facto* change in the manner of possession of the said land occurred. Following the division effected in

1940, wire fences had been erected and constructions were made on the said lands (as depicted in Preliminary Plan No. 255) by the new holders, which was also admitted in her testimony by the Appellant Sopinona, who stated that the two houses on the land were occupied by Menchinona, the widow of Obias, and Cornelis, both grandsons of Jeeris. Furthermore, the Appellant's mother-in-law, Sethuhamy, directly participated in the division effected by Plan No. 1868 (3D1) in 1940 and conveyed, by Deed No. 1845 (3D3) executed on 23rd February 1950, the entirety of lot D of the said Plan No. 1868 (3D1) to Remanis, the deceased husband of the Appellant.

This court cannot also ignore the fact that the testimony of Carolis, who is the only descendant of Haramanis to testify in this case, goes more to establish the case of the Respondent. He stated in evidence that he lived in part of Kirigaldeniya, and that he used to go to Porikehena and "Charley Mama", who was one of Jeeris' sons and who was in occupation of the land picked coconuts and breadfruit and gave them to him as well as to other members of his family, acknowledging their rights as co-owners of Porikehena. It is noted that Carolis stated in evidence that he went to Porikehena with his grandmother: "මගේ ආච්චි සමඟ මම පොල් දෙල් එහෙම කඩා ගෙන එනවා'" Although the point of time at which Carolis collected such produce from Porikehena was not elicited by Counsel for the Appellant, he has given a clue about the approximate date in his answers to questions put to him in cross-examination:

"ප්‍ර : පොරිකියාහේනට තමා ගොස් තිබෙද ?

උ : ඔව් කුඩා කාලයේ ගියා.

ප්‍ර : කුඩා කාලයේ ගියාට පසුව තමා අද වන තුරු එම ඉඩමට ගියේ නැහැ ?

උ : අවුරුදු 15 තරම ගියාට පසුව ගියේ නැත."

It is relevant to note that at the time when Carolis testified in 1997 he was 72 years old, which means that he was born in 1925, and he *would have been 15 years old in 1940, the year in which the amicable partition was effected by Plan No. 1868 (3D1).* This gives credence to the testimony of Cornelis, the sole witness for the Respondents at the second trial, who testified that he was in possession of lot 'E' of 3D1 but he did not know Carolis and that he never exercised any rights of co-ownership over Porikehena.

> "ඔහු කියන පිඹුරේ දකුණු පැත්තට ලොට්. E අක්ෂරය දරන කොටසේ අයිතිය තිබුනේ මට. 1940 සිට මා බුක්ති විඳ තියනවා. මා එහි ජදිංචිවී ඉන්නවා. මේ නඩුවේ කරෝලිස් කියා කෙනෙක් පැමිණිල්ලට සාක්ෂි දුන්නා මතකයි. කරෝලිස් හා තව කට්ටියක් අත්සන් කර ඔප්පුවක් ඉදිරිපත් කලා 3D1 කියා. කරෝලිස් මේ ඉඩමේ කවදාවත් පොල් කොස් බුක්ති විඳින්න ආවේ නැහැ. ඒ අය ඉඩම අවට ඉන්න කට්ටිය නෙමෙයි. කිට්ටුව නැහැ. මේ ඉඩමට ළඟ පාත අය නෙමෙයි. මා අයිතිවාසිකම් කියන කොටස වෙන කවුරුත් බුක්ති විඳ නැහැ."

It is possible to reconcile the apparent conflict in the testimony of Carolis and Cornelis on the basis of the period of time during which rights of co-ownership were allegedly exercised by the heirs of Haramanis including Carolis. The only conclusion that one can reasonably arrive on the basis of the testimony of these witnesses is that none of the heirs of Haramanis excercised any rights over Porikehena after the amalgamation of that land with two other lands and the amicable partition effected by Plan No. 1868 (3D1) in 1940. In fact, the totality of the evidence point to the fact that none had

contested the separate possession established in 1940, and all respected the separation effected in 1940 and entered into various subsequent transactions on that basis.

It is important to note that the only other witness for the Appellant was Sopinona herself, who admitted in her testimony that she knew nothing herself about the manner in which Jeeris and Haramanis exercised rights over Porikehena, nor did she know personally about the amicable partition alleged to have been effected in 1940 through Plan No. 1868 (3D1). In fact, in the course of her testimony she admitted in cross examination that after 1940, the parties to the said Plan had abided by the division made thereunder. She answered a vital question as follows:

"ප්‍ර : මම යෝජනා කරනවා තමන් කියපු ඔප්පු වලින් මේ ඉඩමේ අයිතිවාසිකම් 3D1- කියන පිඹුර අනුව ඔය කියපු එක 1, 2, 3, 19 යන විත්තිකරුවන් අරගෙන තියෙනවා කියලා ?

උ : ඔව්"

In the context of all this evidence, the conclusion is irresistible that land named Porikehena which was referred in the scheduled to the plaint lost its separate identity by reason of the amalgamation and partition effected by Plan No. 1868 (P1) in 1940. It also transformed the character of the possession of Jeeris's heirs from one consistent with co-ownership into what we may call "adverse" possession, which is essential for the acquisition of prescriptive title. By 1950, such possession had crystallized into ownership, which made it lawful for Sethuhamy to covey lot D of 3D1 to Remanis by Deed No. 1845 (3D3) in 1950. Furthermore, it is important to note that the heirs of Jeeris and Haramanis, who live not too far apart mainly in Porikehena and Kirigaldeniya respectively, have refrained from asserting rights of co-ownership in relation to the land held by the other, be it Porikehena or Kirigaldeniya, for a long time until coaxed into action by Remanis, who in 1967, perhaps as a prelude to the institution of this partition action, purported to buy from certain heirs of Haramanis rights in Porikehena under Deed No. 1874 (P2) in October 1967. It has to be observed that these heirs of Haramanis had themselves acquiesced in the division that had been effected by Plan No. 1868 (P1) in 1940, and the said division had has remained substantially the same changing hands from parent to child or vendor to vendee for a period in excess of five decades at the point of time Sopinona, Carolis and Cornelis gave evidence at the second trial in 1996 and 1997.

There are two major difficulties that arise in the stand taken by the Appellant in this case. The first is that the claims of the Appellant for a share of Porikehena under a purchase from the heirs of Haramanis effected by Deed No. 1874 dated 28th October 1967, and a further share of Porikehena under the birth right of her deceased husband Remanis, as an heir of Jeeris, are mutually inconsistent. The contradiction arising from the juxtaposition of these two claims is that in order to assert a "birth right" to the co-ownership of Porikehena as an heir of Jeeris, she has to disassociate herself from Plan No. 1868 (3D1), which she can ill afford to do as the ownership to the divided lot D of the said Plan sought to be conveyed by Deed No. 1845 (3D3) is expressed in the deed itself to be based on the said amicable partition effected in 1940 and prescription.

Secondly, the Appellant has an even more serious problem in regard to the total extent of land that was taken to constitute the corpus sought to be partitioned in the impugned judgment of the District Court. The Appellant has failed to explain to this Court the basis on which Porikehena, which according to the plaint, and the evidence led in the case, consisted of 3 roods and 11 perches as stated in Crown Grant No. 30258 (P1) increased in size and extent to 1 acre and 16.85 perches as shown in the Preliminary Plan No. 255. The problem here is that there is no evidence of any paper title that establishes co-ownership between Jeeris and Haramanis to the extent beyond 3 roods and 11.9 perches covered by the Crown Grant.

In my view, the Learned District Judge has considered the relations between Jeeris and Haramanis as co-owners of the land they acquired through the Crown Grant of 1895 (P1) but her examination of the material relating to the amalgamation and amicable partition effected in 1940 and subsequent dealings and transactions that took place thereafter is lacking in depth. I am of the opinion that the evidence relating to the enjoyment and use of the property by the heirs of Jeeris and Haramanis over a period of at least 29 years leading up to the institution of the action in 1969 has not been adequately examined and analyzed by the learned District Judge. Accordingly, I answer question (a) on which special leave was granted in the negative, and hold that the original court has not conducted a sufficiently investigate of title as required by law.

Duty to Answer All Issues

It is now necessary to turn to the other two questions on which leave to appeal has been granted by this Court. Question (b) arising on this appeal is whether all issues need be answered by the District Judge when the answer to one issue alone sufficiently determines the title of the parties to the land both on deeds and on prescription. It is quite obvious that the duty of formulating issues is a responsibility of Court, and it is the duty of court to answer all issues arising in the case. As Lord Devlin observed in *Bank of Ceylon v. Chelliah Pillai* 64 NLR 25 (PC) at page 27, "…a case must be tried upon the issues on which the right decision of the case appears to the court to depend and it is well settled that the framing of such issues is not restricted by the pleadings…." In *Peiris v. Municipal Council, Galle* 65 NLR 555 at page 556, Justice Tambiah remarked that even where the plaintiff fails to raise a relevant issue, it is the duty of the judge to raise the necessary issues for a just decision of the case. *A fortiori,* it follows that it is the duty of the judge to answer at the end of the trial *all* the issues raised in the case.

The only exception to this cardinal principle is found in Section 147 of the Civil Procedure Code wherein courts have been vested with a degree of discretion, where it is of the opinion that a particular matter may be decided on the issues of law alone, to try the issues of law first. In *Mohinudeen and Another v. Lanka Bankuwa, York Street, Colombo 01* [2001] 1 Srl LR, 290 at 299 Hector Yapa, J., cited with approval the following *dicta* of Wijeyaratna, J. in *Muthukrishna v. Gomes and Others* [1994] 3 Sri LR at page 8:

> "Judges of original courts should, as far as practicable, go through the entire trial and *answer all the issues* unless they are certain that a pure question of law without the leading of evidence (apart from formal evidence) can dispose of the

case." *(Emphasis added)*

Making a further exception which will enable judges to avoid answering one or more of *issues of fact* - such as issues (2) to (9) in this case - on the basis that the answer to one of them will effectively disposes of all questions regarding which the parties are at variance, might be somewhat imprudent as they could lead to disastrous results. In fact, a careful examination of the issues formulated at the commencement of trial in this case shows that there was no way in which the court could have avoided answering all the issues raised at the commencement of the trial, and it is ironic that the learned trial Judge had gone through the entire trial but had chosen not to answer only issue (1). Indeed, if the learned Judge had focused even for a moment on the other 13 issues, she may have answered issue (1) differently.

The final question [question (c)] on which leave to appeal was granted in this case, is whether, if the answer to a single issue is in effect a complete answer to all the issues arising for determination in this action, whether it is necessary and incumbent on the District Judge to give specific answers to the other issues. In this context, it is relevant to note that in terms of Section 187 of the Civil Procedure Code, a judgement should contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision. As was observed by court in *Warnakula v. Ramani Jayawardena* [1990] 1 Sri L.R. 206 at 208, "bare answers to issues without reasons are not in compliance with the requirements of Section 187 of the Civil Procedure Code." The Judge must evaluate and consider the totality of the evidence, giving a short summary of the evidence of the parties and witnesses and stating the reasons for his preference to accept the evidence of one party as opposed to that of the other. The learned District Judge in this case has totally failed to discharge this duty by failing to even attempt answering all of the very material ssues raised on behalf of the Respondents, and has also failed to explain why, in her view, it was not necessary to answer the other very important issues.

I have no difficulty in answering questions (b) and (c) in the negative and in favour of the Respondents.

Conclusion

In the context of all these facts, I conclude that the learned District Judge has not only failed to carefully examine questions relating to the identity of the corpus and the adequacy of the *lis pendens* registered in the case, but also failed to properly investigate title and in particular examine the issues relating to prescription with the intensity that is expected in a partition case. Although for these reasons, I agree with the decision of the Court of Appeal that the judgement of the District Court cannot stand and should be set aside, I have also given anxious consideration to the question whether this case should be sent back to the District Court for trial *de novo*.

I have carefully consider the evidence led at the second trial before the District Court, and am of the opinion that on this evidence, it is clear that the possession of Jeeris's heirs became adverse to Haramanis's heirs after an amicable partition was effected through Plan No. 1868 (3D1) in 1940, and the persons to whom lots 'A' and 'E' of the

said Plan were allocated, and their successors in title, had possessed the said lots exclusively up to the time of institution of action in 1969 by Remanis. It is manifest that Porikehena, the land sought to be partitioned in this action and is described in the schedule to the plaint, which coincides with the said lots 'A' and 'E', had lost the character of co-owned property long before Remanis instituted the partition action from which this appeal arises, more than 40 years ago. Accordingly, I am of the firm opinion that the learned District Judge should have dismissed the action on the basis that the *corpus* sought to be partitioned was not co-owned property.

I am also firmly of the opinion that, in any event, no useful purpose would be served by sending this case back to the original court for trial *de novo*, as directed by the Court of Appeal. This would constitute a third trial of this case more than four decades since the matter was first brought before the District Court. This fact in itself raises serious doubts regarding the possibility of securing witnesses with first hand knowledge of the material facts, considering the time which has already elapsed and the further time such fresh trial would take to make its way through the courts yet again. I note that Sopinona, Carolis and Cornelis, the witnesses presented before the courts in the second trial before the District Court of Homagama, would by now be more than 80 years old if they are living, and their descendants may not know about the facts of this case even to the extent Sopinona, Carolis and Cornelis knew.

Considering therefore all the circumstances of this case, and in particular, the uncertainty regarding the identity of the *corpus*, the failure to register *lis pendens* for the larger land of 1 acre and 16.85 perches, the weakness in the case of the Appellant as presented at the trial, the difficulty of finding witnesses who can testify at a fresh trial, and the evidence led at the trial which show that the land sought to be partitioned was not co-owned property, I am of the opinion that it is appropriate to make order setting aside the judgement of the Court of Appeal dated 22nd November 2002 as well as the judgement of the District Court dated 4th September 1998, and substitute therefore an order that the action filed in the District Court by the substituted Appellant should stand dismissed. I do not make any order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal from an Order of the High Court under the Arbitration Act No. 11 of 1995.

SC. Appeal No. 101/2005

SC.(Spl) LA. No. 201/2005
HC/ARB/No. 1961/2004

Trico Maritime (Pvt) Ltd.,
No. 50, K. Cyril C. Perera Mawatha,
Colombo 13.

Petitioner

Vs.

Ceylinco Insurance Co. Ltd.,
No. 15A, Alfred Place
Colombo 03.

Respondent

BEFORE : S. Tilakawardane, J.
K. Sripavan, J. &
P.A. Ratnayake, J.

COUNSEL : D.S. Wijesinghe, PC. with Kaushalya Molligoda for the Petitioner.

S. Sivarasa, PC. with N.R. Sivendran for the Respondent.

ARGUED ON: 07-12-2009

WRITTEN SUBMISSIONS OF THE PETITIONER TENDERED ON: 18-12- 2009

WRITTEN SUBMISSIONS OF THE RESPONDENT TENDERED ON: 16-12-2009

DECIDED ON : 26-05-2010

P.A. Ratnayake, J.

The Petitioner in this appeal is seeking to set aside the judgment of the High Court of Colombo by which its application for enforcement of an Arbitral award was dismissed.

The Petitioner is a Company by the name of Trico Maritime (Pvt) Ltd., (hereinafter referred to as 'Trico Maritime') which had an insurance policy with the Respondent by the name of Ceylinco Insurance Company Ltd. (hereinafter referred to as the 'Ceylinco Insurance'). The sum insured by the said policy at the relevant date was Rs. 58 million. In April 1999, the Petitioner submitted a claim to the Respondent for a loss that occurred due to the premises going under water. The Ceylinco Insurance paid a sum of Rs. 10 million to Trico Maritime in respect of the claim but Trico Maritime referred the matter for Arbitration in terms of the Arbitration Clause in the policy as Ceylinco Insurance has not met his entire claim. After inquiry two out of the three arbitrators delivered a joint award on 22nd October 2003 granting relief to the Trico Maritime and the other arbitrator delivered a separate award.

The Ceylinco Insurance made an application on 15th December 2003 to the High Court of Colombo in case bearing No. HC/ARB/1848/2003 to set aside the said awards, inter alia on the basis that the arbitrators had no jurisdiction to make the awards. The Ceylinco Insurance supported the application on 19.12.2003 and the Court issued notice on Trico Maritime to show cause as to why the arbitration awards should not be set aside. According to the case record the notice has been served on Trico Maritime but it failed to appear on 31.3.2004 which was the notice returnable date and accordingly on the application of Ceylinco Insurance, the High Court set aside the arbitral award by its Order dated 20th May 2004 and the subsequent decree dated 11th November 2004.

The Petitioner, namely Trico Maritime filed an application on 18th May 2004 in the High Court of Colombo in case bearing No. HC/ARB/1961/2004 under Part VII of the Arbitration Act No. 11 of 1995 to have the majority award enforced. Ceylinco Insurance who was served with notice filed objections and took up the position, inter alia that the arbitration award sought to be enforced has already been set aside by Court. After inquiry, the High Court upheld the said

objection and by its Judgment dated 1st August 2005 dismissed the application. Consequently Trico Maritime has filed this appeal to set aside this judgment of the High Court.

This Court has granted Leave to Appeal on 23rd November 2005 and the proceedings of the said date state as follows:-

> " parties agree that the questions of law that have been formulated in the Petition will not arise. However the new question of law was raised;
>
> **"** 'Did the Learned High Court Judge err in law in dismissing the Petitioner's application for enforcement of the arbitral award on the basis of the order dated 20.05.04 and the decree dated 11.11.04 in HC/ARB/1848/2003 of the same High Court' **"**.

At the hearing before Court Counsel for the Petitioner sought to challenge the judgment of the High Court on many grounds.

He took up the position inter alia that the High Court has failed to consolidate the two applications i.e. HC/ARB/1848/2003 and HC/ARB/1961/2004, in terms of Section 35(1) of the Arbitration Act No. 11 of 1995.

According to the pleadings before Court, HC/ARB/1961/2004 was filed on 18th May 2004. The Order to enter the judgment as prayed for in HC/ARB/1848/2003 was made only on 20th May 2004. Therefore at the time the application for enforcement in this case was made to the High Court, the application to set aside the award in HC/ARB/1848/2003 was pending before the same High Court. In the circumstances, the High Court should have consolidated both applications in terms of Section 35(1) of the Arbitration Act.

Section 35(1) of the Arbitration Act states as follows:-

> "Where applications filed in Court to enforce an award and to set aside an award are pending, the Court shall consolidate the applications."

If the Court consolidated the applications as required by the above Provision, there may not have been a default in appearance by the Petitioner Trico Maritime.

An argument was advanced by the Respondent Ceylinco Insurance to the effect that the Court could not have known that an application to enforce the award had been filed prior to the order made on 20th May 2004 as the application to enforce the award was filed only on 18th May 2004. It is a matter for the Administration of the High Court to have procedures in place to ensure that such applications are brought to the notice of Court without delay.

The Ceylinco Insurance has also taken up the position that Trico Maritime should have brought to the notice of Court the pending application to set aside the award when it made its application to enforce the award. The Petitioner Trico Maritime has taken up the position that it has not been served with notice prior to the ex-parte judgment in HC/ARB/1848/2003. Therefore the Court cannot find fault with the Petitioner for not disclosing HC/ARB/1848/2003 when application HC/ARB/1961/2004 was filed.

The law contemplates the consolidation of applications made to set aside the award and to enforce the award. It is an accepted norm in the jurisprudence of this country that *""actus curiae neminum gravabit"* meaning, an act of Court should not prejudice any man [United Plantation Workers' Union vs. The Superintendent Craig Estate Bandarawela – 74- NLR 499], Also – Madurasinhe vs. Madurasinhe – 1988- 2 SLR 142- Sili Nona vs. Dayalal Silva & Others- 1992- 1 SLR 195 – The Young Mens' Buddhist Association vs. Azeez & Another 1995 – 1 SLR 237]. Therefore, if the Court has not consolidated both applications a party should not suffer as a consequence of the Court not doing what it should do in terms of the law. In the circumstances this Court is of the view that both applications i.e. HC/ARB/1848/2003 and HC/ARB 1961/2004 be consolidated and taken up together.

At this stage it is necessary to consider the merits of the Order of the High Court in HC/ARB1848/2003 dated 20th May 2004 and the consequent decree dated 11th November 2004 by which the arbitration award was set aside. The proceedings in HC/ARB/1848/2003 of 20th May 2004 as appearing in the document annexed by the Petitioner to its petition dated 12th September 2005 marked as '**A9'** are as follows:-

> *"IN THE HIGH COURT OF THE WESTERN PROVINCE OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA*

(Holden in Colombo)

Before: S. Sriskandarajah Esquire - High Court Judge

Court No. 01

Case No: HC/ARB 1848/2003

Date: 20.05.2004 "

Attorney-at-Law Mr. R.I. Thambirathnam with Attorney-at-Law Mr. N.R. Sivendran instructed by Mala Sabarathnam appear for the Respondent-Petitioner.

Mr. Sivendran appearing for the Respondent-Petitioner states as follows:-

"I move to support the motion that have been filed by the Respondent-Petitioner dated 17.05.2004. In this case notice was issued on Claimant-respondent returnable on 31.03.2004. According to the fiscal report that have been filed the said notice regarding in this action has been served on the claimant-respondent prior to the 31.03.2004. The notice has been served on the Manager of the claimant-respondent who is the principal officer of the respondent company. In the circumstances I respectfully state that as the claimant-respondent was not present on 31.03.2004 the respondent is in default and the Petitioner entitled to a relief that the petitioner has prayed for in the prayer to the petition filed in Your Honour's Court.

<u>ORDER</u>

Enter judgment as prayed for in the prayer to the petition.

Enter decree accordingly.

Sgd.
S. Sriskandarajah
High Court Judge of the Western Province- Colombo"

The decree dated 11th day of November 2004 of the High Court in Application HC/ARB/1848/2003 as appearing in the document annexed marked "A7" to the Petitioner's petition is as follows:-

" HC/ARB/1848/2003

This action coming on for final disposal before Honourable S Sriskandarajah Esquire High Court Judge of Colombo on the 20th May 2004 in the presence of Mr. R.E. Thambirathnam Attorney-at-Law with Mr. N.R. Sivendran Attorney-at-Law Instructed by Ms. Mala Sabaratnam on the part of the Respondent-Petitioner and the Claimant-Respondent being absent on the notice returnable dated 31-03-2004, although the notice was served properly on the Manager of the Claimant-Respondent Company requesting them to appear on 31.03.2004 and hearing the submissions of Attorney-at-Law for Respondent-Petitioner.

It is ordered and decreed that the award of the 1st, 2nd & 3rd Arbitrators-Respondents dated 22nd October 2003 is hereby set aside.

It is ordered and decreed that 1st, 2nd & 3rd Arbitrators-Respondents have no jurisdiction to hear and make an award in respect of prayers (a) and (b) of the statement of claim and that the Respondent- Petitioner is entitled to the costs of this action.

Sgd.
High Court Judge of the
Western Province, Colombo

On this 11th day of November 2004

Drawn by: Sgd. Attorneys-at-Law for the Respondent-Petitioner."

Section 32 (1) of the Arbitration Act of No. 11 of 1995 permits a High Court to set aside an arbitral award only in limited circumstances in the following manner.

Section 32(1)

"An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of the receipt of the award-

(a) where the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the law to which the parties have subjected it or, failing any indication on that question under the law of Sri Lanka; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case; or

(iii) the award deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the cope of the submission to arbitration;

Provided however that, if the decision on matters submitted to arbitration can be separated from those not so submitted, only that part of the award which contains decision on matters not submitted to arbitration may be set aside; or

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act; or

(b) where the High Court finds that-

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka; or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka."

Default in appearance of the Respondent is not a ground on which an arbitral award can be set aside under the above provision.

In the decree of 11th November 2004 the Court has "*further ordered and decreed that 1st, 2nd & 3rd arbitrators – Respondents have no jurisdiction to hear and make an award in respect of prayers (a) and (b) of the statements of claim -------".*

In accordance with the proceedings of 20th May 2004 as appearing in document 'A9' the Petitioner has not made any submission on the question of lack of jurisdiction of the 1st, 2nd & 3rd Arbitrators. His only application has been to grant relief as prayed for solely based on the default in appearance of the Respondent. In fact the Petitioner has only moved "to support the motion that have been filed by the Petitioner dated 17.05.2004". This motion dated 17.5.2004 is annexed to the Petitioner's petition marked as **'A8'.** It is observed from the case record that a copy of this motion has not been served on the Claimant-Respondent of the said case. In any event the said motion dated 17.05.2004 annexed to the Petitioner's petition marked as 'A8' state as follows:

"HC/ARB/1848/2003

TO: The Honourable High Court Judge of the Democratic Socialist Republic of Sri Lanka sitting at Colombo

***Whereas** notice of this action was issued on the Claimant-Respondent by Court and whereas notice was handed over on the Claimant-Respondent's Manager through the Fiscal of this Court.*

***And whereas** according to the notice served on the Claimant-Respondent notice returnable was on 31st March, 2004*

***And whereas** on 31st March, 2004 the Claimant-Respondent was not present and/or was not represented in Court.*

***And whereas** the Claimant-Respondent has not shown any ground as to why the relief claimed for by the Respondent-Petitioner in the Respondent-Petitioner's petition to Your Honour's Court should not be granted.*

***And whereas** in the circumstances the Claimant-Respondent is in default and the relief claimed for by the Respondent-Petitioner in the prayer to the petition should be granted.*

We respectfully move that Your Honour's Court be pleased to mention this matter on 20th May 2004 to enable Counsel for the Respondent-Petitioner Mr. R.E.Thambiratnam to support this application.

On this 17th day of May, 2004.

Sgd.
Attorneys-at-Law for the
Respondent-Petitioner "

Accordingly it is clear that there was no application by the Petitioner in this case on 20th May 2004 for an order on the lack of jurisdiction of the 1st, 2nd & 3rd Arbitrators-Respondents. The only application has been to set aside the arbitration award based on the default in appearance of the Respondent. Submissions have not been made by the Petitioner in terms of the reasons and grounds contained in the substantive application dated 15th December 2003 filed in the High Court. The proceedings of 20th May 2004 the decree of 11th November 2004 or the motion of 17th May 2004 do not contain any material to show that the reasons and grounds contained in the substantive application dated 15th December 2003 or the aspect of the lack of jurisdiction was considered by Court when making the aforesaid order and decree.

Due to the above reasons, this Court

(i) set aside the order dated 20th May 2004 and the decree dated 11th November 2004 in Application bearing No. HC/ARB/1848/2003,

(ii) set aside the judgment of the High Court dated 1st August 2005 in Application bearing No. HC/ARB/1961/2004; and

(iii) directs the High Court to consolidate both applications namely HC/ARB/1848/2003 and HC/ARB/1961/2004 and to hear and determine the consolidated application in terms of the law.

In all the circumstances of this case the parties to bear their own costs.

Sgd.

JUDGE OF THE SUPREME COURT

S. Tilakawardane, J.

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

K. Sripavan, J.

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 2/2009
S.C.(H.C.) C.A.L.A. No. 110/2008
H.C.C.A. NWP/HCCA/KUR No. 16/2001(F)
D.C. Maho No. 4241/P

Rajapaksha Mudiyanselage Somawathie, Nikawewa,
Moragollagama.

Plaintiff-Respondent-Appellant

Vs.

N.H.B. Wilmon,
Nikawewa,
Pahala Elawatta,
Moragollagama.

4th Defendant-Appellant-Respondent

1. N.H. Asilin,

2. N.H. Ranjith Nawaratna,

   Both of Nikawewa, Pahala Elawatta, Moragollagama.

3. N.H. Pulhiriya,
   Nikawewa, Serugasyaya,
   Moragollagama.

4. N.H.B. Wilmon,

5. N.H. Simon Pulhiriya,

   Both of Nikawewa, Pahala Elawatta, Moragollagama.
   Defendants-Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
P.A. Ratnayake, J.

COUNSEL : Lakshman Perera with Anusha Gunaratne for Plaintiff-Respondent-Appellant

Ranjan Suwandaratne for 4th Defendant-Appellant-Respondent

ARGUED ON: 04.05.2009

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Respondent-Appellant : 15.06.2009
4th Defendant-Appellant-Respondent : 08.06.2009

DECIDED ON : 24.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the High Court of Civil Appeal of the North Western Province (hereinafter referred to as the High Court) dated 21.08.2008. By that judgment the High Court allowed the appeal preferred by the 4th defendant-appellant-respondent (hereinafter referred to as the 4th respondent) and dismissed the action filed by the plaintiff-respondent-appellant (hereinafter referred to as the appellant) on which the District Court by its decision has allotted an undivided 1/3 share of the corpus to the appellant and left the balance undivided portion unallotted.

Being aggrieved by the judgment of the High Court, the appellant preferred an application to this Court on which leave to appeal was granted by this Court on the following questions:

1. has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?;

2. has the High Court erred in law in failing to consider that the Deed of Gift on the face of it clearly indicates that the life interest holder has signed in acceptance on behalf of the donees?;

3. was the High Court wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect?

The facts of this appeal, as submitted by the appellant, *albeit* brief, are as follows:

The appellant instituted action on 06.05.1996 for the partition of the land morefully described in the schedule to the Plaint. The appellant, in his Plaint had set out that an undivided one-third (1/3) share of the said land, was owned by one Meniki, who by Deed No. 4059 dated 10.01.1944, attested by one Illangaratne, Notary Public had sold the said undivided share to one Singappuliya. The said Singappuliya, by a Deed of Gift, No. 22372, dated 04.03.1962, attested by T.G.R. de S. Abeygunasekera, Notary Public had gifted his undivided one third-share to Peter, Martin and Laisa. The said Peter, Martin and Laisa, by Deed No. 11560 dated 16.12.1994, attested by Mrs. C.M. Balalla, had transferred the said undivided share to the appellant. The appellant is unaware as to the original owners of the remaining two-thirds (2/3) of the undivided share of the land. The 1st, 2nd and 3rd defendants-respondents-respondents (hereinafter referred to as 1st, 2nd and 3rd respondents) are the present owners of undivided one-third (1/3) share of the land and the 5th defendant-respondent-respondent (hereinafter referred to as the 5th respondent) is the present owner of the remaining undivided one-third (1/3) share of the land. The 4th respondent, according to the appellant, is the nephew of the 5th respondent and has no right or title to the land, although he has been cultivating a portion of the land.

Although all the respondents had been present and represented before the District Court, only the 4th respondent had filed a statement of claim. In his statement of claim the 4th respondent had stated, inter alia, that,

1. the land sought to be divided had been possessed by the 4th respondent's maternal grandfather, one Samara Henaya, about 60 years ago and thereafter about 25 years prior to the institution of this action in the District Court, the said land had been possessed by the 4th respondent with the said Samara Henaya;

2. in 1982, the 4th respondent had built the house depicted as 'B' in Plan No. 3270/96, dated 15.12.1996 made by B.G. Bandutilake, Licensed Surveyor, filed of record and lived in that house with his family. Later in 1992 he had built on the said land and had been living in that house depicted as 'A' in the said Plan;

3. the 4th respondent had acquired prescriptive title to the land in dispute as he had continuous and undisturbed possession adversely to the rights of all others for over a period of 15 years.

At the trial the appellant and one of the appellant's predecessors in title, one Peter had given evidence on behalf of the appellant. The 4th respondent had led the evidence of the Surveyor Bandutilake, the 5th respondent, two farmers, namely Kiriukkuwa and Rajapaksha and the Grama Niladari, viz., Hemamali Rajapaksha.

Learned District Judge, Maho, by the judgment dated 22.01.2001 had declared that the appellant was entitled to an undivided one-third (1/3) share of the land and had left the remaining two-thirds (2/3) share unallotted. It was further held that the plantations and buildings on the land should be allocated among the parties as they had claimed before the Surveyor in the Report marked 'Y'.

Being aggrieved by the aforementioned judgment of the learned District Judge dated 22.01.2001, the 4th respondent had preferred an appeal to the High Court. The High Court by its judgment dated 21.08.2008, had held that the predecessors in title of the appellant could not be held to have derived title by the said Deed of Gift. Accordingly the High Court had allowed the 4th respondent's appeal and dismissed the appellant's action.

Being aggrieved by the said judgment of the High Court dated 21.08.2008 the appellant preferred an application before the Supreme Court.

Having stated the facts of the appeal, let me now turn to consider the questions on which leave to appeal was granted by this Court.

The High Court after considering the provisions contained in section 4(1)d of the Partition Law, No. 21 of 1977, had held that the appellant had sufficiently pleaded the pedigree in compliance with the provisions of section 4(1)d of the Partition Law. However, on the question of whether the appellant had proved the pedigree pleaded by her in compliance with the law, the High Court had held that the Deed of Gift marked as P_2 had not been accepted by the donees on the face of it, but has only been signed by the donor and the holder of the life interest and that the appellant had not sought to adduce any evidence to establish acceptance by the donees.

The three (3) questions on which leave to appeal was granted, referred to above, are all based on the Deed of Gift marked as P_2 and since the 3rd question states that there were no issues raised in the District Court on the basis of the non-acceptance of the Deed of Gift, let me first consider that question before proceeding to consider the questions No. 1 and 2.

a) Was the High Court of Civil Appeal wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court, or to lead any evidence to that effect?

At the outset of the trial, one admission had been recorded and 14 issues were raised by the appellant and the 4th respondent, which were accepted by Court. It is to be noted that there was no issue raised at the trial as to whether the Deed of Gift P_2 was invalid for want of acceptance. Accordingly, no evidence was led regarding the acceptance or non-acceptance of the Deed of Gift marked as P_2. A careful perusal of the proceedings before the District Court clearly reveals the fact that there was no opportunity at the trial to have led evidence on the question of non-acceptance, since there was no such issue raised by either party.
In the light of the above, it is quite evident that the question of non-acceptance of the Deed of Gift (P_2) was raised for the first time in appeal.

The question of examining a new ground for the first time in appeal was considered in several decided cases. In considering this question, Dias, J., in **Talagala v Gangodawila Co-operative Stores Society Ltd.,** ((1947) 48 N.L.R. 472) had clearly stated that as a general rule it is not open to a party to put forward for the first time in appeal a new ground unless it might have been put forward in the trial Court under one of the issues framed and the Court hearing the appeal has before it all the requisite material for deciding the question.

The question as to whether a matter that has not been raised as an issue at the trial could be considered in appeal was examined in detail in **Gunawardena v Deraniyagala and others** (S.C. (Application) No. 44/2006 – S.C. Minutes of 03.06.2010), where attention was paid to several decided cases (**Setha v Weerakoon** ((1948) 49 N.L.R. 225), **The Tasmania** ((1890) 15 A.C. 223), **Appuhamy v Nona** ((1912) 15 N.L.R. 311), **Manian v Sanmugam and Arulampillai v Thambu** ((1944) 45 N.L.R. 457)).

After a careful examination of the aforementioned decisions, it was clearly decided in **Gunawardena v Deraniyagala and others** (supra), that according to our procedure a new ground cannot be considered for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. Accordingly the Appellate Court could consider a point raised for the first time in appeal, if the following requirements are fulfilled.

a. the question raised for the first time in appeal, is a pure question of law and is not a mixed question of law and fact;

b. the question raised for the first time in appeal is an issue put forward in the Court below under one of the issues raised; and

c. the Court which hears the appeal has before it all the material that is required to decide the question.

It was not disputed that no issue was raised on the non-acceptance of the Deed of Gift. It is also to be noted that the respondent had not contested the validity of the Deed of Gift as to whether there was acceptance by the donees, at the time of the trial in the District Court. Since no such issue was raised, the District Court had not considered the said non-acceptance of the Deed of Gift and therefore there was no material before the high Court on the said issue. In the circumstances, the High Court was in error when it considered the question of non-acceptance of the Deed of Gift, which was at most a question of mixed law and fact.

Questions No. 2 and 3 both deal with the issue of the non-consideration by the High Court the acceptance of the Deed of Gift by the donees. Accordingly, both the said questions, listed below, could be considered together.

2. Has the High Court erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees?

3. Has the High Court erred in law in failing to consider that the Deed of Gift on the face of it clearly indicates that the life interest holder has signed in acceptance on behalf of the donees?

The Deed of Gift in issue is the Deed No. 22372 marked P_2, dated 04.03.1962 attested by T.G.R. de S. Abeyagunasekera, Notary Public.

By that Deed as stated earlier, Singappuliya had gifted his undivided one-third (1/3) share to Peter, Martin and Laisa. The said gift was subject to the life interest of the donor and his wife, Muthuridee, the mother of the three donees.

Learned Counsel for the 4th respondent strenuously contended that by the said Deed of Gift, the donor had conveyed the life interest of the said property to the said Muthuridee. Accordingly learned Counsel for the 4th respondent contended that the said Deed of Gift has to be accepted formally by the said Muthuridee, and it was necessary for her to have signed the said Deed of Gift in order to accept the life interest, which was gifted to her by the donor. Further it was submitted that the said Muthuridee had been acting in dual capacity as she had to accept the Deed of Gift on behalf of her three children in addition to accepting it on her own behalf and accordingly it was necessary for her to have signed twice indicating the acceptance on behalf of her children and on her own behalf. Since, the said Muthuridee had only signed once on the Deed of Gift, learned Counsel for the 4th respondent contended that the said gift had not been accepted by the donees.

Learned Counsel for the 4th respondent further contended that the learned High Court Judges had considered the question as to the acceptance of the Deed of Gift by the donees and had come to the conclusion that the said Deed of Gift had not been accepted by the donees, as only the donor and the holder of the life interest had signed it. The High Court had been of the view that a donation is not complete unless it is accepted by the donees and that the appellant had not sought to adduce any evidence to establish that the gift in question was accepted by the donees.

The essence of a Deed of Gift is to convey movable or immovable property as a gratuitous transfer. The intention of the donor is to convey the movable or immovable property to the donee. Therefore for the purpose of making the donation complete, the gift has to be accepted. Considering the question of the validity of a Deed of Gift, Canekaratne, J., in **Nagalingam v Thanabalasingham** ((1948) 50 N.L.R. 97) stated thus:

> "The donor may deliver the thing, e.g., a ring or give the donee the means of immediately appropriating it, e.g., delivery of the deed, or place him in actual possession of the property."

Regarding the question of acceptance, it is thus apparent that such acceptance could take different forms. In **Senanayake v Dissanayake** ((1908) 12 N.L.R. 1), Hutchinson, C.J., considered the question of acceptance of a Deed of Gift and had held that it is not essential that the acceptance of a Deed of Gift should appear on the face of it, but that such acceptance may be inferred from circumstances. In arriving at the said conclusion, Hutchinson, C.J., had stated that,

> "**The deed does not state that the gift was accepted; but that is not essential**. It is an inevitable inference from the facts which are above stated that Kachchi was in possession, with the consent of the grantor, at the date of the sale of her interest; and thereafter the purchaser of her interest possessed it during the rest of her life. It is the natural conclusion from the evidence that Ukku Menika, with the consent of the grantor, accepted the gift for herself and her children, (emphasis added)"

Canekaratne, J., in **Nagalingam v Thanabalasingham** (supra) had also considered the question of acceptance of a Deed of Gift. On a careful consideration of the facts and circumstances of that appeal, Canekeratne, J. had clearly stated that,

> "There is a natural presumption that the gift was accepted. Every instinct of human nature is in favour of that presumption. **It is in every case a question of fact whether or not there are sufficient indications of the acceptance of a gift**" (emphasis added).

It is not disputed that in the present appeal, the mother of the three donees, had accepted the said Deed of Gift on behalf of the donees. It is specifically stated in Deed No. 22372 (P_2) that,

"තවද ඉහතකී තැගි ලැබුම්කාර තිදෙනා වෙනුවට ඔවුන්ගේ මෑණියන්වූ එකී නිකවැවේ පදිංචි, නවරත්න හේනයලාගේ කව්වා හේනයාගේ මුතුරිදි වන මම ඉහත සඳහන් කළ පරිත්‍යාගය ප්‍රත්‍යාදර ගෞරවයෙන් හා ස්තුතියෙන් මෙයින් පිළිගනිමි."

The said Muthuridee had signed the Deed of Gift No. 22372 dated 04.03.1962.

Furthermore, the donees had been in possession of the land in question for a period of over 30 years. The evidence of Peter, one of the donees, clearly clarified this position.

"මම මේ නඩු කියන ඉඩම දන්නව. මේ ඉඩම අපි වික්කා. වික්කෙ සොමාවතිට. එන්. එච්. පීටර්, එන්. එච්. මාටින්, එන්. එච්. ලයිසා කියන අපි වික්කෙ. (ඔප්පුව පෙන්වා සිටී. එය හඳුනා ගනී.) මට අයිති වුනේ තාත්තා අරන් තිබුනා. කේ. සිංගප්පුලියා තාත්තා. 4940/59 දරණ ඔප්පුව ඊට පස්සේ අපට තාත්තා ලියා දුන්නා. අයිතිවාසිකම් අපි වික්ක. අපි මේ ඉඩම බුක්ති වින්දා. පැමිණිලිකරුට වික්කෙ 94. විකුණන තෙක් අපි බුක්ති වින්දා. 1/3 පංගුවක් බුක්ති වින්දා."

It is therefore evident that after the execution of the Deed of Gift the donees had possessed and had enjoyed the land in question.

Considering the totality of the circumstances in this appeal, it is abundantly clear that at the time of the execution of the Deed of Gift, it was clearly stated in the said Deed that the gift was accepted by the mother of the donees on behalf of the donees and she had also signed the said Deed of Gift. Moreover, the donees had possessed and had enjoyed the land in question for more than 30 years. Considering the dicta enumerated in **Senanayake v Dissanayake** (supra) and **Nagalingam v Thanabalasingham** (supra) the aforementioned facts clearly show that they are sufficient indications that the donees had accepted the Deed of Gift.

For the reasons aforesaid the questions on which leave to appeal was granted by this Court are answered as follows:

1. yes, the High Court had erred in law in misinterpreting and misconstruing that there was no acceptance of the Deed of Gift by the donees;

2. yes, the High Court had erred in law in failing to consider that the Deed of Gift on the face of it clearly indicated that the life interest holder had signed in acceptance on behalf of the donees;

3. yes, the High Court was wrong in law in considering the question of non-acceptance of the Deed of Gift since there was a failure to raise an issue on that ground in the District Court or to lead any evidence to that effect.

The judgment of the High Court dated 21.08.2008 is set aside and the judgment of the District Court dated 22.01.2001 is affirmed. This appeal is accordingly allowed.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 33/2009
S.C. (Spl.) L.A. No. 4/2009
C.A. No. 412/2002(F)
D.C. Colombo No. 17736/L

D.G. Subadra Menike,
56/1, Kirikiththa,
Weliweriya.

appearing by her Attorney
M. Piyadasa of Mahawatta,
Batapola.

Plaintiff-Appellant-Appellant

Vs.

H.D.S. Jayawardena,
334/F, Robert Gunawardena Mawatha,
Malabe.

Defendant-Respondent-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
Imam, J.

COUNSEL : Ikram Mohamed, PC, with Padma Bandara for Plaintiff-Appellant-Appellant

Ranjan Suwandaratne with Salini Herath for Defendant-Respondent-Respondent

ARGUED ON: 05.10.2009

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Appellant-Appellant : 17.11.2009
Defendant-Respondent-Respondent : 15.12.2009

DECIDED ON: 04.03.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 27.11.2008. By that judgment the Court of Appeal had set aside part of the judgment of the District Court dated 20.05.2002, which was in favour of the defendant-respondent-respondent (hereinafter referred to as the respondent) and dismissed the respondent's claim. The plaintiff-appellant-appellant (hereinafter referred to as the appellant) instituted an application before this Court for special leave to appeal on the basis that the Court of Appeal had not entered judgment in favour of the appellant as prayed in the Plaint on which special leave to appeal was granted by this Court.

When this matter was taken up for hearing, both learned Counsel agreed that the appeal could be considered on the following questions:

1. Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

The facts of this appeal, as submitted by the appellant, *albeit* brief are as follows:

The land in dispute was originally owned by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, whom by Deed No. 4830 dated 07.07.1967 attested by Kodikara and Abeynayake, Notaries Public had transferred the same to one Robert Lamahewa. The said Robert Lamahewa had transferred the said property to the appellant by Deed No. 13496 dated 05.07.1930 attested by D.I. Wimalaweera, Notary Public. Sumanalatha Kodikara had however executed another Deed of Transfer bearing No. 1200 on 25.02.1980 attested by Kodikara and Abeynayake, Notaries Public in favour of one Asela Siriwardena in respect of the same property, who had thereafter executed a Deed of Transfer bearing No. 9271 on 25.08.1982 attested by Kodikara and Abeynayake, Notaries Public, in favour of the appellant. The appellant therefore had claimed that she had become the lawful owner of the said property by way of the aforementioned Deed as well as by way of prescriptive possession.

The appellant submitted that the respondent around 09.06.1996 had started to disturb the appellant's possession of the said property and disputed her title thereto and therefore the appellant had instituted action by plaint dated 15.01.1997 against the respondent for a declaration of title and for a permanent injunction restraining the respondent from interfering with her possession.

The respondent had filed answer dated 04.06.1997 and had pleaded *inter alia* that the said property belonged to Sumanalatha Kodikara, who by Deed No. 1200 dated 25.02.1980 transferred the same to one Asela Siriwardena. Thereafter the said Asela Siriwardena had transferred the said property by Deed No. 2708 on 31.10.1995 attested by W.H. Perera, Notary Public to the respondent. It was also submitted that the said Deed was duly registered in the Land Registry and that Deed had obtained priority over the appellant's Deeds. Therefore the respondent sought a declaration that his Deed No. 2708 obtains priority over the appellant's Deeds Nos. 9271 and 13496 and that the appellant's Deeds are void in law as against the respondent's Deed No. 2708.

After trial the District Court on 20.05.2002, had dismissed the appellant's action and had entered judgment in favour of the respondent as prayed in the answer, holding that the respondent's title Deed had obtained priority over the appellant's Deed. The appellant had come before the Court of Appeal against that order, where the Court of Appeal by its judgment dated 27.11.2008 had held that the respondent is not entitled to the reliefs claimed by way of a Claim in Reconvention in the Answer as he was only a co-owner, who was only entitled to a half share of the subject matter and had set aside that part of the judgment in favour of the respondent. The appellant had filed an application before the Supreme Court as the Court of Appeal had not entered judgment as prayed in the Plaint in favour of the appellant.

Having stated the facts of this appeal, let me now turn to examine the two questions of law on which this appeal was argued.

1. Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?

The contention of the learned Counsel for the respondent was that Sumanalatha Kodikara was the sole owner of the property in question. In support of his contention, learned Counsel for the respondent submitted that the appellant in the Pedigree set out in the Plaint, had merely stated that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were the legal owners of the property described in the schedule to the Plaint. It was also stated that they had transferred the said property by Deed No. 4830 dated 07.07.1967 to one Robert Lamahewa. The appellant had alleged that the said Robert Lamahewa had conveyed the said property by Deed No. 13496 dated 05.07.1970 to her and thereby she had become the owner of the said property. The appellant in her Plaint had alleged that Sumanalatha Kodikara had conveyed the said property by Deed No. 1200 dated 25.02.1980 to one Asela Siriwardene.

It was also submitted that the appellant had alleged in her Plaint that Sumanalatha Kodikara had acted fraudulently, but stated in the Plaint that the appellant had got a transfer of the

property in question by Deed No. 9271 dated 25.08.1982 attested by K. Abeynayake, Notary Public, in her favour.

Accordingly the contention of the learned Counsel for the respondent was that, the appellant by purchasing rights from Sumanalatha Kodikara in August 1982 by Deed No. 9271 dated 25.08.1982 had conceded that Asela Siriwardena had obtained rights by virtue of Deed No. 1200 dated 25.02.1980 and therefore the appellant is estopped from disputing the flow of title from Sumanalatha Kodikara to Asela Siriwardena. Learned Counsel for the respondent therefore contended that in terms of the aforementioned devolution, Sumanalatha Kodikara has acted as the sole owner of the property in question. It was further contended that by obtaining the transfer of the property by Deed No. 9271 dated 25.08.1982, the appellant had conceded that Sumanalatha Kodikara was the sole owner of the property concerned.

Learned President's Counsel for the appellant contended that as submitted at the outset on the basis of the facts of this appeal, the subject matter in question had originally belonged to both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. Later by Deed No. 4830 dated 07.07.1967 (P_1) both of them had transferred the said property to one Robert Lamahewa. The said Robert Lamahewa, by Deed No. 13496 dated 05.07.1970 (P_2) had transferred this property to the appellant by which the appellant had become the sole owner of the land. Thereafter the said Sumanalatha Kodikara had executed another Deed of Transfer bearing No. 1200 dated 25.02.1980 (P_3) in favour of one Asela Siriwardena in respect of the same property and later the said Asela Siriwardena had by Deed No. 9271 dated 25.08.1982 (P_4) had transferred the same property in favour of the appellant. Accordingly, the appellant claimed that she had thus obtained title to the said land by the aforementioned Deed as well as by prescription.

It is in the above background, that it would have to be ascertained as to whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

The contention of the learned Counsel for the respondent was that although the learned President's Counsel for the appellant contended that by Deed No. 4830 dated 07.07.1967, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa, that there was no reference in the said Deed of such a transaction.

A perusal of the Deed No. 4830 dated 07.07.1967, clearly indicates that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa. It is interesting to note that, the respondent in his evidence in chief had stated that Sumanalatha Kodikara had got title by Deed No. 3312 dated 23.09.1962. He had further stated that the said land was divided and the land in question is Lot No. 45. According to the said Deed No. 3312, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had become co-owners of the entirety of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta,* situated at Thalangama, depicted in Plan No. 2464 dated 08.09.1962, prepared by V.A.L. Senaratne, Licensed Surveyor (P_5) in extent A10-R2-P16.5 and the land in question is Lot No. 45 shown in the said Plan No. 2464, which is 20 perches in extent as could be seen from the first schedule in Deed No. 4830 (P_1). This land is described in the schedule of Deed No. 3312 dated 23.09.1962, in the following terms:

> "WHICH SAID allotments of land adjoin each other and now forming one property and according to a recent figure of survey, is described as follows: All that defined allotment of land depicted in Plan No. 2464 dated 8th September 1962 made by V.A.L. Senaratne, Licensed Surveyor of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta* situated at Talangama aforesaid and bounded on the North by land of P.D. Abraham East by Road and land of Albert and others South by Path and land of P.D. Abraham and on the West by paddy field and containing in extent ten acres two roods and sixteen decimal five perches (A10.R2.P16.5) according to the said Plan No. 2464."

As stated earlier, the respondent in his evidence in chief had accepted the position that the land in question is Lot 45 in Plan No. 2464, which was a part of the larger land purchased and the co-owners of Lot No. 45 had been both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara.

"හේවදේව ධර්මසිරි ජයවර්ධන

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ප්‍ර තමා මූලික සාක්ෂියේදී කියා සිටියාද මේ නඩුවට අදාල දේපල සුමනලතා කොඩිකාර සහ මැල්කම් ජයතිස්ස කියන දෙදෙනකුට අයිතිව තිබුනාය කියා"

උ ඔව්ගා

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ප්‍ර වි$_3$ දරණ ලේඛනයේ සටහන් අනුව එම 3312 දරන ඔප්පුව මගින් සුමනලතා සහ මැල්කම් ජයතිස්ස යන දෙදෙනා විසින් මිළදී ගති කියා සදහන් වෙනවා

උ මම දන්නේ නැහැග

ප්‍ර මෙහි තිබුනා කියුවොත් පිළි ගන්නවාද

උ ඔව්

ප්‍ර තමා විසින් ඉදිරිපත් කරන ලද ලේඛනයේ ඉහතින්ම ඇති සටහනේ 3312 දරන ඔප්පුවට අදාලව ලියා පදිංචි කර තිබෙන්නේ

එහි සඳහන් දේපල සුමනලතාට සහ මැල්කම් යන දෙදෙනාට ලැබී තිබෙනවා කියුවොත් පිළි ගන්නවා

උ ඔව්

ප්‍ර ඒ අනුව එම ලේඛනයේ සඳහන් දේපල අයිතිව තිබෙන්නේ දෙදෙනෙකුට

උ ඔව්

ප්‍ර ඒ සුමනලතා සහ මැල්කම් යන අයට

උ ඔව්

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ප්‍ර මේ නඩුවට අදාල දේපල තමා ඉදිරිපත් කරන ලද ඔප්පු අනුවද කුවිතාන්සි අනුවද සුමනලතා සහ මැල්කම්ට අයිති වී තිබෙනවාරෑ

උ ඔව්

ප්‍ර තමාට ඉහලින් තිබෙන පූර්වගාමී අයිති කාරයන් දෙදෙනාගෙන් එක්කෙනෙකුගෙන් අරන් තිබෙන්නේ

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ප්‍ර ඒ ලොට් 45 කියන සම්පූර්ණ දේපල අරගෙන තියෙනවා

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ප්‍ර තමා දන්නවාද 3312 ඔප්පුව මගින් සුමනලතා සහ මැල්කම් යන දෙදෙනා අක්කර 10 රූඩ් 2 ක් පමණ විශාල ඉඩමක් මිළදී ගෙන තිබුනා කියාරූ

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It is to be noted that it is common ground that the land in question is depicted as lot No. 45 in Plan No. 2464 dated 08.09.1962 prepared by V.A.L. Senaratne, Licensed Surveyor. It is also to be noted that, the respondent had produced a Deed of Transfer (V_3) bearing No. 3312 dated 23.09.1962. The contents of the said Deed No. 3312, clearly demonstrate the fact that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara both of Dewala Road, Nugegoda had derived their title from Kahawita Appuhamilage Dona Grace Perera, Totagodagamage Kusumawathie, Swarna Perera and Totagodagamage Charles Perera all of Lily Avenue, Wellawatta as co-owners of the entirety of land called *Delgahawatta, Delgalanda* and *Delgalandawatta* situated at Talangama and depicted in Plan No. 2464 dated 08.09.1962 made by V.A.L. Senaratne, Licensed Surveyor, in extent A10-R2-P16.5.

Thereafter both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had transferred the aforementioned property to Robert Lamahewa by Deed No. 4830 dated 07.02.1967.

Considering all the aforementioned it is abundantly clear that the subject matter had originally belonged to both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara and they have been the original co-owners of the property in question.

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

Learned Counsel for the respondent contended that Section 7 of the Registration of Documents Ordinance gives priority to an instrument which is registered and such an instrument would get priority over any other instrument which is not registered, although the previous document is prior considering the time it was purchased. Accordingly the contention of the learned Counsel for the respondent was that whether the Vendor gets absolute right to an immovable property or undivided interest to an immovable property is apparently irrelevant in considering the absolutely clear provisions contained in Section 7 of the Registration of Documents Ordinance. Learned President's Counsel for the appellant on the other hand referred to the Full Bench decision in **Silva v Gunawardena** ((1915) 18 N.L.R. 241) and stated that a previous instrument to be void as against the subsequent instrument on the basis of due registration of the subsequent instrument, the said subsequent instrument must necessarily be adverse to the previous instrument and not against a part of the said previous instrument. The contention of the learned President's Counsel for the appellant was that, the concept of prior registration in terms of Section 7 of the Registration of Documents Ordinance would not be applicable to an undivided share such as the land in question.

The Registration of Documents first came into being in the maritime provinces of the country in 1801, by a proclamation of 01.03.1801, which imposed on the Presidents of Civil and Land Raads the obligation to maintain a Register of Lands within their respective districts. The proclamation had declared that,

> "All title deeds, transfers, mortgage bonds and assignments so made out and enrolled by the aforesaid registers were to have **preference and precedence** over the like kind drawn up and executed before a notary or other person, excepting those passed by or before the Courts of Justice and Land Raads, Weeskamers or elsewhere, according to the formalities required by the Dutch Government."

After several Regulations, the first Registration Ordinance came into operation in Ceylon in 1863, which was enacted by Ordinance No. 8 of 1863 and later amended by Ordinance No. 3 of 1865 and replaced by Ordinance No 14 of 1891. Thereafter in 1927 the Ordinance No. 23 of 1927 was introduced for the registration of documents. This was for the purpose of amending and consolidating the law relating to registration of documents and the said Ordinance No. 23 of 1927 had been amended on several occasions.

Chapter III of the said Ordinance on Registration of Documents refers to the registration of Instruments affecting land and Section 7 deals with registered and unregistered instruments. Section 7(1) of the said Ordinance reads as follows:

> "7(1) An instrument executed or made on or after the 1st day of January, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly registered under this chapter or if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in Section 26 of that Ordinance."

It is to be borne out in mind that Section 7(1) of the Registration of Documents Ordinance deals with a situation where the instrument becomes void if there is no due registration and this is not applicable to one's rights or title acquired under such an instrument. Thus the key provision contained in this Ordinance clearly had pronounced that unregistered instruments are

void against subsequent registered instruments and such an instrument means an instrument affecting land. It is also to be noted that, such an instrument would become void against all parties 'claiming an adverse interest thereto on valuable consideration'.

It is therefore important that when a question arises in terms of Section 7(1) as to the registration or non registration of an instrument, it is necessary to consider whether the instruments in question are adverse to each other. Furthermore, it is also necessary to refer to the provisions contained in Section 7(4) of the Registration of Documents Ordinance, which clearly states that registration of an instrument under the chapter on Registration of Documents shall not cure any defect in the instrument or confer upon it any effect or validity, which it would not otherwise have, except the priority conferred on it. This position has been carefully considered in a series of cases, which has clearly settled the applicable law in this country.

In **Massilamany v Santiago** ((1911) 14 N.L.R. 292) Van Langenberg, A.J., considering the effect of the registration of a document had stated thus:

> "The only effect of registration was to give priority to the subsequent deed. The earlier deed is not affected in any way, save that it has to take second place."

In **Lairis Appu v Tennakoon Kumarihamy** ((1958) 61 N.L.R. 97) Sinnetamby, J., was of the view that,

> "Our Registration Ordinance provides for the registration of documents and not for the registration of titles. If it had been the latter, then, from whatever source the title was derived, registration by itself would give title to the transferee. When, however, provision is made only for the registration of documents

> of title, the object in its simplest form, is to safeguard a purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by his vendor. **The effect of registration is to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds**" (emphasis added).

The implications of Section 7 of the Ordinance dealing with the registration of documents as to priority of registered instruments was clearly described by Clarence, J. in **Silva v Sarah Hamy** ((1883) Wendt's Reports 383), where he had stated that,

> "When an owner of land conveys it to A for value, and subsequently executes another conveyance of the same land in favour of B also for value, it is true that at the date of the second conveyance the owner has nothing left in him to convey, but, by the operation of the Ordinance, B's conveyance overrides A's, if registered before it. **Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment**" (emphasis added).

Learned President's Counsel for the appellant strenuously contended that, a previous instrument to be void as against the subsequent instrument, on the basis of due registration of the subsequent instrument, the subsequent instrument must necessarily be adverse to the previous instrument and not against a part thereof. It was also contended that an undivided share cannot in our law gain priority by virtue of prior registration. The contention was that the concept of priority as contained in Section 7(1) of the Registration of Documents Ordinance, does not apply to an undivided share and therefore the subsequent transfer, even though duly registered, does not gain priority and will not confer any title since the owner has in fact transferred his title by the earlier instrument, although it was not duly registered.

As clearly stated earlier, the effect of an unregistered instrument becomes material only if there is a conflict with a subsequent registered instrument. However, if there is such a registered instrument, the unregistered Deed becomes deprived of any legal force. The criteria of such a situation was clearly described by Lascelles, C.J., in **James v Carolis** ((1914) 17 N.L.R. 76), where he had stated that,

> "If an intending purchaser finds on the register no adverse deed affecting the property, he is placed in the same position, as regards his title to the land, as if no such deed in fact existed. On the other hand, the grantee under the prior unregistered deed is penalized for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist, and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration."

It is therefore apparent that in a situation, where there is a conflict between a registered and an unregistered Deed, the registered Deed has to be given priority. This appears to be a penalty a party has to pay for the non-registration of an instrument, as he has been negligent in protecting his own rights. When considering the provisions contained in Section 7(1) of the Ordinance, it also appears that the intention of the Legislature was to protect the 'innocent' second purchaser of the land in question. This aspect was referred to in **Samaranayake v Cornelis** ((1943) 44 N.L.R. 508), where it was stated that,

> "The ordinance does not expressly penalize the purchaser who did not register, nor was that its object probably, for it arrived at protecting the innocent second purchaser, but the result is that the first purchaser pays the penalty.

On a consideration of the facts of this appeal, it appears that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara have been the co-owners of the land in question. Both of them had transferred the said land by Deed No. 4830 dated 07.07.1967 (P_1) to Robert Lamahewa, who in turn had transferred the same to the appellant by Deed No. 13496 dated 05.07.1970 (P_2). Thereafter Sumanalatha Kodikara had transferred the same land by Deed No. 1200 dated 25.02.1980 (P_3) to one Asela Siriwardena from whom the appellant had purchased her rights by Deed No. 9271 dated 25.08.1982. Asela Siriwardena had also sold his rights by Deed No. 2708 dated 31.10.1995 (V_7) to the respondent, which Deed was admittedly duly registered.

In such circumstances, what would be the position regarding the competing Deeds of the appellant (P_2) and the respondent (V_7)?

As referred to earlier the original owners of the land known as *Delgahawatta, Delgahalanda* and *Delgahalandawatta* had co-owned lot 45 viz., the land in question. The general rule regarding co-ownership is that, a co-owner has no right to alienate more than his undivided share of the common property (**Vaz v Haniffa** ((1948) 49 N.L.R. 286, Voet 18.1.14). When Sumanalatha Kodikara and Malcolm Jayatissa Kodikara transferred the property in question to Robert Lamahewa, both of them had transferred the entire extent of the said lot 45 to him and therefore when Robert Lamahewa in turn transferred the said property to the appellant, she became the owner of the said lot 45. However, thereafter, Sumanalatha Kodikara had transferred the same land to Asela Siriwardena by Deed No. 1200 dated 25.02.1980 (P_3). It is obvious that the said transfer was only limited to the half share of Sumanalatha Kodikara and not the entire extent of the land in question.

It is quite clear that in terms of Section 7(1) of the Registration of Documents Ordinance, an instrument becomes void if it is not duly registered, provided that there is an adverse claim against the said instrument by virtue of a subsequent instrument, which is duly registered.

It is also important to note that there is no provision made under the Registration of Documents Ordinance, stating that instruments dealing with co-owned immovable property come under the category of instruments of which registration is optional or not necessary.

In this appeal the adverse claims are between the appellant and the respondent. Whilst the appellant claims that she derived her rights form Robert Lamahewa to whom the land in question had been sold by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, the respondent's claim is that he got his rights from Asela Siriwardena to whom the land was sold by Sumanalatha Kodikara. If it was only by Sumanalatha Kodikara, it could only be a half share, as the property in question was owned both by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. In those circumstances, considering the fact that the respondent had registered his Deed, when the appellant had not taken steps for such registration in terms of Section 7(1) of the Registration of Documents Ordinance, the Deed which was registered would prevail over an unregistered Deed. Accordingly the respondent's deed should prevail over the appellant's Deed.

However, since it was only a half share that was transferred to the respondent, he would only be entitled to a half share of the land in question.

Accordingly, the two questions on which this appeal was heard are answered as follows:

1. Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

2. The concept of prior registration would apply in respect of an undivided share in terms of Section 7 of the Registration of Documents Ordinance.

For the reasons aforesaid the judgment of the Court of Appeal dated 27.11.2008 is affirmed and this appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

Imam, J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 9/2002
S.C. (Spl.) L.A. No. 242/2001
C.A. (Rev.) 1235A/2000

Bengamuwa Dhammaloka Thero,
Chief Priest,
Sri Sudharmaramaya,
Henegama,
Akuressa

Plaintiff-Respondent-Respondent-Appellant

Vs.

Dr. Cyril Anton Balasuriya,
No. 16, Fonseka Terrace,
Colombo 06.

Petitioner-Petitioner-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
Jagath Balapatabendi, J.

COUNSEL : Navin Marapana for Plaintiff-Respondent-Respondent-Appellant

Romesh de Silva, PC, with S. Amarasekera for Petitioner-Petitioner-Respondent

ARGUED ON: 18.10.2007 and 20.07.2009

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Respondent-Respondent-Appellant - 09.09.2009
Petitioner-Petitioner-Respondent - 17.09.2009

DECIDED ON: 02.03.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 12.11.2001. By that judgment, the Court of Appeal set aside the order made by learned District Judge on 14.09.2000 and allowed the appeal of the petitioner-petitioner-respondent (hereinafter referred to as the respondent). The plaintiff-respondent-respondent-appellant (hereinafter referred to as the appellant) sought special leave to appeal from this Court, which was granted on the following questions:

1. Whether a petitioner in an application made under Section 328 of the Civil Procedure Code, against whom an order has been made by the District Court, is entitled to canvass the correctness of the Order made by the District Judge by way of an application in Revision, in the Court of appeal?

2. Whether in any event the Court of Appeal could in the exercise of revisionary jurisdiction in relation to an inquiry under Section 328 of the Civil Procedure Code hold that the Decree entered in the case against one of the parties is void?

3. Whether in an inquiry under Section 328 of the Civil Procedure Code the Court could hold that the Decree entered against the defendants is void?

The facts of this appeal as submitted by the appellant and the respondent *albeit* brief, are as follows:

The appellant obtained an ex-parte Decree in the District Court of Colombo against the 1st and 2nd defendants in respect of the land in dispute. On 10.01.2000, the Fiscal had handed over possession of the said premises to the appellant. The Fiscal had stated in his report that when he visited the land in dispute, none of the defendants had been present and after some time the substituted 1E defendant had arrived. When the Decree was explained to him, the substituted 1E defendant had consented to the handing over of possession to the appellant and took away his belongings from the premises in question (A1).

On 17.01.2000, the respondent had filed a petition under Section 328 of the Civil Procedure Code, claiming *inter alia* that he was not a party to the said action between the appellant and the defendants, and that he was ejected by the Fiscal on 10.01.2000. Accordingly the respondent prayed, *inter alia* that he be restored to possession of the premises in question (A2).

The appellant had denied that the respondent ever had any possession of the land and therefore stated that the respondent was not ejected by the Fiscal.

It was further submitted that the respondent had not adduced any oral evidence to prove that he was in possession of these premises at the time the Decree in the District Court was executed or that he was ejected by the Fiscal. Both parties had tendered written submissions and learned Additional District Judge of Colombo by his Order dated 14.09.2000, dismissed the respondent's application for want of proof of the facts he had adduced in his application. Learned Additional District Judge in his Order had stated that in the said Section 328 application, the onus was on the respondent to prove that he was in possession of the said premises at the time the Decree was executed and that since the respondent had failed to discharge this burden, his application should be dismissed.

The respondent had filed a Revision application, against the said Order of the learned Additional District Judge of Colombo on 14.09.2000, in the Court of Appeal.

The respondent, in the Court of Appeal contended that he had purchased the land in question from the 2nd defendant in D.C. Colombo Case No. 16694/L and that at the time the said case was instituted, the 2nd defendant was already dead. Accordingly the respondent contended that the ex-pare Decree obtained against him is bad in law and that no summons were served on the 2nd defendant or his heirs. Further it was contended that the respondent's Counsel never agreed to have the Section 328 inquiry decided on written submissions alone and that written submissions were tendered only at the request of the learned Additional District Judge, who had informed Counsel that he would allow the parties to lead oral evidence, if necessary.

The appellant, in writing had submitted that to that date the respondent had not filed a case in the District Court against the appellant. Further it was contended that the respondent had no right to file a Revision application in the Court of Appeal to canvass an order made in terms of Section 328 of the Civil Procedure Code as he was provided with an alternative remedy under Section 329 of the Civil Procedure Code.

The Court of Appeal delivered its Order on 12.11.2001 allowing the respondent's application (y).

Learned President's Counsel for the respondent strenuously contended that the appellant had been fraudulent from the inception of his application before the District Court and referred to the facts that the appellant had filed action against 2 persons and had obtained an ex-parte Decree. By this the respondent, who was the lawful, owner was dispossessed. The respondent had become the owner of the land in question by Deed No. 671 in 1990. He had filed action (18615/L) against the pupil priest of the appellant on 01.07.1999 and had obtained an injunction preventing the said pupil priest, who was the defendant in that application from dispossessing the appellant. Learned President's Counsel for the respondent submitted that the said enjoining order still remains in force and notwithstanding that, the appellant took out Writ and dispossessed the respondent, who was the plaintiff in Case No. 18615/L. Learned President's Counsel for the respondent further contended that it was common ground that prior to the institution of the present action, the 2nd defendant had passed away. It was also contended that the prayer to the

plaint clearly indicated that both defendants were to be ejected. However, there was only one Decree against both defendants. The contention of the learned President's Counsel for the respondent was that since the 2nd defendant was dead prior to the institution of action and no steps were taken for substitution, that the said action is a nullity and in any event the Decree is a nullity. Accordingly the submission was that, no Writ could have been taken out in terms of the said Decree and therefore all execution proceedings were null and void.

In the circumstances learned President's Counsel submitted that the respondent had been dispossessed consequent to an invalid action, an invalid Decree and invalid execution proceedings and therefore the respondent must be put back into possession.
Having stated the facts of this appeal and the submissions of the learned President's Counsel for the respondent and the learned Counsel for the appellant, let me now turn to consider the questions on which special leave to appeal was granted by this Court.

1. **Whether a petitioner in an application made under Section 328 of the Civil Procedure Code, against whom an Order has been made by the District Court, is entitled to canvass the correctness of the Order made by the District Judge by way of an application in Revision in the Court of Appeal?**

Learned Counsel for the appellant, strenuously argued that the respondent could not have filed a Revision application to canvass an order made under Section 328 of the Civil Procedure Code, since an alternative remedy has been provided in terms of Section 329 of the Civil Procedure Code. Learned Counsel referred to the decisions in **H.S. Wattuhewa v S.G. Guruge** (C.A. Application No. 141/90 - C.A. Minutes of 15.10.1990) and **Letchumi v Perera and another** ([2000] 3 Sri L.R. 151). The contention of the learned Counsel for the appellant was that where a party seeks to revise an order made under Section 328 of the Civil Procedure Code without availing himself of the alternative remedy provided in terms of Section 329 of the civil Procedure Code, the Courts will not exercise the revisionary power in favour of such a party. It was further contended that since the facts of the present appeal are identical to the facts of the aforementioned judgments, the respondent was not entitled to file a Revision application in the Court of Appeal.

Section 329 of the Civil Procedure Code refers to the orders made under Section 326 or Section 327 or Section 328 and reads as follows:

> "No appeal shall lie from any order made under Section 326 or Section 327 or Section 328 against any party other than the judgment-debtor. Any such order shall not bar the right of such party to institute an action to establish his right or title to such property."

In **Letchumi v Perera and another** (supra), Edussuriya, J., considering the alternative remedy provided by Section 329 of the Civil Procedure Code, had cited with approval the reference made by Justice Senanayake in **H.S. Wattuhewa v S.G. Guruge** (supra) that,

> "In my view this Section gives an alternative remedy to an aggrieved party in such a situation. It is the duty of the Court to carry out effectually the object of the statute. It must be so construed as to defeat all attempts to do so or avoid doing in a direct or circuitous manner that which has been prohibited or enjoined."

There is no dispute as to the applicability of Section 329, as an alternative remedy to an aggrieved party, who had sought to revise an order made in terms of Section 328 of the Civil Procedure Code, which position has been strengthened by the decisions of the Court of Appeal (**H.S. Wattuhewa v S.G. Guruge** (supra) and **Letchumi v Perera and another** (supra). Moreover, the Court of Appeal had agreed with the learned Counsel for the appellant that a party, whose claim under Section 328 of the Civil Procedure Code had been rejected cannot seek relief by way of revision, when he has not availed himself of the alternative remedy provided by Section 329 of the Civil Procedure Code.

Therefore, there cannot be any disagreement with regard to the contention of the learned Counsel for the appellant on the applicability of Section 329 of the Civil Procedure Code.

However, the difficulty which had arisen in this matter was with regard to the Decree obtained in the District Court, which was considered by the Court of Appeal as a Decree, which was invalid. The question that had to be considered by the Court of Appeal in view of the applicability of Section 329 of the Civil Procedure Code was as to whether the learned District Judge had duly complied with all relevant and necessary procedural requirements relating to the service of summons at the ex-parte trial against the 2nd defendant before the District Court, who was the predecessor in title of the respondent.

The appellant, who was the plaintiff in the District Court case, in his plaint dated 11.05.1994 had claimed title to a land in extent of 1 Acre and sought a declaration of title and ejectment against the two defendants namely, B.W. Premadasa (1st defendant) and M.S. Perera (2nd defendant) stating that they had entered into forcible possession of the appellant's land on 23.02.1993. The 1st defendant had filed answer to the effect that he had no rights in the land in question, stating that he was only a broker, who had entered into a sale agreement with the 2nd defendant M.S. Perera and was not a title holder. The 2nd defendant was the predecessor of the respondent. The 2nd defendant had sold his property to the respondent by Deed No. 671 dated 22.11.1999. The contention of the learned President's Counsel for the respondent was that the 2nd defendant was never served with summons.

Journal Entry of the District Court dated 23.11.1994 shows that the summons had been served on the 1st defendant, but the Fiscal had not met the 2nd defendant (94.11.23 **පළවන විත්තිකරුට සිතාසි භාරදී ඇති බවත්, 2වන විත්තිකරු හමු නොවූ බවත් පිස්කල් වාර්තා කරයි**) On that day, the District Court had made Order giving a final date for the 1st defendant's answer, but had made no order regarding the service of summons on the 2nd defendant. Even thereafter no order had been made for the issue of summons on the 2nd defendant, and the appellant had not taken any steps to issue summons on him. On 27.03.1997, the case was fixed for ex-parte trial for 24.04.1997 on which day the case was taken for such trial.

Learned President's Counsel for the respondent contended that the said 2nd defendant was not among the living on the date, when the ex-parte judgment was delivered on 24.04.1997 as he had died on 29.12.1995.

Accordingly, it is not disputed that the Decree had been entered against the 2nd defendant, without serving summons on him and at a time he was not among the living and therefore the question in issue as to whether revision was available for the respondent should be examined in the above background.

Powers of revision of the Court of Appeal is clearly defined in Section 753 of the Civil Procedure Code. The said Section is as follows:

> "The Court of Appeal may, of its own motion or on any application made, call for and examine the record of any case, whether already tried or pending trial, in any Court, tribunal or other institution for the purpose of satisfying itself as to the legality or propriety of any judgment or order passed therein, or as to the regularity of the proceedings of such Court, tribunal or other institution, and may upon revision of the case brought before it pass any judgment or make any order thereon, as the interests of justice may require."

The applicability of the powers of revision of the Court of Appeal in terms of Section 753 of the Civil Procedure Code had been discussed in several decisions. The power of revision, which is well known as an extraordinary power, is independent from the usual appellate jurisdiction. The basis for such extraordinary power vested in a Court with the jurisdiction for revision was clearly examined by Sansoni, C.J., in **Marian Beebee v Seyed Mohamed et.al** (69 C.L.W. 34), where it was stated that, the object of the power of revision is the due administration of justice and the correction of errors, sometimes committed by the Court itself, in order to avoid a miscarriage of justice.

The exercise of the revisionary power of the Court of Appeal and its restrictions, if any, were examined in detail in **Rustom v Hapangama and Co**. (1978/79 2 Sri L.R. 225). In that case, the plaintiff-petitioner had filed an application for revision of an order of the District Court, which allowed the defendant an opportunity to file his answer and defend the action and holding that an application by the plaintiff-petitioner for ex-parte trial should not be allowed. A preliminary objection was raised by the defendant-respondent that the plaintiff-petitioner cannot invoke the revisionary powers of the Court of Appeal as he had the right of appeal against the said order of the Learned District Judge. Considering the said objection, it was held that the powers by way of revision conferred on the Appellate Court are very wide and can be exercised, whether an appeal has been taken against an order of the original Court or not. It was also stated that such revisionary powers could be exercised only in exceptional circumstances and the types of such exceptional circumstances would depend on the facts of each case. Considering the facts and circumstances of the case in **Rustom v Hapangama and Co.** (supra), the Court held that there were no such exceptional circumstances disclosed as would cause the Appellate Court to exercise its discretion and grant relief by way of revision. However it is noteworthy to mention that it was also clearly held that, in a situation where there had been something illegal about the Order made by the trial Judge, which had deprived the petitioner of his rights, the Appellate Court could exercise its revisionary jurisdiction.

There had been other instances, where the Court had held that the Appellate Court has the power in revision to set aside an erroneous decision of the District Court. For instance in **Sinnathangam v Meeramohaideen** ((1958) 60 N.L.R. 393) considering the question of revision, T.S. Fernando, J. Stated that,

> "The Court possesses the power to set aside, in revision, an erroneous decision of the District Court in an appropriate case even though an appeal against such decision has been correctly held to have abated on the ground of non-compliance with some of the technical requirements in respect of the notice of security."

As stated earlier, learned President's Counsel for the respondent, contended that the 2nd defendant in the District Court case had died before the Order was made. A similar position was considered in **Marian Beebee v Seyed Mohamed** (supra), where it was clearly stated that if a party to the action was dead, and his estate was not represented at the time the adjudication as to title was made, his estate will not be bound by any decision entered thereafter. Further and more importantly, Sansoni, C.J., in **Marian Beebee v Seyed Mohamed** (supra) had clearly stated the reasons for the exercise of the extraordinary power of revisionary jurisdiction by Appellate Courts. In the words of Sansoni, C.J.,

> "The power of revision is an extraordinary power which is quite independent of and distinct from the appellate jurisdiction of this Court. Its object is the due administration of justice and the correction of errors, sometimes committed by this Court itself, in order to avoid miscarriages of justice,"

This position was further strengthened in **Rasheed Ali v Mohamed Ali** ([1981] 1 Sri L.R. 262), where it was clearly stated that the power of revision vested in the Court of Appeal is very wide and the Court can in a fit case exercise that power irrespective of the fact that whether or not an appeal lies against the decision in question.

It is not disputed that the learned District Judge had made an Order dismissing the claim preferred by the respondent in terms of Section 328 of the Civil Procedure Code and against that Order the respondent had come before the Court of Appeal by way of revision. It is also not disputed that, under Section 329 of the Civil Procedure Code no appeal shall lie from any order made under Sections 326, 327 or 328 of the Civil Procedure code against any party other than the judgment-debtor.

Considering all the aforementioned facts and circumstances, it is apparent that, the decision of the District Court was not only erroneous, but also amounts to be a miscarriage of justice. In such circumstances, notwithstanding the provisions contained in Section 329 of the Civil Procedure Code, the Court of Appeal is empowered to set right an erroneous

decision of the District Court, for the purpose of exercising due administration of justice and for such purpose could exercise its power of revision. Accordingly, the respondent, although he had made an application under Section 328 of the Civil Procedure code, against whom an Order was made by the District Court, was entitled to canvass the correctness of the Order made by the District Judge, by way of an application in Revision in the Court of Appeal.

Both 2nd and 3rd questions of law deal with similar issues, which are as follows:

2. Whether in any event the Court of Appeal could in the exercise of revisionary jurisdiction in relation to an inquiry under Section 328 of the Civil Procedure Code hold that the Decree entered in the case against one of the parties (not being the petitioner) is void?

3. Whether in an inquiry under Section 328 of the Civil Procedure Code the Court could hold that the Decree entered against the defendants is void?

Since both these questions are raising similar issues regarding the judgment of the Court of Appeal and the inherent powers of the Court in relation to an inquiry under Section 328, both questions would be examined together.

As stated in detail under the first question of law, the Decree was entered against the 2nd defendant without serving summons on him and more importantly at a time when the 2nd defendant was dead. What could be the position, other than being regarded as a nullity of a Decree, which was entered against a dead man on whom summons had never been served? Although the learned Counsel for the appellant contended quite strenuously that the Court of Appeal could not have held that the ex-parte Decree entered by the learned District Judge is null and void in the exercise of its revisionary jurisdiction, it is to be borne in mind that the said argument could be entertained only if the Order of the District Judge was a valid decision. As referred to earlier, the basic and the vital question in issue is as to the validity of the Order made by the District Judge, when there was an ex-parte judgment delivered and the Decree entered against the 2nd defendant, on whom the summons were

not served and whom had been dead well before the decision was entered against him. In such a situation there should be only one prime duty cast upon the Court, which hears an application made by an aggrieved party. Such a Court would be duty bound to make Orders for the due administration of justice and therefore to repair the injury and to undo the damage.

It is important to be borne in mind that although the procedure laid down in the Civil Procedure Code is binding on all Courts, the said Code is not exhaustive as to the powers of a Court with regard to matters of procedure. Even at a time when there are no provisions that would be directly applicable to a situation, the Court has the inherent authority to make Order in the interest and due administration of justice. Considering such a situation, in **Victor de Silva et.al v Jinadasa de Silva et.al** ((1964) 68 N.L.R. 45), Manicavasagar, J. said that,

> "Our Code is not exhaustive on all matters; one cannot expect a Code to provide for every situation and contingency; if there be no provision, it is the duty of the Judge and it lies within his inherent power, to make such order as the justice of the case requires."

When the need arises on situations, where no direct section could be found in the Civil Procedure Code, it is the duty of a Judge to base his decision on sound general principles, which are not in conflict with any other principles or with the intention of the Legislature. In **Sirinivasa Thero v Sudassi Thero** ((1960) 63 N.L.R. 31), the Court clearly expressed the view that it is a rule that a Court of Justice, will not permit a suitor to suffer by reason of its own wrongful act, and it is under a duty to use its inherent power to repair the injury done to a party by its act. In that matter a Buddhist priest had sued three other priests for a declaration that he was entitled to the office of Viharadhipathi, incumbent and trustee of a Vihara and *Pansala* and to the management and control of their temporalities. He did not ask for possession of any property. He obtained judgment and Decree as prayed for and upon his application to execute the Decree, a writ of possession was issued in respect of a room in the *Pansala*. It was held, *inter alia*, that inasmuch as the Court acted without

jurisdiction in issuing Writ, the person, who was dispossessed of property in consequence of the execution of the Writ was entitled to be restored to possession. In such a case a Court of Justice has its inherent power to repair the injury done to a party by its act. Considering the inherent power of the Court in a situation, where an obvious injury had occurred, Sansoni, J., (as he then was) in **Sirinivasa Thero** (supra) had stated that,

> "Justice requires that he should be restored to the position he occupied before the invalid order was made, for it is a rule that the Court will not permit a suitor to suffer by reason of its wrongful act. The Court will, so far as possible, put him in the position which he would have occupied if the wrong order had not been made. It is a power which is inherent in the Court itself, and rests on the principle that a Court of Justice is under a duty to repair the injury done to a party by its act . . . .
>
> The duty of the Court under these circumstances can be carried out under inherent powers.
>
> I would, therefore, direct that the plaintiff be restored to possession of the room which he was occupying in the Hippola Pansala prior to the execution of the writ in case No. L. 3167."

The aforementioned principle set out by Sansoni. J., (as he then was) in **Sirinivasa Thero v Sudassi Thero** (supra) was cited with approved by G.P.S. de Silva, J., (as he then was) in **Jane Nona v Jayasuriya** ((1986) C.A.L.R. 315).

In **Jane Nona's case**, the defendant was already dead when the District Judge made an Order allowing plaintiff's application for execution of the Decree pending appeal. In consequence, the deceased defendant's eighty one (81) year old wife (the petitioner in that application) was ejected from the premises in suit. The petitioner sought revisionary

powers of Court to have himself restored to possession of the premises on the basis of unlawful ejectment. Considering the fact that the defendant was already dead when the District Judge made the Order allowing the plaintiff's application, Court of Appeal held that as the Order directing Writ of execution to be issued was made after the defendant had died, it was a nullity and was therefore set aside. Further it was held that in the exercise of the inherent powers of the Court, which is under a duty to repair the injury done to a party by its acts, the petitioner should be restored to possession of the premises in suit.

Again in **Mowjood v Pussadeniya** ([1987] 2 Sri L.R. 287), Sharvananda, CJ., referring to the decision in **Sirinivasa Thero v Sudassi Thero** (supra) held that as the Court had acted without jurisdiction in issuing the Writ, the appellant who was dispossessed of the premises in suit in consequence of the execution of the Writ is entitled to restoration to possession. Later in **Ariyananda v Premachandra** ([2000] 2 Sri L.R. 218), Wigneswaran, J., expressed a similar view regarding the duty of Court to correct the wrong committed by its decision. Considering the decisions in **Sirinivasa Thero v Sudassi Thero** (supra), **Wickramanayake v Simon Appu** ((1972) 76 N.L.R. 166), **Mowjood v Pussadeniya** (supra) and **Sivapathalingam v Sivasubramaniam** ([1996] Sri L.R. 378), it was held that,

> "When a District Court finds that summons/Decree have not been served on the defendant and yet an ex-parte judgment had been illegally made and thereafter writ issued and executed, what must be the character of the legal order that should be made? It was the duty of the Court *ex mere motu* to have restored possession to the defendant even if such a relief had not been asked for."

It was also held that it is the duty of Court to *restore status quo ante* where a fraud had been perpetrated and as abuse of the process of Court had been committed.

Learned Counsel for the appellant contended that a party whose claim under Section 328 of the Civil Procedure Code has been rejected cannot seek relief by way of revision where he has not availed himself of the remedy provided by Section 327 of the Civil Procedure

Code. This position is not disputed at all and even the Court of Appeal had been in agreement with this contention.

However, the issue that has to be considered is whether Court could take into account the applicability of Sections 328 and 329 of the Civil Procedure Code under the circumstances which prevailed in the present case. As referred to earlier, in terms of Section 329, there is no provision for an appeal against the Order made under Section 328 of the Civil Procedure Code other than by the judgment-debtor. However, when the respondent had been dispossessed due to a Decree which had been issued without serving summons to the 2nd defendant who was dead, such a Decree undoubtedly must be regarded as a nullity and should be set aside. In the circumstances it becomes necessary and the Court is under a duty to exercise its inherent powers to repair the injury caused and to meet the ends of justice.

Accordingly the Court of Appeal was correct in its decision when it held that the Decree entered in the case against the 2nd defendant was void.

For the reasons aforesaid, I answer all the questions of law on which special leave to appeal was granted in the affirmative. The judgment of the Court of Appeal dated 12.11.2001 is therefore affirmed. This application is accordingly dismissed. I make no order as to costs.

Judge of the Supreme Court

Saleem Marsoof, J.

I agree.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

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

S.C. (Appeal) No. 32/2009
S.C. (Spl.) L.A. No. 6/2009
C.A. No. 412/2002(F)
D.C. Colombo No. 17736/L

H.D.S. Jayawardena,
334/F, Robert Gunawardena Mawatha,
Malabe.

Defendant-Respondent-Appellant

Vs.

D.G. Subadra Menike,
56/1, Kirikiththa,
Weliweriya.

appearing by her Attorney
M. Piyadasa of Mahawatta,
Batapola.

Plaintiff-Appellant-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
Imam, J.

COUNSEL : Ranjan Suwandaratne with Salini Herath for Defendant-Respondent-Appellant

Ikram Mohamed, PC, with Padma Bandara for Plaintiff-Appellant-Respondent

ARGUED ON: 05.10.2009

WRITTEN SUBMISSIONS
TENDERED ON: Defendant-Respondent-Appellant : 15.12.2009
Plaintiff-Appellant-Respondent : 17.11.2009

DECIDED ON: 04.03.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 27.11.2008. By that judgment the Court of Appeal had set aside part of the judgment of the District Court dated 20.05.2002, which was in favour of the defendant-respondent-appellant (hereinafter referred to as the appellant) and dismissed the appellant's claim. The appellant instituted an application before this Court for special leave to appeal on the basis that he is aggrieved by the judgment of the Court of Appeal which had held that the appellant and the plaintiff-appellant-respondent (hereinafter referred to as the respondent) are co-owners and also the Court of Appeal holding that there were two owners to the subject matter of the District Court action, on which special leave to appeal was granted by this Court.

When this matter was taken up for hearing, both learned Counsel agreed that the appeal could be considered on the following questions:

1. Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

The facts of this appeal, as submitted by the appellant *albeit* brief are as follows:

The land in dispute viz., Lot No. 45 of Plan No. 2464 dated 08.09.1962 made by V.A.L. Senaratne, Licensed Surveyor, was owned by Sumanalatha Kodikara. She had sold the said property to one Asela Siriwardena by Deed No. 1200 dated 25.02.1980 attested by Kodikara and Abeynayake, Notaries Public. The said Asela Siriwardena had transferred the property to the appellant by Deed No. 2708 dated 31.10.1995 attested by W.H. Perera, Notary Public, which had been duly registered. Prior to the said transaction in 1995, Asela Siriwardena had transferred the property in question back to the respondent by Deed No. 9271 dated 25.08.1982 attested by Kodikara and Abeynayake, Notaries Public.

The appellant had submitted that his Deed No. 2708 dated 31.10.1995 was duly registered in the Land Registry and that Deed had obtained priority over the respondent's Deeds. Accordingly the appellant sought a declaration that his Deed No. 2708 obtains priority over the respondent's Deeds Nos. 9271 and 13496 and that the respondent's Deeds are void in law as against the appellant's Deed No. 2708.

After trial the District Court on 20.05.2002 had entered judgment in favour of the appellant as prayed in the answer holding that the appellant's title Deed had obtained priority over the respondent's Deed. The respondent had come before the Court of Appeal against that order, where the Court of Appeal by its judgment dated 27.11.2008 had held

that the appellant is not entitled to the reliefs claimed by way of a claim in Reconvention in the Answer as he was only a co-owner, who was only entitled to a half share of the subject matter and had set aside that part of the judgment in favour of the appellant. The appellant had filed an application before the Supreme Court against the said order of the Court of Appeal dated 27.11.2008.

Having stated the facts of this appeal, let me now turn to examine the two questions of law on which this appeal was argued.

1. **Whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question?**

The contention of the learned Counsel for the appellant was that Sumanalatha Kodikara was the sole owner of the property in question. In support of his contention, learned Counsel for the appellant submitted that the respondent in the Pedigree set out in the Plaint, had merely stated that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were the legal owners of the property described in the schedule to the Plaint. It was also stated that they had transferred the said property by Deed No. 4830 dated 07.07.1967 to one Robert Lamahewa. The respondent had alleged that the said Robert Lamahewa had conveyed the said property by Deed No. 13496 dated 05.07.1970 to her and thereby she had become the owner of the said property. The respondent in her Plaint had alleged that Sumanalatha Kodikara had conveyed the said property by Deed No. 1200 dated 25.02.1980 to one Asela Siriwardene.

It was also submitted that the respondent had alleged in her Plaint that Sumanalatha Kodikara had acted fraudulently, but stated in the Plaint that

the respondent had got a transfer of the property in question by Deed No. 9271 dated 25.08.1982 attested by K. Abeynayake, Notary Public, in her favour.

Accordingly the contention of the learned Counsel for the appellant was that, the respondent by purchasing rights from Sumanalatha Kodikara in August 1982 by Deed No. 9271 dated 25.08.1982 had conceded that Asela Siriwardena had obtained rights by virtue of Deed No. 1200 dated 25.02.1980 and therefore the respondent is estopped from disputing the flow of title from Sumanalatha Kodikara to Asela Siriwardena. Learned Counsel for the appellant therefore contended that in terms of the aforementioned devolution, Sumanalatha Kodikara has acted as the sole owner of the property in question. It was further contended that by obtaining the transfer of the property by Deed No. 9271 dated 25.08.1982, the respondent had conceded that Sumanalatha Kodikara was the sole owner of the property concerned.

Learned President's Counsel for the respondent contended that as submitted at the outset on the basis of the facts of this appeal, the subject matter in question had originally belonged to both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. Later by Deed No. 4830 dated 07.07.1967 (P_1) both of them had transferred the said property to one Robert Lamahewa. The said Robert Lamahewa, by Deed No. 13496 dated 05.07.1970 (P_2) had transferred this property to the respondent by which the respondent had become the sole owner of the land. Thereafter the said Sumanalatha Kodikara had executed another Deed of Transfer bearing No. 1200 dated 25.02.1980 (P_3) in favour of one Asela Siriwardena in respect of the same property and later the said Asela Siriwardena had by Deed No. 9271 dated 25.08.1982 (P_4) had transferred the same property in favour of the respondent. Accordingly, the

respondent claimed that she had thus obtained title to the said land by the aforementioned Deed as well as by prescription.

It is in the above background, that it would have to be ascertained as to whether Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

The contention of the learned Counsel for the appellant was that although the learned President's Counsel for the respondent contended that by Deed No. 4830 dated 07.07.1967, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa, that there was no reference in the said Deed of such a transaction.

A perusal of the Deed No. 4830 dated 07.07.1967, clearly indicates that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had sold the land in question to Robert Lamahewa. It is interesting to note that, the appellant in his evidence in chief had stated that Sumanalatha Kodikara had got title by Deed No. 3312 dated 23.09.1962. He had further stated that the said land was divided and the land in question is Lot No. 45. According to the said Deed No. 3312, both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had become co-owners of the entirety of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta,* situated at Thalangama, depicted in Plan No. 2464 dated 08.09.1962, prepared by V.A.L. Senaratne, Licensed Surveyor (P_5) in extent A10-R2-P16.5 and the land in question is Lot No. 45 shown in the said Plan No. 2464, which is 20 perches in extent as could be seen from the first schedule in Deed No. 4830 (P_1). This land is described in the schedule of Deed No. 3312 dated 23.09.1962, in the following terms:

"WHICH SAID allotments of land adjoin each other and now forming one property and according to a recent figure of survey, is described as follows: All that defined allotment of land depicted in Plan No. 2464 dated 8th September 1962 made by V.A.L. Senaratne, Licensed Surveyor of the land called *Delgahawatta, Delgahalanda* and *Delgahalandawatta* situated at Talangama aforesaid and bounded on the North by land of P.D. Abraham East by Road and land of Albert and others South by Path and land of P.D. Abraham and on the West by paddy field and containing in extent ten acres two roods and sixteen decimal five perches (A10.R2.P16.5) according to the said Plan No. 2464."

As stated earlier, the appellant in his evidence in chief had accepted the position that the land in question is Lot 45 in Plan No. 2464, which was a part of the larger land purchased and the co-owners of Lot No. 45 had been both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara.

"**හේවදේව ධර්මසිරි ජයවර්ධන**

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උ මම දන්නේ නැහැ.

ප්‍ර මෙහි තිබුනා කියුවොත් පිළි ගන්නවාද?

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ප්‍ර තමා විසින් ඉදිරිපත් කරන ලද ලේඛනයේ ඉහතින්ම ඇති සටහනේ 3312 දරන ඔප්පුවට අදාලව ලියා පදිංචි කර තිබෙන්නේ එහි සඳහන් දේපල සුමනලතාට සහ මැල්කම් යන දෙදෙනාට ලැබී තිබෙනවා කියුවොත් පිළි ගන්නවා?

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ප්‍ර මේ නඩුවට අදාල දේපල තමා ඉදිරිපත් කරන ලද ඔප්පු අනුවද කුවිතාන්සි අනුවද සුමනලතා සහ මැල්කම්ට අයිති වී තිබෙනවා?

ළ ඔව්

ප්‍ර තමාට ඉහලින් තිබෙන පූර්වගාමී අයිති කාරයන් දෙදෙනාගෙන් එක්කෙනෙකුගෙන් අරන් තිබෙන්නේ

ළ ඔව්

ප්‍ර ඒ ලොට් 45 කියන සම්පූර්ණ දේපල අරගෙන තියෙනවා

ළ ඔව්

. . . .

ප්‍ර තමා දන්නවාද 3312 ඔප්පුව මගින් සුමනලතා සහ මැල්කම් යන දෙදෙනා අක්කර 10 රූඩ් 2 ක් පමණ විශාල ඉඩමක් මිළදී ගෙන තිබුනා කියා?

ළ ඔව්"

It is to be noted that it is common ground that the land in question is depicted as lot No. 45 in Plan No. 2464 dated 08.09.1962 prepared by V.A.L. Senaratne, Licensed Surveyor. It is also to be noted that, the appellant had produced a Deed of Transfer (V_3) bearing No. 3312 dated 23.09.1962. The contents of the said Deed No. 3312, clearly demonstrate the fact that Sumanalatha Kodikara and Malcolm Jayatissa Kodikara both of Dewala Road, Nugegoda had derived their title from Kahawita Appuhamilage Dona Grace Perera, Totagodagamage Kusumawathie, Swarna Perera and Totagodagamage Charles Perera all of Lily Avenue, Wellawatta as co-owners of the entirety of land called *Delgahawatta, Delgalanda* and *Delgalandawatta* situated at Talangama and depicted in Plan No. 2464 dated 08.09.1962 made by V.A.L. Senaratne, Licensed Surveyor, in extent A10-R2-P16.5.

Thereafter both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara had transferred the aforementioned property to Robert Lamahewa by Deed No. 4830 dated 07.02.1967.

Considering all the aforementioned it is abundantly clear that the subject matter had originally belonged to both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara and they have been the original co-owners of the property in question.

2. Whether the concept of prior registration would apply in respect of an undivided share in terms of Section 7 of Registration of Documents Ordinance?

Learned Counsel for the appellant contended that Section 7 of the Registration of Documents Ordinance gives priority to an instrument which is registered and such an instrument would get priority over any other

instrument which is not registered, although the previous document is prior considering the time it was purchased. Accordingly the contention of the learned Counsel for the appellant was that whether the Vendor gets absolute right to an immovable property or undivided interest to an immovable property is apparently irrelevant in considering the absolutely clear provisions contained in Section 7 of the Registration of Documents Ordinance.

Learned President's Counsel for the respondent on the other hand referred to the Full Bench decision in **Silva v Gunawardena** ((1915) 18 N.L.R. 241) and stated that a previous instrument to be void as against the subsequent instrument on the basis of due registration of the subsequent instrument, the said subsequent instrument must necessarily be adverse to the previous instrument and not against a part of the said previous instrument. The contention of the learned President's Counsel for the respondent was that, the concept of prior registration in terms of Section 7 of the Registration of Documents Ordinance would not be applicable to an undivided share such as the land in question.

The Registration of Documents first came into being in the maritime provinces of the country in 1801, by a proclamation of 01.03.1801, which imposed on the Presidents of Civil and Land Raads the obligation to maintain a Register of Lands within their respective districts. The proclamation had declared that,

> "All title deeds, transfers, mortgage bonds and assignments so made out and enrolled by the aforesaid registers were to have **preference and precedence** over the like kind drawn up and executed before a notary or other person,

> excepting those passed by or before the Courts of Justice and Land Raads, Weeskamers or elsewhere, according to the formalities required by the Dutch Government."

After several Regulations, the first Registration Ordinance came into operation in Ceylon in 1863, which was enacted by Ordinance No. 8 of 1863 and later amended by Ordinance No. 3 of 1865 and replaced by Ordinance No 14 of 1891. Thereafter in 1927 the Ordinance No. 23 of 1927 was introduced for the registration of documents. This was for the purpose of amending and consolidating the law relating to registration of documents and the said Ordinance No. 23 of 1927 had been amended on several occasions.

Chapter III of the said Ordinance on Registration of Documents refers to the registration of Instruments affecting land and Section 7 deals with registered and unregistered instruments. Section 7(1) of the said Ordinance reads as follows:

> "7(1) An instrument executed or made on or after the 1st day of January, 1864, whether before or after the commencement of this Ordinance shall, unless it is duly registered under this chapter, or, if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in section 26 of that Ordinance, be void as against all parties claiming an adverse interest thereto on valuable consideration by virtue of any subsequent instrument which is duly

> registered under this chapter or if the land has come within the operation of the Land Registration Ordinance, 1877, in the books mentioned in Section 26 of that Ordinance."

It is to be borne out in mind that Section 7(1) of the Registration of Documents Ordinance deals with a situation where the instrument becomes void if there is no due registration and this is not applicable to one's rights or title acquired under such an instrument. Thus the key provision contained in this Ordinance clearly had pronounced that unregistered instruments are void against subsequent registered instruments and such an instrument means an instrument affecting land. It is also to be noted that, such an instrument would become void against all parties 'claiming an adverse interest thereto on valuable consideration'.

It is therefore important that when a question arises in terms of Section 7(1) as to the registration or non registration of an instrument, it is necessary to consider whether the instruments in question are adverse to each other. Furthermore, it is also necessary to refer to the provisions contained in Section 7(4) of the Registration of Documents Ordinance, which clearly states that registration of an instrument under the chapter on Registration of Documents shall not cure any defect in the instrument or confer upon it any effect or validity, which it would not otherwise have, except the priority conferred on it. This position has been carefully considered in a series of cases, which has clearly settled the applicable law in this country.

In **Massilamany v Santiago** ((1911) 14 N.L.R. 292) Van Langenberg, A.J., considering the effect of the registration of a document had stated thus:

> "The only effect of registration was to give priority to the subsequent deed. The earlier deed is not affected in any way, save that it has to take second place."

In **Lairis Appu v Tennakoon Kumarihamy** ((1958) 61 N.L.R. 97) Sinnetamby, J., was of the view that,

> "Our Registration Ordinance provides for the registration of documents and not for the registration of titles. If it had been the latter, then, from whatever source the title was derived, registration by itself would give title to the transferee. When, however, provision is made only for the registration of documents of title, the object in its simplest form, is to safeguard a purchaser from a fraud that may be committed on him by the concealment or suppression of an earlier deed by his vendor. **The effect of registration is to give the transferee whatever title the vendor had prior to the execution of the earlier unregistered deeds**" (emphasis added).

The implications of Section 7 of the Ordinance dealing with the registration of documents as to priority of registered instruments was clearly described by Clarence, J. in **Silva v Sarah Hamy** ((1883) Wendt's Reports 383), where he had stated that,

> "When an owner of land conveys it to A for value, and subsequently executes another conveyance of the same land in favour of B also for value, it is true that at the date of the second conveyance the owner has nothing left in him to convey, but, by the operation of the Ordinance, B's conveyance overrides A's, if registered before it. **Unless the Ordinance has this effect, it has none at all, and this seems the actual construction of the enactment**" (emphasis added).

Learned President's Counsel for the respondent strenuously contended that, a previous instrument to be void as against the subsequent instrument, on the basis of due registration of the subsequent instrument, the subsequent instrument must necessarily be adverse to the previous instrument and not against a part thereof. It was also contended that an undivided share cannot in our law gain priority by virtue of prior registration. The contention was that the concept of priority as contained in Section 7(1) of the Registration of Documents Ordinance, does not apply to an undivided share and therefore the subsequent transfer, even though duly registered, does not gain priority and will not confer any title since the owner has in fact transferred his title by the earlier instrument, although it was not duly registered.

As clearly stated earlier, the effect of an unregistered instrument becomes material only if there is a conflict with a subsequent registered instrument. However, if there is such a registered instrument, the unregistered Deed becomes deprived of any legal force. The criteria of such a situation was

clearly described by Lascelles, C.J., in **James v Carolis** ((1914) 17 N.L.R. 76), where he had stated that,

> "If an intending purchaser finds on the register no adverse deed affecting the property, he is placed in the same position, as regards his title to the land, as if no such deed in fact existed. On the other hand, the grantee under the prior unregistered deed is penalized for his failure to put his deed on the register. He is taken to have given out to the world at large that his deed did not exist, and is prohibited from setting it up against the registered deed of the subsequent purchaser for valuable consideration."

It is therefore apparent that in a situation, where there is a conflict between a registered and an unregistered Deed, the registered Deed has to be given priority. This appears to be a penalty a party has to pay for the non-registration of an instrument, as he has been negligent in protecting his own rights. When considering the provisions contained in Section 7(1) of the Ordinance, it also appears that the intention of the Legislature was to protect the 'innocent' second purchaser of the land in question. This aspect was referred to in **Samaranayake v Cornelis** ((1943) 44 N.L.R. 508), where it was stated that,

> "The ordinance does not expressly penalize the purchaser who did not register, nor was that its object probably, for it arrived at protecting

the innocent second purchaser, but the result
is that the first purchaser pays the penalty."

On a consideration of the facts of this appeal, it appears that both Sumanalatha Kodikara and Malcolm Jayatissa Kodikara have been the co-owners of the land in question. Both of them had transferred the said land by Deed No. 4830 dated 07.07.1967 (P_1) to Robert Lamahewa, who in turn had transferred the same to the respondent by Deed No. 13496 dated 05.07.1970 (P_2). Thereafter Sumanalatha Kodikara had transferred the same land by Deed No. 1200 dated 25.02.1980 (P_3) to one Asela Siriwardena from whom the respondent had purchased her rights by Deed No. 9271 dated 25.08.1982. Asela Siriwardena had also sold his rights by Deed No. 2708 dated 31.10.1995 (V_7) to the appellant, which Deed was admittedly duly registered.

In such circumstances, what would be the position regarding the competing Deeds of the appellant (V_7) and the respondent (P_2)?

As referred to earlier the original owners of the land known as *Delgahawatta, Delgahalanda* and *Delgahalandawatta* had co-owned lot 45 viz., the land in question. The general rule regarding co-ownership is that, a co-owner has no right to alienate more than his undivided share of the common property (**Vaz v Haniffa** ((1948) 49 N.L.R. 286, Voet 18.1.14). When Sumanalatha Kodikara and Malcolm Jayatissa Kodikara transferred the property in question to Robert Lamahewa, both of them had transferred the entire extent of the said lot 45 to him and therefore when Robert Lamahewa in turn transferred the said property to the respondent, she became the owner of the said lot 45. However, thereafter, Sumanalatha Kodikara had transferred the same land to Asela Siriwardena by Deed No. 1200 dated 25.02.1980 (P_3). It is obvious that

the said transfer was only limited to the half share of Sumanalatha Kodikara and not the entire extent of the land in question.

It is quite clear that in terms of Section 7(1) of the Registration of Documents Ordinance, an instrument becomes void if it is not duly registered, provided that there is an adverse claim against the said instrument by virtue of a subsequent instrument, which is duly registered.

It is also important to note that there is no provision made under the Registration of Documents Ordinance, stating that instruments dealing with co-owned immovable property come under the category of instruments of which registration is optional or not necessary.

In this appeal the adverse claims are between the appellant and the respondent. Whilst the respondent claims that she derived her rights form Robert Lamahewa to whom the land in question had been sold by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara, the appellant's claim is that he got his rights from Asela Siriwardena to whom the land was sold by Sumanalatha Kodikara. If it was only by Sumanalatha Kodikara, it could only be a half share, as the property in question was owned both by Sumanalatha Kodikara and Malcolm Jayatissa Kodikara. In those circumstances, considering the fact that the appellant had registered his Deed, when the respondent had not taken steps for such registration in terms of Section 7(1) of the Registration of Documents Ordinance, the Deed which was registered would prevail over an unregistered Deed. Accordingly the appellant's deed should prevail over the respondent's Deed.

However, since it was only a half share that was transferred to the appellant, he would only be entitled to a half share of the land in question.

Accordingly, the two questions on which this appeal was heard are answered as follows:

1. Sumanalatha Kodikara and Malcolm Jayatissa Kodikara were original co-owners of the property in question.

2. The concept of prior registration would apply in respect of an undivided share in terms of Section 7 of the Registration of Documents Ordinance.

For the reasons aforesaid the judgment of the Court of Appeal dated 27.11.2008 is affirmed and this appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi,

I agree.

Judge of the Supreme Court

Imam, J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 44/2006
S.C. (Spl.) L.A. No. 252/2005
C.A. Appeal No. 455/99(F)
D.C. Negombo No. 3576/L

Bastian Koralage Denzil Anthony Chrishantha Rodrigo Weerasinghe Gunawardena,
"Villa Victoria",
Uswetakeiyawa,
Kandana.

Defendant-Appellant-Appellant

Vs.

1a. A. Ralph Senake Deraniyagala,
No. 15, Rajakeeya Mawatha,
Colombo 07.

2a. Hilda Niloo Edward de Saram,
No. 6/3, Wijerama Mawatha,
Colombo 07.

3. Shiran Upendra Deraniyagala,
No. 4, 36th Lane,
Borella,
Colombo 08.

Plaintiffs-Respondents-Respondents

4. Hasley Limited,
No. 37, Moor Road,
Wellawatte,
Colombo 05.

5. N.K.Thambipillai,
No. 37, Moor Road,
Wellawatte,
Colombo 05.

Added Defendants-Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
P.A. Ratnayake, J.

COUNSEL Gamini Marapana, PC, with Keerthi Sri Gunawardena and Navin Marapana for Defendant-Appellant-Appellant

D.S. Wijesinghe, PC, with Kaushalya Molligoda for Plaintiffs-Respondents-Respondents

ARGUED ON: 23.03.2009

WRITTEN SUBMISSIONS
TENDERED ON: Defendant-Appellant-Appellant : 11.05.2009
Plaintiffs-Respondents-Respondents: 11.05.2009

DECIDED ON: 03.06.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 13.10.2005. By that judgment the Court of Appeal had affirmed the judgment of the District Court of Negombo dated 30.03.1999, which had decided in favour of the plaintiffs-respondents-respondents (hereinafter referred to as the respondents) and had dismissed the appeal instituted by defendant-appellant-appellant (hereinafter referred to as the appellant).

The appellant preferred an application for Special Leave to Appeal, which was granted by this Court.

When this matter was taken up for hearing, learned President's Counsel for the appellant submitted that the main issue in this appeal was founded on the question as to whether on the basis of the documentary evidence placed before the District Court by the respondents, it is clear that the land, which was the subject matter of the action, had vested in the Land Reform Commission and whether the Land Reform Commission could have by their letter dated 19.01.1982 (P_{18}) divested itself of its title in favour of the respondents, by stating that the said land had been excluded from the category of 'agricultural land'. Accordingly, learned President's Counsel for the appellant contended that the main point of law on which the Supreme Court had granted special leave to appeal was on the following:

> "Whether the Land Reform Commission could divest itself of title to property vested in it, in the manner it had purported to do by the letter P_{18}."

Learned President's Counsel for the appellant also contended that this question was raised in the same form in the Court of Appeal, but the Court of Appeal had held that it was a new matter that had been raised for the first time in appeal and such mixed question of fact and law cannot be raised for the first time in appeal.

Learned President's Counsel for the respondents strenuously contended that the said question was a new point raised for the first time in the Court of Appeal, which was not a pure question of law.

The facts of this appeal as submitted by the appellant, *albeit* brief, are as follows:

The respondents had instituted action in October 1987, in the District Court of Negombo, claiming *inter alia* a Declaration of title to the land morefully described in Schedule 2 to the

Plaint. The respondents' position was that at one point of time, Justin Ferdinand Peiris Deraniyagala owned the said land and that upon his death in 1967, his Estate was vested in his brother and sister, namely the 1st and 2nd respondents and one P.E.P. Deraniyagala. The respondents had also stated that the interests of the said P.E.P. Deraniyagala had devolved on the 3rd respondent. They had produced the Inventory filed in Justin Deraniyagala's Testamentary case bearing D.C. Gampaha No. 948/T at the trial marked P_4. The said Inventory had revealed that the said Justin Deraniyagala had possessed agricultural land well in excess of 500 Acres (P_4). The respondents' position had been that they had made a request to the Land Reform Commission to have this land released to them as it was not agricultural land. In June 1978 the respondents by their letter dated 22.06.1978 (P_{28}) had requested the Land Reform Commission to exempt the land in question from the operation of Land Reform Law on the basis that it was a marshy land. The Land Reform Commission had, by its letter dated 15.10.1979 (P_{29}) refused the request of the respondents. The respondents, by their letter dated November 1979 (P_{24}) appealed against the said decision and the Land Reform Commission had decided to exclude the land from the definition of 'agricultural land'.

The District Court had held in favour of the respondents and the Court of Appeal had affirmed the said order of the learned District Judge.

Learned President's Counsel for the respondents contended that the respondents, being the plaintiffs in the District Court of Negombo case, had instituted action against the appellant seeking inter alia a declaration of title to the land described in Schedule II to the Plaint and for ejectment of the defendant, who is the appellant in this appeal from the said land. The respondents had traced their title to the land described in Schedule II to the Plaint, known as Muthurajawela, from 1938 onwards through a series of deeds. The respondents had also made a claim for title based on prescriptive possession. The appellant had filed answer and had taken up *inter alia* the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The appellant had taken up the position that his father had obtained a lease of the land in question from Justine Deraniyagala, who was the respondents' predecessor in title, which lease expired on 01.07.1967. The appellant had

further claimed that his father and the appellant had overstayed after the expiry of the lease adversely to the title of the respondents and he had further stated that he had rented out part of the land to the added respondents.

Learned President's Counsel for the respondents referred to the issues framed both by the appellant and the respondents before the District Court and stated that on a consideration of the totality of the evidence of the case and having rejected the evidence of the appellant as 'untruthful evidence'; the learned District Judge had proceeded to answer all the issues framed at the trial in favour of the respondents.

It was the contention of the learned President's Counsel for the respondents that although the appellant had preferred an appeal to the Court of Appeal, the appellant had not urged any of the grounds stated in the Petition of Appeal, but instead informed Court that he will confine his submissions to the question with regard to the maintainability of the action on the ground that title to the land in suit remains vested in the Land Reform Commission and that the respondents are not entitled to succeed in that action.

The contention of the learned President's Counsel for the respondents was that, the submission of the learned President's Counsel for the appellant on the basis of the question, which was referred to at the outset, was not taken up in the District Court as there was no issues to that effect nor was it referred to in the Petition of Appeal to the Court of Appeal. Therefore the learned Counsel for the respondents had objected to that matter being taken up in the Court of Appeal, as it was not a pure question of law, which could have been raised for the first time in appeal.

Learned President's Counsel for the appellant strenuously contended that the main point on which the Supreme Court had granted special leave to appeal was based on as to whether the Land Reform Commission could divest itself of title to property vested in it in the manner it had purported to by the letter marked as P_8 and the said matter was taken up in the same form in the Court of Appeal. Learned President's Counsel for the appellant contended that

although the Court of Appeal had held that the said question was a new matter, which was raised for the first time in appeal and that mixed questions of fact and law cannot be so raised for the first time in appeal, that not only the appellant, but also the respondents had taken up the issue in question in the District Court.

Accordingly it is evident that the main issue in question is to consider whether the question of vesting of the land with the Land Reform Commission was urged before the District Court, and it would be necessary to consider the said question in the light of the decision of the Court of Appeal.

Learned President's Counsel for the appellant referred to the documents marked as P_{18}, P_{24}, P_{28}, P_{29} and P_{36} and stated that the main issue in this appeal, which is raised on the basis as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of letter P_{18} was taken up before the District Court, although learned District Judge had misunderstood the question.

The trial had commenced in June 1989 and in the absence of any admissions, issues 1-6 were raised on behalf of the respondents and issues 7-9 were raised on behalf of the appellant. The said issues were as follows:

1. Does the ownership of the land described in Schedule II to the amended Plaint vest with the plaintiffs [respondents in this appeal] as stated in the amended Plaint?

2. Has the defendant [appellant in this appeal] claimed title to the said land by making a false and illegal declaration by deed No. 897 as stated in paragraph 9 of the amended Plaint?

3. Has the defendant [appellant in this appeal] interrupted the possession of the plaintiffs [respondents in this appeal] on or about November 1985, as stated in paragraph 10 of the Plaint?

4. Has the defendant [appellant in this appeal] caused damage/losses to the said land as stated in paragraph 4 of the Plaint?

5. If the issues 1, 2 and/or 3 and/or 4 above are answered in favour of the plaintiffs [respondents in this appeal] are the plaintiffs [respondents in this appeal] entitled to the relief claimed in the prayer to the Plaint?

6. If so, what are the damages that the plaintiffs [respondents in this appeal] are entitled to?

7. Has the defendant [appellant in this appeal] acquired a prescriptive title to the land described in Schedule II to the amended Plaint?

8. If issue No. 7 is answered in the affirmative, should the action of the plaintiffs [respondents in this appeal] be rejected?

9. If the issues of the plaintiffs [respondents in this appeal] are decided in favour of the plaintiffs [respondents in this appeal] is he [the defendant] [appellant in this appeal] entitled to the sum claimed by him in respect of improvements – what is that amount?

As stated earlier, learned District Judge had answered all these issues in favour of the respondents.

A careful examination of the issues clearly reveals that the issue as to whether the land in question, being vested in the Land Reform Commission, had not been raised before the District Court. It is also to be noted that when the matter was before the District Court, the appellant had failed to plead that the property in question was vested in the Land Reform Commission. Instead, the appellant had denied the title of the respondents and had pleaded title upon prescriptive possession.

This position could be clearly seen, when one examines the proceedings before the District Court.

The appellant took up the position in the District Court that although the respondents had declared both agricultural and non-agricultural land to the Land Reform Commission, they had not made a declaration regarding the land in question as the said land did not belong to them. The respondents at that time had taken the position that, they had not taken steps to declare the land in question to Land Reform Commission, as it was not agricultural land within the meaning of Land Reform Law. Considering the title of the respondents, learned District Judge had clearly stated that,

> "Another attack on title of the plaintiffs was launched on the basis that the 1st plaintiff had not declared this land as another land belonging to them under the Land Reform Law of 1972. To substantiate this, the defendant produced D_1 of 1st November 1972 and D_2 of same date and D_8 to D_{11} of 19th September 1973. These documents show that the plaintiffs have not declared this land as part and parcel of their property under the Land Reform Law.
>
> But the 1st plaintiff by letters addressed to the Chairman of the Land Reform Commission in November 1976 (P_{24}) and letter of 22nd June 1978 (P_{28}) informed the Commission.
>
> P_{28} discloses all the circumstances why this land has not been declared and why it should be regarded as a non-agricultural land. They also submitted the plan and report made by A.F. Sameer dated 03.11.1977, 03.04.1979, respectively.

> In response to these the Commission has taken various steps as evidenced by their documents P_{36} dated November 1981, P_{37} dated 6th November 1981
> and P_{39} dated 17th August 1981, respectively.
>
> By P_{29} dated 15.10.1979 the Commission originally rejected the plea of the plaintiffs.
>
> Thereafter the Commission has decided that this land is a non-agricultural land by their documents P_{18} dated 19.11.1982 and P_{38} dated 27th November 1981."

After considering all the aforementioned documents for the purpose of ascertaining as to the ownership of the land in question, learned District Judge clearly had stated that,

> "It is abundantly clear from these documents listed above that the plaintiffs and their predecessors-in-title were the owners of this land for a long period of time."

Except for the aforementioned paragraphs, the District Court had not considered as to whether the land in question was vested in the Land Reform Commission by operation of the provisions of the Land Reform Law. Learned President's Counsel for the respondents, correctly submitted that, for the Court to determine whether any land had been vested in the Land Reform Commission by operation of the provisions of the Land Reform Law, the Court has to decide two preliminary issues in terms of section 3(2) of the Land Reform Law, No. 1 of 1972, viz.,

1. whether the land was agricultural land under the provisions of Land Reform Law of 1972;

2. if so, whether the land in question had vested in the Land Reform Commission by operation of law.

It is to be borne in mind that the respondents had instituted action in the District Court against the appellant and had prayed for a declaration of title and for ejectment of the appellant and in his answer dated 02.09.1986 the appellant took up the position that he had prescriptive title to the land and that he had the right to execute his deed of declaration. The documents referred to by learned President's Counsel for the appellant (P_{18}, P_{24}, P_{28}, P_{29} and P_{36}) all were documents filed by the respondents in the District Court. Out of them the appellant had made specific reference to P_{18} to show the decision taken by Land Reform Commission.

All the aforementioned letters referred to by the appellant, deal with correspondence regarding the exemption of the land in question from the operation of the Land Reform Law on the basis that the said land being a non-agricultural land.

The document marked P_{18} is dated 19.01.1982, which was addressed to the 1st respondent and reads as follows:

ඉඩම් ප්‍රතිසංස්කරණ පනත

ඉහත සඳහන් පනතේ 18 වන වගන්තිය යටතේ ඔබ විසින් ඉදිරිපත් කරන ලද ප්‍රකාශණය හා බැඳේ.

ඔබගේ ප්‍රකාශණයේ විස්තර කර ඇති ඉඩම් අතුරෙන් පහත උප ලේඛණයේ දී ඇති ඉඩම/ඉඩම් කෘෂිකාර්මික ඉඩම් ඝනයෙන් බැහැර කර ඇති බව කොමිෂන් සභාවේ අණ පරිදි දක්වනු කැමැත්තෙමි.

උප ලේඛණය

ඉඩමේ නම	පිහිටීම	ප්‍රමාණය
මුතුරාජවෙල එග එෆ්ග සමීර් ගේ පිඹුරු අංක 1886 හි	මීගමුව	අග 16 රුග 02 පර්ග 23

ලොට් ඩී$_1$ සහ ඩී (කොටසක්)		

මෙයට,

විශ්වාසී,

ප්‍රග අධ්‍යක්ෂ,

සභාපති වෙනුවට,

ඉඩම් ප්‍රතිසංස්කරණ කොමිෂන් සභාව."

It is to be noted that this letter was sent to the original 1st respondent. It refers to a declaration made by the 1st respondent, but the Administrative Assistant of the Land Reform Commission, who gave evidence on the declarations made by the 1st respondent had stated in the cross-examination that the 1st respondent had not made a declaration in respect of the land in question either as an agricultural land or as a non-agricultural land. Accordingly, it is evident that the document marked P_{18} is contradictory to the direct evidence given by the officer of the Land Reform Commission. It is also to be borne in mind that there had been no evidence that the land in question was agricultural land in terms of the provisions of the Land Reform Law, No. 1 of 1972. The obvious reason for the said lack of evidence as to the status of the land was due to the fact that there was no issue raised by the parties as part of the case in the District Court.

A careful perusal of the proceedings before the District Court and the judgment of the District Court of Negombo, clearly reveal that the question as to whether the land in issue was agricultural or not in 1972 was not raised as an issue before the District Court and therefore the said issue had not been considered by the District Court.

In such circumstances it is clearly evident that the question whether the land in issue was vested in the Land Reform Commission and/or whether the land in question was agricultural or not in 1972, was taken up for the first time by the appellant in the Court of Appeal.

In **Talagala v Gangodawila Co-operative Stores Society Ltd.** ((1947) 48 N.L.R. 472), the question of considering a new ground for the first time in appeal was considered and Dias J., had clearly stated that as a general rule it is not open to a party to put forward for the first time in appeal a new ground unless it might have been put forward in the trial Court under one of the issues framed and the Court of Appeal has before it all the requisite material for deciding the question.

The same question as to whether a new point could be raised in appeal was again considered by Howard C.J., and Dias. J. in **Setha v Weerakoon** ((1948) 49 N.L.R. 225), where it was held that,

> "a new point which was not raised in the issues or in the course of the trial cannot be raised for the first time in appeal, unless such point might have been raised at the trial under one of the issues framed, and the Court of Appeal has before it all the requisite material for deciding the point, or the question is one of law and nothing more."

There are similarities in the facts in **Setha v Weerakoon** (supra) and the present appeal. In **Setha** (supra) learned Counsel for the appellant had sought to raise a new point, which was neither covered by the issues framed at the trial, nor raised or argued at the trial. Learned Counsel for the respondent had objected either to this new contention being raised or argued at that stage.

Examining the question at issue, Dias, J., referred to a decision of the House of Lords and a series of decisions of the Supreme Court.

In **Tasmania** ((1890) 15 A.C. 223) considering the question of raising a new point in appeal, Lord Herschell had stated that,

> "It appears to me that under these circumstances, a Court of Appeal ought only to decide in favour of an appellant on a ground there put forward for the first time, if it is satisfied beyond doubt, first, that it has before it all the facts bearing upon the new contention, as completely as would have been the case if the controversy had arisen at the trial; and, next, that no satisfactory explanation could have been offered by those whose conduct is impugned, if an opportunity for explanation had been afforded them when in the witness box."

The decision in **The Tasmania** (supra) was followed in **Appuhamy v Nona** ((1912) 15 N.L.R. 311), in deciding whether it could be allowed to raise a point in appeal for the first time. Examining the said question, Pereira, J., clearly held that,

> "Under our procedure all the contentious matter between the parties to a civil suit is, so as to say, focused in the issues of law and fact framed. Whatever is not involved in the issues is to be taken as admitted by one party or the other and I do not think that under our procedure it is open to a party to put forward a ground for the first time in appeal unless it might have been put forward in the Court below under someone or other of the issues framed and when such a ground that is to say, a ground that might have been put forward in the Court below, is put forward in appeal for the first time, the cautions indicated in the **Tasmania** may well be observed."

The question of raising a matter for the first time in appeal came up for consideration again in **Manian v Sanmugam** ((1920) 22 N.L.R. 249). In that case, for the first time in appeal, learned Counsel for the appellant, in scrutinizing the record had found that the evidence was formally

insufficient to justify the finding of the lower Court on that particular item. In that matter, at the hearing, the plaintiff swore that he gave defendant some jewellery. Defendant's Counsel stated that he could not cross-examine on this point, but that he would call the defendant to deny it and leave it to the Court to decide on the credibility of the parties. The defendant, however, was not called as a witness. The Judge decided for the plaintiff on that matter. On appeal Counsel urged that the evidence was formally insufficient to justify the finding, as the plaintiff did not say in express terms that he supplied the jewellery.

Considering the matter in question, Bertrem, C.J., had held that as the point was not taken in the lower Court, that point could not be taken in appeal. It was further held that,

> "The point is, in effect, a point of law . . . . The case seems to me to come within the principles enunciated in the case of **The Tasmania** ((1890) 15 A.C. 223)."

The same question as to a point raised for the first time in appeal came up for consideration in **Arulampikai v Thambu** ((1944) 45 N.L.R. 457), where Soertsz, J., had held that the Supreme Court may decide a case upon a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material upon which the question could be decided.

On an examination of all these decisions, it is abundantly clear that according to our procedure, it is not open to a party to put forward a ground for the first time in appeal, if the said point has not been raised at the trial under the issues so framed. The appellate Courts may consider a point raised for the first time in appeal, where the point might have been put forward in the Court below under one of the issues raised and where the Court has before it all the material that is required to decide the question.

The contention of the learned President's Counsel for the appellant was that the Court of appeal should have considered the question as to whether the Land Reform Commission could divest itself of title to property vested in it in terms of P_{18}. As has been described in detail

earlier, except for the declaration made by the 1st respondent, there is no evidence as to whether the land in question had been declared in a section 18 declaration by the 2nd and 3rd respondents. Further as stated by the officer from the Land Reform Commission, the 1st respondent had not made a declaration in respect of the said land either as an agricultural land or as a non-agricultural land. The document marked P_{18} refers to a declaration made by the 1st respondent, which is contradictory to the direct evidence led through the officer of the Land Reform Commission. The Committee of Experts, which had been appointed to inspect the land and to report to the Land Reform Commission, had informed that the said land was a non-agricultural land. The Land Reform Commission had taken into consideration the fact that the said land was a non-agricultural land in 1982 and on that basis had written P_{18} stating that it could not have been an agricultural land even in 1972. However, it is to be borne in mind that no evidence had been led to ascertain whether the land was in fact an agricultural land in terms of the provisions of Land Reform Law in 1972.

Accordingly, it is not disputed that there has been no evidence to establish as to whether the land was agricultural or not in 1972 and whether it was vested or not in the Land Reform Commission in 1972.

Learned District Judge had not come to any of such findings since there were no issues framed by the appellant and/or reported in the District Court regarding the said aspects. An issue should have been raised on the basis as to whether the land in question was agricultural land in 1972, before the District Court for both parties to adduce evidence and for the learned District Judge to arrive at a finding in the District Court.

Considering all these circumstances of the appeal it is abundantly clear that the question of vesting of the land with the Land Reform Commission was not urged before the District Court and therefore the Court of Appeal did not have before it all the material that is required to decide the question. Accordingly the Court of Appeal had correctly refrained from considering an issue that was raised for the first time in appeal, which was at most a question of mixed law and fact.

For the reasons aforesaid, the judgment of the Court of Appeal dated 13.10.2005 is affirmed. This appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Saleem Marsoof, J.

I agree.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court

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

In the matter of an application for special leave to appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

S.C. Appeal No. 64/2008
S.C. (H.C.) C.A.L.A. No. 25/2008
WP/HCCA/Col/131/2007 (LA)
D.C. Mt. Lavinia No. 349/98/Spl.

1A. Sasikala Rasadari Mahawewa (more correctly) Sasikala Rasadari Baddegama Mahawewa nee Liyanage,

1B. Vithana Appuhamilage Sasindu Udara Mahawewa,

Appearing by

Sasikala Rasadari Mahawewa (more correctly) Sasikala Rasadari Baddegama Mahawewa nee Liyanage,

Both of No. 177/1,

Galle Road,

Dehiwela.

Defendant-Petitioner-Petitioner-Petitioners

Vs.

Vithana Appuhamilage Oliver Hemachandra
Mahawewa,
No. 183/2A,
Galle Road,
Dehiwela.
Plaintiff-Respondent-Respondent-Respondent

BEFORE : **Ms. S. TILAKAWARDANE.J**
MARSOOF.J &
SRIPAVAN.J.

COUNSEL : Dr. Jayatissa de Costa with Amitha Rajapakse for Defendant-Petitioner-Petitioner-Petitioners.
Ranjan Suwandaratne with Anil Rajakaruna for the Plaintiff-Respondent-Respondent-Respondent.

ARGUED ON : 23.11.2009.

WRITTEN SUBMISSIONS OF THE PETITIONERS TENDERED ON : 18.12.2009.

WRITTEN SUBMISSIONS OF THE RESPONDENT TENDERED ON : 18.12.2009

DECIDED ON : 06.05.2010

Ms. S. TILAKAWARDANE.J

An application for Special Leave was preferred by the Defendant-Petitioner-Petitioners-Petitioners (hereinafter referred to as the Petitioners) against the decision of the Provincial High Court of Civil Appeal of the Western Province dated 13.02.2008. This Court granted Special Leave to Appeal on 25.07.2008 on the question of law set out in paragraph 12 (c) of the Petition, namely whether the action to revoke a deed of gift based on gross ingratitude would survive, upon the death of the original Defendant (donee) before the conclusion of the case

The Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) instituted action bearing No. 349/98/SPL, in the District Court of Mount Lavinia, against the deceased Defendant praying, inter alia, that the Deed of Gift bearing No.1909 dated 07.08.1992, made by the Respondent to the deceased Defendant be canceled, on the ground of alleged gross ingratitude by the Defendant. The deceased Defendant by his answer dated 08.03.1999, denied this claim, and moved for the dismissal of the Respondent's action.

At the trial, upon conclusion of the Respondent's case, the deceased Defendant commenced his case. However, the Defendant died on 31.01.2005, prior to the conclusion of the cross examination of his case. Thereafter, the Respondent sought to substitute the Petitioners – who are the widow and son of the deceased Defendant – by an application in terms of Section 398 of the Civil Procedure Code.

The Petitioners objected to the application for substitution on the ground that the cause of action for the case, which was based on gross ingratitude of the deceased Defendant, ceased to operate upon the death of the original Defendant. Having heard both parties, the learned Judge by order dated 29.11.2005 allowed the application for substitution, leaving the question of maintainability of the action upon the death of the original Defendant, to be taken up in the course of the trial.

Subsequently, at trial, the Petitioner raised objections to the maintainability of the action following the death of the original Defendant. By his decision dated 17.08.2007 the District Judge of Mount Lavinia rejected the objections raised by the Petitioners. Aggrieved by this decision, the Petitioners appealed to the Provincial High Court of Civil Appeal of the Western Province. The High Court dismissed the appeal by its judgment dated 13.02.2008 from which the Petitioner preferred the present application to this Court.

The only question of law to be determined in this case is whether, in an action to revoke a deed of gift based on gross ingratitude, the cause of action survives upon the death of the original Defendant, against the Petitioners.

In terms of Section 398(1) (a) of the Civil Procedure Code, in the event of the death of a sole Defendant, an application can be made for substitution of the legal representatives of the deceased Defendant, on the condition that the right to sue survives.

Moreover section 392 of the Civil Procedure Code provides that:

"The death of a Plaintiff or Defendant shall not cause the action to abate if the right to sue on the cause of action survives." The practical effect of Section 392 is that the death of either the Plaintiff or the Defendant would cause the action to abate if the cause of action does not survive.

The law on donation and the revocation of gifts in Sri Lanka is governed by Roman Dutch Law, under which a gift once donated, can be revoked on grounds of gross ingratitude by the donee to the donor. The donor may initiate court proceedings to cancel the gift so donated. However, given that an action for revocation of gift based on ingratitude is of a personal nature, the issue remains as to whether the cause of action in such a case would survive the death of either party to the case.

Atukorale J. in *Jayasuriya v. Samaranayake* 1982 (2) Sri L.R Page 460, answered this question in the negative in so far as the Plaintiff donor was concerned. In this case, the original Plaintiff instituted action against the Respondent to revoke the deed of Gift executed by him

in her favour on the ground of gross ingratitude towards him. However, the Plaintiff died prior to summons being issued on the case. Thereafter the Appellant, his widow, sought to be substituted in place of the original Plaintiff as his legal representative under Section 395 of the Civil Procedure Code. In this instance, Atukorale J. held that the right to claim revocation on grounds of gross ingratitude will not pass to the estate of the donor.

In light of *Jayasuriya v. Samaranayake* it is clear that in so far as the Plaintiff is concerned the cause of action would cease to exist, if the Plaintiff dies prior to the conclusion of the case. This principle is embodied in the maxim *personalis moritur cum persona.*

Counsel for the Petitioner has sought to rely on the principle as it was considered in *Deeranada Thero v. Ratnasara Thero* 60 NLR 7. In this case, the Plaintiff-Respondent instituted action against the Defendant, Piyaratana Thero, alleging that the Defendant was unlawfully disputing his right to the incumbency of the temple, was disobedient and disrespectful towards the Plaintiff and obstructed him in the lawful exercise of his rights as incumbent. The Plaintiff prayed that he be declared the incumbent and also that the defendant and his agents be ejected from the temple. The original Defendant having died before the trial could be resumed, the Plaintiff sought to substitute his successor for the purpose of prosecution. While the District Judge allowed the substitution and ejected the Defendant, the Appeal Court held that the original action was personal in nature and invalidated the substitution. The Court found that since the Plaintiff was alleging disobedience and disrespect to him by the conduct of the Defendant the question of ejecting the Defendant was merely incidental to the action.

The decision in *Deeranada Thero v. Ratnasara Thero* does not by itself support the contention that the cause of action in the instant case ceases to exist with the death of the original Defendant based on the ground that action is personal in nature. The *Deeranada Thero Case* is distinguishable on facts in issue, in that unlike in the instant case, the *Deeranada Thero Case* did not involve the revocation of a gift based on ingratitude. Rather, in *Deeranada Thero* the case turned mainly on the allegation of

disobedience and disrespect leveled against the deceased Defendant. The issue of property and ejectment as pronounced in the judgment itself was only a collateral concern. Moreover, the action did not involve any issue relating to the inheritance of property. The instant case focuses clearly on the property gifted by the Plaintiff and the inheritance rights of the heirs of the deceased Defendant. The intention of the donor to revoke the gift of property on grounds of ingratitude remains of parallel importance.

Cases of slander and libel have also been cited by the Petitioner in order to highlight the relevancy of the maxim *personalis moritur cum persona* in relation to the instant case. Undoubtedly, these cases fall into the category of personal action and therefore the cause of action would not survive with the death of either the plaintiff or defendant in such a case (Vide, *AG v. Satarasinghe* 2002 (2) SLR 113). However, the maxim cannot be uniformly applied to each and every action which qualifies as personal in nature and whether or not the maxim applies must be determined on the fact and circumstances of the instant case.

The Counsel for the Petitioner also cited *Perezius on Donations* (E.B. Wickramanayake translation- 1933 at page 35 and 36) to the effect that in a case where the Donor has been silent and made no complaint of the ingratitude exhibited, then his heirs and successors are not entitled after his death to sue because this is a personal action and "is prosecuted more for the sake of retribution, punishment than money; and the inquiry seems to have abated by negligence since the man, while alive, made no complaint about and injury already committed. Wherefore it follows that just as the heir is not entitled to an action for ingratitude so it is not granted against the heir of the donee"

If the purpose of an action for the revocation of gifts based on ingratitude is to seek retribution and punishment, then one must consider whether such purpose would be served by denying continuation of action in cases where the Plaintiff has complained about the alleged ingratitude. In the instant case, if the cause of action is said to have died with the death of the original Defendant, the Petitioners will be enriched to the detriment of the Respondent. The donated property runs parallel to the personal nature of this action due to

the fact that such property forms part of the deceased Defendant's estate the benefit of which accrues to his heirs. In other words, the Petitioners would be unjustly enriched in the circumstances where retaining such property is not supported by adequate cause. Therefore in order to prevent unjust enrichment it is proper to substitute the Petitioners in place of the deceased Defendant in order to continue the action instituted by the Respondent for the revocation of the gift.

In support of this conclusion, the Respondent also submits that at the time of death of the deceased Defendant, the stage of *litis contestatio* had been reached and therefore, the Petitioners cannot argue against the continuation of the case by the Respondent following the death of the original Defendant. The Respondent has cited several authorities in support of this submission.

In *Stella Perera and others v. Margret Silva* 2002 (1) SLR 169 the first Defendant died pending the appeal in the Court of Appeal. However by that time he had a judgment in his favor in respect of his claim to have the donation to his wife revoked. Amerasinghe J. held that the stage of *Litis Contestio* having been reached, the first defendant's action did not die with him and therefore, the maxim *actio personalis moritur cum persona* did not apply. Wood Renton J in *Muheeth v. Nadarajapillai* 19 NLR 461 at 462 observed that 'An action became litigious, if it were in rem, as soon as the summons containing the cause of action was served on the defendants; if it was in personam on litis contestio, which appears to synchronies with the joinder of issues or the close of the proceedings". Again in *Vangadasalam and another v. Karuppaiah* and another 79 (2) 150 (SC), Samarawickrama J. observed that a personal action dies with the plaintiff unless the stage of *Litis Contestio* has been reached.

In the instant case, at the time of the original Defendant's death, the trial had commenced and the Respondent had completed his evidence and closed the case for the Plaintiff, and even the deceased Defendant had commenced his case. Clearly, the stage of *Litis Contestitio* had been reached at the time of the deceased Defendant's death.

Accordingly the Respondent should be permitted to continue the action for revocation of the gift against the Petitioners, after substitution. It must also be observed however that the reasoning given in the Judgment of the High Court of Civil Appeal in the Western Province appears to contradict the final order made therein. It was also incumbent upon the Trial Court to rule on the question of patent jurisdiction that was raised, instead of informing parties that it would be decided later when it was taken up at the hearing.

The appeal is accordingly dismissed. No Costs.

JUDGE OF THE SUPREME COURT

MARSOOF.J

I agree.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for special leave to appeal from an order of the Court of Appeal in terms of Article 128 of the Constitution.

S.C. Appeal No. 79/2008

S.C. (Spl.) L.A. No. 153/2008

C.A. No. 161/2004

H.C. Colombo No. 818/2004

The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Petitioner

Vs.

Sandanam Pitchi Mary Theresa,
No. 65/05,
Gardinar Thomas Cooray Mawatha,
Avariyawatte,
Wattala.

Accused-Appellant-Respondent

BEFORE : **Ms. S. TILAKAWARDANE.J**
SRIPAVAN.J &
IMAM.J

COUNSEL : Palitha Fernando, A.S.G., with P.C Sarath Jayamanne,

D.S.G., for the appellant (A.G.).

Gayan Perera with Ms. Prabha Perera for the accused-appellant-respondent.

ARGUED ON : 10.09.2009.

WRITTEN SUBMISSIONS OF THE APPELLANT TENDERED ON : 06.10.2009.

WRITTEN SUBMISSIONS OF THE RESPONDENT TENDERED ON : 23.11.2009

DECIDED ON : 06.05.2010

Ms. S. TILAKAWARDANE.J

An application for Special Leave was preferred by the Respondent Petitioner Appellant, the Attorney General, (hereinafter referred to as the Appellant) against the Judgment of the Court of Appeal dated 30/05/2008 wherein the conviction and the sentence imposed against the Accused Appellant Respondent (hereinafter referred to as the Respondent) was set aside.

This Court granted Special Leave to Appeal on 18/09/08 on the following questions of law.

1. Did the Court of Appeal err in law by holding that "there was no reason to reject the evidence of the defence witness Matilda?"

2. Did the Court of Appeal err in law by holding that the prosecution has not proved its case beyond reasonable doubt without considering the prosecution evidence?
3. Did the Court of Appeal err in law by the failure to evaluate and consider the prosecution evidence and or the submissions made on behalf of the prosecution (State) in the Court of Appeal?
4. Did the Court of Appeal err by relying upon observations made by their Lordships of the demonstration conducted by an Officer of Court in the Court of Appeal?

The Respondent was indicted in the High Court for the allegations of possessing and trafficking, 45.72 grams of heroin, punishable under section 54 (a) and (c) of the *Poisons Opium and Dangerous Drugs Ordinance*. In the High Court she was convicted under count 1 for possession, and imposed a sentence of life imprisonment, and was acquitted under count 2 for trafficking.

In terms of the submissions made, it is important at the outset of the case to consider the evidence that was presented in the High Court and whether on the relevant and admissible evidence the final count of possession was proved beyond reasonable doubt.

The Respondent was at the time admittedly in occupation of a room at 65/5, Cardinal Cooray Mawatha, Averriwatte, Wattala. Ostensibly her residence in this house which belonged to her brother was to facilitate the care of his children. Admittedly she had 4 children of her own and one was being educated in London at the time.

According to the detecting officer of the Police Narcotics Bureau (hereinafter referred to as the PNB), the detection took place at De Vos Lane in Colombo pursuant to information provided by an informant, who had pointed out the Respondent. According to SI Tennakoon who apprehended her, at the time of her arrest the Respondent was carrying a black bag, a fact which was not contested. This bag according to the detecting

officer contained a shopping bag containing 130,460 currency notes (9 Rs 1000/- notes, 22 Rs 500/- notes,105 Rs200/- notes, 484 Rs 100/- notes, 501 Rs 50/- notes, 507 Rs 20/- notes and 587 Rs 10/- notes. Under this there was a till (referred to by both parties at times as a tin, which contained a shopping bag inside which there were 2868 wrapped packets of, what was later proved to be Heroin. When collected together the total weight of the heroin was indisputably 172.600 grams.

The officer further testified that subsequently the officers of the PNB had searched the house the Respondent was residing in and recovered a small weighing scale and 3 weights of 20, 50, and 100 grams from under her bed. There was no challenge to the procedure by which the productions were sealed, tested and subsequently duly produced in the High Court. These productions, perceived in open court, were examined by the High Court judge as is evident from his judgment dated 19.11.2004.

The Respondent however denies the prosecution version of events and claims that she was arrested at her residence at Wattala. Both the Respondent and her sister, Matilda testified at the trial that Heroin was not recovered from the Respondent's possession. All that was recovered from the residence of the Respondent was Rs. 130,460 which she claimed to be the proceeds from the sale of a three wheeler.

The evidence of Matilda, the Respondent's sister, was assessed by the Judge of the High Court in his Judgment and the evidence on the factual issues in the case were carefully considered, evaluated along with the general principles of law on assessment of witness credibility/ testimonial trustworthiness. The learned High Court judge rejected the version put forward by Matilda as improbable in light of the totality of the evidence presented to the Court. The Court of Appeal however, took a different view and placed considerable weight on the evidence of Matilda, which the Court believed to have created a reasonable doubt in the prosecution case.

When considering the testimonial creditworthiness of Matilda, it is important to bear in mind established principles on witness credibility which may guide the Court in assessing the facts in a situation where conflicting evidence is presented. The Court must be conscious of the fact that not all witnesses are reliable. A witness may fabricate or provide a distorted account of the evidence through a personal interest or through genuine error (Vide, Emson, *Evidence,* 3rd Edition, 2006).

A key test of credibility is whether the witness is an interested or disinterested witness. Rajaratnam J. in *Tudor Perera* v. *AG* (SC 23/75 D.C. Colombo Bribery 190/B – Minutes of S.C. Dated 1/11/1975) observed that when considering the evidence of an interested witness who may desire to conceal the truth, such evidence must be scrutinized with some care. The independent witness will normally be preferred to an interested witness in case of conflict. Matters of motive, prejudice, partiality, accuracy, incentive, and reliability have all to be weighed (Vide*, Halsbury Laws of England* 4th Edition para 29). Therefore, the relative weight attached to the evidence of an interested witness who is a near relative of the accused or whose interests are closely identified with one party may not prevail over the testimony of an independent witness (Vide, *Hasker v. Summers* (1884) 10 V.L.R. (Eq.) 204 – Australia; *Leefunteum v. Beaudoin* (1897)28 S.C.R. 89) - Canada).

The overall consistency of evidence is a further test of creditworthiness. Consistency is not just limited to consistency inter se but also consistency with what is agreed and clearly shown to have occurred (Vide, *Bhoj Raj v. Sita Ram*, AIR 1936 PC 60). The Court may also determine credibility based on the relative probability of the defence version taking place in light of the evidence before Court.

With respect to the currency notes found with the accused, the Court of Appeal accepted the defence version that the money was from the proceeds of the sale of a three wheeler. The Court surmised hypothetically, that the use of small value currency

notes would be reasonable on the basis that the three-wheeler was purchased by an owner or driver of a three wheeler.

The High Court had rejected Matilda's evidence that the money was found in the respondent's cupboard and that it was the proceeds from the sale of a three wheeler. The Respondent initially, when she was produced before the magistrate, claimed the money as her own, but later shifted her testimony to state that the money belonged to her brother. The High Court held that if the money did indeed belong to the Respondent's brother, it was unlikely no doubt considering the quantum of the money, that it would be kept in her cupboard. The High Court also reasonably concluded that, the fact that the money was almost entirely in small value currency notes made it unlikely to have been obtained from the sale of a vehicle.

The witness Matilda had come forward for the first time in five years to give evidence in support of her sister, the Respondent. Generally, the spontaneity or the promptness in which a witness makes a statement to the police would accrue in favor of the creditworthiness of the witness, as it precludes the time needed for deliberate fabrication. It is relevant that the evidence disclosed that the witness has two previous convictions and two pending cases before the High Court on drug related offences.

Considering the relationship between the witness and the Respondent and the probability of her version being true in light of the independent evidence presented to court on the facts of the case, I find that the learned High Court has fittingly rejected the testimony of Matilda as not worthy of credit..

The next ground of Appeal is that the Court of Appeal has failed to consider the probative value of the evidence led on behalf of the Appellant. The Respondent highlighted contradictions in the statements of the two PNB officers. In the first instance, the officers statements on meeting the informant differ, in that according to SI

Tennakoon, the junior officer got down from the vehicle and met the informant, before introducing him, whereas prosecution witness number 3, stated that both officers got down and met the informant and that they both knew the informant. On the recovery of scales and weights from the Respondent's residence, both officers claim to have made the recovery from under the Respondent's bed. Similar contradictions also appear with respect to the payment of the three wheeler fare from Orugodawatta, where they met the informant to De Vos Lane where the detection took place.

Whilst internal contradictions or discrepancies would ordinarily affect the trustworthiness of the witness statement, it is well established that the Court must exercise its judgment on the nature tenor of the inconsistency or contradiction and whether they are material to the facts in issue. Discrepancies which do not go to the root of the matter and assail the basic version of the witness cannot be given too much importance (Vide, *Boghi Bhai Hirji Bhai v. State of Gujarat*, AIR 1983 SC 753).

Witnesses should not be disbelieved on account of trifling discrepancies and omissions *(*Vide, *Dashiraj v. the State* AIR (1964) Tri. 54). When contradictions are marked, the judge should direct his attention to whether they are material or not and the witness should be given the opportunity of explaining that matter (Vide, *State of UP v. Anthony* AIR 1985 SC 48; *A.G. v. Visuvalingam* 47 NLR 286). It is dangerous to presume or assume that because two witnesses contradict each other, one of them must be a false witness and reject the testimony in its entirety. The judge has a duty to probe into whether the discrepancy occurred due to a lack of observation or defective memory or a dishonest motive (Vide, Colin Thom'e J in *Bandaranaike v. Jagathsena* 1984 2 Sri LLR 397).

In *State of UP v. Anthony* the Indian Supreme Court stated that 'while appreciating the evidence of a witness, the approach must be whether the evidence...read as a whole appears to have a ring of truth'. The Court went on to elaborate further that 'Minor discrepancies on trivial matters not touching the core of the case, hyper technical

approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole'.

Basnayake CJ in *Queen v. Julius* (1963 65 N.L.R 505) observed 'that in applying the maxim of *Falsus in uno, falsus in omnibus* (he who speaks falsely on one point will speak falsely upon all) it must be remembered that all falsehood is not deliberate. Errors of memory, faulty observation or lack of skill in observation upon any point or points, exaggeration, or mere embroidery or embellishment must be distinguished from deliberate falsehood'.

In the instant case, the Court of Appeal considered the contradictions appearing in the testimony of the chief prosecution witnesses, particularly with respect to the recovery of scales from the Respondent's residence. The Court found that the contradictions and shifting testimony of the two PNB officers, created a serious dent in the testimonial trustworthiness of the prosecution witnesses.

The High Court dealing with this evidence in its analysis had concluded that the contradictions were due to honest mistakes by the police officers and did not affect the root of the case. The court noted that both officers had ample opportunity to correct their versions and ensure that their statements matched in every respect. No such collusion on the part of the detecting officers is apparent from the evidence before the Court. The court observed further, that human beings are not computers and that it would be dangerous to disbelieve the witness and reject evidence based on small contradictions or discrepancies.

Police officers are not infallible observers and may like any other witness make honest mistakes. However, they differ from eye witnesses generally in that their training and

experience encourages them to be more observant and to focus on detail and there is no reason why this shouldn't be taken into account when assessing the reliability of their evidence (Vide, *R v. Tyler* (1992)96 Cr App R 332(CA) pp.342-3). It is clear that the contradictions in the prosecution case are the product of human error and not due to any dishonest intent. Such slight discrepancies cannot be deemed to affect the probability of the Prosecution case in the totality of the probative value of the evidence presented on behalf of the prosecution.

Furthermore, both sides accept that the police officers are strangers to the Respondent and have no motive to fabricate a case against her. The prosecution witnesses were official witnesses with no personal interest in the arrest of the Respondent. In *Ajith Singh v. State of Panjab* (1982 Cr.L.J 522) the court rightly observed that '*… The significant thing herein is that these official witnesses are not held to have any animus or hostility against the petitioner'.* Unlike in the case of Matilda, both prosecution witnesses are independent and have faced no allegations of a possible motive to present false evidence against the accused.

There is also a general disposition in courts to uphold official, judicial and other acts rather than render them to be inoperative. Illustration D to Section 114 of the Evidence Ordinance contains the presumption that judicial and official acts have been regularly performed or done with due regard to form and procedure (Vide, *Dharmatilake v. Brampy Singho* (1938)40 NLR 497; *Hapuganoralage Menikhamy v. Podi Menika* (1978)79 II NLR 250; *Nishan Singh v. State* AIR 1955 Punj. 65). While the presumption is used sparingly in criminal cases, it will be presumed even in a murder case that a man acting in public capacity has properly discharged his official duties, until the contrary is proven (Vide, *R v. Gordon*, (1789)1 Leach 515).

Finally, with respect to the appreciation of evidence by the Court of Appeal, the Respondent submits that the Court of Appeal examined the productions by placing the

till inside the polythene bag in order to understand the possibility or probability of the evidence which was marked at the trial. Based on the demonstration of evidence conducted by an officer of the court, the Court of Appeal concluded that it was highly improbable that a person transporting Heroin would do so in such a prominent manner. The court therefore favored the Respondent's version that the detection had not in fact taken place at De Vos place as the Appellant suggests but rather that the money alone was recovered from the Respondent's residence in Wattala.

Credibility is a question of fact, not of law. Appellate judges have repeatedly stressed the importance of the trial judges' observations of the demeanor of witnesses in deciding questions of fact (Vide, *R. v. Dhlumayo* (1948)2 SALR 677 (A); *Merchand v. Butler's Furniture Factory* (1963)1 SALR 885). No doubt the Court of Appeal has the power to examine the evidence led before the High Court. However, when they go so far as to conduct a demonstration of the evidence, they observe the material afresh and run the risk of stepping into the role of the original court (Vide, *King v. Endoris* 46 NLR 498; *Alwis v. Piyasena Fernando* 1993 (1) SLR 119; *Fradd v. Brown and Co Ltd*; *Attorney General v. D. Senevirathne* 1982 (1) SLR 302). The trial judge has a unique opportunity to observe evidence in its totality including the demeanor of the witness. Demeanor represents the trial judges' opportunity to observe the witness and his deportment and it is traditionally relied on to give the judges findings of fact their rare degree of inviolability (Vide, Bingham, '*The Judge as Juror*' 1985 p.67).

Lord Loreburn in *Kinloch v. Young* (1911) SC (HL)1 observed that '...this house and other courts of appeal have always to remember that the judge of first instance has had the opportunity of watching the demeanor of witnesses – that he observes, as we cannot observe the drift and conduct of the case; and also that he has impressed upon him by hearing every word the scope and nature of the evidence in a way that is denied to any court of appeal. Even the most minute study by a court of appeal fails to produce the same vivid appreciation of what the witnesses say or what they omit to say'.

Similarly, Lord Pearce in *Onnassi v. Vergottis* ((1968)2 Lloyds' R.403) stated that 'one thing is clear, not so much as a rule of law but rather as a working rule of common sense. A trial judge has, except on rare occasions, a very great advantage over an appellate court; evidence of a witness heard and seen has a very great advantage over a transcript of that evidence; and a court of appeal should never interfere unless it is satisfied both that the judgment ought not to stand and that the divergence of view between the trial judge and the court of appeal has not been occasioned by any demeanor of the witnesses or truer atmosphere of the trial (which may have eluded the appellate court) or by any other of those advantages which the trial judge possesses'.

Appellate courts are generally slow to interfere with the decisions of inferior courts on questions of fact or oral testimony. The Privy Council has stated that appellate court should not ordinarily interfere with the trial courts opinion as to the credibility of a witness as the trial judge alone knows the demeanor of the witness; he alone can appreciate the manner in which the questions are answered, whether with honest candor or with doubtful plausibility and whether after careful thought or with reckless glibness; and he alone can form a reliable opinion as to whether the witness has emerged with credit from cross examination (Vide, *Valarshak Seth Apcar v. Standard Coal Company Limited* AIR (1943)PC 159). But where the matter is one of inference from evidence, and the evidence is not well balanced the appellate court will set aside the finding of the trial court if it is against the weight of evidence (Vide, *Sris Chandra Nandi v. Rakhalananda* (AIR) 1941 PC 16).

As rightly pointed out by the Appellant in terms of Section 351 (a) of the Code of Criminal Procedure while an appellate court may exercise its discretion to call for the productions, its power is conditional upon it being *necessary or expedient in the interest of justice.* Section 329 of the Code of Criminal Procedure Act stipulates that calling fresh evidence by an appellate court must occur only in very rare instances. Thus according to

the unreported case (No.CA 1161/82 dated 13/09/1989) cited by the Appellant this piece of evidence being available at the stage of the original hearing precludes the Court of Appeal from recalling it as fresh evidence.

Having considered the evidence and testimonies adduced on by both sides, and applying the several tests to determine testimonial creditworthiness, this Court finds that the proximity of the cash to the heroin packets recovered, the scales and the weights are all circumstantial evidence which when taken cumulatively result in a compelling body of evidence having significantly strong probative evidential value on the charge of possession with intent to supply, and proves the case of the prosecution beyond a reasonable doubt.

There is simply no jurisdiction in an appellate court to upset trial findings of fact that have evidentiary support. A court of Appeal improperly substitutes its view of the facts of a case when it seeks for whatever reason to replace those made by the trial judge. It is also to be noted that state is not obliged to disprove every speculative scenario consistent with the innocence of an accused– R v. Paul [1977]1 SCR 181.

In view of the facts elicited by the prosecution and indeed the real evidence discovered by the officers conducting the investigation, it cannot be said that the factual conclusion drawn by the trial judge are either unsupported or unreasonable.

This court accordingly allows the Appeal of the appellant, sets aside the judgment of the Court of Appeal dated 30.5.2008 and upholds the conviction and sentence of the High Court dated 19.11.2004. No costs.

The decision of this Court is to be communicated forthwith to the High Court to notice the Respondent and impose the sentence given in the judgment of the High Court dated 19.11.2004.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

IMAM.J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code.

Stassen Exports Limited,
No. 833,
Sirimavo Bandaranaike Mawatha,
Colombo 14.
Plaintiff - Appellant

S. C. (C.H.C.) Appeal No. 48/1999
H. C. No. 32/96 (3)
D. C. (Colombo) No. 3411/SPL

-Vs-

1. Brooke Bond Group Ltd.,
One Watergate,
London EC4Y OAE,
England.

2. Brooke Bond (Ceylon) (Pvt.) Ltd.,
No. 200,
Union Place,
Colombo 02.

3. Kirthisiri Jayasinghe,
Patent and Trade Mark Registrar,
No. 267, 5th Floor,
Union Place,
Colombo 02.
Defendants-Respondents

BEFORE : Dr. S. A. Bandaranayake, J;
Saleem Marsoof, P.C., J; and
D. J. de S. Balapatabendi, J.

COUNSEL : Ben Eliyathambi, P.C., with Gomin Dayasri and Priyanthi Goonerathne for the Appellant.

Avindra Rodrigo with Manoj de Silva for the Respondents.

ARGUED ON : 22.10.2007

WRITTEN SUBMISSIONS : 30.11.2007

DECIDED ON : 15.03.2010

MARSOOF, J.

This is an appeal from a decision of the Commercial High Court of Colombo dated 22nd October 1999 dismissing the action filed by the Plaintiff-Appellant (hereinafter referred to as the "Appellant"), seeking *inter alia* to remove from the register maintained by the Registrar of Trade Mark under the now repealed Code of Intellectual Property Act No. 52 of 1979, as subsequently amended, the trade mark bearing No. 12307 registered in the name of the 1st Defendant-Respondent, Brooke Bond Group Ltd of Watergate, London, United Kingdom, and currently licensed to the 2nd Defendant-Respondent, Brooke Bond (Ceylon) Pvt Ltd. It is common ground that Brooke Bond Group Ltd is a company duly incorporated in the United Kingdom and was previously named and known as Brooke Bond Liebig Ltd. and Brooke Bond Group PLC respectively. It is also an admitted fact that Brooke Bond (Ceylon) Pvt Ltd. was, on the date the original action was filed, a wholly owned subsidiary of Brooke Bond Group Ltd. The essence of the dispute was whether the words '*Red Label*' used with the '*Brooke Bond*' trade mark bearing No. 12307 was sufficiently distinctive so as to prevent the Appellant using the words '*Red Medal*' with its trade mark bearing No. 53509.

The action, which was originally filed in the District Court of Colombo in 1991 and was pending at the time on the "appointed date" specified in the order made under Section 2(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, stood "removed" to the Commercial High Court of Colombo as contemplated by Section 10 of the said Act. The Appellant in the main sought a declaration in terms of Section 130(1) of the Code of Intellectual Property Act that the registration of the said trade mark bearing No. 12307 is null and void and a further declaration in terms of Section 132(1) of the said Code that the said trade mark be removed from the Register of Trade Marks. Additionally, the Appellant had also prayed that the entries pertaining to the successive proprietorships of Brooks Bond Liebig Ltd., Brooke Bonds PLC and Brooke Bonds Group Ltd., of the said trade mark made respectively in the years 1983, 1985 and 1987 be expunged from the said Register under Section 172(2) of the said Code. The Appellant also sought the review, in terms of Section 172(4) of the Code, of any decision of the Registrar of Trade Mark relating to any purported entries in the said Register in respect of trade mark No. 12307. The 1st and 2nd Defendant-Respondents (sometimes hereinafter collectively referred to as "Brooke Bond"), while denying the position taken up by the Appellant, sought in their answer by way of claims in reconvention *inter alia* a declaration that the Appellant is not entitled to use the trade mark bearing No. 12307, a further declaration that the Appellant is not entitled to use the trade mark '*Red Label*', and a permanent injunction restraining the Appellant from using the said '*Red Label*' trademark bearing No. 12307 or any colorable imitation of the mark of Brooke Bond.

It is important to note that when the case was taken up for hearing in the District Court of Colombo, on 5th February 1993, the Court recorded 19 admissions, and thereafter 21 issues were formulated on behalf of the Appellant. 19 issues were raised by learned President's Counsel for Brooke Bonds, which prompted the Appellant to raise 2 more issues bringing the number of issues formulated by Court to 42. The hearing was thereafter postponed for several dates, but in the meantime, the case stood removed to the Commercial High Court of Colombo as noted already. On 3rd December 1996, when the case was called for the first time before the Commercial High Court, the proceedings that had taken place previously before the District Court of Colombo were expressly adopted, and accordingly, when the case was taken up for trial before the Commercial High Court on 13th October 1997, it abided by the admissions and issues recorded previously in the District Court of Colombo.

It appears from the admissions recorded in the District Court and adopted by the Commercial High Court that at the time the action from which this appeal arises was instituted, the name of Brooke Bond Group Ltd. appeared in the Register of Trade Marks maintained by the 3rd Defendant-Respondent as the proprietor of the *'Brooke Bond'* trade mark bearing No. 12307, while the name of Brooke Bond (Ceylon) Ltd. appeared as its licensee. It is also admitted that while the former company did not at the relevant time engage directly in any trading activity in Sri Lanka, the latter was engaged in the business of blending, selling and distributing tea in and from Sri Lanka. It is an admitted fact that the said trade mark No. 12307 was first registered upon the application dated 24th July 1950 made by Brooke Bond (Ceylon) Ltd., which thereafter by the Deed of Assignment dated 27th March 1981 assigned the said trade mark along with 17 other trade-marks to Brooke Bond Liebig Ltd., which was registered as the proprietor of the said trade mark in terms of Section 119 of the Code of Intellectual property Act on or about 30th August 1983. It is also admitted that the said trade mark bearing No. 12307 was associated with trade mark Nos. 5557, 11989, 11837, 11838, 12306, 13101, 14378, 28955 and 27554, all of which contain the words "Brooke Bond". Consequent upon a licensing agreement being entered into between Brooke Bond Liebig Ltd and Brooke Bond (Ceylon) Ltd granting to the latter the right to use the said trade mark, and on the basis of an application made under Section 121 of the Code for this purpose, Brooke Bond (Ceylon) Ltd was also entered as licensee of the said trade mark No. 12307 in the Register of Trade Marks on or about 30th August 1983. It is common ground that when Brooke Bond Liebig Ltd's name was changed to Brooke Bond Group PLC, the name of the proprietor of the said trade mark No. 12307 was accordingly altered in favor of the latter company in the Register of Trade Marks on or about 25th March 1985, and that once again when the latter changed its name as Brooke Bond Group Ltd, the name of the proprietor of the said trade mark was accordingly altered in the said Register on or about 16th November 1987.

It is admitted that Brooke Bond Group Ltd is not a licensed dealer of tea under the Tea Control Act and is not a registered exporter of tea under the Tea Control Act read with the provisions of the Tea (Tax and Control of Export) Act and is therefore not entitled to sell or distribute tea from Sri Lanka. It is also an admitted fact that Brooke Bond Group Ltd has never registered with the Sri Lanka Tea Board a carton or packet containing the said trade mark No. 12307. It is common ground that although Brooke Bond Group Ltd is a company incorporated in the United Kingdom, it is not the owner of any trade mark registered in the United Kingdom containing the words "Brooke Bond Red Label Tea".

Amongst the admissions recorded in the District Court and adopted in the Commercial High Court, there is also an admission to the effect that the Appellant has for several years exported 'Pure Ceylon Tea' in cartons, and that the Appellant has also applied to register trade mark bearing No. 53509 with the words *'Red Medal'*. It is further admitted that the Appellant has exported tea in cartons similar to 'P3' bearing the trade mark *'Red Medal'* to several countries including Egypt, Saudi Arabia, Kuwait, Syria and Jordan. It is also an admitted fact that the Appellant's application for registration of the trade mark bearing No. 53509 has been opposed by Brook Bond Group Ltd. *inter alia* on the basis of the purported ownership of the said *'Brooke Bond'* trade mark bearing No. 12307. It is also admitted that Brook Bond Group Ltd filed an application to register trade mark No. 55881 containing the words *'Red Label'* and that the said application has been opposed by the Appellant.

It is on the basis of these admissions that several issues were formulated by the District Court, which were ultimately taken up for trial in the Commercial High Court. In view of the fact that there were altogether 42 issues to be tried, which issues may if reproduced in this judgment *verbatim*, result in tedious reading, I shall endeavor to highlight the main issues with respect to which parties were at variance, to the extent that such issues may be relevant for the disposal of the present appeal. The 21 issues raised by the learned President's Counsel for the Appellant may

conveniently be summarized as follows: Is the Appellant entitled to any or all of the relief prayed for by it by reason of –

(a) the invalidity of the Deed of Assignment dated 27th March 1981 by which Brooke Bond (Ceylon) Pvt Ltd., purported to transfer the '*Brooke Bond*' trade mark bearing No. 12307 to Brooke Bond Liebig Ltd., due to the fact that the Power of Attorney issued by the latter to M/s Julius & Creasy, Attorneys-at-law, to act as its authorized agent was not executed under its seal, and has only been signed by a person designated as its Secretary when the signature of two of its Directors or one Director and the Secretary was required for this purpose?; and / or

(b) the consequent invalidity of the entries in the Register of Trade Marks made respectively on or about 30th August, 1983, 25th March 1985 and 16th November 1987; and / or

(c) the total non-user by Brooke Bond Group Ltd and the consistent non-user since 1983 by Brooke Bond (Ceylon) Pvt Ltd of the said '*Brooke Bond*' trade mark bearing No. 12307 for the sale and / or export of tea from Sri Lanka?; and /or

(d) the consequent inability arising from the said non-user, to distinguish the teas of Brooke Bond Group Ltd and Brooke Bond (Ceylon) Pvt Ltd from those of other Sri Lankan distributors and / or exporters?

In the same way, the 19 issues formulated by learned President's Counsel for Brooke Bond may be summarized as follows: Should the application filed by the Appellant be dismissed, and judgment entered in favor of Brooke Bond Group Ltd as prayed for in prayer (c) and (e) of its Answer for the reason that:-

(e) Brooke Bond Group Ltd engaged in the business of blending, packeting, marketing, selling, and exporting tea through its subsidiary, Brooke Bond (Ceylon) Pvt Ltd under the supervision, direction and control of the former company?; and / or

(f) the registration of the cartons and packets bearing the said '*Brooke Bond*' trade mark bearing No. 12307 with the Tea Board, and the use of the said trade mark, as well as the said cartons and packets, by Brooke Bond (Ceylon) Ltd amounted to use of the said mark by Brooke Bond Group Ltd? and / or

(g) the '*Red Label*' trade mark has become distinctive of the tea blended, packeted, distributed and marketed by the subsidiaries of Brooke Bond Group Ltd, as a result of the use by Brooke Bond (India) Ltd, a company incorporated in India as a subsidiary of Brooke Bond Group Ltd, of the said trade mark for exporting tea from India? and / or

(h) in any event, the action filed by the Appellant is time-barred and prescribed?

In response to (g) above, learned President's Counsel for the Appellant was permitted to raise two further issues as issues 41 and 42 as to whether the exports by Brooke Bond (India) Ltd, under a trade mark registered in India, would amount to the user of a trade mark registered in Sri Lanka.

Accordingly, when the case was taken up for further trial on 13th October 1997, the affidavit of Don Harold Stassen Jayawardene dated 11th October 1997 was tendered in evidence under Section 176 of the Code of Intellectual Property Act on behalf of the Appellant, along with the documents marked A1 to A52. Thereafter, a date was obtained by Brooke Bond for the cross-

examination of the said Jayawardene. On 19th December 1997, the date fixed for such cross-examination, the said Jayawardene was very briefly cross-examined by leaned Senior Counsel for Brooke Bond, and since there were no questions in re-examination and no other witness to be called on behalf of the Appellant, learned President's Counsel for the Appellant moved to close his case "reading in evidence A1 to A52". Thereafter, learned High Court Judge made order that the affidavit of the Brooke Bond should be filed on 16th February 1998. On that date, no affidavit was filed, and in fact, learned Senior Counsel for Brooke Bond informed Court that no evidence will be led on behalf of Brooke Bond. He also intimated to Court that he was objecting to the reception in evidence of the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49, and thereafter moved to close his case without any evidence. The learned High Court Judge then gave a date for the written submission of both parties, which were filed in due course.

On 22nd October 1999 the learned Commercial High Court Judge delivered his judgment upholding the objection taken on behalf of Brook Bond to the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 on the basis that the contents of the said documents have not been proved by primary evidence or secondary evidence as required by Section 61 of the Evidence Ordinance, nor are they duly certified copies certified by the public officer having custody thereof as contemplated by Sections 76 and 77of the Evidence Ordinance. In the result, the learned High Court Judge held that "the Court is left with no evidence to be considered" to substantiate the application of the Appellant. Accordingly, the High Court answered the several issues framed at the instance of the Appellant against it on the basis that there is "no proof" and dismissed the action filed by the Appellant, ostensibly for the same reason that he dismissed Brooke Bond's claims-in-reconvention, namely paucity of evidence. The latter decision of course is clearly justified as Brooke Bond had failed to file any affidavit or adduce any other evidence in support of its claims-in-reconvention. However, in the context that 19 admissions had been recorded and an affidavit had been filed with as much as 52 documents, by way of justification for his decision to dismiss the application of the Appellant the Learned High Court Judge was constrained to add that-

> "Even though there are several admissions recorded, they are not conclusive proof of matters admitted as provided for under Section 31 of the Evidence Ordinance. Though they may operate as estoppels against the defendants (Brooke Bond) a mere estoppels will not entitle the plaintiff (Appellant) to have an adjudication (sic) in its favor"

This is an astounding and most unacceptable proposition of law, to say the least. It is astounding because Section 31 of the Evidence Ordinance, which applies to informal or casual admissions, testimony relating to which may be led at the trial, has no relevance to formal or judicial admissions recorded at the trial. The learned Judge has altogether overlooked Section 58 of the Evidence Ordinance applicable to the latter category of admissions, which provides that-

> "*No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing*, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings…." *(italics added)*

It is clear that the learned High Court Judge has seriously misdirected himself in disregarding the vital admissions recorded at the trial, which learned President's Counsel for the Appellant contends could have, along with the documents produced with Jayawardene's affidavit to which no objections were taken by learned Senior Counsel for Brooke Bond, namely, the documents marked A1 to A4, A9, A10, A14, A29, A30, A42, A43 and A50 to A52, gone a long way in proving the Appellant's case. I do not propose to consider in any depth the rather interesting issues of intellectual property law and arrive at any findings in regard to the questions relating to the use

of certain trade-marks that this case gives rise to, as in my view this is neither necessary nor desirable for the disposal of the present appeal. I prefer to confine myself to the mundane questions of procedure and evidence which were the main focus of submissions of learned Counsel in this case. However, before considering these vital issues, it is necessary to refer to Section 176 of the Code of Intellectual Property Act in terms of which the affidavit of Don Harold Stassen Jayawardene was tendered in evidence by the Appellant in evidence. Sub-section 1 of this section provides that-

> "In any proceeding under this Code before the Registrar or the Court, the evidence shall be given by affidavit in the absence of directions to the contrary. But, in any case in which the Registrar or the Court shall think it right so to do, the Registrar or the Court may take evidence *viva voce* in lieu of, or in addition to, evidence by affidavit."

The above quoted provision has to be contrasted with Section 174 of the Code of Intellectual Property Act, which provides that a certificate purporting to be under the hand of the Registrar as to any entry, matter, or thing which he is authorized by the said Code or regulations made thereunder to make or do, "shall be *prima facie* evidence of the entry having been made, and of the contents thereof, and of the matter or thing having been done or not done." The affidavit of Jayawardene tendered in terms of Section 176 of the Code is obviously much more than *prima facie* evidence of the facts adverted to therein, and in the absence of any objections to its admission in evidence and any directions to the contrary made by court, it has to be treated as the examination in-chief of the witness Don Harold Stassen Jayawardene. Of course, the High Court had the power to take evidence *viva voce* "in lieu of, or in addition to, evidence by affidavit", which power it appears to have exercised, by affording Brooke Bond an opportunity to cross-examine Jayawardene. The documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 may therefore be equated to documents marked during the examination in-chief of a witness in the course of a regular trial.

It is in this context that the objection taken on behalf of Brooke Bond to the admission in evidence of the aforesaid documents has to be viewed. These documents broadly fall into two categories, namely, those sought by the Appellant to be admitted in terms of Section 77 of the Evidence Ordinance, and those sought to be tendered in terms of other provisions of law. A careful reading of the affidavit of Don Harold Stassen Jayawardene would reveal that only the documents marked A5 to A8, A15, A22 to A27, A33 to A37 and A39 to A41 were tendered as "true copies" of the pleadings, proceedings and judgement in D. C. Colombo 2955/Spl filed by Brooke Bond Group Ltd against Akbar Brothers Exports (Pvt) Ltd in relation to which an appeal was pending in the Court of Appeal, fall within the first category to which the provisions of Sections 76 and 77 of the Evidence Ordinance are said to be applicable. Section 76 of the Ordinance provides that-

> "Every public officer having the custody of a *public document*, *which any person has a right to inspect,* shall give that person on demand a copy of it on payment of the legal fees therefore together with a certificate written at the foot of such copy that *it is a true copy* of such document or part thereof, as the case may be, and such certificate shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies."*(italics added)*

Section 77 provides that-

> "Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies."

It may be useful to pause here to explain that although according to Section 61 of the Evidence Ordinance, the contents of documents may be proved either by primary or by secondary evidence, it is expressly provided in Section 64 of the Ordinance that documents *must* be proved by primary evidence, except in the specific instances listed in Section 65 of the Ordinance as cases in which secondary evidence may be given. This provision embodies the so called 'Best Evidence' rule, which postulates that it is in the interests of justice to produce the best evidence as opposed to inferior evidence, which in the case of a document would mean that it is desirable to produce in court the original rather than a copy thereof.

Where the document in question is a case record of another court or even the same court but relating to a different case, Section 110 of the Civil Procedure Code makes it possible for a court, of its own accord, or upon an application of any of the parties to an action, to "send for, either from its own records or from any other court, the record of any other action or proceeding, and inspect the same." However, this provision has to be used sparingly and with caution. In fact, the practice of calling for the record has not been encouraged as the removal of the record from its proper place would make it impossible for others to use the record, and there is also a serious risk of loss of the record or documents contained therein, and the attendant wear and tear involved in the movement of the record. *See, Joses v. Randall,* Cowp. 17 *per* Lord Mansfield; *Hennet v. Lyon*, 1 B. & Ald. 182 at 184 *per* Lord Ellenborough; *Mortimer v. M'Callan*, 6 M. & W. 58 at 69 *per* Lord Abinger ; *Doe v. Roberts*, 13 M. & W. 523 at 530 *per* Pollock C. B.

It is in view of practical difficulties of this nature that Section 65 of the Evidence Ordinance makes provision for the proof of a document through secondary evidence in the specific instances enumerated therein. Section 65(5) of the Ordinance permits the use of secondary evidence to prove the existence, condition, or contents of a document where "the original is a public document within the meaning of section 74". It appears from the catalogue of "public documents" found in Section 74 of the Evidence Ordinance that, amongst other things, documents forming the acts, or records of the acts o f public officers, in the legislative, *judicial,* and executive spheres, whether in Sri Lanka or in a foreign country, may be regarded as public documents. The only Sri Lankan case which has considered the question whether judicial proceedings fall within this catalogue of "public documents" in Section 76 of the Evidence Ordinance, is the decision of the Supreme Court in *Kowla Umma v. Mohideen* [1938] 39 NLR 454, but the document in question in that case was a foreign judgment which it was thought has to be certified under Section 78(6) rather than under Section 76 read with Section 77 of the Evidence Ordinance. There also appears to be a difference of judicial opinion in regard to the question of the extent to which a person has the "right to inspect" a public document. *See, The Attorney-General v. Geetin Singho* [1956] 57 NLR 280; *Buddhadasa v. Mahendran* [1957] 58 NLR 8. However, as far as a case record maintained by a court of law is concerned, this is a distinction without a difference, and I am firmly of the opinion that since judicial proceedings are conducted in public (except in exceptional cases where for some good reason evidence has to be recorded in camera) and the judicial process has to be transparent, a case record is very much a "public document" which any member of the public has the right to inspect. Accordingly, certified copies of the whole or part of a case record may legitimately be tendered in evidence under Section 77 of the Evidence Ordinance.

The focus of the submissions of learned Counsel before the High Court as well as before this Court in this case was therefore on the issue whether the documents marked A5 to A8, A15, A22 to A27, A33 to A37 and A39 to A41 and produced with the affidavit of Jayawardene purportedly as part of the proceedings in D. C. Colombo 2955/Spl. had been "duly certified" in compliance with Section 77 read with Section 76 of the Evidence Ordinance. The certification relied upon by the Appellant for the purpose of having the aforesaid documents admitted in evidence, was in fact made by the Chief Clerk of the Court of Appeal "at the foot" of the document marked A39 in the following terms :-

"I do hereby certify that the foregoing is a true photo-copy of the proceedings page Nos. 140-145, 244, 250, 276, 277, 334-353, 408-411, 435, 440, 441, 448, 453, 463, 464, 467, 476, 490-492 filed of record in Court of Appeal Case No. 961/91(F) and D. C. Colombo No. 2955/Spl.

Sgd/-

10th October 1997 Chief Clerk, Court of Appeal"

It is relevant to note that the above certification has been made by the Chief Clerk of the Court of Appeal under the seal of the Court of Appeal placed on a stamp for the value of Rs. 10.00, and that the said seal has also been placed on every page of the proceedings so certified along with his initials. Several objections, albeit of a rather technical nature, have been taken to the reception in evidence of each of the document sought to be produced, such as that it is a certification by the Chief Clerk of the Court of Appeal instead of the Registrar of that Court, that it is not in due form as it merely purports to certify that the document is a "true photo-copy" and not as a "certified copy" and that it is not sufficiently descriptive of which case record it seeks to certify as it in fact refers to two case numbers, one of the District Court of Colombo and the other of the Court of Appeal. Although the said certification is somewhat vague and does not clearly state that what is certified is part of the record of the proceedings in D. C. Colombo case No. 2955/Spl, the record of which was at the relevant time, in the *de jure* custody of the Registrar of the Court of Appeal and in the *de facto* custody of the Chief Clerk of that Court, the correct position has been clarified by Jayawardene in the affidavit with which the copies were tendered, and the words "true photo-copy" used in the certification appear to be appropriate and consistent with the language used in Section 76 of the Evidence Ordinance.

The main difficulty faced by the learned High Court Judge was that the said proceedings which learned President's Counsel claims have been "compendiously certified" by the Chief Clerk of the Court of Appeal have *not been compendiously presented* with the said affidavit. As the learned High Court Judge observes in the course of his judgement, the document marked A39 itself consists of a fewer number of pages (pages 490-492) than the pages of the proceedings which have been compendiously certified. Although the said certificate at the foot of A39 seeks to certify "that the *forgoing* is a true photocopy" certain parts of the document so certified have been attached to the relevant affidavit, marked A40 and A41 which cannot be regarded as "forgoing". Similarly, the other documents produced with the affidavit to which objection had been taken namely A5 to A8, A15, A22 to A27, A33 to A37, A40 and A41 did not have at the "foot" of such document a similar certification by the certifying officer although each page of said document bore the seal of the Court of Appeal with the initials of the Chief Clerk and the date of certification. In my opinion, when a document has been certified as a true copy of a public document, the entire document so certified should be tendered in evidence without physically breaking it into parts as the Appellant has done in this case, as such breaking up will have the effect of destroying the identity and character of the certified copy as one single document. I agree with the view of the learned Commercial High Court Judge that the documents marked A5 to A8, A15, A22 to A27, A33 to A37, A40 and A41 cannot in law be regarded as "certified copies" within the meaning of Sections 76 and 77 of the Evidence Ordinance, and that even the document marked A 39 does not fully conform to the requirement of Section 76 as the said document does not contain all the page numbers or even the number of pages specified in the said certification. Accordingly, I hold that the learned High Court Judge was perfectly right when he held as a matter of law that none of the aforesaid documents were duly certified copies admissible under Sections 77 read with Section 76 of the Evidence Ordinance.

However, in my considered opinion, this does not conclude the matter. As previously noted, there is another category of evidence to which Brooke Bond had objected to on 16th February

1998, namely those that were sought to be tendered not under Section 76 and 77 of the Evidence Ordinance, but under some other legal provisions. Unfortunately the learned High Court Judge has failed to consider the fact that only the documents marked A5 to A8, A15, A22 to A27, A33, A35 to A37, A39 to A41 were claimed in the affidavit of Jayawardene to be part of the record in D. C. Colombo case No. 2955/Spl. The documents marked A1 to A4, A9 to A14, A16 to A21 were clearly not part of the proceedings in the said case, and the learned High Court Judge has failed to adduce any reasons for rejecting them, possibly because he was laboring under the mistaken assumption that they too were purported certified copies of the said case record. In fact a reading of the affidavit of Jayawardene would reveal that A11 to A14, A19, A21, A44, A46, A47 were tendered as true copies of documents in the custody of, entries made by, or proceedings conducted in the office of, the Register of Patents and Trade Marks, purportedly certified by the Registrar of Trade Marks in terms of Section 174 of the Code of Intellectual Property, under which such certified copies are admissible as *prima facie* evidence of the same. I am firmly of the opinion that there was no legal basis for the rejection of these documents.

An even more fundamental error committed by the learned High Court Judge is his failure to consider the belatedness of the objection of Brooke Bond to the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49. It is important to note that learned Senior Counsel for Brooke Bond had chosen to raise his objections to these documents only on 16th February, 1998, which, as I have already noted, was the date for the tendering of the affidavit of Brooke Bond. However, on 19th December 1997, when the Appellant's case was closed reading in evidence documents marked A1 to A52, no objection was taken on behalf of Brooke Bond to their admission in evidence, and the learned High Court Judge made order as follows:-

> "Plaintiff's *case closed* reading in evidence A1 to A52.
>
> Affidavit by the defendants on 16th Feb: 1998.
>
> Sgd./-
> HIGH COURT JUDGE (CIVIL) "

Objection was for the first time taken to these documents only on 16th February 1998 as would appear from the proceedings of that date quoted below:-

> ''දිනය 1998.02.16
>
> වත්තිය වෙනුවෙන් නීතීඥ එස්. එල්. ගුනසේකර මහතා පෙනී සිටී.
> පැමිණිල්ල වෙනුවෙන් නීතීඥ එලියතම්බි මහතා පෙනී සිටී.
>
> වත්තියේ සාක්ෂි ඉදිරිපත් නොකරන බව කියා සිටී. ලේඛන වලට විරෝධතා ඉදිරිපත් නොකරන බවද දන්වා සිටී.
>
> ඒ 5 සිට ඒ 8 දක්වා ද, ඒ 11 සිට ඒ 13 දක්වා ද, ඒ 15 සිට ඒ 29 දක්වා ද, ඒ 31 සිට ඒ 41 දක්වා ද, ඒ 44 සිට ඒ 49 දක්වා ද, ලේඛණ වලට විරෝධතාවය දක්වා සිටී.
>
> නිවරදි කිරීම් කරන ලදී. එයට පැමිණිල්ලෙන් විරෝධතා නැත.
>
> වත්තිය වෙනුවෙන් පෙනී සිටින නීතීඥ එස්. එල්. ගුනසේකර මහතා වත්තියේ නඩුව අවසන් කරන බව දන්වා සිටී. දෙපක්ෂයේ ලිඛිත සැලකිරීම් 1998 මැයි 08.
>
> අත්සන
> මහාධිකරන විනිසුරු''

It is clear from the above quoted proceedings of the Commercial High Court in this case that on 19th December 1998, when after the conclusion of the cross-examination and re-examination of witness Jayawardene, the case for the Appellant was closed by learned Counsel for the Appellant marking in evidence A1 to A 52, *no objection was taken by Senior Counsel for Brooke Bond to the*

reception in evidence of the said documents, and on the next date when Brooke Bond was expected to file its affidavit and / or call its witnesses, learned Senior Counsel for Brooke Bond had first informed Court that it is not intended to lead any evidence on behalf of Brooke Bond, and that it does not object to any of the documents of the Appellant except the ones marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49. Learned Senior Counsel for Brooke Bond also took the opportunity to correct the proceedings of the previous date, namely, that of 19th December 1995, and learned President's Counsel for the Appellant did not have any objections to these corrections, which fact was also recorded, after which learned Senior Counsel for Brooke Bond had closed the case for the Defense. It is trite law that as Samarakoon, C.J. observed in *Sri Lanka Ports Authority and Another v. Jugolinija – Boat East* [1981] 1 Sri LR 18 at pages 23-24, "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 *cursus curiae* of the original courts. *See, Silva v. Kindersle* [1915-1916] 18 NLR 85*; Adaicappa Chettiar v. Thomas Cook and Son* [1930] 31 NLR 385 *Perera v. Seyed Mohomed* [1957] 58 NLR 246*; Balapitiya Gunananda Thero v. Talalle Methananda Thero* [1997] 2 Sri LR 101; *Cinemas Limited v. Sounderarajan* [1998] 2 Sri LR 16. Since the documents marked A1 to A52 had been read in evidence on 19th December 1998 at the close of the Appellant's case without any objection from Brooke Bond, they cannot legitimately be objected to on the next date, particularly because serious prejudice could thereby be caused to the Appellant by the belated nature of the objection. I therefore hold that the learned High Court Judge erred in sustaining the said objection.

The learned High Court Judge has also inexplicably failed to consider the implication of the fact that the belated objection to the admissibility of the Appellant's documents being confined to the documents marked A5 to A8, A11 to A13, A15 to A28, A31 to A41 and A44 to A49 which means that there were a large number of documents to which no-objection at all had been taken by Brooke Bond. In fact, documents marked A1 to A4, A9, A10, A14, A29, A30, A42, A43 and A50 to A52 were not objected to by learned Counsel for Brooke Bond even belatedly. It is noteworthy that when learned President's Counsel for the Appellant closed the case for the Appellant on 19th December 1997, no objection was taken on behalf of Brooke Bond to any of the documents marked A1 to A52 which were sought to be read in evidence. As such it was incumbent on the learned High Court Judge to consider whether on the basis of the admissions recorded, the contents of the affidavit of Jayawardene, and the aforesaid un-objected documents, it is possible to award one or more of the relief prayed for by the Appellant. The learned High Court Judge, regrettably, has not undertaken such an evaluation, and the only reason adduced in his judgment for not taking to consideration the affidavit of Jayawardene is that he "could not have had any personal knowledge relating to the several matters deposed to in the affidavit". The learned High Court Judge has formed this opinion on the basis of the very brief cross-examination of Jayawardene, in the course of which it was elicited that the said Jayawardene had never been employed or had and any dealings with Brooke Bond or Eastern Brokers Ltd. However, the said cross-examination clearly reveals that Jayawardene was the Managing Director of the Appellant Company since its incorporation in 1977, and was in the tea trade. Jayawardene has in paragraph 1 of his affidavit expressly declared that he deposes to the facts contained therein from his personal knowledge and from documents available to him, copies of which he has produced marked A1 to A52. In his brief cross-examination of Jayawardene, learned Senior Counsel for Brooke Bond made no endeavor to probe the extent of the witnesses personal knowledge of matters deposed to by him in the affidavit, and the strange proposition that he had absolutely no personal knowledge of any of such matters was never put to him in cross-examination. In these circumstances, I am of the opinion that it is not reasonable to conclude from this cross-examination that Jayawardene had no personal knowledge of the matters he had deposed to in the affidavit, and to refuse to consider the contents thereof in deciding the case at hand. I hold that the learned Commercial High Court Judge had no justification for the rejection of the affidavit of the affidavit in this manner.

I have at the commencement of this judgment summarized the facts admitted by the parties at the trial, and also summarized the primary issues regarding which the parties were at variance, and in view of my finding that the Commercial High Court had no justification in law for rejecting the affidavit of Jayawardene or any of the documents tendered with the said affidavit, the question arises as to whether if the rejected evidence had been received, the ultimate decision of the Commercial High Court would have been different. This is a very material consideration particularly in the light of Section 167 of the Evidence Ordinance, which provides that-

> "The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decisions in any case, if it shall appear to the court before which such objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision."

Having examined the recorded admissions, the issues, as well as the documents marked A1 to A52, I am clearly of the opinion that had the learned Commercial High Court Judge taken the said documents into consideration, there was a strong likelihood that the Court would not have dismissed the application of the Appellant and would have granted one or more of the relief prayed for by the Appellant. I hasten to add that this is a view formed by me without the benefit of submissions of Counsel on the questions of intellectual property rights that arise in this case, and that therefore the Commercial High Court is free to arrive at its findings on the issues already raised, if they are adopted without objection, or on fresh issues that may be formulated by Court, at a fresh trial. For the aforesaid reasons, I am of the opinion that this case should be remitted to the Commercial High Court for fresh trial.

Before parting with this judgement, I wish to add that although Notice of Appeal and Petition of Appeal in this case were issued respectively on 5th November 1999 and 17th December 1999, and the matter was first fixed for hearing in the Supreme Court on 1st August 2003, argument has thereafter been repeatedly postponed in view of the submission made by learned President's Counsel for the Appellant, without any objection from the learned Counsel for Brook Bonds, that the outcome of the appeal then pending in the Court of Appeal in C. A. Appeal No. 961/91 (F), which arose from Brooke Bond's action against Akbar Brothers Exporters (Pvt) Ltd., would have a bearing on this appeal. However, there has been no intimation to this Court of the outcome of the said case, and the findings of the Court of Appeal in the said case could not be taken into consideration in determining this appeal.

Accordingly, I make order setting aside the judgement of the Commercial High Court of Colombo dated 22nd October 1999 and remitting the case back for fresh trial. I award to the Appellant a sum of Rs. 15,000 as the costs of this appeal.

JUDGE OF THE SUPREME COURT

BANDARANAYAKE, J;

I agree.

JUDGE OF THE SUPREME COURT

BALAPATABENDI, J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (CHC) Appeal No. 3/2000
H.C. (Civil) No. 101/98(1)

Hon. The Attorney-General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

Defendant-Appellant

Vs.

1. Lanka Tractors Limited,
   No. 45/100, Nawala Road,
   Narahenpita,
   Colombo 05.

2. Globe Commercial Trading Limited,
   No. 40/1, Dickman's Road,
   Colombo 05.

Plaintiffs-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
S.I. Imam, J.

COUNSEL : Y.J.W. Wijayatillake, P.C., A.S.G., with Rajitha Perera, S.C., for Defendant-Appellant

Faiz Musthapha, P.C., with Ronald Perera for 1st Plaintiff-Respondent

Kuvera de Zoysa with Senaka de Saram for 2nd Plaintiff-

Respondent

ARGUED ON: 16.11.2009

WRITTEN SUBMISSIONS
TENDERED ON: Defendant-Appellant - 19.01.2010
1st & 2nd Plaintiffs-Respondents - 08.02.2010

DECIDED ON: 30.03.2010

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the High Court (Commercial) of Colombo dated 28.03.2000. By that judgment the High Court had granted relief in favour of the plaintiffs-respondents (hereinafter referred to as the respondents) in terms of prayers a, b and c of the Plaint. The defendant-appellant (hereinafter referred to as the appellant) appealed to this Court in terms of High Court of the Provinces (Special Provisions) Act, No. 10 of 1996 read with Section 756 of the Civil Procedure Code and the said appeal was fixed for hearing.

When this matter was taken up for hearing Additional Solicitor General for the appellant, learned President's Counsel for the 1st respondent and learned Counsel for the 2nd respondent agreed that the appeal could be considered on the following question:

> "Whether the undertaking of the Secretary to the Treasury contained in clauses 9 and 10 of the Agreement marked P7, binds the State."

The facts of this appeal, as submitted by the learned Additional Solicitor General, for the appellant, *albeit* brief, are as follows:

The respondents instituted action in the High Court of the Western Province against the appellant, seeking to enforce a purported Agreement against the State and claiming the following:

a. a declaration that the Secretary to the Treasury had acted in breach of clauses 9 and 10 of the purported Agreement annexed to the Plaint marked P_7;

b. that the Secretary to the Treasury be directed to execute a 99 year lease over a land and premises at Nawala Road, Narahenpita and to hand over the deeds and plans of premises at Olcott Mawatha, Colombo 11; and

c. for damages in a sum of Rs. 174,540,995/- up to 31st March 1998 and continuing damages in a sum of Rs. 1,800,000/- per month with legal interest.

The appellant had filed answer denying that the respondents were entitled to the reliefs sought and stated *inter alia* that,

1. the Ministry of Trade and Commerce had called for offers for the purchase of 60% of the issued share capital of Lanka Tractors Ltd. (the 1st respondent),

2. the 2nd respondent had offered a sum of Rs. 144 million for the purchase of the said 60% share holding in the 1st respondent;

3. the offer of the 2nd respondent had been accepted by the Ministry of Trade and Commerce and that 17.5 million shares amounting to 60% of the issued share capital of the 1st respondent had been transferred to the 2nd respondent; and

4. there was no legal obligation on the State to grant a 99 year lease over the property at No. 45/100, Nawala Road, Narahenpita as that,

i. the land at No. 45/100, Nawala Road, Narahenpita was admittedly State land;

ii. in law the only person entitled to authorize the grant of a lease of 50 years or more in relation to the State land is HE the President of the Republic;

iii. the purported Agreement P_7 was alleged to have been signed by the Secretary to the Treasury Mr. Paskaralingam, who in any event, had no authority to authorize a grant of a 99 year lease.

Learned Additional Solicitor General contended that the trial commenced on 2nd March 1999, issues were framed for the parties and the respondents led evidence of several witnesses, but failed to call as a witness, the Chairman of the 1st respondent Company, who would have been best placed to give evidence in relation to several allegations in the Plaint.

The appellant had led evidence of several witnesses including the Assistant Commissioner of Lands, who gave evidence regarding the requirement that HE the President should authorize the grant of a 99 year lease and the Secretary to the Cabinet, who produced the Cabinet Report and the Cabinet decision thereon relating to the sale of the 60% shareholding of the 1st respondent to the 2nd respondent, marked $D_{6(a)}$ and D_6 , respectively.

The High Court of the Western Province delivered its judgment on 30.03.2000 in favour of the respondents and granted the reliefs claimed under prayers a, b and c of the Plaint dated 04.08.1998.

Being aggrieved by the said judgment of the High Court of the Western Province, the appellant sought to appeal to this Court.

The main contention of the learned Additional Solicitor General was on the basis that the learned Judge of the High Court of the Western Province had failed to consider the evidence to

the effect that the grant of a 99 year lease was not recommended to Cabinet and that the Cabinet decision did not authorize the grant of a 99 year lease to the 2nd respondent.

The basis for the learned Additional Solicitor General's contention was that, the only person entitled to authorize the grant of a lease of 50 years or more in relation to State land would be HE the President of the Republic and that even if the Secretary to the Treasury had signed the said document P_7, he had no legal authority to do so as only HE the President is empowered to approve the granting of a 99 year lease of State land.

In support of his contention, learned Additional Solicitor General relied on the decision of the **Attorney-General v A.D. Silva** ((1953) 54 NLR 529) and submitted that a Public Officer cannot bind the State unless expressly empowered to do so. It was also contended that the same principle was recognized and applied in **Dean V The Attorney-General** ((1923) 25 NLR 333), **The Attorney-General v Wijesooriya** ((1946) 47 NLR 385), **Rowlands v The Attorney-General** ((1971) 74 NLR 385) and **Vasudeva Nanayakkara v N.K. Choksy and 30 others** (S.C. (FR) application No. 209/2007 – S.C. Minutes of 21.07.2008).

It was further contended that the document marked as P_7 does not bind the State and does not make the State liable to the respondents in any manner.

It was the contention of the learned President's Counsel for the 1st respondent and the learned Counsel for the 2nd respondent (hereinafter referred to as the learned President's Counsel for the respondents) that clauses 9 and 10 of the Agreement marked P_7 clearly requires the Government of Sri Lanka to execute a lease Agreement in favour of the 1st respondent and that its failure to act in accordance with the aforementioned clauses had caused the respondents to suffer loses. It was further submitted that according to clause 10 of the document P7, the Government was obliged to execute a 99 year lease of the land and premises at Nawala Road, within a period of one year, in favour of the 1st respondent and to hand over to the 1st respondent within six months of the date of execution of P_7, the Deeds and documents of title relating to the land and buildings at Olcott Mawatha, Colombo 11.

Learned President's Counsel for the respondents further submitted that the appellant's contention that the non-compliance of clauses 9 and 10 of P_7 were due to the fact that,

1. clauses 9 and 10 do not form a valid Agreement enforceable by law;

2. no material consideration has been given for clauses 9 and 10 of P_7; and

3. enforcement of clauses 9 and 10 of P_7 is against the State and is detrimental to the interests of the public,

cannot be sustained as the said amounts had been paid and the receipt of the said payment had been accepted by the appellant. It was further contended that, the appellant had not adduced any reasons as to why the Government could not fulfill its obligations under the Agreement marked P_7. It was also contended on behalf of the respondents that, they do not dispute the proposition of law brought forward by the learned Additional Solicitor General on the basis of the decisions in **Attorney-General v Silva** (supra) and **Rowlands v Attorney-General** (supra), but join in issue on the facts and submitted that the Secretary to the Treasury had clear authority and a mandate from the Cabinet to enter into the relevant Memorandum of Understanding (MOU) and as such the same Memorandum of Understanding (MOU) is binding on the State.

The Conversion of Public Corporations or Government Owned Business Undertakings into Public Companies came into being in 1987 in terms of Act, No. 23 of 1987. Under Section 2 of the said Act, the Sri Lanka State Trading (Tractor) Corporation was converted into a limited liability Company known as Lanka Tractors Limited, viz., the 1st respondent company in 1991. Thereafter the Government of Sri Lanka, who had held all the shares of the 1st respondent, had offered 60% of its shares for sale to the public (P_4). All the said shares were vested in the Secretary to the Treasury on behalf of the State as, section 2(3) of Conversion of Public Corporations Act, No. 23 of 1987 clearly states that,

> "Upon the publication of the Order referred to in sub-Section (2) of the Gazette, the Registrar of Companies shall allot all the shares into which the share capital of the Company is divided to the Secretary to the Treasury (in his official capacity) for and on behalf of the State."

For the purpose of the said sale of 60% of shares of the 1st respondent Company an advertisement was published in the Ceylon Daily News issue of 25.05.1993.

It is important to refer to the said advertisement by the Ministry of Trade and Commerce, which extended an invitation to purchase shares in Lanka Tractors Ltd., which had clearly stated to return the documents in quadruplicate addressed to the Chairman 'Cabinet Appointed Committee'. The Cabinet Memorandum of 15.07.1993 (D_{6A}) made reference to the said advertisement, which read as follows:

> "Office of the Ministry of Trade and Commerce,
>
> 15th July, 1993.
>
> Cabinet Memorandum
>
> Peopalisation of Lanka Tractors Ltd., (Formerly Sri Lanka State Trading Tractor Corporation)
>
> The Cabinet of Ministers at its meeting held on 10.02.93 approved the recommendation made by the Divestiture Committee in its report that both of the shares of Lanka Tractors Ltd., be offered for such by public advertisement. The Divestiture Committee has reported that the award of 60% of shares of Lanka Tractors Ltd.,

be offered to M/s Globe Commercial Trading Co. Ltd., who made the highest offer.

I enclose a copy of the 3rd report of the Divestiture Committee and seek approval of the Cabinet for the implementation of the recommendations at paragraph 9 of the report.

Sgd.
A.R. Munsoor,
Minister of Trade & Cinnerce,"

The 2nd respondent, who had wanted to make an offer for the said 60% shares of the 1st respondent, had obtained the Profile issued by the Assistant Secretary of the Ministry of Trade and Commerce (P_5).

It is to be borne in mind that the Profile on Sri Lanka State Trading (Tractor) Corporation (P_5) was prepared by Ernst & Young **for the Government** and on the basis of the said Profile, offers were solicited. The lands referred to above and which were in issue were clearly described under the heading on 'Fixed Assets', which were given as follows:

"The land and buildings shown in the schedule of Fixed Assets above represents the premises at Nawala Road, Narahenpita and Olcott Mawatha, Colombo 11. The Narahenpita premises is presently owned by the Government of Sri Lanka and is expected to be given on a 99 year lease. These premises should be transferred to the Corporation prior to its peopalisation."

Thus it is quite obvious that the Profile, which solicited the offers, included both premises at Nawala Road, Narahenpita and Olcott Mawatha, Colombo 11, and also had stated that such premises should be transferred to the Corporation well before its peoplisation. It also emphasized the fact that the said premises were to be given on a 99 year lease.

The 2nd respondent made an offer of Rs. 144.48 million for the said 60% shares of the 1st respondent (P_{7A}). The 2nd respondent's offer being the highest received, the Cabinet appointed Tender Board recommended (D_{6B}) that the 2nd respondent's offer was the highest and had been well above the valuation of the Chief valuer. In their evaluation, the said Cabinet Appointed Tender Board had stated thus:

> "EVALUATION
>
> . . . .
>
> The offer made by Globe Commercial Trading Ltd., does not contain any unacceptable conditions, and in terms of both value of the offer, i.e., Rs. 144,480,000/- for 60% of the shares, and the per share price of Rs. 13/76 is above the chief valuer's valuation and is ranked first in the financial offers.
>
> RECOMMENDATIONS
>
> i. 60% of the shares of Lanka Tractors Ltd., be transferred to M/s. Globe Commercial Trading Co. Ltd., for a total consideration of Rs. 144,480,000/-."

On 28.07.1993 the Cabinet of Ministers, having considered the recommendations of the Cabinet Committee had granted approval for the transfer of 60% of the shares of Lanka

Tractors Ltd., to be transferred to M/s. Globe Commercial Trading Co. Ltd., for a total consideration of Rs. 144,480,000/- (D_6)."

Learned Additional Solicitor General for the appellant strenuously contended that the report of the Cabinet appointed Committee did not specifically had referred to the two immovable properties.

As referred to earlier, the offers were solicited in terms of the Profile prepared for the Government (P_5) and the said Profile had clearly referred to both the properties in question. Moreover in paragraph 10 of the Agreement between the Government of Sri Lanka and the 2nd respondent, both lands were clearly referred to as the immovable properties in question. It is therefore quite clear that the properties in question included the land and premises at Nawala Road, Narahenpita and the land and buildings at Olcott Mawatha, Colombo 11.

It is of interest to note as to what had taken place after the approval was granted for the transfer of 60% shares of the 1st respondent to the 2nd respondent by the Cabinet of Ministers. On 16.08.1993, the then Secretary for Trade and Commerce had written to the Chairman/Managing Director of the 2nd respondent Company in regard to the said transfer of shares and had stated as follows:

"Sale of 60% shares in Lanka Tractors Ltd.,

> I wish to inform you that your offer dated 17th June for the purchase of 60% of the shares of Lanka Tractors (Pvt.) Ltd., has been successful.
>
> 02. Before transferring the 60% of shares of Lanka Tractors Ltd., to your Company, you are requested to make a full payment of Rs. 144,480,000/-and enter into a Memorandum of

Understanding with the Government of Sri Lanka. A copy of the draft Memorandum of Understanding will be sent to you shortly."

Accordingly the then Secretary to the Treasury, R. Paskaralingam, had entered into an agreement with the 2nd respondent, that being the Globe Commercial Trading Limited. It is not disputed that the full consideration of Rs. 144,480,000/- was paid to the Government at the time of signing the Agreement. The respondents had called the signatories to the said Agreement and one Mr. Marian, who was present at the signing of the Agreement. Both of them had stated that the Secretary to the Treasury had signed the said Agreement as representing the Government of Sri Lanka.

As stated earlier, learned Additional Solicitor General took up the position that a Public Officer cannot bind the State unless and otherwise expressly empowered to do so and relied on the decision in **Vasudeva Nanayakkara v N.K. Choksy and 30 others** (supra), which had recognized and applied the decision in **Attorney-General v A.D. Silva** (supra).

In **Attorney-General v A.D. Silva** (supra) the Privy Council had to deal with a matter as to the scope of a Public Officer to act for an on behalf of the Crown, in terms of the Customs Ordinance read with the Interpretation Ordinance. In that matter the plaintiff's case was that, by a notification in the Government Gazette the Principal Collector of Customs, acting for an on behalf the Crown had advertised certain goods for sale by public auction. The said plaintiff had purchased the goods at an auction and thereafter the Principal Collector had refused to deliver the goods. The defendant had pleaded, *inter alia* that there had been no contract binding on the Crown and prayed that the action be dismissed.

The Privy Council had held that the Principal Collector of Customs had neither actual authority under Sections 17 and 108 of the Customs Ordinance nor ostensible authority on behalf of the Crown to sell the goods.

In **Vasudeva Nanayakkara v N.K. Choksy and 30 others** (supra) reference was made to the decisions in **Attorney-General v A.D. Silva** (supra) and **Rowlands v Attorney-General** (supra) in considering the question whether a Public Officer can act in excess of his statutory authority and enter into any agreement or arrangement that would be binding on the State.

Learned Additional Solicitor General for the respondents relied on the following passage in **Vasudeva Nanayakkara's** (supra) decision in support of his contention.

> "The question whether a Public Officer can act in excess of his statutory authority and enter into any agreement or arrangement and whether such agreement or arrangement would be binding on the State on a plea based on the ostensible authority of the Public Officer has been fully considered and settled more than half a century ago. It appears that with the passage of time the basic proposition of law in this regard has been forgotten. . . . . The judgment in **A.D. de Silva's** case was followed by the Supreme Court in the case of **Rowlands v Attorney-General** (74 N.L.R. 385). In that case the Court considered the question whether the principle of ostensible authority could be applied to enforce a liability against the State on the basis of an assurance given by the Minister of Finance."

On the basis of the aforementioned decisions, learned Additional Solicitor General for the appellant contended that no representation by the agent as to the extent of his authority, can amount to holding power on behalf of the State and no Public Officer has the right to enter into a contract in respect of the property of the State. It was further contended that a representation by the Public Officer would be binding on the State only if there is a specific provision to that effect in the statute.

Although learned Additional Solicitor General had relied on the aforementioned decisions the question that arises in this appeal is as to whether the undertaking given by the Secretary to the Treasury in terms of the Agreement would bind the State. As stated earlier, the present appeal is based on the transfer of 60% of shares of the 1st respondent Company to the 2nd respondent, which had taken place after the peoplisation of the 1st respondent Company under and in terms of the Conversion of Public Corporations Act, No. 23 of 1987. If one considers carefully the procedure that had been followed since the time the advertisement for the sale of 60% appeared in the Ceylon Daily News on 25.05.1993, it is apparent that every step had been taken with the approval of the Cabinet of Ministers. The Secretary to the Treasury had taken certain actions only on the basis of the approval granted by the Cabinet of Ministers. Article 43 of the Constitution deals with the Cabinet of Ministers and Article 43(1) states as follows:

> "There shall be a Cabinet of Ministers charged with the direction and control of the Government of the Republic, which shall be collectively responsible and answerable to Parliament."

More importantly Article 43(2) of the Constitution specifically states that the President of the Republic shall be a member of the Cabinet of Ministers and shall be the Head of the Cabinet of Ministers. In terms of the aforementioned, provision has been made for the Cabinet of Ministers to be charged with the direction and control of the Government. It is to be borne in mind that they are also responsible and answerable to Parliament. Referring to the powers vested in HE the President and the Cabinet of Ministers, Dr. J.A.L. Cooray (Constitutional and Administrative Law of Sri Lanka, 1995, pg. 188) had described the authority vested with them, which reads as follows:

> "The President is the person who is solely vested under the Constitution with the executive power of the People, including the defence of Sri Lanka. Subject to the powers and functions conferred on the President by the Constitution, the Cabinet of Ministers exercises control and responsibility in respect of the

> determination of the general policy as well as in respect of the direction of that policy and the decision-making of the Administration. **The President and the Cabinet of Ministers are thus the central directing authorities of the Republic responsible for the formulation and execution of the national policy**" (emphasis added).

In the aforementioned background, it is quite clear that when an Agreement had been entered into with the approval of the Cabinet of Ministers that would include not only the Cabinet of Ministers but also the Head of the State. In such circumstances, it would not be correct to say that the Secretary to the Treasury had acted in excess of his statutory authority as he had acted on the basis of the decision of the Cabinet of Ministers and had acted on behalf of the Republic of Sri Lanka. It is also to be noted that since it had been a decision of the Cabinet of Ministers, headed by the HE the President it would not be correct to say that there was no approval for the transfer of land on a 99 year lease.

In the light of the above, it would be of importance to refer to the decision in **New South Wales v Bardolph** (1934 52 L.L.R. 455), which decision has been referred to in **Rowlands v Attorney General** (supra) as one of the clearest statements relating to the enforceability of contracts against the Crown. The facts in **New South Wales v Bardolph** (supra) were as follows:

The Tourist Bureau of New South Wales was a department of the Public Service of that State under the control of the Chief Secretary, who was the responsible Minister. It was an industrial undertaking within the meaning of the Special Deposits (Industrial Undertakings) Act 1912-1930. An incident of its work is continued advertising. It is the duty of an officer of the Premier's department to arrange for advertisements relating to the various Government departments. On the authority of the Premier 'as a matter of government policy', this officer

entered into a contract with the plaintiff, a resident of South Australia, for the weekly insertion in a newspaper owned by the latter, of advertisements relating to the Tourist Bureau. The contract, which was for a period which affected more than one financial year, was not expressly authorized by the legislature, nor was it sanctioned or approved by any Order in Council or Executive Minister. Shortly after the making of the contract a change of Government took place and the new Administration refused to use or pay for any further advertising space in the newspaper. Notwithstanding this, the plaintiff continued to insert the advertisements, and at the end of the period named in the contract, brought an action in the High Court against the State of New South Wales for the recovery of the total unpaid amount of the agreed advertising rates. Evatt, J., held that the contract was validly entered into by responsible Ministers of the Crown and that it was enforceable against the State of New South Wales subject to the Parliament's making moneys available to the Executive to discharge liabilities under the contract. On an appeal to the Full Court, decision of Evatt, J., was affirmed and held that the contract was one that of the Crown and subject to the provision by Parliament of sufficient moneys for its performance, was binding on the Crown.

Considering the appeal, Starke J., referred to the authority sanctioned to officers and had stated that,

> "The departments of Government enter necessarily into many and various relations with the King's subjects, and the officers of these departments, through whom these relations are established, represent the Executive – that is, the Crown – (Anson, Law and Custom of the Constitution, 3rd ed. ((1908), The Crown, Vol. II, Part II pg. 298). It is well established that an officer of the Crown is not personally liable under contracts made by him for an on behalf of the Crown (**Gidley v Lord Palmerston** ((1822) 3 Brod. & B 275), **Palmer v Hutchinson** ((1881) 6 App. Cases 619) and **Dunn v Macdonald** ((1897) 1 Q.B. 555).

. . . .

> It is not every contract made or purporting to have been made by an officer or servant of the Crown on its behalf that will bind the Crown, but only such as are within the authority delegated to that officer or servant. The authority is a matter which ultimately falls for determination in the Courts of law (see **Musgrave v Pulido** ((1879) 5 App. Case 102).
>
> . . . .
>
> The question then is simply whether a contract made by the Superintendent of Advertising on behalf of the Crown binds it.
>
> An advertising branch in the Premier's Department had been established in New South Wales as one of the ordinary activities and functions of its Government. A superintendent in charge of the branch was appointed, and it was on the ordinary course of his duty to prepare and make contracts for Government advertising. In the present case, he received special instructions from the head of the Government to make the contract sued upon. **A contract made in these circumstances is a Government contract, and in my opinion, binds the Crown**" (emphasis added).

On a careful consideration of the decision in **New South Wales v Bardolph** (supra), it is clear that in the absence of controlling provisions, contracts are enforceable against the Crown if,

a) The contract is entered into in the ordinary or necessary course of Government administration;

b) It is authorized by the responsible Ministers of the Crown; and

c) The payments which the contract is seeking to recover are covered by or referable to a parliamentary grant for the class of service to which the contract relates.

Evatt, J., however had specifically referred to the 3rd point aforementioned (c) and had stated that,

> "In my opinion, however, the failure of the plaintiff to prove (c) does not affect the validity of the contract in the sense that the Crown is regarded as stripped of its authority or capacity to enter into a contract . . . . The enforcement of such contracts is to be distinguished from their inherent validity."

In the present appeal which is under review, as referred to earlier, from the inception, the Ministry of Trade and Commerce had been involved in the Agreement in question. The said Ministry had called for offers, which were to be submitted to a Cabinet Appointed Committee thereby the contract had obtained the sanction of the Cabinet of Ministers, the Profile was prepared for the Government and later the recommendations were approved by the Cabinet of Ministers. If the contract had been entered into with a party on behalf of the Government by an official acting in excess of authority, such a contract would not bind the State as the officer had no authority to perform such an act. However, in the present appeal it is quite clear that the Secretary to the Treasury had acted on behalf of the State as the Cabinet of Ministers had approved the said transaction which was based on the peoplisation in terms of Act, No. 23 of 1987.

This position could be further established by reference to the following aspects.

After the completion of the preliminary steps regarding the transfer of 60% of shares of the 1st respondent, referred to above, all based on approvals granted by the Cabinet of Ministers, an agreement was signed **between the Government of the Democratic Socialist Republic of Sri Lanka and Messrs Globe Commercial Trading Limited regarding the transfer of 60% of the shares of Lanka Tractors Limited**. The undertaking given by the Government to the 2nd respondent was clearly stipulated in clauses 9 and 10 of the said agreement, which read as follows:

> "9. **The Government shall make available** to the purchasers for the perusal on or before the execution of these presents a statement of the fixed assets of the Company as given in the Profile. **The Government confirms** that the fixed assets are free from lien and/or any encumbrances of whatever nature. The **Government undertakes** that all deeds, documents and survey plans evidencing title in the property of the Company will be handed over to the Purchasers within six (6) months.
>
> 10. **The Government** undertakes to execute within a period of one year, a ninety nine (99) year lease in respect of the land and premises at Nawala Road, Narahenpita in favour of the Company and also undertakes that all deeds, documents and survey plans evidencing title in the property to the land and buildings at Olcott Mawatha, Colombo 11 in favour of the Company will be handed over to the Purchasers within six (6) months from the date of execution hereof" (emphasis added).

Section 2(3) of the Conversion of Public Corporations Act, No. 23 of 1987 clearly states that all shares were vested in the Secretary to the Treasury,

"in his official capacity for and on behalf of the State."

It would be of interest to refer to a letter filed by the learned Additional Solicitor General by way of a motion dated 09.09.2009, which deals with the clauses 9 and 10 of the Agreement (P_7) in question. A letter dated 22.12.2008 addressed by Dr. Sarath Amunugama, the Minister of Enterprise Development and Investment Promotion to His Excellency the President was attached to this motion. This letter reveals not only the method in which the transaction in question had taken place, but also the attitude of the present authorities towards its finalization. Salient paragraphs of the said letter of 22.12.2008, which emphasizes this position, are given below.

> "The sale of the majority stake in LTL was **carried out in the most transparent and competitive manner** in that after failed attempts for obtaining a quotation in the Colombo Stock Exchange on an all or nothing basis for 60% of the stake in the Company the Cabinet appointed sub-Committee called for competitive bids on 25th May 1993. For the purpose of privatization a Profile of the Company was prepared by Ernst & Young on behalf of the Cabinet appointed Committee for privatization. This Profile which was for all intention and purpose was a prospectus by the GOSL was provided to all the potential bidders. This document gave the financial performance and the operations of the Company for the past several years. Also details of its two immovable assets namely at No. 343, Olcott Mawatha, Colombo 11 and at 45/100, Nawala Road, Colombo 05.
>
> . . . .

The foreign investors namely Messrs Beaver Power Limited of United Kingdom with other consortium partners through their local representative signed a MOU with the Government of Sri Lanka on 21st January 1994, in pursuant to which it paid a sum of Rupees 144,480,000/- (Rs. 144.4 Mn) as one installment on the same day to acquire the **60% ownership of the Company and Control of the management**.

As per clause 10 of the said agreement (MOU) the Government had an **obligation** to execute a 99 year lease of land situated at 45/100, Nawala Road, Colombo 05. This land is occupied by the Company even prior to the day of the agreement was executed.

Undertaking also given by the Government of Sri Lanka to hand over all deeds, documents and Survey Plans evidencing the title to the property (land) and buildings at Olcott Mawatha, Colombo 11 in favour of the Company within six months from the date of signing the agreement.

The above two undertakings formed the **FUNDAMENTAL CONDITIONS** of the sales agreement (MOU) executed on 21st January 1994 between Government of Sri Lanka and the consortium of investors led by globe Commercial Trading Limited."

It should also be mentioned that the Government of Sri Lanka had taken steps to make a payment as a settlement of dues to Lanka Tractors Ltd. The Cabinet of Ministers had granted approval for a Memorandum dated 26.03.2004 submitted by the Minister of Finance on settlement of dues to Lanka Tractors Ltd., by government of Sri Lanka. The said Cabinet paper,

which was referred to by the learned Additional Solicitor General for the appellant (04/0395/105/037) was in the following terms:

> "Approval was granted for the Treasury to advance a sum of Rs. 36,248,761/- against the agreed amount payable to Lanka Tractors Ltd., upon the settlement being finalized, in view of the hardships being faced by the employees. Out of this amount Rs. 29,321,619/- to be paid through the Commissioner of Labour and the balance amount of Rs. 6,927,142/- to be paid to the Company for payment to those workers, who retired under the Voluntary Retirement Scheme."

In the said letter dated 22.12.2008, the Minister of Enterprise Development and Investment Promotion had suggested to settle this matter, but when inquired at the hearing, learned Additional Solicitor General categorically stated that there is no possibility of a settlement.

On a consideration of the totality of the above, it is abundantly clear that the transaction in question, for the said transfer of 60% of shares of the 1st respondent to the 2nd respondent had taken place on the approval granted by the Cabinet of Ministers and therefore the undertaking of the Secretary to the Treasury contained in clauses 9 and 10 of the Agreement P_7 clearly binds the State.

For the reasons aforesaid, the question on which this appeal was considered is answered as follows:

> "The undertaking of the Secretary to the Treasury contained in clauses 9 and 10 of the Agreement marked P_7, binds the State."

The judgment of the High Court (Commercial) of Colombo dated 28.03.2000, is therefore affirmed and this appeal is accordingly dismissed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court

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

SC CHC No. 25/2001

In the matter of an application made
In accordance with Chapter LVIII of the Civil Procedure Code read together with Sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

Kulanthan Palaniyandy,
Carrying on business under the name style and firm of Paramount exporters, No. 151, Old Moor Street, Colombo 12.
Defendant-Petitioner-Appellant

HC (Civil) 73/99 (1)

-Vs-

G. Premjee Limited,
7th Floor, Cathay House, No. 8/30, North Sathorn Road, Bangkok 10501, Thailand.
Plaintiff-Respondent-Respondent

BEFORE : **SHIRANEE TILAKAWARDANE, J.**
K. SRIPAVAN, J.
RATNAYAKE, J.

COUNSEL : Kushan D' Alwis with chamila Wickramanayake instructed by Sinnadurai Sundaralingam and Balendra for Defendant-Petitioner-Appellant.

Plaintiff-Respondent-Respondent is absent and unrepresented.

ARGUED &
DECIDED ON : 02.07.2010

…….

SHIRANEE TILAKAWARDANE, J.

During their submissions, both Counsel conceded that the only question of law which is urged before this Court is whether the service of summons on the Appellant by way of substituted service was duly served under Section 60 (2) of the Civil Procedure Code and whether the order of the learned High Court Judge refusing to vacate *ex-parte* judgment and decree was erroneous.

The Defendant-Petitioner-Appellant (hereinafter referred to as the Appellant) had preferred this appeal to set aside the order of the Commercial High Court (Civil) of the Western Province dated 05.10.2001, whereby the

application to set aside the *ex parte* decree, consequent to the default in the appearance of the Appellant , was refused .

Plaint in this case was filed on 19/07/99, and summons was issued thereafter and sent for service through one Hemachandra , a fiscal officer of the Court. This fiscal officer's report dated 15/9/99 (marked as X1) was filed with the Petition of Appeal dated 26th November, 2001. In his report the fiscal officer had noted that summons could not be served in person as the Appellant was avoiding the service of summons. Service of summon was re-issued and reserved on three separate occasions namely, 16/8/99, 18/8/99 and 21/8/99.

The fiscal officer in giving evidence before the Court at the inquiry stated that on all three occasions the business premises had been open, and though the office was working that he had been informed that the Appellant was not in and therefore summons could not be served

The fiscal officer Hemachandra further stated that it was his considered opinion that the Appellant was deliberately seeking to evade the receipt of summons.

Counsel for the Appellant sought to assail the evidence led at that inquiry, but which side the entrance was or other such matters of fact were admittedly not raised at the inquiry, and had this been done during the cross examination, the

fiscal officer would have had the opportunity to explain and clarify these matters of fact.

There is a presumption under Section 114 of the Evidence Ordinance that all acts performed as official acts of the Court are regularly performed and the burden to rebut this presumption in law is solely on the Appellant.

Due to the opinion of the Court that summons had been deliberately refused and service of the summons evaded by the Appellant order for ex parte trial was made on 03/12/99 and subsequently *ex parte* decree was admittedly served on the Appellant and report was filed marked as X2, by the same fiscal officer who confirmed this through his affidavit dated 25/10/99.

It is noted by this Court that this *ex parte* decree was served on the Appellant whilst he was at the same residential address referred to in X1, the fiscal report of Hemachandra.

The Appellant had failed to give adequate evidence to rebut the presumption and /or to satisfy the Court that he had a pertinent and genuine reason why summons

could not be served on him originally. There is also the evidence of the fiscal officer to disclose that reasonable due diligence had been exercised to serve the original summons by substituted service which was sought to be served on 11/10/99. According to the fiscal officer's evidence, this too had not been successful due to the deliberate evasive tactics of the Appellant.

Therefore, we see no reason to interfere with the order dated 05/10/2001 made by the Judge of the Civil Appellate Court. Accordingly, the appeal is dismissed. No costs.

Registrar is directed to send the original case record and the judgment of this Court to the original Court for the expeditious conclusion of the case.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

RATNAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of
Article 126 of the Constitution.

SC. FR Application
No. 252/2006

Roshan Mahesh Ukwatta,
No. 16/6A, Kotigala Mawatha,
Walpola,
Angoda

(Presently at the Colombo Remand Prison)

Petitioner

Vs

1. Sub Inspector Marasinghe,
   Officer in Charge,
   Crime Division,
   Police Station,
   Welikada.

2. Sagara Liyanage,
   Inspector of Police,
   Officer in Charge,
   Police Station,
   Welikada.

3. The Inspector General of Police,
   Police Headquarters,
   Colombo 1.

4. Honourable Attorney General,
   Department of the Attorney General,
   Colombo 12.

Respondents

Before	:	**Saleem Marsoof P C, J** **P A Ratnayake P C, J** **Chandra Ekanayake, J**
Counsel	:	Upul Jayasuriya with Sandamali Rajapaksa for the Petitioner
		Upul Kumrapperuma with Suranga Munasighe for the 1st Respondent
		Riaz Hamza, SSC for 3rd and 4th Respondents.
Argued on	:	07.07.2009.
Written submissions tendered on	:	13th August 2009 (by the Petitioner) 03rd September 2009 (by the 1st Respondent)
Decided on		15.12.2010

Chandra Ekanayake, J.

By petition dated 24/7/2006 (filed together with his Affidavit) the petitioner has sought relief from this Court for the alleged infringement of his fundamental rights guaranteed under articles 11,12, 13(1) and 13(2) of the Constitution. Leave to proceed was granted by this Court on 28.07.2006 only for the alleged violations of articles 11, and 13(2).

When the case was mentioned in open Court on 09-11-2006 the 1st and 2nd respondents were absent and unrepresented and the State Counsel who represented the 4th Respondent (Hon. the Attorney-General) had informed Court that the Attorney General was not appearing for the 1st and 2nd respondents. Perusal of the docket reveals that on 25th August 2008 the Attorney-General had intimated to Court that on investigation reports filed by the 1st and 2nd respondents the Petitioner would be discharged in the criminal proceedings. However the petitioner elected to proceed with this application.

At the outset I wish to deal with the objection taken up by the 1st respondent that this application is time barred, in that the petitioner has not invoked the jurisdiction of this Court within one month of the alleged violation as stipulated in article 126 of the constitution. Section 13(1) of the Human Rights Commission Act No. 21 of 1996 which empowers the Human Rights Commission of Sri Lanka (hereinafter sometimes referred to as HRCSL) too to entertain complaints in respect of the violations of fundamental rights guaranteed by the constitution, and it mandates that when a complaint is made to the Commission by an aggrieved party in terms of Section 14 of the Act, within one month of the alleged infringement of a fundamental right by executive and administrative action the

period within which the inquiry into such complaint is pending before the commission shall not be taken into account in computing the period of one month within which an application may be made to the Supreme court in terms of article 126(2) of the constitution. According to the complaint marked P1, same had been preferred on 24.02.2006 – that is within two days of the alleged arrest of the petitioner and as the alleged illegal detention and torture were continuing the petitioner is within the stipulated one month time frame from the alleged violations.

Further the 1st respondent objected that the complaint had not been made by the petitioner himself as mandated by Article 126(2). The answer to 1st respondent's objection is basically found in section 14 of the Human Rights Commission Act No. 21 of 1996 which states that the Commission may on its own motion or on a complaint made to it by an aggrieved person or group of persons or a person acting on behalf of the aggrieved person or a group of persons, investigate an allegation of the infringement or imminent infringement of a fundamental right of such person or group of persons by executive or administrative action.

Moreover, although the time limit of one month is mandatory in ordinary circumstances, in exceptional circumstances the application of the legal maxim '*lex non cogit ad impossiblia' applies* where the delay in invoking the jurisdiction of the Court under article 126 is not due to a lapse on the part of the petitioner**.** In the exceptional circumstances, the Court has a discretion to entertain an application made out of time. In

this regard the decision of this Court in **Gamaethige v Siriwardane** (1988) 1 SLR 384 would lend assistance. In the above case it was held by Fernando J. - Jameel J. agreeing that:

> "Three principles are discernible in regard to the operation of the time limit prescribed by Article 126(2). Time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exists. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle 'lex non cogit ad impossibilia', if there is no lapse, fault or delay on the part of the petitioner, this Court has discretion to entertain an application made out of time."

Saman v Leeladasa (1989 1 SLR 1), too is case where a petition filed after one month from the alleged infringement was considered with regard to a petitioner who was in remand custody. At page 10 in that judgment per Fernando J, :

> "A remand prisoner cannot contact a lawyer with the same ease and facility as other persons; additional time has necessarily to be spent in sending messages to, or in awaiting a visit from, a relative, who would then have to contact a lawyer; and more time would be necessary to give proper instructions. The period of time necessary would depend on the circumstances of each case.

> Here the Petitioner was hospitalised from 2.12.87 until his release, and was thus prevented from taking immediate action to petition this Court for redress; an impediment, to the exercise of his fundamental right (under Article 17) to apply to this Court, caused by the very infringement complained of. Further, the fact that he had been assaulted, or that an injury has been inflicted on him, would not *per se* bring him within Article 11; whether the treatment meted out to him would fall within Article 11 would depend on the nature and extent of the injury caused; until the Petitioner had knowledge, or could with reasonable diligence have discovered, that an injury sufficient to bring him within Article 11 had resulted, time did not begin to run."

Further in the case of **Namasivayam v Gunawardena** 1989 1SLR 394 - per His Lordship Sharvananda, C.J. (with Athukorala J, and H.A.G. de Silva J. agreeing);

> 'To make the remedy under Article 126 meaningful to the applicant, the one month prescribed by Article 126(2) should be calculated from the time that he is under no restraint. If this liberal construction is not adopted for petitions under Article 126(2) the petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory. It could be rendered nugatory or frustrated by continued detention.'

Thus what becomes evident from all above judicial pronouncements is that - although time limit is mandatory, in exceptional circumstances, on the application of the principle *les non*

cogit ad impossibilia, if it can be concluded there is no lapse, fault or delay on the one month period. In the present case the petitioner has alleged that he was arrested on 22.02.2006 around 11 a.m and having produced before the Magistrate on 28.02.2006, a remand order was made. Subsequent to that only he had been hospitalised in different hospitals. However as per document annexed to his counter affidavit marked as CA 1 which being the proceedings had before High Court of Colombo pertaining to his bail application bearing No. HCBA-529/06 establishes that the order granting bail had been made only on 17.10.2006. His present petition to this Court had been filed on 25.07.2006 that is obviously during his incarceration. This position makes it clear that he had filed this petition even while he was under restraint i.e - to have access to Court due to incarceration. In view of the above I am inclined to take the view that 1st respondent's preliminary objection with regard to one month period is liable to be rejected and same is hereby overruled.

The complainant Krishantha Ukwatta (petitioner's brother) in his complaint [P 1] to the Human Rights Commission had stated that the petitioner, his wife and servant (Vani Karunanidhi) were arrested by the officers of the Welikada police station on 22nd February 2006 and they were being detained at the police station even on the 24th February 2006 and he made a complaint to the HRCSL to get them released and to obtain required medical treatment for the petitioner, as he had been brutally assaulted at Welikada police station. The HRCSL had acknowledged the receipt of the said complaint 'P1' by its letter dated 24-02-2006 having registered the said complaint under – Complaint No. HRC 1123/06. The said complainant Krishantha Ukwatta in his affidavit dated 23.02.2006 annexed to the said petition marked 'P3' states that after he made the complaint to the HRCSL an

officer of the Commission contacted the Welikada police station (presumably by telephone) and inquired about the arrest of the petitioner and requested the police either to release the petitioner and others taken to the police station on the 22nd February 2006 or produce them before Courts immediately - vide paragraph 7 of P3.

The 1st respondent took up the position in his objections that the petitioner was arrested by him on 27-02-2006 and entries made by the reserve officers of the police station were produced marked 'R10, R11, R12 and R 13 in support of their position. Further the original Grave Crime Information Book (GCIB) of the Welikada police station containing information *inter alia* entries from 10-02-2006 to 13-03-2006 were produced in this Court on an order of Court. The Court noted that these notes had been pasted on the GCIB on 02-03-2006 and on a perusal of the relevant page 267 it was found that the date of the note was 27-02-2006.

The Counsel for the petitioner with the permission of Court submitted that although it is seen from the original GCIB that the petitioner was arrested on 27.02.2006 at 14.15 hours and was brought to the Welikada police station at 14.39 hours, in the original of R 14 of the GCIB, it is recorded that the petitioner had been taken out of the cell at 10.00 hours on the same day. The learned Counsel for the petitioner has also invited the attention of Court to the position taken by the 1st respondent as per paragraph 4(k)of his affidavit namely that the petitioner was arrested on the 27-02-2006 had been contradicted by R 11 produced by the 1st respondent himself where it is recorded that he the 1st respondent and his team left the station on 24-02-2006 at 14 hours (2 pm) and went directly to the petitioner's residence at Himbutana and arrested him, whereas in the GCIB extract R

12 it is recorded that the petitioner was arrested on 27-02-2006 at 14.15 hours (2.15 pm). The learned Counsel for the petitioner submitted further that R 12 further contradicts the GCIB extract R 14 as it is recorded therein *inter alia* that the petitioner Roshan Ukwatta was taken out of the cell of the Welikada police station at 10.00 am on 27-02-2006 to record his statement. But according to R 12 the petitioner had been arrested at 14.15 hours (2.15 pm) on 27-02-2006, four hours and fifteen minutes after the time he was taken out of the police cell to record his statement.

The position taken up by the petitioner that he was arrested on 22-02-2006 at his residence in Himbutana is strongly supported by his brother Krishantha Ukwatta in his affidavit marked P3, which has been strongly corroborated by his written complaint submitted to the Human Rights Commission of Sri Lanka (HRCSL) on 24-02-2006 (P 1) complaining that the petitioner was arrested by the officers of the Welikada Police and was being kept at the Welikada police station even on that date. The fact that he made such a complaint to the HRCSL is further supported by the letter of HRCSL sent to him acknowledging the receipt of his complaint dated 24-02-2006 marked P2. I take judicial notice of the fact that the HRCSL is a statutory body established by the State under an Act of Parliament namely (Act No. 21 of 1996) for the protection, fulfillment and promotion of the fundamental as well as other internationally recognized rights of citizens and residents of Sri Lanka. The 1st respondent has not challenged the authenticity of the two documents P1 and P2. Moreover the report sent by the Assistant Judicial Medical Officer (AJMO) of Colombo Dr. Sameera A. Gunawardena in response to an order of this Court, reveals that the

features of the injuries on the petitioner's body are compatible with the time and manner described by the victim (the petitioner) in his history further strengthening the petitioner's case.

The attention of this Court was also drawn by the petitioner's Counsel to the fact that although at page 6 of the document annexed to the petition marked as P9 there is reference to PR 75/2006, that is a receipt issued in respect of a lease document, whilst in R13 the same production receipt No. PR 75/06 is indicated as the acknowledgment of the receipt of a sum of Rs. 179,000/- that had been taken charge from one Manjula Ukwatta who appears to be a sister of the petitioner. Further it was pointed out on behalf of the petitioner that the 1st respondent's stance that the petitioner was arrested on 27.02.2006 has been contradicted by receipt No. 53/06 which had been issued with regard to certain items said to have been recovered from the petitioner but in the same document R12, it is recorded further down that a temporary driving license issued by the Kotahena police station was also taken into custody from the petitioner for which receipt No. 25/06 had been issued. The counsel for the petitioner also submitted that therefore what becomes clear is that the last mentioned serial number of the production receipt had been issued much before the date on which the respondent had recorded as the date of arrest of the petitioner namely 27.02.2006.

On the other hand it was the contention of the 1st respondent that the Human Rights Commission to whom the petitioner's brother made a complaint about the arrest and detention of the petitioner has failed to submit any proof of follow up action taken by the HRCSL on his complaint. He also does not deny the contention of the affidavit of the petitioner's brother that the officers of the HRCSL contacted (telephoned) the 1st respondent after the

complaint was made to the HRCSL, and secondly, a day after as the 1st respondent failed either to release the petitioner or to produce him before the relevant Magistrate even on 25.02.2006 that is three days after his arrest. It must be stated that the 1st respondent who speaks about the failure of the petitioner to prove follow up action has not been able to shake the authenticity of the petitioner's brother making a complaint to the Commission on 24.2.2006 in respect of the arrest of the petitioner and assault on 22.02.2006 by P1 supported by P2. In my view the documents marked P3, P11, P11A, P12 further support the petitioner's contention. Viewed in the above context I find difficult to believe the version of the 1st respondent and reject it as a concocted version manufactured, abusing his official powers.

Article 13(2) of the Constitution stipulates that –

> 'Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the Judge of the nearest competent court according to procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such Judge made in accordance with the procedure established by law.'

In **Channa Peiris v Attorney General and others** (1994) 1SLR 1 at page 75 Justice A.R.B. Amarasinghe having considered the previous decisions regarding the constitutional requirement to produce an arrested person before a Magistrate proceeded to observe that, 'the Constitutional requirement must be complied in a reasonable way within a reasonable time which is a matter for Court to decide on the circumstances of each case. It

was further held that a right to be brought before a Judge required by section 37 of the Code of Criminal Procedure Act No. 15 of 1979 has evolved into the status of a fundamental right'.

Further in the case of **Queen v Jinadasa** 59 CLW 97 (1960) (CCA) it was held by the Supreme Court that section 37 of the Criminal Procedure Code and section 66 of the Police Ordinance require that a person arrested without a warrant should be produced before a Magistrate with the least possible delay. The limit of twenty four hours prescribed in both sections does not enable the police to detain a suspect for the length of time even when he can be produced earlier or to deliberately refrain from producing him before a Magistrate. In this case per His Lordship Basnayaka C. J. at page 100:-

> "The law requires (section 66 of the Police Ordinance) that an accused person taken into custody by a police officer without a warrant must forthwith be delivered into the custody of the officer in charge of the Police Station *in order that such person may be secured* until he can be brought before a Magistrate to be dealt with according to law. That is the lawful purpose to be served by means of detention and we would sternly and emphatically disapprove of what seems to have become the common practice of compelling an accused to accompany the Police from place to for the purpose of participating in the detection of a crime. The delay of his production before a Magistrate in order that this unlawful purpose may be served is illegal and deserving of censure."

Having subjected the evidence available and the circumstances of this case to a sharp scrutiny I am compelled to conclude that the petitioner has established on a

very high preponderance of probability that he was arrested by the 1st respondent on 22-02-2006 and was detained at the Welikada Police Station from that date in violation of section 37of the Code Criminal Procedure Act No. 15 of 1979 being the procedure established by law under the circumstances, which stipulates that "Any police officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period than under all circumstances of the case is reasonable and such period shall not exceed twenty four hours excluding of the time necessary for the journey from the place of arrest to the Magistrate".

Thus the 1st respondent had kept the petitioner in detention almost for five days in excess of the stipulated period of twenty four hours and has infringed the fundamental rights of the petitioner guaranteed to him by Article 13(2).

I shall now advert to the alleged infringement of Article 11. Same is reproduced below :

"No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The issue of torture that the petitioner alleges that was perpetrated on him by the 1st respondent with two others must be examined in the backdrop of detaining the petitioner in violation of the procedure established by law. The petitioner has stated the manner in which the 1st respondent assaulted him from the time after his arrest on 22-02-2006 in his supporting affidavit filed with the petition and elaborated further in paragraphs 17(B) and 17(C) of his counter affidavit. A Medico Legal Report (MLR) p4a, P5, P6, 7, P8 and P8B were produced in respect of the injuries found on the petitioner's body supported by a

Medical Report submitted by the Assistant Judicial Medical Officer (AJMO) on the orders of this Court authenticated by Dr. Sameera A Gunawardane - (received by this Court on 24.08.2006). According to said MLR 'History as given by t he prisoner' appears to be as follows:

> "He has been arrested on 22nd February 2006 by the Welikada Police for questioning on suspected involvement in a robbery, which he denies. He claims that from about 11.30 a. m to 12.30 p. m, three civil clothed police officers had assaulted him while he was in custody. His hands and feet have been bound together and a crowbar had been pushed in between his elbows and knees. He was assaulted on the head, face, back, buttocks and knees mainly with police batons and also fist blows. The soles of his feet have also been beaten with a wooden pole."

Further he had also noticed blood stained discharge coming from petitioner's left ear.

The AJMO has proceeded to note down petitioner's complaints at the time of examination. Those are:

1) Aches and pains of whole body
2) Difficulty in walking
3) Difficulty in sitting
4) Unable to fully open the mouth

The AJMO in his report (prepared after an examination of the petitioner on 28.02.2006 at 2.30 p.m.) had identified 19 injuries in all on the petitioner's body. According to the said report, under sub-head 'injuries' following injuries appear:

1. Bilateral Infra Orbital Haematoma more on the left side. The eyelids were not swollen. There were no injuries to the eyes.
2. There was tenderness and swelling over the left tempero-mandibular joint and he had difficulty in fully opening his mouth or clenching his teeth. (After admission to hospital he was detected to have dislocation of the tempero-mandibular joint and mandibular fracture with occlusal derangement.)
3. A linear imprint abrasion was seen over the left mastoid region 2.5cm long. It had a thin black scab. No underlying injuries.
4. An oval shaped purple coloured contusion 3cm in the longer diameter was seen over the front of the left shoulder. The center of it was 3cm below and 1cm to the left of the outer end of the left collarbone.
5. A large triangular shaped purple coloured contusion, 6cm x 8cmx 6cm was seen on the front and lateral aspects of the right upper arm. Its base started from the lateral supra condyle of the humerus and ran upwards and inwards to end 3 cm above the elbow join line. The apex was placed on the lateral border of the arm 5 cm below the shoulder joint.
6. A tramline contusion 4cm long and 2cm wide was seen on the back of the chest on the left running downwards and outwards from the middle of the upper border of the left scapula.
7. A rectangular imprint abrasion was seen on the posterior and lateral surfaces of the distal end of the right forearm. It was 5cm long and 1.5 cm wide. It had a pale pink appearance with a dried up exudates and puckered margins.

8. A rectangular abrasion similar in appearance to injury no. 6 was seen on the distal end of the left forearm on the posterior surface. It was 2 cm x 0.5 cm in size.
9. A triangular shaped contusion 2 cm x 1.5 cm x 1.5 cm was seen over the middle of the anterior aspect of the distal end of the left forearm.
10. A small oval imprint abrasion 0.5 cm in size was placed 1 cm to the left injury number 9.
11. A blackish blue coloured tramline contusion 5cm long and 2cm wide was seen running upwards and to the left across the left buttock. Its medial end was not well defined and was placed 2cm to the right of the midline and 2 cm above the lower margin of the buttock. Lateral end was placed 3cm below and 1cm behind the left hip joint.
12. A rectangular blue-black coloured contusion 6cm x 4cm was seen placed obliquely across the right buttock. Its medial border started from a point 6cm to the right of the midline and 2.5cm above the lower margin of the right buttock and ran upwards and medially to a 1.5 cm to the right of the midline and 8 cm above the lower margin of the buttock. There was a rectangular imprint abrasion over the inner half of this contusion measuring 5cm x 1.5cm.
13. An oval shaped imprint abrasion with a brown scab was seen on the front of the right knee measuring 2 cm in diameter.
14. A semi circular imprint abrasion 4cm in length and 1cm in width was placed with its convexity facing downwards, immediately below injury no. 13 on the lower border of the right kneecap.

15. There was an imprint abrasion 1.5 cm long and 0.3 cm wide on the back of the right knee joint closer to the medial border. There was surrounding erythema and scab formation. It was placed horizontally along the joint line.
16. Similarly an imprint abrasion 2cm long and 0.5 cm wide was seen over the back of the left knee joint along the joint line with grazing over the medial end.
17. There was a bluish black coloured haematoma on the postero-latereal aspect of the left foot 1cm in diameter and placed over the base of the left fifth metatarsal bone. X ray of this area has been reported by the Consultant Radiologist as having a "discontinuity of the cortex of the base of the 5th metatarsal bone of the left side, "it is unclear whether it is due to a fracture and repeating the X ray for callus formation is required to confirm it.
18. The entire right foot was swollen and there was a dark blue discoloration over the middle of the sole suggestive of a deep seated haematoma X-rays have not revealed any fracture and after admission the swelling has been diagnosed as cellulites.

All the injuries were tender and he had considerable difficulty in walking and sitting.

Examination of other systems of the body did not reveal any abnormality. He did not have any obvious neurological impairment.

He was admitted to the National Hospital of Sri Lanka for treatment on the 28th of February 2006 at 11.55 p.m. under the Bed Head Ticket No. 652507. When he was reviewed again on the 7th of March at ward 19 following findings were noted.

"He was seen by the Consultant Oromaxillofacial Surgeon and was diagnosed as having a fracture of the left side of the mandible and dislocation of the temperomandibular joint with deviation of the mouth and occlusal degangemeny corresponding to injury no. 2 above."

19. He has been seen by the Consultant ENT Surgeon and found to have an acute traumatic perforation of the left eardrum, (*referred to as injury no. 19).*

In the said report under the sub-head 'categorization of hurt':

1. Injuries 1 and 3 – 16 are non-grievous in nature
2. Injury No. 2 is grievous in nature under limb (g) section 311 of the penal code.
3. Injuries 17, 18 and 19 needed review after 20 days to accurately assess the hurt but though the police was informed about it, the victim was not brought back to me for reassessment.

As per the report - 'features of the weapon' are as follows:

1. All the injuries suggest an application of blunt force.
2. Injuries number 6 and 11 are suggestive of assault by a blunt elongated cylindrical weapon.
3. Injuries number 7 - 10 could have occurred as a result of an agent encircling the wrist.

Under further comments the AJMO had stated that:

The features of the injuries are compatible with the time and the nature of assault described by the victim in his history.

The petitioner avers in his supporting affidavit submitted with the petition and in the counter-affidavit tendered to Court that his hands and legs were tied together and an iron rod was placed between his knees and he was lifted by the said iron rod and was placed between two bends in such a way that he could be made to revolve on the iron rod. Having placed the petitioner's body in a revolving process the 1st respondent and two other police officers who were present there began to beat him on his legs and feet and also on his face. He has further averred that due to the excruciating pain he fainted several times and fell totally unconscious. When he regained consciousness his body was soaked with water and same officers began to assault him again. He further states after sometime he had been removed from that position and had been dragged into another place.

According to paragraph 17 of the petition and corresponding paragraph in the supporting affidavit, on 28-02-2006 six days after his arrest he had been produced before the Judicial Medical Officer of Colombo and taken to the Chief Magistrate's Court of Colombo but was not physically produced before the learned Chief Magistrate. The police officers who took him to Courts had registered a case under No. B/788/04/2006 and taken the report without the petitioner to the learned Chief Magistrate of Colombo. However the learned Magistrate had ordered them to produce the petitioner before her. On being produced the Magistrate having observed the injuries on him and the difficulty in walking and talking had committed him to fiscal custody ordering that the petitioner be given immediate medical treatment (vide P 4). The application made by the Police for further detention in their custody too was refused. The above position is amply established by the

document marked as P4 – being the order of the learned Magistrate made when the petitioner was produced on 28.02.2006. P4 is reproduced below:

ආර්" මහේස් උක්වත්ත - සිටී

සැ/කට කතා කිරීමට අපහසුය" ජීප් රථයෙන් බැසීමටද අපහසුය"

පොලිසියෙන් පහර දුන් බව කියයි" ඔහුගේ කකුල් පහල කොටස

ඉදිමී ඇත" සැ/රූ සමබන්ධයෙන් වෛද්‍ය වා/වක්ද ඉදි/කරයි"

එය නඩුවට ගොනු කරමි"

පො"කො" 25032 ආයුවර්ධන විසින් සැ/කව හ/පෙරෙ" සඳහා/ඉදි කරයි"

මිලග දින හ/පෙර" සඳහා නියි ආව" සහිතව ඉදි/කිරීමට නි/කරමි"

සැක/අපහසුවෙන් සිටින බැවින් වහාම වෛද්‍ය පනිකාර ලබාදීමට නි/කරමි"

පරි/අව" නැත" ඇප විරුයි"

සැ/රි 06-03-13

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In response to paragraph (4) of the petition the 1st respondent by paragraph (5) of his affidavit dated 25.05.2007 had admitted the petitioner being produced before the JMO on 28.02.2006 and thereafter producing before the Magistrate and had denied rest of the averments. The petitioner has pleaded that then only he was admitted to the prison hospital and thereafter to the accident ward of the National Hospital – Colombo and warded in ward No. 19 there.

The JMO Colombo who examined the petitioner, issued a letter addressed to the OPD Accident Service of the National Hospital, Colombo, for treatment and advise him for medico-legal purposes marked P4A, in which the JMO had recorded a history of assault by police and had also observed injuries on the left side mandibular joint (jaw bone-joint), right side tibia /fibula (the shin bone and another bone situated closer to the tibia in the lower part of the legs). He was later admitted to the Prison Hospital and according to the report dated 14.06.2006 (P6) addressed to the orthopedic clinic of the National Hospital, the Medical Officer of the Prison Hospital had identified the following injuries on the petitioner:-

1. A torn ACL ligament in the right knee.
2. A contused fat pad in the right knee, (document P6).

On the said referral note the Petitioner had been examined by the senior consultant orthopeadic surgeon of the NHSL Dr. Upali Banagala, on 24-06-2006 that is four months and 2 days after his arrest and he who was still in fiscal custody. Dr. Banagala who examined him had found the following injuries as per his report dated 13.07.2006 – P7A.

1. A torn Anterior cruciate ligament of the right knee, and,
2. A contused area under the left foot.

Dr. Banagala had recommended the performance of an atheroscopy of the anterior-cruciate ligament reconstruction surgery on a future date. His report marked P7A clearly shows that the Petitioner had been treated and surgery performed in the National Hospital for the injuries that he suffered during his arrest and detention, more than

four months ago. Further the Medical Officer in charge of the Prison Hospital had sent letters dated 13-03-2006 and 19-03-2006 (marked as P8A and P8B) to the Magistrate's Court, Colombo stating that the petitioner was unable to attend Court on 13.03.2006 and 20.03.2006 due to fractures of the mandible (jaw bone) and the contusions of the ankles.

The document marked P5 shows that the petitioner had been treated at the Dental Institute, Colombo to fix the dis-arrangement of his jaw bone. On the other hand the 1st Respondent's explanation as to how the petitioner came by the injuries is very short. He states that at the time of the arrest the petitioner offered resistance to the police and attempted to escape by jumping over the parapet wall of the house but could not make it and fell off the wall. 1st respondent also states that the police had to use minimum force to make the petitioner surrender. It is the position of the 1st respondent that the petitioner sustained injuries when he fell off the wall. He also stated that they tied his hands with a rope. It is very strange that a team of officers going to arrest a suspect had not taken hand cuffs with them. Further it is to be noted that none of the documents and/or material submitted on behalf of the 1st respondent explains the injuries found on the body of the petitioner, which the petitioner claims that same were caused while in police custody.

I find that none of the injuries are compatible with the cause of the injuries stated by the 1st Respondent. A reasonable man will find it difficult to believe that an acute traumatic perforation of an eardrum could be caused by a fall such as what has been contemplated by the 1st respondent. I disbelieve the version given by the 1st Respondent as to how the petitioner sustained the injuries found on his body using the test of probability. I

also reject the version of the 1st Respondent on the grounds of credibility in that the Court has found that he has falsified official document fraudulently to subvert the truth in violation of the law abusing the powers granted to them and the trust placed in him as a police officer.

Article 11 of the Constitution of Sri Lanka contains 2 composite fundamental rights namely:-

i. Torture

ii. Cruel, inhuman or degrading treatment or punishment.

Cruel, inhuman or degrading treatment or punishment is a lesser degree of ill-treatment than torture. At this juncture it would be pertinent to consider the legal principles enunciated by some decided cases on torture by the Supreme Court of Sri Lanka.

Delivering the judgment in the case of **Sudath Silva v Kodituwakku** (1987) 2 SLR 119) at pp.126, 127, Justice Atukorala observed that :

> "Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman treatment, It is an absolute fundamental right subject to no restriction or limitation what so ever. Every person be he a criminal or not, is entitled to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the state is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as the right is enjoyed by every member of the police force so is he also prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this Court to protect and defend this right jealously to the fullest measure with a view to ensuring that his right which is declared and intended to be fundamental and that the Executive, by its action does not reduce it to a mere illusion. …… The

facts of this case has revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in custody. Such methods can only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity, particularly at the present time when every endeavour has been made to promote and protect human rights. Nothing shocks the conscience of man so much as the cowardly act of delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard core criminal whose tribe deserves no sympathy, but if constitutional guarantees are to have any meaning or value in our democratic set-up, it is essential that he be not denied the protection guaranteed by our constitution".

In the case of **Balasekaran v OIC JOOSSP Army Camp** and others (SC-FR No. 547/98, SC Minutes of 03.05. 2000 and Bar Association Law Reports 2000 -23) where the petitioner alleged that he had been assaulted whilst he was in army and police custody with PVC pipes with his face being covered with a shopping bag containing petrol and the burning of his penis with cigarette butts, which were corroborated by medical evidence. The Court found that the injuries he sustained and the trauma he suffered were sufficient to fall into the international definition of torture. Per S.N.Silva C.J. at pg.24 in the aforesaid judgment;

"The United Nations Declaration on Torture adopted by the General Assembly in December 1975, the Convention Against Torture adopted in December 1984 and Section 12 of Act No. 22 of 1994 being the law enacted by Parliament to give effect to the Convention, define the actus reus of the offence of torture as "any act which causes severe pain whether physical or mental…"

> The telltale marks observed by the J.M.O as scars reveal the severity of the attack to which the Petitioner was subjected. The intensity of the attack appears to have descended from ferocity to sadism. The attack with "P.V.C.Pipes" resulting in the injuries that have been observed by the J.M.O. And the process of the penis being burnt with cigarette butts would undoubtedly have caused severe pain to the petitioner so as to amount to torture as defined above."

The injuries found on the petitioner in the case at hand appears to be even more severe, graver and contributed inter alia to the impairment of one of his vital organs (the perforation of an ear drum) and the trauma of the multiple injuries made the petitioner to suffer both physically and mentally for a very long period. I also find that it is amply established that the injuries found on the body of the petitioner are compatible with the version given by him and have been fully corroborated by the medical evidence. The petitioner sustained the injuries described above as a result of assault and other methods of torture inflicted on him by the 1st Respondent with two other officers of the Welikada Police Station as demonstrated above with the complicity of the 2nd Respondent - the Officer in Charge of the Welikada Police Station. The injuries suffered by the petitioner as a result of the attack undoubtedly have caused severe pain to him so as to amount to torture. Even in the AJMO's report the history given by the petitioner tallies with his version as to how the injuries were caused.

Now the credibility of the two versions viz – of the petitioner and of the first respondent has to be assessed. At page 24 of this judgment I have already rejected the version of the 1st Respondent for the reasons given therein. However one matter cannot escape the attention of this Court. That is when the totality of the evidence and material placed by the 1st respondent is scrutinized the inescapable conclusion one could arrive upon is that he had made a valiant attempt to claim the benefit of the fact that the petitioner was a person engaged in criminal activities. In this regard I wish to rely on the

principle of law enunciated by Mark Fernando J. in **Sriyani Silva v Iddamalgoda, OIC – Police Station, Paiyagala** (2003 2 SLR 63) namely –

> "On the question of compensation, a person who has a "bad record" is entitled to the same rights as any other person. The deceased was entitled to have the allegation against him determined by a competent court after a fair trial."

In the case at hand on instructions of the Attorney General the petitioner was even discharged from the criminal proceedings. So there was no allegation against him left for determination.

On the evidence enumerated as above I am of the view that the injuries found on the Petitioner will constitute the act of torture as contained in Article 11 of the Constitution and the definition given to torture in international legal norms and jurisprudence (vide the decision in the aforementioned **Balasekeran's** case). As such it is difficult to resist the conclusion that 1st respondent did commit torture on the petitioner in violation of Article 11 of the Constitution.

Under the procedure established by law for the administration and discharge of duties of a police station, regulations have been gazetted under the Police Ordinance and the Code of Criminal procedure Act and officer-in-charge of a police station is the Chief administrative officer. He is in charge of the entire police station and is personally responsible for overall functions of the police station. It is mandatory for him to read all information books maintained at the police station everyday at least once, as much as practicable and having read, it would suffice to make an entry to the effect that 'IB – read' vide Regulation A 17 Part 1 - paragraph (3). Further under same Regulation A 17 he is also required to give instructions to other officers about the carrying out of their duties.

Regulation A3 - part II paragraph (3) makes it mandatory on the O.I.C to inspect the cell, barracks, recreation room etc., daily and to make entries in the IB re-the matters which needs attention. From the above it becomes abundantly clear that no person could be kept in custody in violation of the procedure established by law or no injuries could be caused to any person in the custody of a police station without being noticed by the OIC.

In the case of **Sriyani Silva v Iddamalgoda** ((2003) 2 SLR 63) it was held by Justice Mark Fernando that the 1st respondent OIC's responsibility and liability is not restricted to participation, authorization, complicity, and knowledge of the acts of torture and cruelty meted out to the Petitioner. He was held liable for not ensuring that the Petitioner was being treated as the law required. Because of his culpable inaction, including the failure to monitor the activities of his subordinates that would have prevented further ill-treatment of the petitioner, and investigation of any misconduct. In the case of **Rani Fernando (SCA (FR) No. 700/2002, SC Minutes of 26-07-2004)** as per the judgment of Justice Shirani Bandaranayake, with Justice J.A.N. De Silva and Justice Nihal Jayasinghe agreeing-the OIC Negombo Prison, the Chief Jailor and the Superintendent of prisons, Negombo Prison, were found liable despite the fact that there was no evidence of their direct involvement in the assault on the deceased on the judicial finding that there had been a dereliction of their duties.

Further it is my view that the responsibility and culpability of the 2nd Respondent in this case is not of any lesser degree than that of the 1st Respondent. As the officer in charge of the Welikada police station he could have prevented both the illegal detention and the perpetration of torture on the petitioner by the1st respondent with two others who were his subordinate officers always acting on his orders. But he had facilitated the infringement of the rights guaranteed to the Petitioner under Articles 13 (2) and 11 by complicity, commission and omission. It is needless to say that the information books of the Welikada police station could never have been altered without the complicity of the 2nd respondent. I also take note of the impunity with which he treated this Court by not even

appearing before this Court or even through Counsel to respond to the serious allegations of violations of fundamental rights alleged against him by the petitioner despite having issued notice on him by this Court. It is to be observed that said notices had not been returned undelivered.

On the evidence set out above I hold that the petitioner has been subjected to torture whilst in the custody of the 1st and 2nd respondents and I accordingly grant a declaration that the petitioner's fundamental right guaranteed by Article 11 has been infringed**.** I also hold that petitioner's fundamental right guaranteed by Article 13(2) has also been violated. Accordingly I award the petitioner a sum of Rs.80,000/- as compensation. I direct the state to pay the said sum of Rs 80,000/- and a further sum of Rs 20,000/- as costs of this application to the petitioner. The said amounts shall be paid within three months from today.

Judge of the Supreme Court

Saleem Marsoof P C, J
I agree

Judge of the Supreme Court

P. A. Ratnayake P C, J
I agree

Judge of the Supreme Court

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

S.C. (FR) Application
No. 320/2007

1. Padma Maithrilatha Akarawita,
   No. 308, Magammana,
   Homagama.

2. G.L.S. Suriarachchi,
   No. 23/4, Wickramasinghe Pura,
   Battaramulla.

3. Chandralatha Colambage,
   No. 63 A/2, Horana Road,
   Kesbewa.

Petitioners

Vs.

1. Dr. Nanda Wickramasinghe,
   Director Museums,
   Department of National Museums,
   Sir Marcus Fernando Mawatha,
   Colombo 07.

2. D.S. Edirisinghe,
   Commissioner General of Labour,
   Department of Labour,
   Narahenpita,
   Colombo 05.

3. Mahinda Madihahewa,
   Secretary,
   Ministry of Labour Relations and Manpower,
   Labour Secretariat,
   Colombo 05.

4. Hon. C.R. de Silva,
   The Attorney-General,
   Attorney General's Department,
   Colombo 12.

5. M.E. Lionel Fernando,
   Co-Chairman,
   National Salaries and Cadre Commission,
   Room 2-G 10, BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

6. K.N.S. Wimalasuriya Mathew,
   Co-Chairman,

7. Ariyapala de Silva,
   Member,

8. S.H. Siripala,
   Member,

9. Sunil Chandra Mannapperuma,
   Member,

10. D.W. Subasinghe,
    Member,

11. Gunapala Wickramaratne,
    Member,

12. M. Mackey Hashim,
    Member,

13. Prof. Carlo Fonseka,
    Member,

14. H.M. Somawathie Kotakadeniya,
    Member,

15. Don Gnanaratna Jayawardena,
    Member,

16. Lloyed Fernando,
    Member,

17.Leslie Devendra,
Member,

18. S. Sivanandan,
Member,

(The above 7th to 18th Respondents are all members of the National Salaries and Cadre Commission, Room 2-G 10, BMICH, Bauddhaloka Mawatha, Colombo 07)

19.K.L.L. Wijeratne,
Secretary,
National Salaries and Cadre Commission,
Room 2-G 10, BMICH,
Bauddhaloka Mawatha,
Colombo 07.

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
S.I. Imam, J.

COUNSEL : Uditha Egalahewa with Gihan Galabadage for Petitioners

Rajiv Gunatillake, SC, for Respondents

ARGUED ON: 01.10.2009

WRITTEN SUBMISSIONS
TENDERED ON: Petitioners : 19.01.2010
Respondents : 19.01.2010

DECIDED ON: 02.11.2010

Dr. Shirani A. Bandaranayake, J.

The petitioners, who belong to the Supra Grade of the Librarians' Service, alleged that the decision by the 5th to 19th respondents to place them in the salary scale of MN – 7 in terms of Public Administration Circular, No. 06/2007 was illegal, null and void and violative of their fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioners accordingly had prayed to direct the 5th to 19th respondents to place them in a salary scale comparable to that of Class II Grade II of Sri Lanka Administrative Service.

This Court had granted leave to proceed for the alleged infringement of Article 12(1) of the Constitution.

The facts of this application, as submitted by the petitioners, *albeit* brief, are as follows:

At the time of filing this application, the 1st petitioner was the Librarian of the National Museum, the 2nd petitioner was the Librarian of the Department of Labour and the 3rd petitioner was the Librarian of the Attorney General's Department. They were the only three (3) officers serving in the Supra Grade of the Librarians' Service of Sri Lanka. The 1st petitioner had joined the Sri Lanka Librarians' Service (hereinafter referred to as SLLS) on 16.12.1976 and was promoted to the Supra Grade of the SLLS on 22.03.1998. The 2nd petitioner had joined the SLLS on 01.08.1978 and was promoted to the Supra Grade of SLLS on 14.08.1989. The 2nd petitioner had retired from the service on 07.06.2007. However, she had been re-employed on contract basis thereafter with effect from 08.06.2007 as there were no Supra Grade Librarians in the service. The 3rd petitioner joined the SLLS on 01.06.1984 and was promoted to the Supra Grade of the SLLS on 23.12.1997.

The qualifications required for Supra Grade of SLLS have not been prescribed in the Minute of the SLLS and therefore the appointments to the Supra Grade of the SLLS is governed by the Public Administration Circulars (hereinafter referred to as PA Circulars) No. 47/89 of 27.09.1989 (P_{2a}) and 47/89(1) of 13.11.1991 (P_{2b}). Since 1981 in all PA Circulars issued in the years

1986,1988, 1989, 1993, 1994, 1997, 2002 and 2004, the salary scale assigned to the Supra Grade of the SLLS was higher than the initial salary scale of the Sri Lanka Administrative Service (hereinafter referred to as the SLAS).

In terms of PA Circular No. 09/2004, the Supra Grade Librarians were placed on an initial salary scale of TB – 5 – 3 (172,620 – 11 x 3780 – 214,200), whereas the Class II Grade II of SLAS officers were placed on the salary scale of TB – 5 – 1 – 2 (157,500 – 15 x 3780 – 214,200).

The PA Circular No. 6 of 2006 that came into effect from 01.01.2006 has placed the Supra Grade Librarians in a new scale of MN – 7 with the initial salary scale of 19,755 – 15 x 325 – 11 x 400 – 29,030 and has placed the Class II Grade II of SLAS officers in a new scale of SL – 1 with an initial salary scale of 22,935 – 10 x 645 – 8 x 790 – 17 x 1050 – 53,555. Librarians of Supra Grade had never been placed in a step with such a law increment.

According to the petitioners their duties are similar to that of the Assistant Commissioners, SLAS officers and Assistant Directors of the Public Service and their placement in terms of the new salary revision therefore amounts to a demotion.

The three (3) petitioners made representations to the 19th respondent being the Secretary to the National Salaries and Cadre Commission through the 1st, 3rd and 4th respondents respectively. The 2nd and 3rd petitioners by letters dated 24.04.2006 and 07.05.2006 had appealed to the 19th respondent and to the National Salaries and Cadre Commission, to rectify the anomaly.

The 19th respondent by Circular dated 21.09.2006, advised the Secretary to the Ministry of Public Administration and Home Affairs to place the petitioners in salary step 16 of MN – 7. The 19th respondent by the said letter declared the recruitment Grade of Supra Grade Librarians as salary step 4 of MN, creating a further anomaly.

Thereafter the 2nd and 3rd petitioners by letters dated 01.08.2006 (P_{13a}) and 08.08.2006 (P_{13b}) again complained to the 19th respondent of the salary anomaly. Although there were

discussions even with the 5th respondent, viz., Co-Chairman of the National Salaries and Cadre Commission, there had been no final decision regarding petitioners' grievance.

Accordingly the petitioners complained that after the release of the Circular, No. 06/2006, the petitioners had been deprived of the privilege of importation of motor vehicles on duty concessions in terms of Circular No. 1 of Commerce, Customs Duty and Investment Policy of 30.03.2007, which concession was given to the Supra Grade Librarians by the previous Circular dated 23.06.1999.

The petitioners submitted that for all purposes, the Supra Grade Librarians were considered on par with Assistant Commissioners, Assistant Directors and Accountants of the Public Service. The petitioners submitted that the refusal of the 5th to 19th respondents to take a final decision on their grievance is a violation of their fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

The main grievance of the petitioners was that there is a salary anomaly in the salary scale of the Supra Grade Librarians in comparison with the salary scale of the officers in Class II Grade II of the SLAS. In terms of the affidavit filed by the 5th respondent, the promotional structure of the Librarians' Service is four fold from Grade III to Supra Grade and their salary scales since 1992 until 2004 had been as follows:

Table I

	1992	**1997**	**2003**	**2004**
Grade III	S 11 – 1	T 11 – 1	TA 11 – 1	TB 11 - 1
Grade II	S 11 – 2	T 11 – 2	TA 11 – 2	TB 11 - 2
Grade I	S 11 – 3	T 11 – 3	TA 11 – 3	TB 11 - 3
Supra Grade	S 5 – 3	T 5 – 3	TA 5 – 3	TB 5 - 3

The initial salary scale of the Librarians' Service and the SLAS in terms of the PA Circular, No. 9/2004 were as follows:

Table II

Librarians' Service		**SLAS**	
Grade III	Rs. 121,320/- p.a.	Class II – Grade II	Rs. 157,500/- p.a.
Grade II	Rs. 127,560/- p.a.	Class II – Grade I	Rs. 214, 980/- p.a.
Grade I	Rs. 130, 680/- p.a.	Class I	Rs. 276,540/- p.a.
Supra Grade	Rs. 172,620/- p.a.		

It is to be noted that, according to Table II, the Supra Grade Librarians had been placed at the salary scale of Rs. 172,620/- per annum, whereas Class II Grade II of SLAS officers were to receive Rs. 157,500/- per annum.

The 5th respondent in response to the above position had averred in his affidavit that Class II Grade II is the recruitment grade to the SLAS, whereas the other positions are promotional grades. Notwithstanding the above, the 5th respondent, on behalf of the Salaries and Cadre Commission, had admitted that the salary of the Supra Grade Librarians has been higher than that of the Class II Grade II of the SLAS. The 5th respondent had also averred that although the petitioners had complained that there has been an anomaly in the salary scale of the Supra Grade Librarians in comparison with the salary scale of officers in Class II Grade II of SLAS, that there has been no such anomaly or a change from the earlier position where the Supra Grade Librarians had been drawing a salary higher than the Class II Grade II SLAS officers.

In support of this position, learned State Counsel for the respondents drew our attention to the PA Circular, No. 06/2006, which states the salary scale of Class II Grade II of SLAS as Rs. 22,935/- (pg. 44 of P_4). By letter dated 21.09.2006 (P_{11}), the Secretary to the National Salaries and Cadre Commission had informed the Secretary to the Ministry of Public Administration and Home Affairs that the Supra Grade Librarians shall be placed on the 16th step of MN – 7 Salary Scale, which would be Rs. 24, 630/-.

Accordingly under the PA Circular No. 6/2006, the Supra Grade Librarians would be drawing Rs. 24,630/-, whereas the Class II Grade II SLAS officers would be on a salary scale of Rs. 22,935/-. In such circumstances it would not be correct to state that the petitioners have been placed in a salary scale, which is lower than that of Class II Grade II of SLAS.

The petitioners' next grievance was that they were placed in a salary scale of the MN - 7 category as the said salary scale denies the petitioners' certain privileges such as vehicle permits on duty free basis etc. The petitioners had further complained that for all purposes Supra Grade Librarians were considered on par with Assistant Commissioners, Assistant Directors and Accountants of the Public Service. In support of this contention, the petitioners had annexed a letter dated 25.06.2001 received by the 2nd petitioner (P_{19}) to their petition. This letter is as follows:

"**මුදල් අධ්‍යක්ෂ,**

මුදල් අංශය.

<u>2001 වර්ෂයේ යෝජිත මාසික ගමන් වියදම් වල උපරිම සීමාව</u>

2001. 04. 04 දිනැති 2001 වර්ෂයේ යෝජිත මාසික ගමන් වියදම් සම්බන්ධව 08/2001 දරණ චක්‍ර ලේඛයට අමතරවයි.

02 **ඉහත චක්‍ර ලේඛයේ අංක 06 යටතේ ඇති නිළධාරිවරුන්ට අමතරව පුස්තකාලයාධිපති තනතුරටද ගමන් වියදම් වශයෙන් රු. 4500/- ක මාසික ගෙවීමක් කම්කරු කොමසාරිස් ජනරාල් විසින් අනුමත කර ඇත.**

03 **ඒ අනුව ඉහත චක්‍ර ලේඛයේ දැක්වූ පරිදි ආයතන සංග්‍රහයේ XIV වැනි පරිච්ඡේදයේ විධි විධාන වලට යටත්ව ගමන් වියදම් ගෙවීමට කටයුතු කරන ලෙස දන්වමි.**

කම්කරු කොමසාරිස් ජනරාල්".

The 5th respondent in his affidavit had averred that the duties of the Supra Grade Librarians are not of a supervisory or an executive nature and those positions are not comparable to that of an Administrative Officer of a Government Department or of Assistant Commissioners and Assistant Directors. In terms of the Minute of the SLAS (R_1), only the officers of the Librarians' Service with 10 years experience would be eligible to sit for the recruitment examination for SLAS Class II Grade II.

Although the petitioners had complained that they were discriminated due to the anomaly created by the introduction of the MN Grade, a careful scrutiny of the Budget Proposals of 2006 shows that this has not been the intention of the said proposals. It is important to note that PA Circular, No. 06/2006, which deals with the Budget proposals is not a document prepared merely for the purpose of increasing the salary of government employees. On the contrary, the said document had been prepared for the purpose of restructuring the Public Service salaries based on Budget proposals for 2006. Accordingly the proposal referred to in PA Circular, No. 06/2006 is different to all the other Circulars referred to by the petitioners. By these proposals, as stated by the 5th respondent, 126 different salary scales that had existed previously had been reduced to 37. Also, all Supra or Special Grade categories of employees similar to Librarians, Railway Station Masters etc., except the employees of the Health Sector were placed in the salary scale of MN – 7. Later as stated earlier, this scale was changed and the Supra Grade Librarians were placed in the salary scale of MN - 16, by letter dated 21.09.2006.

The salary scales for the Supra Grade Librarians in service and for future recruitments thus became as follows:

Table III

Grade	**Salary as per PA Circular 9/2004**	**Recommended salary scale and the step**
III	TB 11 – 1	MN 3 – 2006 – Initial step
II	TB 11 – 2	MN 4 – 2006 – step No. 12

I	TB 11 – 3	MN 4 – 2006 – step No. 23
Supra Grade	TB 5 – 3	MN 7 – 2006 – Step No. 16

The salary scales for future recruitments were stated as follows:

Table IV

Grade III – B	Trainee Grade (Non Graduates)	MN 3 – 2006 – Initial step
Grade III – A	Graduates and Trained Officers	MN 4 – 2006 – Initial step
Grade II	-	MN 4 – 2006 – Step No. 12
Grade I	-	MN 4 - 2006 – Step No. 23
Supra Grade	-	MN 7 – 2006

These two tables clearly indicate that the petitioners had not been correct when they had stated that the 19th respondent had declared that the recruitment Grade of Supra Grade Librarians would be placed in salary step 4 of MN scale.

Learned State Counsel for the respondents contended that although the petitioners had complained that they would not be entitled to duty free vehicle permits due to the anomalies in the 2006 Budget proposals, that the said submission is not correct. According to the learned State Counsel, the privilege of importing vehicles on a permit with duty concessions, is a policy decision of the Government, independent of salary structures. The various Circulars issued by the Secretary to the Treasury from time to time indicate that the Government has taken different policy decisions in this regard. For instance, Treasury Circular, No. 866(1) dated 23.06.1999 (P_{18}) is an amendment to the previous Treasury Circular, No. 866 dated 22.02.1999. Learned State Counsel submitted that due to such changes in policy decisions, persons holding the posts of Principals of schools, who were previously entitled to the said privilege of vehicles with duty free concessions, were no longer granted the said concessions. Similarly the Librarians were also not included in the present Circular. Learned State Counsel for the respondents therefore categorically stated that the said change is due to a policy decision of

the Government and had no connection that could be attributed to the decisions taken by the National Salaries and Cadre Commission.

The petitioners referred to the document marked P_{19}, which dealt with an increased allocation for travelling expenses. The said document (P_{19}) has been issued by the Commissioner-General of Labour and refers to the travelling expenses of the relevant Librarian. It is only an internal Circular and not a general Circular applicable to all Government officers. Accordingly as stated by learned State Counsel for the respondents that the issuance of the said letter was to enhance the out put of the activities assigned to the employees of the Department of Labour, and cannot be taken as a document in support of the view that the Supra Grade Librarians are on par with the Assistant Commissioners, Assistant Directors and Accountants of the Public Service.

The 5th respondent in his affidavit had drawn a distinction between the SLAS Staff and the Nursing Staff to show that there has been no discrimination against the petitioners. According to the 5th respondent, the Special Grade of Nursing officers were assigned with a salary scale higher than the Officers of SLAS Class II Grade II. However, the Nursing officers were never considered as equals or superior to SLAS officers. By PA Circular, No. 06/2006, Special Grade of Nursing officers were placed in a salary scale of MT - 8 – 2006, where Supra Grade Librarians were placed in the salary scale MN – 7 – 2006 both at a step higher than the initial salary scale of SLAS Officers, who belong to Class II Grade II.

The petitioners alleged that their fundamental rights guaranteed in terms of Article 12(1) of the Constitution were violated by the 5th to 19th respondents due to the non-placement of the petitioners in a salary scale comparable to Class II Grade II officers of SLAS. Article 12(1) of the Constitution, which deals with the right to equality, reads as follows:

> "All persons are equal before the law and are entitled to the equal protection of the law."

Article 12(1) of the Constitution therefore brings in a guarantee that there shall be no discrimination between one person and another, who are equals. This does not however mean that there cannot be any classifications between groups. Classifications are allowed if they are not arbitrary and as stated in **Ram Krishna Dalmia v Justice Tendolkar** (AIR 1958 S.C. 538), classifications have been founded upon intelligible differentia. The objective of this is to treat equals equally and not unequally.

Accordingly each case must be looked at separately to decide whether there had been a violation of the petitioners fundamental rights guaranteed in terms of Article 12(1) of the Constitution. In the present application, petitioners' main contention was that they were equal to officers in Class II Grade II of SLAS, but by the introduction of PA Circular, No. 6/2006, the petitioners were given a lower salary scale than that of Class II Grade II officers of SLAS.

The petitioners belong to the Sri Lanka Librarians' Service, which is under the control of the Director-General of Combined Service in terms of the Minute of the Sri Lanka Librarians' Service. The SLAS is governed by the Minute of the SLAS and in terms of the said Minute, the appointments, postings and transfers of the SLAS officers are dealt with by the Secretary to the Ministry of Public Administration with the approval of the Public Service Commission. It is thus apparent that these two services do not belong to one class but are of two categories. The petitioners had stated that they did not request for SLAS scale, but that of a comparable position. However, their allegation on the basis of the violation of their fundamental rights was entirely based on the premise that they being Supra Grade Librarians had been drawing a higher salary than that of the Class II Grade II officers of SLAS. In the circumstances, their comparable service had been SLAS. The SLAS as stated earlier is totally a different category and the petitioners and SLAS officers cannot be treated as equals.

Notwithstanding the fact that the two groups not being equals, it is also important to note that by letter dated 21.09.2006 (P_{11}) the Secretary for the National Salaries and Cadre Commission had informed to Secretary of the Ministry of Public Administration that the Supra Grade Librarians should be placed at 16th step of MN – 7 scale, which had allowed the Supra Grade Librarians to draw a higher salary of Rs. 24,630/-, where an officer in Class II Grade II of SLAS would be drawing only Rs. 22,935/-.

It is therefore quite evident that there has been no discrimination or arbitrary treatment against the petitioners with the introduction of PA Circular, No. 6/2006. For the reasons aforesaid it is apparent that the petitioners had not been successful in establishing that their fundamental rights guaranteed in terms of Article 12(1) had been violated by the 5th to 19th respondents. This application is accordingly dismissed. In all the circumstances of this application, I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

S.I. Imam, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application under
Article 126 of the Constitution of the Democratic
Socialist Republic of Sri Lanka.

S.C. (F/R) No. 326/2008

Edward Sivalingam,
No. 176, Aanai Vilundan,
Killinochchi,
Presently at,
The 'H' Ward of New Magazine Remand
Prison, Colombo 8.

Petitioner

Vs.

1. Sub Inspector Jayasekera,
   CID, Colombo 1.
2. Officer-in-Charge,
   CID, Colombo 1.
3. The Inspector General of Police,
   Police Headquarters,
   Colombo 1.
4. Hon. Attorney General,
   Attorney General's Department, Colombo 12.

Respondents

BEFORE : **SHIRANEE TILAKAWARDANE.J**
SALEEM MARSOOF.J &
S.I. IMAM.J

COUNSEL : M.A. Sumanthiran with Ms. Sharmaine Gunaratne for the Petitioner.
S.L. Gunasekera with Suren De Silva instructed by D.L. and F. De Saram for the 1st Respondent.
Riyaz Hamza, S.S.C., for the 2nd to 4th Respondents.

ARGUED ON : 08.06.2009.

WRITTEN SUBMISSIONS OF THE PETITIONER TENDERED ON : 20.08.2009

WRITTEN SUBMISSIONS OF THE 1ST RESPONDENT TENDERED ON : 23.07.2009

DECIDED ON : **10.11.2010**

SHIRANEE TILAKAWARDANE J.

Leave to proceed was granted on the Application filed by the Petitioner on the alleged violation of his Fundamental Rights under Articles 11, 12(1), 13(1) and 13(2) of the Constitution.

During the course of the submissions Counsel for Petitioner conceded that he would not be proceeding under Article 13(1) of the Constitution. This was also challenged by the Attorney General in so much as the Vavuniya Police who allegedly effected the arrest of the Petitioner as stated in paragraph 4 (a) of the Petition, had not been made parties to the case.

The Petitioner in his Petition (dated 7th August 2008) stated that he was a resident of Killinochchi. When he was 13 years old he had been forcibly taken by the Liberation Tigers of Tamil Eelam (LTTE) but had been later released when his parents pleaded on his behalf but no details or specific

facts have been given with regards to the date or the release. On or about August 2006 the Petitioner had come from Killincochi to Vavuniya in order to travel to Colombo. On 04th August 2006, at around 5.00 a.m., while he was lodged at the YMHA in Vavuniya, he was arrested with several others by the Vavuniya Police and on 6th August 2006, he was handed over to officers of the Criminal Investigations Department, who had transferred him to Colombo.

The Petitioner alleged that he was brutally assaulted with clubs at the Criminal Investigations Department (hereinafter referred to as the CID) and within the first week he suffered an injury to his right arm. After about two weeks in the custody of the CID he claims that his right arm was badly wounded and dislocated with severe paint and swelling. He also had received back and head injuries. The Petitioner alleges that an officer, whose name was not known to him, assaulted him while the 1st Respondent subjected him to interrogation.

He claimed that he was assaulted as he was being forced by such officers to say that three others persons arrested were suicide cadres of the LTTE. It is to be noted that though the 1st Respondent recorded the statements of the Petitioner, he made no mention therein of any of the persons arrested, as being suicide cadres of the LTTE [Vide document marked H].

After two weeks of continuous torture and interrogation the Petitioner stated that he was forced to sign a paper with something written in Sinhala and he states that as he could not speak or read in Sinhala he could not understand any of the contents of the statement which were never explained to him.

Whilst he was in custody, and due to the assault the Petitioner alleged that the officers of the CID took him to an Ayurvedic Physician at Minuwangoda, a private hospital and the National Hospital at Colombo for treatment for his wounds. This evidence was neither corroborated by medical evidence or records, nor was any specific details of the Ayurvedic physician or Medical Officer furnished to Court. No contemporaneous medical reports confirming injuries of the nature described by the Petitioner were ever furnished to the Court.

After having been held in detention at the CID headquarters for eight months the Petitioner had been taken to the Boossa Detention Camp wherein he was detained for a further four months. The Petitioner alleged that while there he was in detention assaulted by officers of the CID, who visited the camp regularly.

Thereafter he was produced before Magistrate Balapitiya under B report bearing number BR 90282 and remanded.

The Petitioner claimed that he informed the Magistrate about the assault on him and the injury to his head and the Magistrate directed that he be produced before the Judicial Medical Officer of the Karapitya Teaching Hospital. Accordingly he was examined by such Medical Officer on 18th March 2007 and 27th July 2007. The Petitioner states further that he narrated the incidents of torture to all medical officers including the Judicial Medical Officers who examined him.

The Petitioner states that he suffered much pain as a result of the injuries caused to him by the officer of the CID and further he was rendered unable to attend to his day-to-day needs due to his right arm been injured and bandaged for a long time.

In **Fox, Campbell and Hartley V. U.K. 1990** the accused were arrested in Northern Ireland by a constable exercising a statutory power allowing him to arrest for up to 72 hours, 'any person whom he suspects of being a terrorist'. This had been interpreted by the Courts as incorporating a subjective test, so that an arrest was permissible if the policeman had 'honestly held suspicion'; it was not necessary to show that a person in his position would have had a reasonable suspicion. (**McKee V Chief Constable for Nother Ireland 1984)**

It was held in **Abhinandan Jha V. Dinesh Mishra, AIR 1968 SC 117** that the actions to be taken by the police in the course of investigation are clearly laid down in the Code of Criminal Procedure. The Supreme Court in this case, has also categorically dictated way back in 1968 that investigation is the exclusive domain of the police who is to form an independent opinion on the result of investigation without any intervention from the executive or non executive. The tendency of some High Courts to disclose the contents of the case diaries at the time of passing an Interim Order during the stage of investigation of Criminal cases has been deprecated by the Supreme Court. [**Director, C.B.I V. Niyamavedi, 1995 AIR SCW 2212**]

When considering the allegations made by the Petitioner against officers of the CID it is important to bear in mind that the burden of proving these allegations lies with the Petitioner. This court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a

higher thresh hold than mere satisfaction. The standard of proof employed is on a balance of probabilities test and as such must have a high degree of probability and where corroborative evidence is not available it would depend on the testimonial creditworthiness of the Petitioner.

Therefore in its deliberation on the violation of rights as alleged, there must necessarily be an accurate deliberation and careful assessment of the Petitioner's case. Assertions or statements by the Petitioner which are *per se* or *inter se* inconsistent or improbable will significantly weaken the Petitioner's case and assail his creditworthiness if they pertain to a material point and taints the credibility of the Petitioner, and /or discloses that a deliberate falsehood has been stated in the unfolding of the narrative of the Petitioner's case. The Court must scrutinise and look for the cogent element of facts that are the foundation of the allegation.

Testimonial creditworthiness has an added significance in the absence of any independent records to substantiate the Petitioner's assertions, especially where the Police have maintained consistent and contemporaneous records of the facts before and after the Petitioner's arrest and detention. When such records are ex facie unassailable, the presumption under Section 114 of the Evidence Ordinance operates in favour of the police. This presumption is rebutted only by cogent, concise and consistent evidence which creates a strong case in favour of the Petitioner. Additionally there must be *Uberrima fides* evident in the disclosures made and there must be an overall credibility and creditworthiness attached to the Petitioner's testimony based on the affidavits and documents submitted before Court.

As for example, where the Petitioner's allegation of torture is supported by documents and records that must necessarily be maintained by the various officials who came into contact with the Petitioner since his arrest, including the Magistrate, medical officers, prison officials, police etc., then the presence of such documents would militate against the presumption in favour of the validity of official acts and help the court reach a verdict in favour of the Petitioner on the cumulative value, even if his testimony taken independently, may be weak and contain minor inconsistencies.

However, it must be stressed that material inconsistencies in the Petitioner's testimony before Court, which indicate palpable falsehood and improbable assertions will militate against the Petitioner and may result in his testimony being discarded in its entirety.

The 1st Respondent filed a statement of objections, dated 14th November 2008, where in he specifically denied the allegations of wrongdoing made by the Petitioner.

He alleged that at all times pertinent the Petitioner was an active member of the Liberation Tiger's of Tamil Eelam and at the time of arrest was in possession of an identity card issued by the LTTE (produced, annexed to the affidavit and marked as Z).

Such complicity was even *ex facie* evident in his confession to Wimal Samarasekara, Assistant Superintendent of Police of the CID, made on 8th February 2007[A].

When considering the facts leading up to the Petitioner's arrest and detention, the official notes maintained by the CID which have been produced in this case divulge that on 03.08.2006, in terms of certain information provided by the Police Officers of the Karandeniya Police Station, a lorry bearing No. 41-1281 was taken into custody. The real evidence that was discovered pursuant to the information given by the informant establishes that the lorry had been used for the purpose of transporting arms and ammunitions in a specially constructed hidden compartment. The large cache of arms, ammunition and explosives recovered from the lorry are more-fully described in Schedule (1) to the Statement of Objections dated 14.11.2008 filed by the 1st Respondent - who at all pertinent times in this case was a Sub Inspector attached to the CID. Consequent to this recovery, the property described in Schedule 1 was handed over on 04.08.2006 to the Sri Lanka Police.

Based on information received the Petitioner was admittedly arrested on 04.08.2006 from the Young Men's Hindu Association in Vavuniya by a team of officers of the Vavuniya Police led by Sub Inspector Ranaweera. The Petitioner was detained at the Vavuniya Police Station until the 5th August 2006, before he was handed over to the CID.

Significantly, at the time of his arrest, the Petitioner had in his possession several identity cards - one issued by the LTTE bearing No. 0600876 valid up to 09.08.2006 (document marked as Z), another issued by the Methodist Church issued on 20.07.2004 and valid up to 19.07.2005 (document marked as Z1) and a National Identity Card (document marked as Z2).

The documents Z, Z1 and Z2 have been produced before Court and the identifying photograph in the national identity card and the card carrying the emblem of the LTTE are similar and the picture of the Petitioner visibly appears recognizable. Arresting Officer Ranaweera in his Affidavit dated November 2008, confirms the recovery of the above mentioned identity cards from the Petitioner's possession at the time of his arrest on 04.08.2006. Contemporaneous records of the arrest of the Petitioner and the recoveries made thereon.

The three identity cards recovered from the Petitioner were produced and entered in the List of Property bearing receipt No. 275/06 by the Vavuniya Police (Vide, Document marked C). Contemporaneous entries have also been made in the Police Information Book, Vavuniya on 04.08.2006 (Document marked B) regarding the Petitioner's arrest and the recovery of three identity cards from the Petitioner's possession. It is important to note that the dates mentioned in the Police Information Book (marked B) and the List of Property (marked C) are consistent and tally with the confession made by the Petitioner to the Police. It appears that the recovery of the three identity cards together with the entries made in the Police Information Book have formed the basis for a reasonable suspicion that the Petitioner was involved in terrorist acts linked to the LTTE movement.

My attention was drawn to the identity card issued by the LTTE marked Z which was recovered from the Petitioner at the time of his arrest. This document, which clearly carries the emblem of the LTTE, appears to be issued by an authorized officer of the said proscribed organization and permits the Petitioner to travel within and out of LTTE controlled areas up to 09.08.2006. The Petitioner contends that he was a member of the Christian Church and used this travel permit to serve people in that capacity. It is significant in this regard that the Petitioner's Methodist Church identity card had lapsed on 19.07.2005 (according to the photocopy made available to this Court) and appears not to have been extended. The Petitioner also contends that travel permits are

regularly issued by the LTTE to every person living within LTTE controlled areas in order to facilitate travel.

Certainly as far as the facts are concerned it can be inferred that the Petitioner was in a favoured position to carry one of these cards, even after he no longer had the relevant valid permit as a Methodist priest, He offered no explanation of his need to travel into these areas even after the expiry of the card given by the Methodist Church. It is pertinent to note that the Petitioner admits that he was a resident of Killinochchi and that he had been working with the LTTE from the age of 13, but was later released. Significantly, he does not give the date of his release. The fact that he was at one time admittedly working with the LTTE, leads to a reasonable conclusion that he seemed to have a freedom of approved movement inside terrorist held areas pointing significantly to the allegation of the Respondents that he was an active member of the LTTE, even at the time of his arrest.

Under the circumstances that prevailed in 2006, possession of a travel pass issued by the LTTE may plausibly give rise to the conclusion that the Petitioner maintained linkages with the LTTE. This fact combined with information received from the Karandeniya Police linking the Petitioner to the stash of explosives, arms and ammunition recovered from the lorry recovered on 03.08.2006 has reasonably triggered his arrest and inquiry into possible terrorist activities committed or planned by the Petitioner. In light of the circumstance of the Petitioner's arrest on 04.08.2006 I hold that there has been no violation of the Petitioner's rights under Article 12(1) of the Constitution by the arrest and detention of the Petitioner..

The Petitioner also claims that he was severely tortured by official of the CID while being detained at the CID Headquarters in Colombo. Specifically the Petitioner claims that he was tortured by an unnamed CID officer while being interrogated by the 1st Respondent. The Petitioner claims that he was badly wounded as a result of the torture and that he was taken to an Ayurvedic Physician, a private hospital and finally the National Hospital in Colombo where he received treatment. The Petitioner was detained at CID Headquarters for 8 months before being transferred to the Boosa Detention Camp where he was detained for a further 4 months.

Significantly the Petitioner was examined by AJMO, Colombo, Dr. Ganesh on or about 08.02.2007 and the Medico-Legal Examination Report dated 09.02.2007 does not disclose any injuries consistent with the alleged assault and torture suffered by him during his incarceration at the CID Headquarters (Vide, documents marked K and L). The Petitioner has also failed to provide the name or details of the private hospital at which he purportedly received treatment while in CID custody.

(a) The Petitioner having expressed willingness to make a confession was produced before Dr. Ganesh, the Assistant Judicial Medical Officer, Colombo, both before and after the recording of the confession i.e. on 8th February 2007 and 9th February 2007. Dr. Ganesh found no injuries on him [Medico Legal Examination Forms J & K].

(b) Thereafter, the Petitioner was examined by two Assistant Judicial Medical Officers of Galle, on 16th March 2007, when he was transferred to Boossa, and thereafter on 27th July 2007, upon the Petitioner being committed to remand custody. Both the said doctors found no injuries on him [Medico Legal Examination Forms – L & M].

During his incarceration at the CID Headquarters, the Petitioner was visited by officers of the International Committee of the Red Cross (hereinafter referred to as the 'ICRC') on two separate occasions. Entries made in the Routine Information Book Records maintained by the CID indicate that ICRC officials visited the Petitioner on 01.09.2006 and 11.10.2006. I am satisfied that these entries are contemporaneous records. The records contain no mention of torture or ill treatment with respect to the Petitioner and it appears that the Petitioner had failed to bring the alleged acts of torture to the attention of the ICRC officials nor had the officers noted any observations of ill health or injuries in the register maintained at the time.

Furthermore, though produced before the Magistrate, Balapitiya on every day on which case No. BR 90282 was called, the Petitioner made no complaint of assault or ill-treatment [Journal Entries G].

The Petitioner also contends that following his transfer to the Boosa Detention Center he was tortured by CID officers who visited the Detention Center on or about July 2007. However, the

Medico Legal Examination Forms of Dr. K.S. Dahanayake and Dr. Amararatne of the Karapitiya Hospital dated 16.03.2007 and 27.07.2007 respectively, did not refer to any injuries or dislocation of the arm as claimed by the Petitioner. Only the presence of scars or 'old scars' but provided no indication of how or when these scars or whether they were in any way related to the injuries. (Vide documents marked as M and N).

In the meantime, the Petitioner has been produced before the Learned Magistrate of Balapitiya on several occasions in relation to case bearing No. M.C. Balapitiya BR 90282, filed with respect to the recovery of explosives, arms and ammunition by the Karandeniya Police on 03.08.2006. Journal entries of the Magistrate's Court, Balapitiya (Document marked as H) confirms this. I am satisfied with the genuineness of those journal entries which contain no indication and or observation that the Petitioner appeared to have any injuries or complained of being tortured or receiving ill-treatment while in detention.

There appear to be no public records or documentary evidence that has been produced to substantiate the Petitioner's allegation of torture against officers of the CID. On the other hand, the Medico-Legal Examination Forms dated 09.02.2007; 16.03.2007 and 27.07.2007 do not suggest injuries which are consistent with the acts of torture alleged by the Petitioner. Furthermore, the Journal Entries of the Magistrate's Court, Balapitiya and the CID Records pertaining to visits by ICRC officials, indicate that the Petitioner repeatedly failed to bring these alleged acts of torture and ill-treatment to the attention of the Magistrate or the Red Cross even though he had the opportunity to do so. In light of the weight of evidence produced by the Respondents I find that there has been no violation of the Petitioner's rights under Article 11 of the Constitution.

With respect to the confession made to the CID, the Petitioner contends that following two weeks of torture and interrogation the CID compelled him to sign a statement written in Sinhala, the contents of which were not explained to the Petitioner. The Petitioner contends that at the time, he could not read or write in Sinhala. As the confession was recorded in Sinhalese the issue arises as to whether it was a voluntary confession, especially since the Petitioner is a Tamil by race.

The 1st Respondent has submitted that the Petitioner is fully conversant in Sinhala and that the Petitioner had no objection to being questioned in Sinhala. It is not disputed that the Petitioner was born in Elpitiya, Galle, a predominantly Sinhala area where the Petitioner lived and schooled until he was 9 years old. A statement by Rev. M.S. Padmakumara, (Marked J) dated 26.09.2006 discloses that after becoming an Evangelist he returned to Elpitiya and lived in his sister's house for about five months. During this period he participated in services at the Smyrna Church, Divithurai Estate, Elpitiya. The Petitioner, having been born in 1974 in Elpitiya, the population whereof is predominantly Sinhalese, and lived there for 9 years prior to moving to Kilinochchi, was conversant with Sinhala.

This statement is consistent with and supports the position taken by the 1st Respondent as to the Petitioner's fluency in Sinhala and that the Petitioner both understood and expressed his willingness to have his statement recorded in Sinhala.

Notes maintained by the CID dated 30.11.2006 has been explained that he could record his confession and a period of time has been given for him to consider, as has been specified under the law, whether he wanted to make a confession and the gravity of such a confession and ruminate on its consequences .Although an officer that by the name of Raheem had been present in the room in order to translate and assist in any language difficulties faced by the Petitioner, he appears not to have sought any assistance from him but had subsequently opted to make his statement in Sinhalese. According to the entries on 08.02.2007 at the time indicate that the Petitioner had expressed a willingness to have his statement recorded in Sinhala and that based on his consent the confession was so recorded by Assistant Superintendent Wimal Samarasekera (Documents marked as A).

He had been produced immediately before and after the recording of his confession before a Judicial Medical Officer who recorded no complaint, or observed any injuries. On this date, Assistant Superintendent Wimal Samarasekera, upon examining the Petitioner noted contemporaneously, that the Petitioner had no visible injuries and that all relevant warnings had been issued to the Petitioner in terms of the law.

In light of the circumstances detailed above, it appears that the Petitioner was conversant in Sinhala and that he had consented to have his statement recorded in Sinhala. The confession itself contains details that could only have been given by the Petitioner especially relating to his early life. The Petitioner's stand that he could not understand Sinhala is contradicted by the statement of an independent and impartial priest who has stated that the Petitioner conducted sermons at his parish in a predominantly Sinhala area in the South of Sri Lanka. Such an attempt to mislead the Court on a threshold issue in order to invalidate his previous confession to the CID has assailed the Petitioner's evidence and has damaged his testimonial creditworthiness before this Court.

Despite his testimonial creditworthiness being assailed and the Petition should be dismissed for the lack of uberrima fides, I have nevertheless considered for posterity his other complaints in this case. The Petitioner has also alleged the violation of his Fundamental Rights under Article 13(1) and 13(2) of the Constitution by his wrongful detention.

Even though in his arguments the Learned Counsel for the Petitioner abandoned his allegation of wrongful arrest, I have nevertheless considered this fact as it affects the cherished liberty of the person.

In considering the Petitioner's arrest, the Court must consider the circumstances leading up to his arrest, particularly the discovery of a large containment of arms and ammunition by the Karandeniya Police and the allegation that the Petitioner was complicit in the transport of such ammunition, coupled with the recovery of three separate identity cards, including an LTTE travel permit from the Petitioner at the time of his arrest. The facts detailed above on their own would satisfy the threshold for initiating an investigation into the Petitioner's conduct and possible involvement with the LTTE. It is significant to note that the ammunition was found on the date prior to the Petitioner's arrest and the identity cards were recovered at the time of arrest. In evaluating the evidence the court must consider the totality of evidence including the recoveries made on 03.08.2006 and 04.08.2006 and the contemporaneous records maintained by the CID on the one hand, and the bald testimony of the Petitioner on the other. Under the circumstances this Court does not find that the Petitioner's arrest violated Article 13(1) of the Constitution.

Following the Petitioner's arrest by the Vavuniya Police on 04.08.2006 the Petitioner was produced before a Magistrate on 31.08.2006. The Petitioner was arrested and detained under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005 and under a Detention Order dated 04.08.2006 under which the Petitioner could be detained for a period of Ninety days from the date of the Order. Between 04.08.2006 and 30.06.2007, the Petitioner was served with a total of 6 Detention Orders (Dated 4.08.2006, 02.11.2006, 02.12.2006, 01.01.2007, 16.03.2007, 01.04.2007, and 30.06.2007) by which his detention was extended validly under the Emergency Regulations. It appears that on the face of the serious nature of the offences against the Petitioner that the detention had been regularized with a Detention Order which had been signed by the then Additional Secretary of Defence at the Ministry of Defence, Public Security Law and Order and are valid in law. The Petitioner was so kept in detention as per the said Detention Orders up to 22nd July 2007, on which day he was remanded to fiscal custody.

Regulation 19(1) of the Emergency Regulations reads as follows;

"19(1) Where the Secretary to the Ministry of Defence is of opinion with respect to any person that, with a view to preventing such person:
-from acting in any manner prejudicial to the security or to the maintenance of public order, or to the maintenance of essential services; or
-from acting in any manner contrary to any of the provisions of sub-paragraph (a) or sub-paragraph (b) of paragraph (2) of Regulation 40 or Regulation 25 of these Regulations, where it is necessary so to do, the Secretary may Order that such person be taken into custody and detained in custody :
Provided however that no person shall be detained upon an Order under this paragraph for a period exceeding one year."

Regulation 21(1) of the Emergency Regulations provides that where any person has been arrested and detained under the provisions of Regulation 19, such person shall be produced before magistrate within a reasonable time, having regard to the circumstances of each case, and in any event, not later than 30 days after such arrest. The authorities have complied with this provision of the law.

Regulation 21(2) of the Emergency Regulations reads as follows;

"21(2) Any person detained in pursuance of provisions of Regulation 19 in a place authorized by the Inspector General of Police may be so detained for a period not exceeding ninety days reckoned from the date of his arrest under that Regulation, and shall at the end of that period be released by the officer in charge of that place unless such person has been produced by such officer before the expiry of that period before a court of competent jurisdiction; and where such person is so detained in a prison established under the Prisons Ordinance ……: "

Regulation 21(3) stipulates that:

"Where a person who has been arrested and detained in pursuance of the provisions of Regulation 19 is produced by the officer referred to in paragraph (2) before a court of competent jurisdiction, such court shall Order that the person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance."

On a plain reading of Regulation 19(1) of the Emergency Regulations, specially the proviso thereto, that a person can be detained upon an Order under the said paragraph for a period of up to one year.

When reading Regulation 19(1) together with Regulation 21(2) of the Emergency Regulations it is evident that a Detention Order could be obtained for a period of 90 days at a time, but for a period not exceeding one year in total.
This was the basis on which it appears that the Petitioner was taken into custody under the Emergency (Miscellaneous Provisions and Powers) Regulations No. 1 of 2005, and detained for a period of up to one year. At the end of the said one year and prior to the lapse of one year on 22nd July, 2007 he was remanded into fiscal custody.

However, this procedure was challenged in Supreme Court Fundamental Rights Application No.173/08 (SCFR 173/08). This was due to the fact that the provisions of Regulation 21(3) contradicted with the provisions of Regulation 19(1) when read together with Regulation 21(2).

Regulation 21(3) stipulates that where a person who has been arrested and detained in pursuance of the provisions of regulation 19(1) is produced by the officer referred to in Regulation 21(2) before a court of competent jurisdiction, such court shall order that the person be detained in the custody of the Fiscal in a prison established under the Prisons Ordinance.

Thus Their Lordships, by Order dated 29th July 2008, held as follows:

"….Court has also heard Learned President's Counsel in support of interim relief. Court has also heard Learned State Counsel who concedes that in terms of Regulation 19(1) and 21 of the Emergency Regulations No 1 of 2005, the detainee should have been transferred to fiscal custody after 90 days from the date of arrest."

A clear ambiguity in the law up to this point of time. This ambiguity was rectified by the Supreme Court, in SC Application 173/08, only on 29th July 2008. This does not mean that all detentions made under the Emergency Regulations No 1 of 2005 prior to this Order were bad in law and therefore illegal. If that was to be the case it will clearly lead to an absurdity.

In any event, by this Order what was determined by the Supreme Court was that the place of detention of a detainee should change at the expiration of 90 days. There was absolutely no dispute with regard to the period of detention. The period of detention could still extend up to one year. The difference being that originally this period of detention was at any place authorized by the Inspector General of Police. However, consequent to the Judgment it now means that any detainee should now be transferred to fiscal custody after 90 days from the date of his arrest.

Therefore, a Detention Order could still be in force (after 90 days from the date of his arrest) for the balance period of nine months. However, during this period the detainee should necessarily be transferred to fiscal custody. Thus new terminology in the form of ***'D/O Remand'*** has been coined to refer to this balance period of detention, meaning '***on a Detention Order but in Fiscal Custody'***.

In the circumstances it is submitted that there is no violation of the Petitioner's Fundamental Rights guaranteed under Article 13(2) of the Constitution.

There appears to be a disparity between these two provisions. This was considered in SC Application No. 173/2008 on 20.07.2008 and ultimately held that the detainee should be transferred to fiscal custody after 90 days from the date of arrest. This determination, being a decision on the substantive law would be operative from the date of the Judgment and this period of detention in the present case would not be covered as it was before that date.

This Court finds that the facts alleged by the Petitioner were not borne out by the official documents that have been produced in Court. However, the findings of this Court and decision thereon are based on the documents presented before court and I make no attempt to preempt or prejudge the truthfulness or lack thereof of the facts contained in the Confessional Statement made by the Petitioner to the CID.

Accordingly the trial court will not be bound by the findings of this Court on the facts as presented on pleadings and affidavits. Under these circumstances, the Application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

SALEEM MARSOOF.J

I agree.

JUDGE OF THE SUPREME COURT

S.I. IMAM.J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 126 of the Constitution of Sri Lanka.

1. W, K. B. Seneviratne,
376/A2, Shanthi Mawatha,
Kirillawala.

And 5 Others
PETITIONERS

S.C. (F.R.) APPLICATION NO. 105/08 ***VS.***

1. Justice P. R. P. Perera,
Chairman,
Public Service Commission,
No. 46, Vauxhall Street,
Colombo 02.

And 23 Others
RESPONDENTS

BEFORE : Saleem Marsoof, P.C., J.,
P. A. Ratnayake, P. C., J., &
Chandra Ekanayake, J.

COUNSEL : J. C. Weliamuna with N. S. Ranaweera for Petitioners

M. K. B. A. Jayasinghe, D.S.G., for 1st-4th, 6th-10th, 11th, 12th-14th and 24th Respondents.

ARGUED ON : 25-11-2009

DECIDED ON : 1.04.2010

MARSOOF, J.

The Petitioners are Class II-Jailors of the Department of Prisons, falling within the purview of the Ministry of Justice and Law Reforms, and have in this application under Article 17 read with Article 126 of the Constitution, sought to challenge the promotions of the 16th to 23rd Respondents to the post of Class I-Jailor in the said Department and the failure to promote the Petitioners to the said post. The Petitioners, who are all

senior jailors in Class II of the service, claim that their fundamental right to equality enshrined in Article 12(1) of the Constitution has been violated by the actions of the 1st to 15th Respondents or any one or more of them, which have resulted in the 16th to 23rd Respondents who are more junior in the service being promoted over the Petitioners, who even otherwise are more qualified than the said Respondents. By way of relief, the Petitioners have prayed for a declaration that their fundamental right to equality has been violated by executive and administrative action and the purported promotions of the 16th to 23rd Respondents to posts of Jailor-Class I is null and void, and additionally, they have prayed that the marking scheme marked P9 and the communication setting out the purported appointments of the 16th to 23rd Respondents marked P8 be quashed. The Petitioners have also sought a declaration that they are entitled to be appointed to the post of Jailor-Class I with effect from 7th June 2007.

In the petition and affidavit filed in this Court, the Petitioners state that by a communication dated 23rd February 2007 (P3), the Secretary to the Ministry of Justice and Law Reforms (10th Respondent) called for applications from the senior-most officers currently holding office as Class II-Jailors having the specified qualifications to fill 4 vacancies in the cadre of Class I-Jailors. The said communication expressly referred to the Public Administration Circular No. 30/91 dated 20th July 1991 (P4) which required that promotions should be made on the basis of merit and seniority (l=i,;djh iy fcHIaG;ajh). It was stated in P3 that the basic qualifications required to be satisfied for the said promotions were completion of 5 years satisfactory service in the post of Class II-Jailor and passing, or being exempted from, the Efficiency Bar Examinations for that post. It is common ground that at the time application were called for the said promotions, there were only 4 vacancies, but by the impugned communication dated 26th February 2008 (P8) issued by the Commissioner General of Prisons, 8 persons were purported to be promoted to the post of Class I-Jailor.

According to the Petitioners, the marking scheme that was applicable to the promotions in question as on the date of the communication calling for applications (P3) was the scheme that was approved by the Public Service Commission (hereinafter referred to as "PSC") by its letter dated 8th July 2002 (P5) under which a maximum of 75 marks had to be allocated for seniority and a maximum of 25 marks for merit. It is stated in P5 that the maximum of 25 marks available under the category of merit, should be allocated under 5 headings for each of which a maximum of 5 marks were available namely, (a) commendations; (b) sports; (c) welfare and religious activities; (d) positions held and responsibilities undertaken; and (e) employment related training courses. The Petitioners stated that although they duly attended the interview held on 27th June 2007 and submitted all relevant documents in support of their candidature, to their surprise and dismay, they learnt that by P8 the 16th to 23rd Respondents have been appointed to the post of Jailor-Class I, although the Petitioners were on account of their seniority and merit more qualified than the said Respondents.

The gravamen of the complaint of the Petitioners, as contended by learned Senior Counsel for the Petitioners, was that at the said interview the marking scheme used was radically different from that contained in P5, and had been used without the approval of the PSC and without prior notice to the Petitioners and the other officers who applied to fill the vacancies. Learned Counsel for the Petitioners submitted that his clients were able to obtain a copy of the marking scheme in fact used at the

interview which they have produced marked P9, and it appears from this that only 50 marks would be allocated for seniority, the remaining 50 marks being apportioned in the following manner :-

(i) Merit: **20 marks**

- Commendations: 04 marks
- Sports: 04 marks
- Welfare & religious activities: 04 marks
- Promotions & responsibilities: 04 marks
- Training programmes : 04 marks

(ii) Performance appraisals : **20 marks**

- Excellent : 04 marks
- Above Average : 03 marks
- Satisfactory : 02 marks

(for each year of the past 05 years)

(iii) Presentation at the interview : **10 marks**

Learned Counsel for the Petitioners submitted that the 1st Petitioner was at the time of the interview ranked first in the Seniority List marked P10, and the 2nd Petitioner ranked second in the said List. He also submitted that the 3rd, 4th, 5th and 6th Petitioners ranked respectively 6th, 7th, 9th and 17th in the said Seniority List, and that the 16th to 23rd Respondents who were successful at the interview, were all junior in Class II to the 1st and 2nd Petitioners, and the 3rd to 6th Petitioners were also senior in Class II to the 16th, 19th, 21st and 22nd Respondents. He emphasized that by adopting the marking scheme P9, instead of the scheme contained in P5, which was the only scheme approved by the PSC, the comparative seniority of the Petitioners as against the 16th to 23rd Respondents has been unduly overlooked. Learned Counsel for the Petitioners contended that P9 was only a proposed marking scheme, which not only did not have the approval of the PSC, but was also irrational and arbitrary; the allocation of the marks for performance appraisals was unfair as no specific guidelines have been introduced in respect of evaluating the performance of the relevant officer; and the allocation of 10 marks for "presentation at the interview" gave the interview panel an unfettered discretion which was capable of being abused.

The learned Counsel for the Petitioners emphasized that by the promotion of the 16th to 23rd Respondents over the Petitioners, the fundamental rights of the Petitioners to equability before the law enshrined in Article 12(1) of the Constitution has been violated. Learned Counsel for the Petitioners submitted that in the absence of any other material to justify the appointment of the 16th to 23rd Respondents to fill the 8 vacancies in question, the Petitioners are entitled to all the relief prayed for by them in the petition.

In several fundamental rights cases involving promotions in the public service, this Court has looked into the legitimacy and rationality of the marking scheme adopted at interviews. *See, Perera and Another v. Cyril Ranatunga, Secretary Defence and Others* [1993]

1 Sri LR 39; *Perera and Nine Others v. Monetary Board of the Central Bank of Sri Lanka & Twenty-two Others* [1994] 1 Sri LR 152; *Wijesuriya v. National Savings Bank* [1997] 1 Sri LR 185; *Piyasena and Another v. The People's Bank and Others* [1994] 2 Sri LR 65; *Abeysinghe* and 3 *Others v. Central Engineering Consultancy Bureau and 6 Others* [1996] 2 Sri LR 36; *Narangoda and Others v. Kodituwakku, Inspector-General of Police and Others* [2002] 1 Sri LR 247. This is because, as explained by Amerasinghe, J. in *Perera and Nine Others v. Monetary Board of the Central Bank of Sri Lanka & Twenty-two Others (supra)* at page 162-

> "Transparency in recruitment proceedings would go a long way in achieving public expectations of equal treatment. The selection of a person must be viewed as a serious matter requiring a thoroughgoing consideration of the need for the services of an officer, and a clear formulation of both the basic qualities and qualifications necessary to perform the services, and the way in which such qualities and qualifications are to be established."

Bearing these words in mind, it is necessary to look at the question whether the marking scheme in P9 was a transparent and clear formulation of both basic qualities and qualifications necessary to perform the services relating to the post of Class I-Jailor and has received the approval of the Public Service Commission (PSC), the authority constitutionally vested with the function of formulating the same. It is noteworthy that the scheme of recruitment applicable to the post of Jailor–Grade I (1R3) in paragraph 11.1(ii) does not lay down any specific guidelines as regards the percentage of marks to be allocated for seniority as opposed to merit, but expressly provides that the PSC should approve the marking scheme to be followed at the interview. Both the 1st Respondent, Justice P. R. P. Perera, former Judge of the Supreme Court, who was at the relevant time the Chairman of the Public Service Commission, and the 10th Respondent, Suhada Gamlath, Secretary to the Ministry of Justice and Law Reforms, have filed affidavits with the objections on behalf of the 1st - 4th, 6th – 14th and 24th Respondents. In their affidavits, they have clarified that the marking scheme marked P9 used at the interview had in fact been approved by the Public Service Commission by its letter dated 9th February 2007, a copy of which was produced as 1R1. It is clear from the said letter that not only did the Public Service Commission approved the marking scheme, it also approved the proposal to fill the 4 additional vacancies that had arisen after the date of the communication dated 23rd February 2007 (P3) by which initially applications had been called only to fill 4 vacancies, that brought the total number of vacancies to be filled to 8. In these circumstances, learned Counsel for the Petitioners concedes that the said marking scheme has been duly approved by the Public Service Commission, and also concedes that the filling of the 4 additional vacancies that had arisen subsequently is not improper.

Accordingly, the question that has to be decided by this Court in the context that the Petitioners' are alleging violation of their fundamental rights enshrined in Article 12(1) of the Constitution, is whether the use of the said marking scheme marked P9, as opposed to the marking scheme marked P5, offend the basic right to equality. The main difference between the two marking schemes is that whereas P5 allocates only 25 per centum of the marks for merit, P9 assigns a maximum of 50 per centum of the marks for merit. In this context, it is necessary to emphasise that the marking scheme marked P9 gives equal weightage to seniority and merit and is in conformity with the requirements in the Public Administration Circular No. 30/91 dated 20th July 1991 (P4),

which embodies the decision made by the Cabinet of Ministers that all promotions to the Public Service should be based on "merit and seniority" (l=i,;djh iy fcHIaG;ajh). It is also important in this context that the communication by which applications were called to fill vacancies in the cadre of Class I-Jailors specifically refers to the said circular.

No doubt, in apportioning the marks into the compartments of merit and seniority, the position of the post or posts to be filled in the hierarchical structure of the relevant establishment and the nature of the work that the person or persons to be promoted have to discharge will be important considerations. One cannot lose sight of the fact that the impugned promotions were to posts of Class I-Jailor which is the highest class in the post of jailor within the hierarchy of the Department of Prisons.

The submission that was made by learned Senior Counsel for the Petitioners that seniority should be given more weight than merit may be of some relevance in the lower grade or class of a particular post, but the higher the position in the hierarchy and the more complex the functions involved, merit has to inevitably increase in its importance in any rational scheme of promotion. As M.D.H. Fernando, J. observed in the course of his judgment in *Perera and Another v. Cyril Ranatunga, Secretary Defence and Others* [1993] 1 Sri LR 39 at page 43-

> "To ignore the requirements of the post and the needs of the public would be to permit the unrestricted application of the "Peter principle" - that in a hierarchy a person will continue to be promoted until he reaches a level at which he is quite incompetent. "Merit" thus has many facets, and the relative importance or weight to be attached to each of these facets, and to merit in relation to seniority, would vary with the post and its functions, duties and responsibilities."

The so called "Peter principle" was enunciated by Dr. Laurence J. Peter and Raymond Hull in their book *The Peter Principle*, a humorous treatise which introduced the salutary science of "Hierarchiology". The gist of the principle is that in a hierarchy, members are promoted so long as they work competently. Sooner or later they are promoted by virtue of their seniority to a position at which they are no longer competent (their "level of incompetence"), and in time, every position in the hierarchy will be occupied by an employee who is incompetent to carry out his duties and the work involved is accomplished by those employees who have not yet reached their level of incompetence. The practical utility of the theory is that in making promotions for even higher positions, the system should be able to filter such employees who have reached their level of incompetence, or else an incompetent person at the top might cause the entire establishment to collapse. It is therefore clear that the allegation that Respondents were obliged to allocate 75 per cent of the marks for seniority and only 25 per cent of the marks for merit in terms of the letter of the Public Service Commission dated 8th July 2002 (P5) is altogether baseless. I also do not consider it unreasonable to award 20 marks under the category "performance appraisals" for the reason that the performance in the previous grade or class is extremely relevant in making promotions to the next grade or class in any service, and no specific allegations have been made in regard to the criteria adopted for such appraisal. The allocation of 10 marks for "presentation at the interview" no doubt bring in a certain degree of subjectivity, but considering that this constitutes only 10 per cent of the marks that can be allocated

under the marking scheme, and the versatility and integrity of the interview panel, I am of the view that no questions of inequality would arise from this position.

Apart from the issue of comparative seniority, the only other basis on which the impugned promotions are sought to be challenged by the Petitioners is that there is an inquiry pending against the 17th Respondent before the Human Rights Commission of Sri Lanka. Although a bold statement to this effect is found in paragraph 18(f) of the Petition and the corresponding paragraph of the affidavit filed in this Court by the Petitioners, no particulars of the case have been provided, and in the absence of material to sustain the allegation, this Court cannot make any finding or pronouncement in this regard.

For the reasons outlined above, I hold that the Petitioners have not succeeded in proving any violation of their fundamental rights enshrined in Article 12(1) of the Constitution. Accordingly I make order dismissing the application, but make no order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Articles 17 and 126 of the Constitution.

SC (FR) No. 459/08

1. Environmental Foundation Limited,
No. 146/34, Havelock Road,
Colombo 5.

2. K.K.D. Perera,
No. 531, Balagolla,
Kengalla.

3. Ajith P. Dharmasuriya
No. 1, New Town,
Aluthwatta Road,
Rajawella.

Petitioners

Vs.

1. Mahaweli Authority of Sri Lanka,
No. 500, T.B. Jayah Mawatha,
Colombo 10.

2. Director-General,
Mahaweli Authority of Sri Lanka,
No. 500, T.B. Jayah Mawatha,
Colombo 10.

3. J.L.H.I. Kumarihami
Resident Project Manager-
Victoria Project,
Mahaweli Authority of Sri Lanka,
Victoria Resident Project Manager's Office,
Digana, Nilagama,
Rajawella.

4. Nihal Wijenayake,

Director-Lands,
Mahaweli Authority of Sri Lanka,
No. 500, T.B. Jayah Mawatha,
Colombo 10.

5. Hon. Maithripala Sirisena, M.P.,
Minister of Agricultural Development and Agrarian Services,
Ministry of Agricultural Development and Agrarian Services,
No. 500, T.B. Jayah Mawatha,
Colombo 10.

6. Secretary,
Ministry of Agricultural Development and Agrarian Services,
Ministry of Agricultural Development and Agrarian Services,
No. 500, T.B. Jayah Mawatha,
Colombo 10.

7. Meda-Dumbara Pradeshiya Sabha
Theldeniya.

8. Patha-Dumbara Pradeshiya Sabha
Wattegama.

9. Patha-Hewaheta Praeshiya Sabha
Thalathu-Oya.

10 Kundasala Pradeshiya Sabha Menikhinna.

11. Divisional Secretary,
Divisional Secretariat of Meda-Dumbara,
Theldeniya.

12. Central Environmental Authority.
"Parisara Piyasa",
No. 104, Robert Gunawarden Mawatha,
Battaramulla.

13. Director of Wildlife Conservation,
Department of Wildlife Conservation,

No. 18, Gregory's Road,
Colombo 7.

14. Hon. Attorney General
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

Respondents

BEFORE : J.A.N. de Silva, CJ.

S. Marsoof, J. &

P.A. Ratnayake, J.

COUNSEL : Nishantha Sirimanna with Ms. Wardani Karunaratne for Petitioners.

Nihal Jayamanne, PC. with Ms. Uditha Collure for the 8th Respondent.

Palitha Kumarasinghe, PC with Chinthaka Mendis for 1st to 4th Respondents.

Indika Demuni de Silva DSG. for 5th, 6th, 11th, 12th, 13th & 14th Respondents.

ARGUED ON : 21-10-2009

WRITTEN SUBMISSIONS OF THE PETITIONER TENDERED ON : 02-12-2009

WRITTEN SUBMISSIONS OF THE RESPONDENT TENDERED ON : 18.12.2009

DECIDED ON : 17- 06 -2010

P.A. Ratnayake, J

The Petitioners in this case have filed this application in the public interest complaining of a violation of Article 12(1) of the Constitution in the alienation of the lands referred to therein and the granting of permission for construction of buildings on such lands. The 1st Petitioner is a non- profit making company incorporated under the laws of Sri Lanka and according to the Memorandum of Association annexed marked 'P1B' to the Petition, the objects include the monitoring of State Departments and Regulatory Agencies so as to ensure that the public interest in protecting the environment is fully considered in their administrative actions. The 2nd and 3rd Petitioners are persons who are residing in close proximity to the Victoria Reservoir. The Petitioners allege that the alienation and granting of permission for construction of buildings in the lands which are the subject matter of this application had been done in an arbitrary and adhoc manner in violation of the applicable legal provisions and guide lines.

Petitioners state that the lands which are the subject matter of alienation and granting of permission for construction fall within the "Special Area" declared in terms of Section 3(1) of the Mahaweli Authority Act No. 23 of 1979. According to them the said land also fall within the 100 m. reservation from the full supply level of the Victoria Reservoir which is one of the important reservoirs falling within the "Accelerated Mahaweli Program" described in the document annexed as 'P3' to the petition of the Petitioners. They also contend that the concerned lands also fall within the "Victoria- Randenigala- Rantabe Sanctuary" created under Section 22 of the Fauna and Flora Protection Ordinance (Cap.469) as amended by Act 44 of 1964 and Act No. 1 of 1970. Accordingly the Petitioners allege that unlike other state lands different and more stringent provisions apply for the alienation of such lands and the granting of permission for construction on the lands falling under the above regimes, and that one or more of the Respondents have violated these provisions.

This Court which granted Leave to Proceed in this application in respect of the alleged violation of Article 12 (1) of the Constitution also on 17th December 2008 granted interim relief as prayed

for by the Petitioner in paragraphs '**m**' and '**n'** of the prayer to the petition which states as follows:-

(m) *Issue an interim order until the final determination of this Application, restraining the 1st to 6th Respondents and/or any one or more of them from issuing any instruments of alienation/disposition, including annual permit, to any person(s), in respect of any lands located within 100 meters from the full supply level of the Victoria Reservoir and vested in the Mahaweli Authority and/or declared as constituting "Special Ares", and/or for the purposes of erecting buildings and/or permanent structures thereon and/or subject to the imposition such terms and conditions that may be deemed fit and appropriate by Your Lordships' Court; and/or*

(n) *Issue an interim order until the final determination of this Application, restraining the 1st to 10th Respondents and/or any one or more of them from permitting and/or authorizing in any manner whatsoever, the erection/construction of any buildings/structures on any lands located within 100 meters from the full supply level of the Victoria Reservoir and/or on any lands located within 100 meters from the boundaries of the 'Victoria Randenigala-Rantambe Sanctuary', except in strict compliance with the conditions/Guidelines laid down by the Special Committee in 1997 (as contained in the document marked P12), and/or with EIA or IEE approval obtained therefore from the Mahaweli Authority and/or the Department of Wildlife Conservation, prior to commencing such construction(s); and/or staying the operation of any building approvals/permits that have been granted/issued by any of the said respondents in breach/violation of the said requirement;*

This application deals with two aspects, namely-

(1) *alienation of the lands in question and*

(2) *granting of permission for construction.*

In order to carry out the functions falling within the "Accelerated Mahaweli Program" the government of the day created a State Corporation by the name of Mahaweli Authority of Sri Lanka (hereinafter referred to as the Mahaweli Authority) by Act No. 23 of 1979. The 1st Respondent in this case is the said Mahaweli Authority and the 2nd and 3rd Respondents are officials of the Mahaweli Authority. The 1st Respondent Corporation, which has wide and extensive powers, was entrusted with the following functions by the Mahaweli Authority of Sri Lanka Act No. 23 of 1979;

"12 (a*) to plan and implement the Mahaweli Ganga Development Scheme including the construction and operation of reservoirs, irrigation distribution system and installations for the generation and supply of electrical energy";*

provided, however, that the function relating to the distribution of electrical energy may be discharged by any authority competent to do so under any other written law;

(b) to foster and secure the full and integrated development of any Special Area;

(c) *to optimize agricultural productivity and employment potential and to generate and secure economic and agricultural development within any Special Area;*

(d) *to conserve and maintain the physical environment within any Special Area;*

(e) to further the general welfare and cultural progress of the community within any Special Area and to administer the affairs of such area;

(f) to promote and secure the participation of private capital, both internal and external, in the economic and agricultural development of any Special Area; and

(g) *to promote and secure the co-operation of Government departments, State institutions, local authorities, public corporations and other persons, whether private or public, in the planning and implementation of the Mahaweli Ganga Development Scheme and in the development of any Special Area*."

The area of authority of the Mahaweli Authority is given in Section 3(1) of the above Act in the following manner.

> "*The Minister may, with the approval of the President from time to time by Order published in the Gazette declare any area which in the opinion of the Minister can be developed with the water resources of the Mahaweli Ganga or of any major river to be a special area (hereinafter referred to as "Special Area" in or in relation to which the Authority may, subject to the other provisions of this Act, exercise perform and discharge all or any of ts powers, duties and functions*."

The Government Gazettes dated 15.6.1979 and 06.11.1981 specify the "Special Areas" declared under the above Provisions and the said Gazettes have been annexed marked as "CA5A" and "CA5B" to the counter affidavit of the Petitioners. It is common ground that the lands which are the subject matter of this application falls within the 'Special Area' as declared by the two Gazette Notifications referred to above. In respect of the 'Special Areas' Section 22 (1) of the Mahaweli Authority of Sri Lanka Act grant the following special powers.

> " 22(1) *The written laws for the time being specified in Schedule B hereto shall have effect in every Special Area subject to the modification that it shall be lawful for the Authority to exercise and discharge in such area any of the powers or functions vested by any such written law in any authority, officer or person in like manner as though the reference in any such written law to the authority, officer or person empowered to exercise or discharge such powers or functions included a reference to the Authority".*

The written laws specified in **Scheduled B** above are as follows:-

Agricultural Development Authority Incorporation Order
Agrarian Services Act
Animals Act
Co-operative Societies Law
Entertainment Tax Ordinance

Fauna & Flora Protection Ordinance

Flood Protection Ordinance

Forest Ordinance

Irrigation Ordinance

Land Development Ordinance

Mahaweli Development Board Act

Mines and Minerals Law

National Water Supply & Drainage Board Law

Paddy Marketing Board Act

River Valleys Development Board Act

Sale of State Lands (Special Provisions) Law No. 43 of 1973.

State Lands Ordinance

State Lands (Recovery of Possession) Act

Thoroughfares Ordinance

Tolls Ordinance

Vehicles Ordinance

Water Resources Board Act

Wells and Pits Ordinance

Written Law enacted under any of the aforesaid enactments.

Accordingly the power to alienate lands under the Lands Development Ordinance vest in the Mahaweli Authority and its authorized officials. The Petitioners contend that the above powers of alienation have been exercised by the 1st Respondent and officials of the 1st Respondent in an "*adhoc and arbitrary manner*".

The Petitioners have annexed to their petition marked as "P15" a report prepared by an official of the 1st Respondent pursuant to a complaint made to the 1st Respondent by the 1st Petitioner. The report is dated 23rd May 2006. This report states that the lands alienated are situated within the 100m. Reservation Area from the full supply level of the Victoria Reservoir. It also states that the lands which are the subject matter of this action and referred to in this report fall within the "Buffer Zone" of the Victoria–Randenigala-Rantabe Sanctuary declared under the

Fauna and Flora Protection Ordinance as amended. These facts are not disputed by the Respondents. It is also common ground that these lands have been given on standard permits issued under the Lands Development Ordinance.

It appears from P22 which is a copy of a permit issued, Clause 12 thereof has been amended granting authority to the permit holder to construct buildings on the said lands alienated on annual permits and the permit holders were entitled to obtain a grant or long term lease of the said lands, if constructions commence within 6 months from the date of the Annual Permit.

The Petitioners have annexed marked as 'P7' the Regulations framed under Sections 54(1) and 54(2) of the Mahaweli Authority of Sri Lanka Act No. 23 of 1979 dated 10th December 1976. Clause 7 of the said Regulations prohibit the construction of buildings and structures in close proximity to reservoirs in the following manner ;

Clause 7 – *Buildings and Structures*-

> *(a) No person shall engage in the construction of a building or structure below the high flood level of a reservoir without prior permission of the Authorised Officer*.
>
> (b) *No person shall engage in the construction or provision of buildings and structures in and around a reservoir without prior approval of an Authorised Officer and in the construction carried out after approval to conform to such terms and conditions laid out in the approval."*

The word "Reservoir" is defined in the said Regulation in the following manner. " "Reservoir" means an expanse of water resulting from manmade constructions across a river or stream to store or regulate water. Its environs will include that area extending to a distance of 100m. from full supply level of the reservoir inclusive of all islands falling within the reservoir." It is common ground that the lands which are the subject matter of this application falls within the area referred to in Clause 7 of the above regulations and accordingly, construction of buildings and structures are prohibited without permission of the authorized officer.

Petitioners have produced many documents and contended that the construction of buildings in the lands which are the subject matter in this application attract Section 23 BB (1) of Part IV (C) of the National Environmental Act No. 47 of 1980 as amended. According to this provision an initial environmental examination report or an environmental impact assessment report is required to be submitted to the project approving agency prior to the approval for construction is granted. They also contend that no such report was obtained by the 1st Respondent prior to approval being granted for the construction of the buildings.

Part IVC of the National Environmental Act No. 47 of 1980 as amended deals with approval of projects. In terms of Section 23(z) coming under Part IV (c) of the Act the Minister by Order published in the Gazette shall specify the projects and undertakings in respect of which approval would be necessary under the provisions of Part IV (C) of the Act. Section 23BB (1) of the National Environmental Act states as follows:-

23BB(1) *"It shall be the duty of all project approving agencies to require from ay Government department, Corporation, statutory board, local authority, company, firm or individual who submit any prescribed project for its approval to submit within a specified time an initial environmental examination report or an environmental impact assessment report as required by the project approving agency relating to such project and containing such information and particulars as may be prescribed by the Minister for the purpose."*

The Petitioners have produced marked 'P8' the order made by the relevant Minister under Section 23(z) of the National Environmental Act dated 18th June 1993. Parts I , II, and III deal with the prescribed projects, which require approval under the provisions of Part IV C of the National Environmental Act

The Respondents have contended that the construction of houses do not fall within the prescribed projects described in 'P8'. After the conclusion of the pleadings and arguments in this application the Petitioners by way of a motion dated 4th December 2009 have produced an Order made by the relevant Minister under the National Environmental Act Section 23(z)

whereby the earlier order is amended and a new Clause is added as Clause 32(a) to the following effect;

32(a) *"Construction of all commercial buildings as defined by the Urban Development Authority Law, No. 41 of 1978 and the construction of dewelling housing units, irrespective of their magnitudes and irrespective of whether they are located in the coastal zone or not, if located wholly or partly within the areas specified in Part III of this Schedule "*

Clause 2 of Part III of the Schedule states as follows:-

"*Within the following areas whether or not the areas are wholly or partly within the Coastal Zone:*

any erodible area declared under the Soil Conservation Act (Chapter 450).

any Flood Area declared under the Flood Protection Ordinance (Chapter 449) and any flood protection area declared under the Sri Lanka Land Reclamation and Development Corporation Act, No. 15 of 12968 as amended by Act No. 52 of 1982.

60 meters from the bank of a public stream as defined in the Crown Lands Ordinance (Chapter 4545) and having a width of more than 25 meters at any point of its course.

any reservation beyond the full supply level of a reservoir.

any archaeological reserve, ancient of protected monument as defined or declared under the Antiquities Ordinance (Chapter 188).

any area declared under the Botanic Gardens Ordinance (Chapter 446).

In these regulations unless the context otherwise requires-

"hazardous waste" means any waste which has toxic, corrosive, flammable, reactive, radioactive or infectious characteristics.

"reservoir" means an expanse of water resulting from manmade constructions across a river of a stream to store or regulate water. Its "environs" will include that area extending up to a distance of 100 meters from full supply level of the reservoir inclusive of all islands falling within the reservoir".

Based on the above Gazette Notification Petitioners contend that the construction of houses within the lands which are the subject matter of this action fall within the "prescribed projects" for which approval need to be obtained in terms of Part IV C of the National Environmental Act, and accordingly an Initial Environmental Examination (IEE) report or Environmental Impact Assessment (EIA) report is required by the Project Approving Agency prior to granting approval. They also contend that the 1st Respondent or its officials did not have such a report before the alienation of the lands or granting approval for the constructions in the land. It may appear that the contention of the Petitioner may be well founded but the Court will not venture to make any pronouncement adverse to the Respondents in this regard as the relevant Gazette Notification has been submitted after the closure of the pleadings and the conclusion of the arguments in this case and accordingly Respondents have not been heard on this matter.

In any event the production of the abovementioned gazette notification is not necessary to contend that part IVC of the National Environmental Act is applicable to the construction of buildings in the lands which are the subject matter of this case due to the following facts and documents produced by the Petitioners.

The Petitioner has submitted the Gazette Notification marked 'P10' containing the order dated 30th January 1987 made by the relevant Minister under Section 2(2) of the Fauna & Flora Protection Ordinance declaring the area described in the said Gazette Notification under the heading "Victoria-Randenigala-Rantabe Sanctuary" as a Sanctuary for the purposes of the Fauna & Flora Protection Ordinance. They have produced marked 'P11' an Order dated 16th February 1995 made by the relevant Minister under Section 23(z) of Act No. 47 of 1980 as amended. They contend in paragraph 20 of the petition that in terms of this order "No house (irrespective of its magnitude) can be constructed within any area extending up to a distance of 100m. from the boundary or within any area declared as a sanctuary under the Fauna & Flora Protection Ordinance, without obtaining approval from the relevant Project Approving Agency under and in terms of Part IV C of the said Act. As such any person who proposes to engage in any construction activity within the said reservation area must obtain, inter alia Environmental Impact Assessment (EIA) or Initial Environmental Examination (IEE) with their application for approval from the Department of Wildlife Conservation, prior to effecting any such

constructions". The 1st to 4th Respondents in their statement of objections have admitted the above contentions of the Petitioners. In paragraph 55(i) of the Petition the Petitioners contend that they "verily believed that EIA or IEE approval has not been obtained from the respective Project Approving Agencies prior to or after the construction of any of the said building/structures on the said lands". It is surprising to observe that the 1st to 4th Respondents have merely stated that they are unaware of this contention. If such approvals were obtained this fact should necessarily have been within the knowledge of the Respondents. Accordingly, it is obvious that such approvals have not been obtained prior to the alienation of the lands and the granting of permission for constructions.

The Petitioners have also submitted annexed marked as 'P35 A' to 'P35C' certain directives issued by the Presidential Secretariat and the 1st Respondent Authority dealing with allocation of State lands. Clause 10 of 'P35A' contains a directive not to lease lands falling within natural water ways, natural reserves and wildlife sanctuaries. 'P35B' and 'P35C' which have been issued by the Director General of the Mahaweli Authority dated 30th July 2000 require certain procedures to be adopted in selecting allotees for alienation of land. The Petitioners contend that these directives guidelines and procedures have also not been followed by the Respondents.

The Petitioners have submitted to Court annexed marked as 'P12' to the Petition a document dated 18.06.1997 containing guidelines for the construction of houses in private lands formulated by a special committee appointed by the Director General of the Mahaweli Authority. The guidelines inter alia state that there should be a minimum land area of 20 perches for each house and there should be a distance of a minimum of 20m. between two houses. By the letter dated 08.11.2006 annexed marked as 'P19' to the Petition the Director General of Mahaweli Authority quoted the legal advice given by the Hon. Attorney General to the effect that the Director General has no legal authority to permit any construction in violation of these special committee guidelines. The alienation of these lands and the granting of permission to construct buildings have been made in violation of these guidelines. Paragraph 36 of the petition of the Petitioners states as follows:-

"Furthermore the Petitioners state that even when owners of private lands, which are situated within the said reservation area, are desirous in engaging in any construction activity, they are required to first obtain the permission of the Mahaweli Authority to build on such lands and also adhere to the stringent building guidelines/conditions stipulated by a special committee in 1997. The Petitioners state without any prejudice to the foregoing that, in any event these guidelines have also been violated, in as much as, inter alia;

(a) the lands alienated on annual permits to the said persons are clearly 15.30 perches each in extent, whereas 1997 guidelines require each land to be a minimum of 20 perches in extent if constructions is to be effected thereon.

(b) Some of the said constructions had been affected not for residential purposes but clearly for commercial purposes.

(c) The guidelines require the minimum distance between two buildings to be 20 meters whereas in some instances the distance between two buildings is only 2 meters."

In the statement of objections the 1st to 4th Respondents have admitted this paragraph. They only make an attempt to justify the alienation of lands in allotments less than 20 perches in their objections in the following manner.

Paragraph 8(c)

"the alienation has been made in allotments in less than 20 perches in view of the decisions taken by the then Director General of the 1st Respondent on the basis that there are large number of applicants and by sub dividing the land into 15 perches of allotments, larger number of applicants could be given lands; True copies of the minute dated 5th April 2005 and letter send by then Director General to the Resident Project Manager-Victoria are filed herewith marked '1R2A and '1R2B' are pleaded as part and parcel of this statement of objections.

8(d) The said decision has been taken in good faith in order to provide land for a larger number of deserving citizens who has no lands to construct houses for their residences".

The Petitioners go further and contend that the guidelines in 'P12' were meant to apply to private land owners whose lands fell within the "Special areas" created under the Mahaweli Authority Act and who owned those lands prior to the creation of these 'special areas'. Therefore, the guidelines contained concessionary terms to satisfy those land owners. Accordingly they contend that the mere satisfaction of the guidelines in 'P12' is not sufficient by any means when granting of permission for constructions in the lands which are the subject matter of this case are being considered. The Court agrees with the contention of the Petitioners. In that context it is observed that even the concessionary guidelines which are applicable when granting permission for constructions to private land owners have not been followed when granting permission for constructions in the lands which are the subject matter of this case.

In paragraph 32 of the petition filed by the Petitioners it is stated as follows:-

"In November 2006, the 1st Petitioner caused a further site visit to be carried out in respect of the Theldeniya area and the said unlawful constructions and a detailed report was prepared in pursuance thereof. The said Report contains the following conclusions;

(a) All constructions referred to in the said Report are contained within the Reservation areas of the Victoria-Randenigala-Rantambe Sancturary."

(b) The plans pertaining to the said constructions have not been approved by the relevant Pradeshiya Sabha.

(c) Soil erosion has escalated as a result of the trees being completely removed from the said lands for the purpose of effecting the said unauthorized constructions in steep

areas within the said reservation areas. The layers of soil get washed away with ran water and get deposited as sediment in the Victoria Reservoir.

(d) Due to unauthorized constructions being effected in steep area, the said areas are susceptible to earth slips and landslides.

A true copy of the said Site Visit Report dated 27.11.2006, together with the annexures thereto, are annexed hereto marked 'P21' and pleaded as part and parcel of this petition"

The 1st to 4th Respondents in their objections have admitted this paragraph. If the position contended by the Petitioners were incorrect it was upto the 1st to 4th Respondents who are the relevant officials having the required information and or the resources to obtain the required information in their custody to have disputed this position and submitted to Court material to establish that the statements made by the Petitioners are incorrect. They have failed to do so.

In the circumstances referred to above I accept the facts as stated in the said paragraph 32 of the petition and contained in the report annexed marked as "P21" to the petition. These facts clearly illustrate the extent and seriousness of the damage caused to the environment due to the unlawful acts that have been committed.

In recent times Court has emphasized the applicability of the Public Trust Doctrine to state functionaries in the exercise of their powers.

The origins of Public Trust doctrine can be traced to Justinien's Institutes where it recognizes three things common to mankind i.e. air, running water and sea, (including the shores of the sea). These common property resources were held by the rulers in trusteeship for the free and unimpeded use of the general public.

The applicability of the Public Trust doctrine was expressly recognized by the Supreme Court of India in the case of M.C. Mehta Vs. Kamal Nath 1997 [1 SCC 388]. The Supreme Court of

California too in the case of National Audubon Society Vs. Superior Court of Alpine Country (the Mono Lake case), 33 Cal.3d 419 summed up the doctrine as follows:-

> "Thus the Public Trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the peoples common heritage of streams, lakes, Marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust".

Under Chapter VI of the Constitution which deals with Directive principles of State Policy and fundamental duties in Article 27(14) it is stated that "The State shall protect preserve and improve the environment for the benefit of the community". Although it is expressly declared in the Constitution that the Directive principles and fundamental duties 'do not confer or impose legal rights or obligations and are not enforceable in any Court or Tribunal' Courts have linked the Directive principles to the public trust doctrine and have stated that these principles should guide state functionaries in the excise of their powers. (Vide *Sugathapala Mendis* vs. *Chandrika Bandaranayake Kumaratunga,* SC FR 352/2007 and Wattegedera Wijebanda Vs. Conservator General of Forests and others in S.C. Application 188/2004 decided on 5th April 2007).

The Public Trust Doctrine requires the 1st to 4th Respondents to exercise their powers only in furtherance of the functions of the Mahaweli Authority. They should not indulge in any activity in the performance of their functions which would be detrimental for the realization of the functions of the Mahaweli Authority. Therefore the lands which are the subject matter of this case and which fall within the reservation area should be utilized exclusively to ensure the realization of the objectives of the Mahaveli Authority.

Section 12 of the Mahaweli Authority of Sri Lanka Act lays down the functions of the Mahaweli Authority in relation to 'Special Areas' declared under Section 3(1) of the Act. Section 12(b) and 12(d) states as follows:-

"The functions of the authority in or in relation to any 'Special Area' shall be

(a) ……..

(b) to foster and secure the full and integrated development of any 'Special Area'.

(c) …….

(d) *to conserve and maintain the physical environment within any 'Special Areas*".

The 1st to 4th Respondents have not provided this Court with a rational or justifiable basis for alienating reserved lands of the reservoir and granting permission for constructions as referred to above to private parties. It is the view of this Court that such alienation of lands and granting permission for constructions cannot facilitate the achievement of the objects specified in Section 12 of the Mahaweli Authority of Sri Lanka Act.

The Respondents have not sought to justify the alienations and permission granted for constructions of the lands which are the subject matter of this application except to say that the power of alienation of such lands are with the Mahaweli Authority and its authorized officials.

From the aforesaid, it is clear that the alienation of the lands and the granting of permission to construct houses in the lands which are the subject matter of this application have been done in violation of the applicable laws and regulations in an arbitrary manner by the 1st Respondent Authority thereby violating Article 12(1) of the Constitution.

Due to the above reasons, I hold that the 1st Respondent Authority has violated Article 12(1) of the Constitution by (i) alienation and (ii) granting of permission to construct houses in respect of the lands which are the subject matter of this application.

There are no specific allegations that have been established against the 2nd Respondent. In paragraph 8(b) of the Statement of Objections of the 1st to 4th Respondents it is stated that the "Alienations have been made prior to the present Director General assumed duties". There is no denial of this position by the Petitioner.

From the pleadings it appears that the impugned actions have been taken not by the 3rd Respondent who is the present Resident Project Manager but by other officials who were his predecessors as referred to in paragraph 9(c) of the Statement of the Objections of the 1st to 4th Respondents. There are also no particular allegations established against the 4th,5th, 6th, 8th,9th, 10th and 11th Respondents.

The letter annexed marked 'P34' to the Petition of the Petitioner clearly set out the circumstances under which the 7th Respondent the Medadumbara Pradeshiya Sabha was compelled to grant permission for the construction of the houses.

The Central Environmental Authority which is the 12th Respondent cannot be found fault with as the Project Approving Agency in terms of the regulations made under the National Environmental Act, in respect of the area comprising the lands and buildings which are the subject matter of this action, is the Mahaweli Authority of Sri Lanka, the 1st Respondent. This position is stated in the document annexed marked 'P11' to the Petitioner's petition.

It is also clear that the 13th Respondent who is the Director of Wildlife Conservation did not have any powers under the laws and regulations referred to by the Petitioners in respect of the lands which are the subject matter of this application and this position has been conveyed to the 1st Petitioner by the letter of the 13th Respondent dated 18th September 2006 annexed by the Petitioners themselves to their petition marked as 'P18 (b)'.

In paragraphs (g) and (h) of the prayer to the petition, the Petitioners have prayed for relief as follows:-

"(g) *Declare and direct the 1st to 10th Respondents and/or anyone or more of them to forthwith revoke/cancel all permits and instruments of alienation/disposition issued in respect of the said lands and/or building approvals issued to the occupants of the said lands and/or issued in breach/violation of the condition/guidelines formulated by the special committee in 1997 (as contained in the document marked P12);and/or "*

(h) Declare and direct the 1st to 4th and/or 7th and/or 8th and/or 9th and/or 10th Respondents to forthwith take steps and measures according to law to eject the occupants of all the said lands and recover vacant possession of the said lands and/or to demolish all the buildings and permanent structures erected thereon and/or to demolish any such buildings/permanent structures that had been erected thereon in breach of the conditions/guidelines formulated by the special committee in 1997 (as contained in the document marked P12) and buildings and structures in respect of which the Mahaweli Authority has not granted EIA or IEE Approval; in so far as any such demolition does not cause any further harm or damage to the environment; "

This Court will not be able to make the orders referred to above as the grantees and/or the occupants of the lands have not been made parties to this application. When the main allegations of the Petitioners are the arbitrary and adhoc alienation of the lands and the permission granted to construct the buildings, it is necessary that the grantees and/or the persons in occupation of the lands whose interests would be directly affected be made parties. This has deprived the Court the ability of making a suitable order in respect of such alienations and the permission granted to construct the buildings.

The Petitioners make specific reference in paragraph 33 of the petition, of 3 allotments of land identified as lots 13, 14 and 15, each containing in extent 15.30 perches situated within the said 100m. area from the Victoria Reservoir which had been allegedly alienated by the former Resident Project Manager to private parties. The Site Visit Report annexed marked 'P21' to the Petition of the Petitioners identified the names of the persons who are in possession as permit holders. But the permit holders, grantees or the former Resident Project Manager have not been made parties to this application. Paragraph 4 of the Petitioner's petition states that "The Petitioners have instituted this application in the best interest of the public, having regard, inter alia to article 28(f) of the Constitution. The Petitioners further state that a meaningful and positive result from these proceedings will also benefit the public and most significantly the environment." The Court whilst appreciating the service done by the Petitioners in filing this application nevertheless observes that not naming as parties the persons referred to above have affected the ability of Court to grant more positive and meaningful results.

In the circumstances mentioned above, this Court makes order as follows:-

(a) The 1st Respondent has violated the fundamental right to equality and equal protection of the law as guaranteed to the Petitioners by Article 12(1) of the Constitution,

(b) *Court directs that a proper investigation be conducted by the 2nd Respondent and suitable action be taken against the officials responsible for the unauthorized alienations and the granting of permission to construct buildings in violation of the applicable legal provisions*,

(c) Court holds that no further allocation of lands in the subject area be made without following the procedure laid down under Part IV C of the National Environmental Act No. 47 of 1980, and the regulations made their under,

(d) Court also holds that the guide lines contained in the document annexed marked as "P12" to the petition be followed in the future when granting permission for the construction of residential buildings,

(e) Court also orders that the 1st Respondent shall pay each of the Petitioners a sum of Rs. 25,000/- as costs.

Sgd.

JUDGE OF THE SUPREME COURT

J.A.N. de Silva, CJ.

I agree.

Sgd.

CHIEF JUSTICE

S. Marsoof, J.

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

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

S.C. (F/R) No. 13/2009

In the matter of an application under and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Dona Dinaya Nimdini Wijayaweera,

No. 36/4,

Galle Road,

Colombo 4.

Appearing by her next friend

Don Kapila Dhamminda Wijayaweera,

No. 36/4,

Galle Road,

Colombo 4.

Petitioner

Vs.

1. Ms. B.M. Weerasuriya,

   Principal,

   Visakha Vidyalaya,

   Vajira Road,

   Colombo 4.

2. Ms. A.R.M.P.N. Sooriyabandara, Chairperson,

3. L.L.B. Tennakoon, Member,

4. D.L.J. Wijesinghe, Member,

5. Ms. S. Siriwardena, Member,
Appeal and Opposition Board in relation to admission to Grade 1 of Visakha Vidyalaya for the year 2009,
Visakha Vidyalaya,
Vajira Road, Colombo 4.

6. G.M.A.N. Pandithasekara, Chairman,

7. S. Illeperuma, Member,

8. S. Jayasinghe, Member,

9. G. Wijayaratne, Member,
Interview Board for admission to Grade 1 of Visakha Vidyalaya for the year 2009,
Visakha Vidyalaya,
Vajira Road, Colombo 4.

10. A.K. Pahathkumbura,
Deputy Principal,
Visakha Vidyalaya,
Vajira Road, Colombo 4.

11. Attorney General,
Attorney-General's Department,
Colombo 12.

Respondents

BEFORE : **Ms. S. TILAKAWARDANE.J**
SRIPAVAN.J &
RATNAYAKE.J

COUNSEL : Manohara de Silva, P.C., with Amrith Rajapaksha instructed by Priyantha Upali Amarasinghe for the petitioner.
Ms. S. Barrie, S.C., for the respondents.

ARGUED ON : 14.10.2009.

DECIDED ON : 06.05.2010

Ms. S. TILAKAWARDANE.J

The Petitioner was granted leave to proceed on 03/02/2009 on the alleged infringement of Article 12(1) of the Constitution of Sri Lanka. The minor Petitioner who appeared by her father Don Kapila Dhamminda Wijayaweera, contended that her fundamental right to equality has been violated by the failure of the Respondents to offer her admission to Grade 1 of Visakha Vidyalaya.

The Petitioner had preferred two separate applications under the categories of "Proximate Residence" and "Brother/Sister currently attending the same school" (hereinafter referred to as the sister category), in terms of the ***Circular No 2008/21 dated 16/05/08 on the Admission of Children to Grade 1 of Government Schools issued by the Secretary, Ministry of Education*** marked P1. The Petitioner argues that she would be qualified for admission to the said school under both categories.

In her application under the "proximate residence" category, the Petitioner claimed that they have been resident at the given address of No.36/4, Galle Road, Colombo 04, since 1999 up to the present time. The Petitioner also claimed that she is eligible for admission under the "sister category" since her elder sister who had been admitted to Grade 1 of Visakha Vidyalaya in 2006, is presently studying in Grade 4 of the same school. The Petitioner had been allocated marks under both categories and there is no dispute regarding the marks obtained by the Petitioner which consists of 52 under the sister category and 67 based on the proximate residence category.

The Petitioner's application under the sister category, subsequent to an interview held on 08.09.2008 had been rejected by the letter dated 02.02.09 on the basis that the actual residence of the Petitioner had not been proved. The Petitioner contends that she also attended the interview in relation to the application based on proximate residence, on 25.09.2008 and obtained a total mark of 67. However the Petitioner's name did not appear on the temporary list of children admitted under either category.

The Petitioner preferred two appeals in accordance with the Circular marked P1. Thereafter the Petitioner presented her case before the Appeal and Opposition Board on 01.12.2008. The Petitioner was nevertheless refused admission by the decision of the Appeal and Opposition Board. The Petitioner alleges that the Board has acted maliciously and in excess of their powers by disqualifying her applications and thereby violating her fundamental right to equality under Article 12 (1) of the Constitution.

The crux of the 10th Respondent's objections is that the Petitioner has not established actual residence in the premises given in the application. School authorities have conducted site visits on three occasions. Firstly on 08.09.2008 prior to the finalization of the temporary list, secondly on 04.12.08 in consideration of the appeal made by the Petitioner and finally on 11.02.09 under a new principal, consequent to the filing of this Fundamental Rights Application and inquiry into the matter by the Ministry of Education.

On all three occasions the Petitioner and the family were found not to be resident at the given address. Thus the Respondents state that even though the Petitioner was eligible under both categories for admission in terms of the Circular, she had failed to establish the necessary requirement of actual residence which was a threshold essential mandatory prerequisite for admission. Moreover the Petitioner was bound to submit honest and accurate documents and

statements of fact in support of her application, failure to do so would result in the application being disqualified under the Circular.

The main issue before this Court is to determine whether the Petitioner has proved the fact of residence for the purpose of admission to the school. The Respondents' argument that the fact of residence is crucial to both applications under the proximate residence and sister category is accurate in terms of the relevant circular. This is evident from Article 3.5 of the Circular referred to above.

It appears that even though the Petitioner claims one James Patrick Raj to be his landlord, the testimony given by James Patrick Raj does not indicate that he has rented part of the premises of No.36/4, Galle Road, Colombo 04, where he runs a granite shop to the Petitioner's father. The Lease Agreement marked 10R-C1 reveals that James Patrick Raj is himself the tenant of the Premises. Under the said Agreement one Prem Rodrigo is the landlord who presently resides in Canada. The Lease Agreement also discloses that Mr. James Patrick Raj is prohibited from subletting the premises; hence he has no authority to rent out the premises to the Petitioner's father.

Therefore the contention of the Petitioner that James Patrick Raj is his landlord is not borne out by credible evidence. It appears that James Patrick Raj has put forward several contradictory versions of the Petitioner's residence in the course of this case – Patrick Raj initially claimed that the Petitioner was his tenant; he then claimed that the Petitioner was a relative living with him and subsequently that the Petitioner was staying in his house based on a mutual agreement – none of which satisfactorily establish the Petitioner's residence for the purpose of school admission.

If anything, the statements by Patrick Raj prove no more than an assumed agreement to live. Even the Birth Certificates of the Petitioner and her sister indicate a place of residence which is different from that provided in the application. It only seems probable that the Petitioner's residence in the premises is occasional and based on a "mutual understanding" as stated by James Patrick Raj himself

by letter dated 11.02.09. Such an arrangement does not satisfy the requirement of 'residence' under the criteria laid down by Article 3.5 of the Circular. In fact Article 3.5 of the Circular contemplates 'permanent residence' as opposed to the mere fact of staying in the premises or transitory occupation of the premises.

Where eligibility for school admission based on prescribed criteria is at issue, the burden is on the applicant to prove residence for the purpose of admission. This burden is to be discharged based on documents presented to the school authorities, which must be validated through a scrutiny and check conducted by the school authorities at the time the application was presented. Site visits by the school are expressly authorised under Article 8(1)(3) a of the Circular.

It must be noted that the Petitioner has not submitted any documents to this Court to prove his actual residence or the fact that he is occupying a specific portion of the said premises. Therefore where 'actual residence' is a pre-condition for admission, mere assertions, unsubstantiated by credible evidence are insufficient to qualify the petitioner for school admission under the procedure laid down by law.

On a consideration of all the facts and the arguments made by both counsel for the Petitioner and the Respondents, It is hard to conceive that the Petitioner has proved actual residence. It appears that the Respondents have allocated marks reasonably in view of the Petitioner's applications under both the categories, only on the assumption that his claim to be resident at the given address was not credible.

As it has been correctly highlighted in the Report of the Inquiry Officer appointed by the Ministry of Education consequent to the filing of this application, the said marks for the Petitioner had been allocated for the purpose of school admission only on the condition that upon site visits to be

conducted, the given residence is well established. In fact the Petitioner has placed his signature to the document (marked as 10R –C3) which states that the final selection would be varied if the documents are found to be inaccurate or residence not established.

There is no dispute on the fact that school authorities visited the premises three times. The final visit was under a new principal and in compliance with a Court Order to that effect and there can be no allegation of bias or malicious intent guiding the scrutiny conducted by the school authorities. The court finds no fault in the “surreptitious” manner in which the site visit was conducted.

It is clear, under the prescribed procedure, that even though marks may be allocated as part of the admission process, the school will then scrutinise and check the assertions made in the application as to residence, before confirming the applicant's place on the school list. Any attempt to mislead or fabricate information provided in the application would disqualify the application and deny the applicant a place on the school list.

In the instant case, the Petitioner has clearly provided misleading and false information as to residence in the application for school admission. The falsity of this assertion, was clearly borne out by the site visits conducted by the school authorities, wherein it was revealed that there was in fact a granite shop operating from the said premises, and that there was “no sign that the Petitioner actually lived “at the given address.

Having considered the arguments put forward by both parties and having regard to the applicable law, this Court holds that the Respondents have rightly refused the Petitioner admission to the school in view of the failure on the part of the Petitioner to prove existent, genuine and actual residence in the address provided in the application for school admission.

The application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under

Article 126 of the Constitution

S.C. (F/R) No. 458/2007

C.A. Premashantha,

"Sirisara",

Punchi Palama,

Nattandiya.

Petitioner

Vs.

1. Neville Piyadigama, Chairman
2. Nihal Jayamanne, Member
3. R. Sivaraman, Member
4. Ven. Elle Gunawansa Thero, Member
5. M.M.M. Mowjood, Member
6. Chandradasa Nanayakkara, Member
7. Charmaine Madurusinghe, Member

All of the National Police Commission,

Rotunda Gardens, Colombo 3.

8. Victor Perera,

Inspector General of Police,

Police Headquarters,

Colombo 1.

9. Justice Ameer Ismail, Chairman

10. Justice P. Edussuriya, Member

11. Indra De Silva, Member

All of the Commission to Investigate Allegations of Bribery and Corruption,

No. 36, Malalasekara Mawatha, Colombo 7.

12. Piyasena Ranasinghe,

Director General,

Commission to Investigate Allegations of Bribery and Corruption,

No. 36, Malalasekera Mawatha, Colombo 7.

12. Hon. Attorney General,

Attorney General's Department, Colombo12.

Respondents

BEFORE **: Ms. S. TILAKAWARDANE.J**

MARSOOF.J &

RATNAYAKE.J

COUNSEL : J.C. Weliamuna with Pasindu Silva for the Petitioner.

K.A.P. Ranasinghe, S.S.C., for the 1st to 8th and 13th Respondents.

Saliya Peiris for the 10th and 11th Respondents.

ARGUED ON : 05.10.2009

DECIDED ON : 06.05.2010

Ms. S. TILAKAWARDANE.J

The petitioner has been granted leave to proceed on 19.2.2008 on an alleged violation of Article 12(1) of the Constitution. The petitioner was appointed to the police force originally on 20.01.1985. At the time of his appointment, he was admittedly informed that it was a transferable post.

The petitioner claimed, that whilst he was functioning as the Officer-in-Charge of the Assets Investigation Division of the Commission to Investigate Allegations of Bribery and Corruption (hereinafter referred to as the Bribery Commission) he was transferred to the Ampara Division and demoted in rank, by document dated 15.11.2007 (marked P4).

Though the petitioner adverts to the fact that he was an Assistant Superintendent of Police (hereinafter referred to as ASP) at the time of his transfer on 15.11.2007, it was conceded during arguments, that he had signed his letters dated 27.11.2007 (marked P7) and 27.11.2007 (marked

P8) as a Chief Inspector of Police. Documents reveal that the petitioner had in fact been promoted to the rank of Assistant Superintendent of Police by letter dated 26.12.2007 though with effect from 29.03.2007. Therefore at the relevant time of his transfer the petitioner had not been informed of his promotion to the rank of ASP. The said promotion is a subsequent event with no relevance or bearing on the incident, except to support the contention of Counsel for the 10th and 11th respondents, that there was no malice or bias against the petitioner as in the same year, he had admittedly received his promotions referred to above without any hindrance by the respondents.

The petitioner claims that at the time of his transfer, he was in charge of the overall administration and supervision of the Investigation Division and that his duties included investigations into the assets of senior public officers. The petitioner contends, albeit belatedly, that his transfer from the Bribery Commission to an unspecified post in the Ampara Division had been made with the collateral purpose of halting his investigations into highly sensitive cases involving senior Police Officers and with a view to preventing the said cases being properly investigated.

The documents filed by the petitioner disclose that shortly after the aforesaid transfer, he sent a letter dated 20.11.2007 (marked P5) through the Chairman of the Bribery Commission. This letter does not make any prompt or contemporaneous allegation of any unreasonableness in the transfer, but merely seeks a deferment of the transfer for a period of 2 months. Indeed, two days later by his letter dated 22.11.2007 (marked P6), the Chairman of the Bribery Commission referred

only to the adverse effect of any sudden transfer on the work of the division and recommended the appeal for deferment.

Subsequently, by his letter to the Secretary of the Police Commission signed on 27.11.2007 (marked as P8), the petitioner again sets out substantively the same matters that he had urged previously in P5. This letter P8 contains the first reference to any allegation by the petitioner that his transfer 'may' have taken place due to an undue influence. The petitioner has based his assumption of undue influence on the fact that he was in charge of several ongoing investigations involving high ranking government officials and that his was the first instance where such a transfer had been made without the consent of the Bribery Commission. The petitioner claims also that the petitioner and his family have been subject to social disrepute and ridicule because of the sudden transfer for which reasons have not been given. On all the aforementioned grounds, the petitioner requested that his transfer be cancelled by the Police Commission.

The letter P8 contradicts the position taken by the petitioner in a separate letter signed on the same date 27.11.2007 (marked as P9), wherein he seeks to have his transfer deferred by 2 months – no request is made for the transfer to be cancelled in its entirety. Accordingly, the Senior Deputy Inspector General of Police (Range III) STF had recommended the deferment of the petitioner's transfer by two months, while stating that no extensions should be given after that date.

Counsel for the petitioner argued that in terms of Section 16 (3) of Act No.19 of 1994 under which the Bribery Commission was established, police officers who are attached to the Bribery

Commission are appointed as authorized officers and function under a delegated authority to investigate complaints under the direction of the Commission. Counsel for the petitioner submit that in terms of this Section, such authorized officers, who also continue as police officers, would function under the overall authority of the Bribery Commission and would no longer be subject to the control of the Police Commission. Therefore, he contended that the petitioner, who is an authorized officer of the Bribery Commission, could not be transferred, unless such transfer was directed or requested by the Chairman of the Bribery Commission.

This argument presupposes that in order for a valid transfer to be made, a request or direction to this effect must first be submitted, by the Bribery Commission to the Inspector General of Police and/or the National Police Commission (established in terms of Article 155(a) of the 17th Amendment to the Constitution). This is not tenable under the Law, as in terms of Article 155(g) of the Constitution, the appointments, promotions, transfers and all other matters of disciplinary dismissal except of the Inspector General of Police are vested in the National Police Commission which is only required to consult the Inspector General of Police.

No doubt, the Bribery Commission, in terms of Act No. 19 of 1994, is expected to act in an independent manner without any undue influence from any organ of the state, in the conduct of investigations into allegations of bribery and corruption. However the argument that the Bribery Commission possesses powers over and above the National Police Commission or the Inspector General of Police with respect to the transfer of police officers would directly contradict the express provision of Article 155(g) of the Constitution referred to above.

When considering the contention that the petitioner's transfer was based on undue influence, with a view to prevent the proper investigation of cases involving high ranking public officers, it is important to consider the response of the Chairman, Bribery Commission to the petitioner's transfer and also the limited objections raised by the 10th and 11th respondents who were members of the Bribery Commission.

By his letter dated 22.11.2007 (marked P6) the Chairman, Bribery Commission does not question the propriety of the transfer but merely requests that it be deferred in order to counter any adverse effect on the work of that particular division.

By their objections dated 25.06.2008 and 16.06.2008, the 10th and 11th respondents have indeed categorically denied any adverse effects the transfer may have on the independence of the Bribery Commission. According to their submission, the transfer would also not affect the quality of investigations carried out by the Bribery Commission as there are other investigating officers attached to the Commission who are fully capable of attending to the work done by the petitioner.

The Court understands the necessity to scrutinize the appointments of officers who are transferred to the Bribery Commission in order to ensure that the caliber of such officers is not adverse to the particular nature of the work carried out by the Bribery Commission. However, the Court finds no basis to support the averments of the petitioner that his transfer was due to an undue influence linked with his ongoing investigations. It is probably in this context that the

petitioner had in P7 dated 27.11.2007 contradicted his error in his application dated 27.11.2007 and merely sought to have his transfer deferred.

It is also relevant in this case to consider the letter dated 27.11.2007 (marked P9) sent by the then Director General of the Bribery Commission to the Secretary to the National Police Commission with a copy to the Inspector General of Police. A copy of this letter appears to have been handed over to the petitioner as well. It is significant that despite the Chairman, Bribery Commission having acceded to the transfer and merely sought deferment of the same on 22.11.2007 (Vide, P6), the Director General in P9 dated 27.11.2002 seeks the immediate cancellation of the transfer. The letter P9 coincides with the petitioner's letter P8 seeking cancellation of the transfer. Unlike the petitioner's letter P5 which was in terms of the regular procedure forwarded through the Chairman of the Bribery Commission, the letter P9 appears to have been written directly to the Police Commission, bypassing the Chairman, who is the administrative Head of the Bribery Commission.

The argument that once a police officer is transferred to the Bribery Commission, the Inspector General of Police and the National Police Commission cease to have powers of transfer, is inimical to the interest of the police officer as well as being untenable in terms of Article 155 (a) and (g) of the Constitution. In the circumstances, the post of the police officer continues with his transfer. Given the fact that there is no evidence to substantiate a claim of undue influence or bias linked to the transfer and the fact that the petitioner himself has only in his correspondence finally sought

to defer his transfer, this Court finds no merit in the claim that the petitioner's fundamental rights have been violated by the impugned transfer. Accordingly, the application is dismissed. No costs.

JUDGE OF THE SUPREME COURT

MARSOOF.J

I agree.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Lal Jayasiri Kulatunga,
No. 69/12, Ramanayake Mawatha,
Hokandara South,
Hokandara.

Petitioner

S.C.(FR) Application No. 229/2007

vs.

1. Hon. W.J.M. Lokubandara,
   Speaker,
   Parliament of Sri Lanka,
   Sri Jayawardenapura,
   Kotte.

2. D. Kitulgoda,
   Acting Secretary General,
   Parliament of Sri Lanka,
   Sri Jayawardenapura, Kotte.

3. Suren Christopher Bernard Perera,
   No 56/39, Jaya Road,
   Udahamulla,
   Nugegoda.

4. Thilak Iddamalgoda,
   Director General,
   Presidential Investigation Unit,
   No.11, Jawatta Road,
   Colombo 5.

5. Neil Iddawela,
   Assistant Secretary General,
   Parliament of Sri Lanka,
   Sri Jayawardenapura,
   Kotte

6. Hikkaduwage Newton,
   Assistant Director
   Administration,
   Establishments Office,
   Parliament of Sri Lanka,
   Sri Jayawardenapura,
   Kotte.

7. Kamal Hapuwatta,
   Principal, Ceylon Hotels School,
   No. 78, Galle Road,
   Colombo 3.

8. Chandra Mohotti,
   Vice President,
   Leisure Sector,
   Galle Face Hotel,
   Colombo.

9. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

BEFORE : J.A.N. DE SILVA, C.J.
N.G. AMARATUNGA, J.
S.I. IMAM, J.

COUNSEL : P.A. Parathalingam PC with Idroos for Petitioner.

Manohara De Silva, PC with Ms. Pubudini Wickremeratne for the 3rd Respondent.

N. Pulle, SSC for 2nd, 4th, 5th, 6th and 9th Respondents.

ARGUED : 8th February 2010

WRITTEN
SUBMISSION
TENDERED ON : 4th March 2010

DECIDED ON : 2 - 7 - 2010

J.A.N. DE SILVA, CJ.

The petitioner in this case was granted leave to proceed on the alleged violation of fundamental rights guaranteed under Article 12(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka. Thereafter at the request of both parties several dates have been granted to explore the possibility of settling the dispute between the petitioner and the 3rd respondent.

This application relates to the filling of the vacancy of the post of Director of Catering and House Keeping Services of Parliament of Sri Lanka.

The above post became vacant on the 12th November 2005. The 3rd respondent was appointed to act in the said post and he does so even today. The Secretary General of Parliament called for application for the said post by placing an advertisement in the Sunday Observer and Silumina papers.

Several applicants responded to the above advertisement and four people were summoned for an interview on 7/4/2006 including the petitioner and the 3rd respondent. The composition of the interview board was as follows: Former Secretary General of Parliament Mrs. P. Wijesekera – Chairperson. Assistant General Secretary (5th Respondent) Principal Ceylon Hotel School (7th Respondent) and Chief Executive Officer of the Hotels Corporation (8th Respondent).

The marks had been awarded under the following criteria at the said interview:-

Qualifications	-	20
Additional Qualifications	-	15
Experience	-	20
Personal Profile	-	30
Conduct & Testimonials	-	15
		100

On the basis of marks allotted at the interview, the board has not considered the petitioner to be the most suitable person for the post in question, but has recommended the 3rd respondent for the job. This is evident from the documents marked R 5 and R 5A. The Secretary General, who was the Chairperson in her affidavit, has stated that marks were given purely on merit and not for any extraneous considerations. She has vehemently denied bias or manipulation on the part of the interview board in awarding marks at any stage of the interview process. The petitioner not being satisfied with the interview process and the outcome of the interview petitioned the Presidential Investigation Unit alleging several misrepresentations made by the 3rd respondent in his application. Presidential Investigation Unit has conducted an inquiry and submitted a report to the Hon. Speaker of the House with a copy to the Secretary General. Thereafter the Secretary General once again published a newspaper advertisement in the Sunday Observer and Silumina on the 24th of Sep 2006 calling for fresh applications for the said post.

When this happened the 3rd respondent invoked the jurisdiction of the Court of Appeal by way of a writ of certiorari quashing the decision of the Secretary General of Parliament to call for fresh applications for the post of Director Catering and Housekeeping Services of the Parliament. This writ application carried the No CA 1551/2006. In the same application he has also prayed for a writ of mandamus directing the Secretary General of Parliament to

appoint him to the post he was selected under Article 65 (3) of the Constitution. The petitioner in the present application sought to intervene in the said Court of Appeal writ application on the basis that he was a necessary party.

However, on the 5th of December 2006 when the above matter was taken up for support the learned counsel who appeared for the Hon. Speaker and the Secretary General informed the Court of Appeal that there is a possibility of "an administrative adjustment" and moved for an adjournment. On that day Court was informed that there was no settlement and the Court fixed the matter for support on 2nd February 2007. Having heard all the parties the Court of Appeal quashed the decision of the Secretary General of Parliament to call for fresh applications and indicated that the Hon. Speaker of the Parliament is free to consider whether approval should be granted or not to appoint the 3rd respondent who was the petitioner in the writ application. When the writ application bearing No 1551/06 was pending in the Court of Appeal the petitioner in the instant case too filed a writ application bearing No 69/2007 on the 17th of July 2006 praying inter alia for a mandate in the nature of certiorari quashing the decision of the interview panel from selecting and recommending the 3rd respondent. However, later in view of the decision given by the Court of Appeal in writ application 1551/07 the petitioner withdrew his application (C.A. Writ 69/7) on 2/2/2007.

On 3/7/2007 the petitioner invoked the jurisdiction of this Court alleging the violation of fundamental rights guaranteed under Article 12 (1) in terms of Article 17 and 126 of the Constitution. At the hearing of this application all counsels who appeared for the respondents took up a preliminary objection to the effect that the application of the petitioner should be dismissed in limine as the petition of the petitioner falls outside the stipulated time in terms of Article 126 of the Constitution.

Article 126 of the Constitution reads as follows "Where any person alleges that any such fundamental right ... has been infringed or is about to be infringed

by executive or administrative action, he may .... Within one month thereof apply to the Supreme Court by way of petition." The Supreme Court has constantly held that this one month rule is mandatory. In Gamaethige Vs Siriwardene and others 1988 1SLR 384 Fernando J made the following observation "time begins to run when the infringement takes place; if knowledge on the part of the petitioner is required.... time begins to run only when both infringement and knowledge exists. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of time limit." This rule has been consistently applied by our Supreme Court in a number of cases. e.g. Siriwardene Vs Rodrigo 1986 (1) SLR 384, Jayaweera Vs National Film Cooperation 1995 2 SLR 123 and Ramanathan Vs Tennakone 1988 2CALR 187.

It is to be noted that although this rule is generally applied strictly, there are certain very rare instances where Supreme Court may allow an application to proceed even though one month has lapsed from the date of the infringement of the fundamental right of the petitioner. In the Case of Edirisuriya Vs Navaratnam 1985 1 SLR 100 the Supreme Court held that in a fit matter the court would entertain an application made after the lapse of the stipulated period provided an adequate excuse for the delay could be adduced by the petitioner. Such excuses include a situation where the petitioner has been held incommunicado, where the principle lex non cogit ad impossibilia would be applicable. It is clear from the facts narrated above the petitioner in this case knew the historical developments of the events that led to the selection and recommendation of the 3rd respondent to the post in question. The fact that he chose to seek a writ from the Court of Appeal too demonstrate the knowledge on his part. The petitioner withdrew this writ application on 2/2/2007 and subsequently after lapse of almost five months on 3/7/2007 he sought to invoke the jurisdiction of this Court. It is pertinent to note that the petitioner has prayed for identical relief in Court of Appeal application No 69/2007.

I uphold the preliminary objection that this petition is time barred and the petition is dismissed without costs.

CHIEF JUSTICE

N.G. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

S.I. IMAM, J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (F/R) No. 264/2006

In the matter of an Application under Articles 17 and 126 of the Constitution.

Amarasinghe Arachchige Mangalasiri Amarasinghe,
"Upeksha", Omaragolla,
Panliyadda.

Petitioner

Vs.

1. P.M. Seneviratne,
   Inspector of Police,
   Police Station,
   Kurunegala.
2. Anil Priyantha,
   Headquarters Inspector,
   Police Station,
   Kurunegala.
3. The Attorney General,
   Attorney General's Department, Colombo 12.

Respondents

BEFORE : **TILAKAWARDANE.J**
SRIPAVAN.J &
RATNAYAKE.J

COUNSEL : Manohara de Silva, P.C., with Bandara Thalagune for

the Petitioner.

Chula Bandara for the 1st respondent.

Madhawa Tennakoon, S.C., for the 2nd and 3rd Respondents.

ARGUED ON : 22.09.2009

DECIDED ON : 06.08.2010

SHIRANEE TILAKAWARDANE.J

This Court granted the Petitioner Leave to Proceed on 13.12.2006 on the alleged violation of Article 11 of the Constitution by the Respondents.

The Petitioner is an Anesthetist, attached to the Base Hospital Dambulla and was also the Chief Organizer of the United National Party for Dodangaslanda. The 1st Respondent is an Inspector of Police of the Kurunegala Police Station. The 2nd Respondent is the Head Quarters Inspector of the Kurunegala Police Station.

The Petitioner alleges that he was assaulted by the 1st Respondent inside the Kurunegala Police Station premises on 21.06.2006 and as such the Petitioner's Fundamental Rights guaranteed under Article 11 of the Constitution have been infringed.

The primary issue to be determined in this case is whether the Petitioner has proved the allegation of torture or cruel, inhuman or degrading treatment against the 1st Respondent.

The Petitioner's version of facts is as follows. On 18.06.2006 he was informed by the Administrative Officer of the Base Hospital Dambulla that a group of police Officers of the Kurunegala Police Station had sought permission to enter the hospital premises to take the

Petitioner into custody and that they had been refused entry since the Petitioner was not in the hospital at the time.

Thereafter on the same day, the Petitioner received a telephone call from an officer of the Kurunegala Police Station to call over at the Police Station to make a statement regarding certain money orders sent to the Petitioner's wife.

The Petitioner's wife had filed divorce action against the Petitioner in the District Court, Mount Lavinia bearing No. 5757/06/D. In January 2006 his wife had also filed a maintenance action against the Petitioner in the Kurunegala Magistrates Court bearing No. 54153/M/06. The Petitioner claims that he had paid the monies due for the months of April and May in accordance with the Order of the Magistrates Court Kurunegala. However the Petitioner's wife has stated in Court that she did not receive the said money orders.

On 21.06.2006, the Petitioner went to the Kurunegala Police Station at around 8.30 am and was informed by the 1st Respondent that one Shashi Prabhani Ekanayake had been arrested for attempting to cash a money order sent by the Petitioner to his wife by presenting the wife's Identity Card. The Petitioner was asked to make a statement regarding the incident.

The Petitioner recorded a statement that he was unaware of the incident and that he had duly sent the monies due for the months of April and May in accordance with the Order of the Magistrates Court Kurunegala dated 28.03.2006 under the Maintenance Action No.54153/M/06. The Petitioner also stated that the said Shashi Prabhani Ekanayake was an ex-employee of the United National Party Office in Kurunegala and that his political opponents may have planned this incident to implicate the Petitioner in order to bring disrepute to him

After the statement was recorded, the 1st Respondent asked the Petitioner to follow him and proceeded to the Minor Offences Branch. The 1st Respondent then informed the Petitioner that he had forgotten his spectacles and proceeded past the Minor Offences Branch towards the Police Quarters which was situated about 15 feet away to the rear of the Police Station.

Believing that the 1st Respondent would return to the Police Station having retrieved his spectacles, the Petitioner turned and walked towards the Police Station Building. At this point the Petitioner claims that the 1st Respondent kicked him from the back several times on his chest and back as a result of which the Petitioner fell down. When the Petitioner tried to get up, he had been subjected to further assault by the 1st Respondent. Thereafter the Petitioner managed to stand up and run towards the Minor Offences Branch at the Police Station.

Following this incident, the Petitioner was taken to the Magistrates Court Kurunegala by the 1st Respondent and handed over to the prison officers. Subsequently, the Petitioner was produced before the Magistrate and remanded till 05.07.2006.

As a result of this assault by the 1st Respondent, the Petitioner states that he suffered severe pain in the chest and back and had noticed contusions in those areas. The Petitioner also had difficulty passing urine and had passed blood with urine.

The Petitioner states that immediately after the Petitioner was remanded, he had made a statement to the Chief Jailor of the Kegalle Remand Prison that he was assaulted by the 1st Respondent at the Police Station on 21.06.2006.

On 22.06.2006 the Petitioner was examined by a Medical Officer and was admitted to the Kegalle Teaching Hospital where he was examined by the Judicial Medical Officer. The Diagnosis Card of the Kegalle Teaching Hospital, marked as P7 indicates the date of admission as 22.06.2006 and the date of discharge as 03.07.2006. The Petitioner states that he suffered pain even after being discharged from hospital.

Having submitted an Application by way of Motion on 28.06.2006, the Petitioner was released on bail on 30.06.2006. However, the Petitioner states that he was discharged from the Kegalle Teaching Hospital on 03.07.2006 and released on bail on 04.07.2006.

The Petitioner denies any involvement in the incident involving the encashment of the money order by Shashi Prabhani Ekanayake and claims that in the circumstances the acts of the 1st Respondent on 21.06.2006 amount to torture or cruel, inhuman or degrading treatment under Article 11 of the Constitution.

The 1st Respondent's version of events is that on 21.06.2006 around 8.30 am the Petitioner appeared at the Kurunegala Police Station and that the 1st Respondent was instructed by the Officer in Charge of the Minor Offences Branch C.I. Navaratne to record the Petitioner's statement and to produce the Petitioner before the Magistrate Court Kurunegala. Accordingly, at around 9.30 am the 1st Respondent recorded the statement of the Petitioner and at around 9.55 am the 1st Respondent along with Sergeant Karunarathne took the Petitioner to the Magistrate's Court Kurunegala in the Petitioner's vehicle driven by the Petitioner's father. The 1st Respondent denies that he assaulted the Petitioner at any point of time.

Having considered the submissions on either side, it is clear that the case involves disputed facts relating to the events on 21.06.2006. In reaching a conclusion this Court must consider the burden of proof on the parties involved and the credibility of the different versions submitted before this court, bearing in mind the seriousness of the allegations made by the Petitioner against the 1st Respondent.

Article 11 of our Constitution reads that:

"No person shall be subjected to torture or cruel inhuman or degrading punishment or treatment"

All international declarations of human rights prohibit torture as well as cruel, inhuman or degrading treatment or punishment. Article 5 of the Universal Declaration of Human Rights, Article 7 of the International Covenant of Civil and Political Rights and Article 3 of the European Convention on Human Rights are in similar terms.

Article 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment states that;

"… torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, intimidating or coercing him or a third person, or any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions"

Dr. Amerasinghe J in his separate judgment in Silva v. Chairman, Fertilizer Corporation 1989 (2) SLR 393, analyzing the concept of inhuman treatment observed that;

"The treatment contemplated by Article 11 wasn't confined to the realm of physical violence. It would rather embrace the sphere of the soul or mind as well."

Thus this Court has given a broad definition to the right not to be subjected to inhuman treatment, extending beyond physical violence into emotional harm as well, which is highly desirable in the present context with widespread attempts to promote and protect human rights and prevent excesses of power by public authorities.

Now let us turn to the issue of proving the allegations made by either party.

It is by now, well established that in a Fundamental Rights case the standard of proof is that applicable in a civil case which is on a balance of probability or on a preponderance of evidence as opposed to beyond reasonable doubt as in a criminal case. (Vide. Velmurugu v. Attorney General 1981(1) SLR 406, Liyanage v. Upasena (SC .FR 13, and 14/97, SCM 15.12.98)

In the case of Malinda Channa Peiris and others v. AG and others (1994 (1) SLR 1), it had been specifically stated that having regard to the gravity of the matter in issue a high degree of certainty is required before the balance of probability is proven in favour of the Petitioner subjected to torture, or cruel, inhuman or degrading punishment to prove that Article 11 had been transgressed.

Considering the relevance of the medical evidence, the Petitioner alleged that he was assaulted by the 1st Respondent on his back and chest and as a result he suffered from severe pain on the chest and back and had also passed blood with urine. The Petitioner contends that the Diagnosis Card marked P7 provides strong corroboration of the allegation of assault by the Respondent. Page 2 of the said Diagnosis Card in particular states 'that there were contusions in the back and chest, tenderness in the renal angle and that the urine report indicated moderately field red cells'.

The attention of the Court is drawn to the case of Jayasinghe v. Appuhamy SC (FR) 15/95, S.C.M.28.08.1995 where the Court held that the description given by the D.M.O in respect of the injuries sustained by the Petitioner provided strong corroboration of the Petitioner's allegation of assault on him.

In the instant case the Diagnosis Card appears to corroborate the injuries sustained by the Petitioner. According to the Medico-Legal Report the Petitioner had been admitted to the Hospital on 22.06.07 and the history given by the patient is as follows:

"He was asked to come to Kurunegala Police on 21.06.06. When he went there he was assaulted by a Police Officer with fist and kicked him and fell down; Following that he was taken to the Courts and sent to the prison; while in the prison he found that he was passing blood with urine and admitted to the hospital"

On the available evidence it seems that the Petitioner did suffer injuries as reflected in the Medico-Legal Report. The Diagnosis Card provides strong evidence that the Petitioner had been

assaulted and bears witness to the injuries suffered by him. However it cannot be held by itself to sufficiently corroborate the fact that such injuries had been caused by the 1st Respondent and the version of facts given by the Petitioner.

In considering both the Petitioner's and Respondent's versions the question is whether there had been any attempt to distort the facts on either side. The Respondent has sought to support his position that no assault took place on 21.06.2006, by producing the affidavits of CI Navarathne, Inspector of Police Mohamed Razik and four witnesses who were allegedly present at the police station at the time when this alleged assault took place. However in the special circumstances of this particular case one is compelled to doubt the independence of these witnesses and the affidavits produced therein.

It is indeed curious that neither the Petitioner nor his attorney brought the fact of the assault to the notice of the Learned Magistrate on 21.06.2006. The 1st Respondent contends that on 30.06.2006 when the Petitioner was granted bail, Counsel appearing for the Petitioner only informed the Learned Magistrate that the Petitioner was sick. Thus there had been no mention of any Police assault. The Petitioner states that he made a contemporaneous statement to the Chief Jailor of the Kegalle Remand Prison regarding the assault by the 1st Respondent. It had been submitted by the Petitioner's father that there wasn't sufficient time to retain or consult a lawyer on the day the Petitioner has been produced before the Magistrate's Court. Therefore one of Petitioner's friends had appeared before the Court on that day on behalf of the Petitioner. The Petitioner's father denies the 1st Respondent's version that the Petitioner was taken to the Magistrates Court in a car driven by him. The Petitioner's father states that when he returned to the Kurunegala Police Station he was informed that the Petitioner had been taken into custody and taken to the Magistrates Court and accordingly had driven himself to the Court premises. The Petitioner's father states that when he arrived at the Magistrates Court the proceedings had already commenced and that he was unable to talk to the Petitioner who was in his cell. He states that when proceedings were adjourned, he inquired from the Petitioner as to why his clothes were stained with mud and was informed that the Petitioner had been assaulted by the 1st Respondent. The Petitioner's father also states that he had urged

the lawyers who appeared for the Petitioner to inform the Magistrate of the assault but was informed that this was not possible.

It must be determined whether P7 alone would prove the Petitioner's case on a balance of probability.

The Petitioner in Sudath Silva v. Kodithuwakku 1987 (2) SLR 126 complained that he was illegally detained at the Police Station for five days and was subject to torture. The Medical Officer of the local hospital before whom the Petitioner was produced by the Police reported no external injuries. However the Additional Judicial Medical Officer, Colombo before whom the Petitioner was produced upon an Order made by the Magistrate, found scars consistent with the Petitioner's complaint.

Atukorale J rejected the report of the Local Medical Officer as worthless and unacceptable and stated that the case disclosed a gross lack of responsibility and a dereliction of duty on his part. According to Atukorale J the failure of the Petitioner to complain to the Medical Officer or to the Magistrate before whom he was produced "must be viewed and judged against the backdrop of his being at that time held in Police custody with no access to any form of legal representation" Sudath Silva v. Kodithuwakku 1987 (2) SLR 125

In light of the above and the circumstances of this particular case, I find that it would be unfair to hold that the failure on the part of the Petitioner to inform the Magistrate of the assault as fatal to the proof of the Petitioner's case on a balance of probability on a consideration of the special circumstances of this case.

Atukorale J also observed in Sudath Silva v. Kodithuwakku that;

"Article 11 of our Constitution mandates that no person shall be subjected to torture or to cruel or inhuman punishment or treatment … Constitutional safeguards are generally directed against the State and its organs. The Police Force being an organ of the State is obliged by the

Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. It's therefore the duty of this court to protect and defend this right jealously to its fullest measure with a view to ensuring that this right is declared and intended to be fundamental is always kept fundamental and that the Executive by its action does not reduce it to a mere illusion"

Sharvananda J in Velmuruge v. AG 1981 (1) SLR 406, 438 highlighted the inherent difficulties in proving a case of torture by the Police.

"There are certain inherent difficulties in the proof of allegations of torture or ill- treatment. Firstly a victim or a witness able to corroborate his story might hesitate to describe or reveal all that has happened to him for fear of reprisals upon himself or his family. Secondly acts of torture or ill treatment by agents of the police or armed forces would be carried out as far as possible without witnesses or perhaps without the knowledge of higher authority. Thirdly where allegations of torture or ill treatment are made the authorities whether the police or armed services or the ministries concerned must inevitably feel they have a collective reputation to defend. In consequence there may be reluctance of higher authorities to admit or allow inquiries to be made into facts which might show that the allegations are true."

Commenting on the systemic increase in allegations of torture or cruel or degrading treatment leveled against the Police Force and the duty to protect against such incidents, this Court in Gerald Perera v. Suraweera SCFR observed that;

'The number of credible complaints of torture and cruel, inhuman and degrading treatment whilst in Police custody shows no decline. The duty imposed by Article 4(d) to respect, secure and advance Fundamental Rights, including freedom from torture, extends to all organs of government, and the Head of the Police can claim no exemption'.

On the facts of this case, it must be held that the medical evidence sufficiently satisfies the case put forward by the Petitioner against the 1st Respondent regarding the violation of his Fundamental Right under Article 11 of the Constitution.

The Respondents also raised the objection that the instant Application is time barred.

The Petitioner contends that he was released from remand prison only on 04.07.2006, even though bail was granted on 30.06.2006, which fact if proved would not make this Application time barred. The Petitioner supports such contention by tendering the Journal Entries dated 30.06.2006 and 04.07.2006 in the Maintenance case filed by the Petitioner's wife in the Magistrate Court of Kurunegala bearing No. 54153/06 marked P2, in which it is clearly stated that the Petitioner was released only on 04.07.2006 which would bring the present Application within the time frame of one month. However the Respondent argues that even if the Petitioner had been released on 04.07.2009, nevertheless he had easy access to a lawyer to represent him.

Article 126 (2) states:

"Where any person alleges that any such fundamental right or language right relating to such has been infringed by executive or administrative action, he may himself or by an attorney at law on his behalf, within one month thereof, in accordance with such rules of court as maybe in force, apply to the supreme court by way of petition in writing addressed to such court praying for relief or redress in respect of such infringement. Such application may be proceeded with only leave to proceed first had and obtained from the supreme court, which leave may be granted or refused, as the case maybe, by not less than two judges"

According to this Article the requirement of filing a Fundamental Right case within one month seems to be mandatory. This Court has repeatedly expressed the view that in situations where

the Petitioner was prevented from seeking legal redress for reasons beyond his or her control such as continuous detention after the violation of his or her rights, the computation of time will begin to run from the date she/he was under no restraint to have access to the Court.

As per CJ Sharvananda in Namasivayamn v. Gunawardene 1989 (1) Sri LR 394 "If this liberal interpretation is not accepted the Petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory"

In Saman v. Leeladasa 1989 (1) Sri LR, Fernando J. was of the view that if the Petitioner did not have easy access to a lawyer due to his status as a remand prisoner and due to subsequent hospitalization on account of the injuries he suffered, the principle of *lax non cogit ad impossibilia* applies in the absence of any lapse of fault.

In this case the Petitioner until the time he was released on bail remained as a remand prisoner. Moreover he had been discharged from the Kegalle Teaching Hospital only on 04/07/06.

Hence on the available evidence it would not be reasonable to dismiss the Application on the basis of lapse of time stipulated under Article 126 (2).

In the light of the reasoning given above, it can well be concluded that the Petitioner's rights under Articles 11 of the Constitution have been violated by the 1st Respondent.

Accordingly this Court declares that the Petitioner's Fundamental Rights guaranteed under Article 11 of the Constitution have been violated by the 1st Respondent. This Court also orders a sum of Rs 50,000/- to be paid by the 1st Respondent to the Petitioner as compensation. This sum is to be paid in his personal capacity. Sum is to be deposited in this Court within one month from this Judgment. No Costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

RATNAYAKE.J

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (F/R) No. 429/2003

In the matter of an Application under

Article 126 of the Constitution.

1. Guneththige Misilin Nona, Akkara Heththedeka, Kindelpitiya, Millewa. (Mother of the deceased).
2. Guneththige Jayalatha, Akkara Heththedeka, Kindelpitiya, Millewa

Petitioners

Vs.

1. Muthubanda (10312), Police Constable Moragahahena Police Station, Moragahahena.
2. Maheepala,
   Officer in Charge,

   Police Station, Moragahahena.
3. Wijemanna, Police Constable Moragahahena Police Station, Moragahahena.
4. Inspector General of Police,

   Police Headquarters, Colombo 3.
5. The Attorney General,

   Attorney General's Department, Colombo 12.

Respondents

BEFORE : **TILAKAWARDANE.J**

SRIPAVAN.J &

IMAM.J

COUNSEL : J.C. Weliamuna for the Petitioners.

Madhawa Tennakoon, S.C., for the 4th and 5th respondents.

ARGUED ON : 01.07.2009 & 15.09.2009

WRITTEN SUBMISSIONS : 22.02.2010

DECIDED ON : 06.08.2010

Hon. Shiranee Tilakawardane J

This Court granted Leave to Proceed on 03.09.2003 to the Petitioners in respect of the alleged infringements of Articles 11, 13 (1), 13 (2), 13 (4) and 17 of the Constitution by the 1st to 3rd Respondents and several other Police Officers of the Moragahahena Police Station (hereinafter referred to as "the Police Station").

The 1st and the 2nd Petitioners are respectively the mother and sister of the deceased Thisera Sunil Hemachandra who died on 26th July 2003 (hereinafter referred to as the deceased), while allegedly in Police custody. The deceased was a Sri Lankan citizen and 32 years of age at the time of his death. The 1st Respondent was a Police constable attached to the Police Station at the time of the death of the deceased. The 2nd Respondent is the Officer in Charge of the Police Station. The 3rd Respondent is a Police constable attached to the Police Station.

The Petitioner's version of facts is as follows. On 28.06.2003 the deceased had purchased a Sanwardana Vasana lottery from a lottery seller named 'Neil' and won the prize money of Rs. 3,003,100.00. The Lottery Agent was one Ranasinghe Lionel. According to the Petitioners, the lottery seller Neil, had initially tried to cheat the deceased by stating that he had won only a sum of Rs.5000 and had taken the lottery from deceased promising to pay Rs.5000 the same evening.

However, on 29.06.2003 the deceased was advised by the Grama Seva Niladhari of the Kindelpitiya Division that he had in fact won the sum of Rs. 3,003,100.00. At or around 4.30 pm the same day, the deceased was visited at his home by Ranasinghe Lionel the lottery agent and the 1st Respondent who offered to provide the deceased with protection at the Moragahahena Police Station. Specifically, they asked the deceased to spend the night at the Police Station and travel to the Development Lottery Board the next day in a Police jeep. However the deceased declined the offer of protection and refused to go with Ranasinghe Lionel and the 1st Respondent to the Police Station as suggested.

The Petitioners state that following this visit by Ranasighe Lionel and the 1st Respondent, the deceased was in fear for his safety. He also feared that he could face further problems, since he did not possess a National Identity Card. He therefore gave the lottery ticket to Guneththige Piyawathie (hereinafter referred to as "Piyawathi") who is the aunt of the deceased and at whose home he had been living for over twenty years and asked her to obtain the money in her name.

On 04.07.2003 the deceased, accompanied by Piyawathie and Ranasinghe Lionel went to the Development Lottery Board and obtained the prize money in the name of Piyawathie. Thereafter the deceased had purchased a van and a three wheeler, respectively on 7.07.2003 and 14.07.2003.

The Petitioners state that about a week later a team of Police Officers from the Moragahahena Police Station including the 3rd Respondent visited Piyawathi's house and questioned her about the whereabouts of the deceased. Hearing that the deceased was in Colombo, the Police then inquired into what they had done with the money the deceased won. According to the Petitioners the 3rd Respondent had told Piyawathi that 'there happiness will not last long'. They had required Piyawathi to inform the deceased to come to the Police Station the next day.

Chanaka Dinesh (hereinafter referred to as "Chanaka") who is the driver of the deceased's van and the son of Ranasinghe Lionel had gone to the Police Station, the same evening to inquire as to why the deceased had been asked to call over at the Police Station. Then the Sub Inspector had informed him that they want Sunil and not Chanaka.

When the deceased had called over to the Police Station the next day, it had appeared to be that there was no Inquiry or allegation against him. One Sub Inspector had claimed money from the deceased to which the deceased had replied that the money was with Piyawathi.

In the meantime, one 21.07.2003 Chanaka had a quarrel with his father; Ranasinghe Lionel and the next day namely on 22.07.2003 at about 8.00 pm Ranasinghe Lionel and few other three-wheel drivers had attempted to assault Chanaka, after which he had gone to Piyawathi's house to sleep for the night.

Thereafter on 21.07.2003, at about 11.15 pm a team of Police Officers arrived at Piyawathi's house where the deceased was sleeping. According to the Petitioners the Police upon entering the house had found the deceased sleeping on the floor in the sitting room. The Police Officer had kicked the deceased on the head and asked him if Chanaka was in the house. According to Piyawathie, before the deceased could respond the officers including the 1st Respondent started to assault the deceased on his head. That same night, the Police took both the deceased and Chanaka into custody. Whilst they were being taken out of the house the 1st Respondent had pointed the deceased to another Police Officer and told "moo thama lotteria dinapu eka" (He is the one who had won the lottery ticket). The Petitioners state that Ranasinghe Lionel was parked in a three wheeler allegedly observing the whole scene and that he followed the Police jeep to the Police Station.

The Petitioners allege that the deceased had been assaulted on his abdominal area and head by all the five Police Officers in the jeep including the 1st Respondent. Chanaka had requested not to assault the deceased, upon which he had received a slap on the face by one of the Police Officers. At the Police Station, the deceased and Chanaka had been put into a cell with five other detainees.

The following morning, on 23.07.2003 at around 7.15 am the deceased had started bleeding from the nose and told Chanaka that he felt vomitish. Chanaka had alerted the Police to the deceased's condition and the Police had initially asked Chanaka to wipe the blood off the deceased's face. Since the bleeding did not stop, a Police Officer called "Malalasekara" had opened the cell for Chanaka to take the deceased to the backyard and wash the deceased's face. The deceased was unable to stand and had to lie on the floor near the tap. The deceased continued to bleed from his nose and mouth. At this point, Chanaka inquired if the Police Officers were not taking the deceased to the hospital.

Piyawathi who visited the Police Station at or around 8.00 am the same day, upon seeing the deceased's condition had started screaming, upon which one of the Police Officers had told her not to scream and informed her that the deceased was suffering from epilepsy. Piyawathi had denied any knowledge of the fact that the deceased had been suffering from epilepsy. The 2nd Respondent had arrived at the Police Station and the deceased was taken to hospital in the Police jeep. The deceased was warded at the Horana Base Hospital by the Police.

The Petitioners state that on the same day at about 2.30 pm two Police Officers from the Police Station had come to the hospital to record a statement from the deceased and having obtained permission from the two nurses, had written two pages in their notebooks. The Police Officers had then taken the thumb impression of the deceased at the end of the note they had recorded.

On 24.07.2003 Piyawathi had made a complaint to the Human Rights Commission to the effect that the deceased was illegally arrested and assaulted by the Respondents. On the same day the deceased had been transferred to the National Hospital, Colombo and treated at the A.S/N.S. ICU where the deceased had undergone a brain surgery. On 26.07.2003 Piyawathi was informed by the hospital that the deceased had passed away. On the same day Piyawathi and other members of the family went to the Police Station and statements were recorded from Piyawathie and Chanaka by the ASP of Horana.

On 28.07.2003 the Inquiry into the death of the deceased was held by the Additional Magistrate J.R. Dissanayake of the Colombo Chief Magistrate's Court. The Respondents on 31.07.2003 produced witnesses to establish that the deceased died due to a fall following an epileptic attack.

The Respondent's version of events, contradicts the above narration of facts as set out by the Petitioners. According to the Respondents, on or about 1.00 am a team of Police Officers including the 1st Respondent headed by S.I Jayasinghe left the Police Station to inquire into a complaint made by Ranasinghe Lionel against his son Chanaka alleging that he was waiting with a gang to assault the father due to some personal grudge. That night Ranasinghe Lionel had led the Police to Piyawathi's house. According to the Respondents, when the Police attempted to arrest Chanaka, the deceased had vehemently resisted the arrest and tried to assault S.I Jayasinghe. Moreover on perceiving that the deceased was after consumption of liquor, as a safety measure, the deceased had been taken into custody along with Chanaka. At the Police Station the deceased and Chanaka had been put into a cell.

An Entry had been made by the 2nd Respondent that at about 07.02 hrs on 22.07.2003, a noise of someone falling inside the cell was heard and that the deceased had fallen on the ground with his face down and was struggling. Consequent to that he was bleeding from the nose and when inquired the reason for such bleeding the deceased had replied that he was suffering from epilepsy and due to the fall his nose struck against the floor and was bleeding. Thereafter the OIC had sent him to the hospital for treatment. This chain of events is borne out by the Police extracts submitted to this Court.

Evidently the Petitioners allegation that the death of the deceased was due to assault and harassment by the Respondents is vehemently opposed by the Respondents.

The Respondents raise three preliminary objections;

1. That the 1st Petitioner is a person of unsound mind. Thus it is doubtful whether the contents of her Affidavit have been affirmed with full awareness of the facts or if it's a mere fabricated story.

2. That the 2nd Petitioner has not submitted an Affidavit along with the Petition and therefore this Application is legally unacceptable.

3. That this Application has not been made within the one month time frame as stipulated in Article 126 (2) of the Constitution. The deceased died on 26.07.2003 and the Application is

made to the Supreme Court on 08.09.2003. Moreover there had been no Inquiry held by the Human Rights Commission into this incident to enable the Petitioners to get the benefit under Section 13 (1) of the Human Rights Commission of Sri Lanka Act No.21 of 1996.

This Application had been made on 08.09.2003.The letter dated 21.08.2008 sent by the Human Rights Commission clearly states that the Inquiry into this incident has been suspended subsequent to the filing of this Application in the Supreme Court, showing that an earlier Application had been tendered to the said Commission.

The material issues are whether the death of the deceased was caused by a fall due to an epileptic attack or due to assault by the Police. In order to come to a decision on these issues, the facts have to be analysed and inferences drawn from all the available evidence, mainly from the testimony of witnesses and the official documents including cotemporaneous entries of official books.

The two most important eye witnesses in this case are Chanaka and Piyawathi. A comparison between the contents of the Affidavits filed by these two witnesses and the statements made by them at the Inquiry conducted by the ASP of Horana Police reveal certain discrepancies. The Respondents contend that the Inquiry conducted by the ASP is impartial and therefore the Inquiry Notes and statements are reliable and constitute independent evidence.

At the Inquiry both Piyawathi and Chanaka have stated that the deceased was strongly addicted to alcohol and that as a habit he consumes liquor every day. Nevertheless in the respective Affidavits both of them have only said that even though the deceased consumed liquor occasionally he was never an addict.

Piyawathi has stated at the Inquiry that on the relevant day namely on 22.07.2003, the deceased was drunk and after watching television till around 11.00 pm the deceased went to sleep and that she was unaware that Chanaka was in the house. In the Affidavit she has vouched for the fact that on that day, the deceased, Chanaka, her own son and some others were talking in the living room before going to sleep.

According to the statements made at the said Inquiry by Chanaka, only the deceased was not aware of his being in Piyawathi's house that night since the deceased was drunk and sleeping on the floor in the living area of the house.

Moreover at the Inquiry Piyawathi has stated that she only saw the Police hitting the deceased on the face several times inside the house and then both Chanaka and the deceased were taken to the Police Station in a Police jeep. According to the Affidavit, inside the house the deceased had been kicked on the head by the Police and both Chanaka and the deceased were beaten by the Police outside the house.

The fact that Piyawathi saw the deceased lying on the ground, bleeding from the nose at the Police Station is consistent in both the Affidavit and the Inquiry Notes. Equally her assertion that the deceased did not suffer from epilepsy at any point is also consistent in the Affidavit and the Inquiry Notes.

Chanaka at the Inquiry stated that he saw the 1st Respondent assaulting the deseased on the head several times inside the house and there had been no mention of any assault inside the jeep apart from several slaps secured on both Chanaka and the deceased by the Policemen. Moreover Chanaka has said that the deceased was feeling perfect the next morning after spending the night in the Police cell. In fact the deceased was in a jovial mood. Thereafter Chanaka's grandmother Nancy Nona had brought tea and at that point the deceased had had a fall and he was bleeding from the nose and mouth. Since the bleeding has not stopped, Chanaka and the Police Officer called 'Malalasekara' had taken the deceased out to the backyard where Chanaka himself has given an iron rod into the hands of the deceased.

This narration of facts is quite contradictory to the contents of his Affidavit.

In the Affidavit, Chanaka states that he saw the deceased being assaulted both inside and outside Piyawathi's house and the 1st Respondent in particular assaulted the deceased on the back of his head. In the jeep too the deceased had been severely assaulted and when he shouted not to assault the deceased he had been slapped by the Police. Thereafter next day morning the deceased had

complained that he felt vomitish and he was bleeding from the nose. Later on the Police Officer Malalasekara had directed Chanaka to give an iron rod into the hands of the deceased.

It should also be noted that at the Inquiry Chanaka has said that he knew nothing of the fact that the Police had demanded money from the deceased which is contrary to what he had stated in the Affidavit.

It is important to note that the Petitioners, Piyawathi and Chanaka deny that the deceased had been suffering from epilepsy. However Nancy Nona (Chanaka's grandmother) had told the Police that the deceased was suffering from epilepsy.

The Policemen who were at the Police Station and the other detainees in the cell with the deceased and Chanaka, have stated that the fall was due to epilepsy. The Respondents state that the signs of bleeding from the nose and the way the deceased was struggling at the time, may have given them the impression that it was an attack of epilepsy.

According to the Police notes dated 24.07.2003 taken at the hospital from the deceased, he had told the Police that he had a fall in the Police cell due to epilepsy. He had also confessed that he was drunk last night and that he had been suffering from epilepsy and that consumption of liquor was his only means of avoiding the disease.

In light of the above it is doubtful as to which version of facts is more favourable and which witness is reliable. Testimonies given by the main witnesses too seem to be contradictory in certain major aspects of the case. In particular sufficient proof of assault which was alleged to have caused the death of the deceased has not been revealed. Only the fact that the deceased won the lottery is proved. The fact that the lottery agent Ranasinghe Lionel sought protection from the Police for the deceased to collect prize money is also not borne out by contemporaneous record.

Thus expert opinion evidence is admissible in this regard in the backdrop of highly contested facts. The cause of death can expected to be resolved with the assistance of a suitably qualified opinion. The Postmortem Examination Report (Report) conducted by Dr.L.B.L de Alwis, the Consultant Judicial Medical Officer, Colombo dated 29.07.03 in this regard can well be considered independent evidence.

In R v. Turner (1971) 2 WLR 56 (CA) p.60, it was observed as follows;

“An expert’s opinion is admissible to furnish the Court with…..information which is likely to be outside the experience and knowledge of a judge or jury. If on the proven facts a judge or jury can form their own conclusions without help, then the opinion of an expert is unnecessary….”

Thus in this context expert evidence is necessary and of vital importance.

According to the said report the cause of death is due to an “acute sub-dural haemorrhage following a head injury caused by blunt trauma”.

“The external head injuries and other injuries are found on the left side of the body. The internal head injuries are found on the rights side of the body. This indicates that the internal head injuries are not due to direct force but due to rotational forces following acceleration and deceleration of head. This mechanism operates during a fall when the head strikes a hard surface such as a cemented floor. The injury pattern found on the deceased indicates that he has had a fall forwards, slightly laterally and to his left side.”

The report further explains the ways in which the fall could have been caused;

1. Due to a heavy blow to the back of the body either with a weapon or a kick with boots on. However there’s no such injury.
2. A fall due being pushed cannot be excluded.
3. The fall maybe accidental.
4. Following a fit. This could be due to epilepsy or due to alcohol withdrawal.

Thus according to the report the injury pattern is consistent with a fall. When one considers the possible causes of such a fall as enumerated above, one invariably thinks of 1 and 4 as possible

causes in the instant case. 1 could still be possible, as it's in line with the Petitioners version of Police assault on the deceased; however the report says that there were no injuries to indicate a definite assault which caused the fall.

The second possibility is No.4 which is that the fall may have been caused following a fit which could either be due to epilepsy or alcohol withdrawal. However the report also contains no positive findings to indicate that he was suffering from epilepsy. This leaves the cause of the fall as excessive alcohol withdrawal which is supported by the fact that the deceased had an enlarged and fatty liver which is most commonly due to long term alcohol usage. Therefore the fall being due to a fit following alcohol withdrawal is highly probable.

The question of unlawful arrest and detention appears pivotal in this case along with the disputed facts and cause of death.

Dicey defines the right to personal liberty as "a person's right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of any legal justification"

It is evident that arrest and detention of persons must be done in strict conformity to legal guidelines or according to the procedure established by law. Therefore violation of fundamental rights occurs only when the arrest or detention of a person is illegal or in contravention of the procedure established by law.

Article 13 (1)-(4) contain specific rights:

1. No person shall be arrested except according to procedure established by law.

2. Any person arrested shall be informed of the reason for his arrest.

3. Every person held in custody, detained or otherwise deprived of personal liberty shall be brought before the judge of the nearest competent Court according procedure established by law, and shall not be further held in custody, detained or deprived of personal liberty except upon and in terms of the order of such judge made in accordance with procedure established by law.

4. Any person charged with an offence shall be entitled to be heard in person or by an attorney-at-law, at a fair trial by a competent Court.

In the instant case both the deceased and Chanaka had been arrested without giving them the reasons for such arrest. In this instance one has to determine whether the arrest of the deceased was based on reasonable grounds.

In R v. Howell (1981) 3 All ER 383 Watkins LJ observed on the English Common Law power to arrest for breach of peace as follows:

"The public expects a Policeman not only to apprehend the criminal but to do his best to prevent the commission of crime, to keep the peace in other words. To deny him therefore, the right to arrest a person who he reasonably believes is about to breach the peace would be to disable him from preventing that of which might cause serious injury to someone or even to many people or to property. The common law, we believe, whilst recognizing that a wrongful arrest is a serious invasion of a person's liberty, provides the Police with this power in the public interest. In those instances of the exercise of this power which depend on a belief that a breach of the peace is imminent it must be established that it is not only an honest, albeit mistaken belief but a belief founded on reasonable grounds"

The grounds upon which the deceased had been arrested by the Police are as follows:

1. The deceased attempted to assault the Police when they tried to arrest Chanaka;
2. The deceased was after consumption of liquor;
3. The deceased vouched that he would commit suicide if the Police take Chanaka away.

The complaint made by Ranasinghe Lionel relating to his fear of apprehension of an imminent attack by his son Chanaka is supported by contemporaneous evidence. Firstly the Police extract dated 22.07.2003 /20.50 hours is to the following effect:

"As I was going about my day to day business as a sweep ticket seller today at about 8.25 p.m Chanaka came to the place where I was working, abused me with uncomplimentary language, threatened and assaulted me. I make this complaint with the hope that the Police will look into my grievances"

Secondly one has to consider the entries made by SI Jayasinghe as well as the 1st Respondent who were part of the Police team that went to Piyawathi's house to arrest Chanaka that night on 23.07.2003. According to such Police entries while the Police were conducting investigations in the night, a man jumped across the road at the Moragahahena junction, signaling the Police jeep to stop. When the Police jeep was stopped the man who turned out to be Ranasinghe Lionel begged the Police to save his life from his son Chanaka and his gang waiting to assault him. Moreover he said that he could not go home for fear of being assaulted by his son. Thereafter the Police jeep had been directed by Ranasinghe Lionel, in order to show the Police where Chanaka was staying that night. The same Police notes narrate the whole incident that happened at Piyawathi's house that night when the Police arrived there with the intention of arresting Chanaka.

The Police notes of SI Jayasinghe state that when knocked on the door, a rather slim man with tanned complexion (identifiable as the deceased Sunil) opened the door and when SI Jayasinghe announced that they were from Morgahahena Police Station and inquired as to whether Ranasinghe Lionel's son Chanaka was in the house, he has replied "there's no one like that in the house". At that moment seeing the surreptitious movement of a figure, walking from a room towards the back of the house, which caught the attention of the Police present at the entrance of the house, the Police took a quick decision to follow him into the house. Then the man had then come forward from the kitchen and pronounced himself to be "Chanaka", at which he was informed that the Police are here to arrest him for assaulting his father Ranasinghe Lionel and subsequently arrested him at 02.10 am.

However when Chanaka was arrested, the deceased (Sunil) had followed the Police shouting and protesting that he cannot let the Police take Chanaka away and if they do so he will commit suicide. The deceased had continuously attempted to resist the Police from taking Chanaka away. SI Jayasinghe states in his noted that he got the impression that the deceased was acting under the influence of liquor when the deceased attempted to assault SI Jayasinghe. In response SI Jayasinghe had used minimal force to avoid the deceased from obstructing the Police in the discharge of their duties as Police Officers.

Thereafter the deceased had been informed by the Police that he will be arrested for obstructing the Police from arresting Chanaka and also as a precaution to safeguard the life of the deceased when he had vouched to commit suicide if Chanaka is arrested.

Thus the Police version is that both Chanaka and the deceased had been lawfully arrested that night for the reasons properly stated and explained to the two suspects before the arrest. Hence the version of facts submitted by the 1st Respondent is supported by contemporaneous evidence.

Accordingly this Court cannot in the circumstances come to a finding that the fundamental rights of the Petitioners had been violated. The Application is dismissed. No costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN.J

I agree.

JUDGE OF THE SUPREME COURT

IMAM.J

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (HC) LA No. 4/2009
H.C. Application Nos. HC/ARB
998/2006 & 1249/2007
(Consolidated in terms of
Section 35 of the Arbitration Act)

Airport and Aviation Services
(Sri Lanka) Ltd.,
Bandaranaike International Airport,
Katunayake.

Respondent-Petitioner-Petitioner

Vs.

Buildmart Lanka (Pvt.) Ltd.,
No. 196/1, Nawala Road,
Nawala,
Rajagiriya.

Claimant-Respondent-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.
P.A. Ratnayake, J. &
Chandra Ekanayake, J.

COUNSEL : Gamini Marapana, PC, with Navin Marapana
for Respondent-Petitioner-Petitioner

Nihal Fernando, PC, with Ruchira Anthonis
for Claimant-Respondent-Respondent

ARGUED ON: 23.03.2010

WRITTEN SUBMISSIONS
TENDERED ON: Respondent-Petitioner-Petitioner : 20.05.2010

Claimant-Respondent-Respondent: 24.05.2010

DECIDED ON: 04.08.2010

Dr. Shirani A. Bandaranayake, J.

This is an application for leave to appeal from the judgment of the High Court of the Western Province (sitting in Colombo) (hereinafter referred to as the High Court) dated 23.01.2009. By that judgment the High Court had made order dismissing the respondent-petitioner-petitioner's (hereinafter referred to as the petitioner) application preferred under section 32 of the Arbitration Act, No. 11 of 1995 and had allowed the claimant-respondent-respondent's (hereinafter referred to as the respondent) application, to execute the Arbitral Award in terms of section 31 of the Arbitration Act.

Being aggrieved by the said judgment of the High Court, the petitioner came before this Court seeking leave to appeal.

When this matter came up for support for leave to appeal, learned President's Counsel for the respondent took up a preliminary objection on the basis that the affidavit filed by the petitioner dated 10.02.2009 is not in terms with the proviso to section 12(2) of the Oaths and Affirmations Ordinance and therefore the said affidavit has no legal validity as it is bad in law. Accordingly, both learned President's Counsel for the petitioner and the respondent were heard on the preliminary objection raised by the learned President's Counsel for the respondent.

The facts of this application for leave to appeal, as submitted by the petitioner, *albeit* brief, are as follows:

On 04.09.2009 the respondent had initiated Arbitration proceedings against the petitioner, claiming *inter alia* damages for breach of contract. The Arbitration Tribunal had pronounced its Award in favour of the respondent on 31.05.2006. The petitioner thereafter had filed an application before the High Court on 08.02.2006, in terms of section 32 of the Arbitration Act to have the aforesaid Award set aside. The respondent had also

made an application on 05.07.2007, to execute the said Award, in terms of section 31 of the Arbitration Act.

Both applications were consolidated by the High Court on 24.09.2007, in terms of section 35 of the Arbitration Act and on 23.01.2009 the High Court had delivered its judgment, enforcing the Arbitration Award given in favour of the respondent and dismissing the petitioner's application.

Referring to the preliminary objection raised, learned President's Counsel for the respondent submitted that when the matter in dispute was referred to arbitration, Malpethi Ratnasinghe, Attorney-at-Law and Assistant Legal Officer of the petitioner, viz., Airport and Aviation Services, was present at the arbitral hearing as an employee and Attorney-at-Law. Thereafter when the matter proceeded to the High Court, the said Malpethi Ratnasinghe had been the Instructing Attorney-at-Law of the petitioner. Later when the petitioner preferred an application to the Supreme Court against the judgment of the High Court seeking leave to appeal, the Commissioner for Oaths, who had admitted the affirmation in the purported affidavit, filed together with the petition in the Supreme Court was the said Malpethi Ratnasinghe.

The contention therefore by the learned President's Counsel for the respondent was that the said affidavit filed before the Supreme Court is not in compliance with the proviso to section 12(2) of the Oaths and Affirmations Ordinance as Malpethi Ratnasinghe is the Attorney-at-Law or a person otherwise interested in the proceedings before the Supreme Court.

Oaths and Affirmations Ordinance, No. 9 of 1895, had come into being as an Ordinance to consolidate the law relating to Oaths and Affirmations in Judicial proceedings and for other purposes. Section 12 of the said Ordinance deals with the Commissioner for Oaths and section 12(1) refers to the ministerial authority to appoint fit and proper persons from time to time as Commissioner for Oaths. The function of the Commissioner for Oaths and the restrictions are referred to in section 12(2) and in the proviso to the said section, which reads as follows:

> "A Commissioner for Oaths appointed under this Ordinance may administer any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law so to do, and in all cases in which an oath, affirmation or affidavit is commonly administered or taken before a Justice of the Peace; and any oath or affirmation or affidavit administered or taken by a Commissioner for Oaths shall in all legal proceedings and for all other purposes have the same effect as an oath, affirmation, or affidavit administered or taken before a Justice of the Peace; and all enactments relating to oaths, affirmations and affidavits administered or taken before a Justice of the Peace shall, with the necessary modifications, apply thereto:
>
> Provided that a Commissioner for Oaths shall not exercise the powers given by this section in any proceeding or matter in which he is attorney-at-law to any of the parties, or in which he is otherwise interested."

Whilst the main section, referred to above, deals with the chief function of the Commissioner for Oaths, the proviso deals with instances, where a Commissioner for Oaths shall not be able to exercise the powers given in terms of section 12(2) of the Oaths and Affirmations Ordinance.

The contention of the learned President's Counsel for the petitioner was that since section 12 is only an enabling provision, the prohibition spelt out in the proviso to section 12(2) would only apply to the Commissioner for Oaths and therefore the said prohibition cannot affect the legal validity of the affidavit filed by the petitioner. In support of his contention, learned President's Counsel for the petitioner relied on the provisions contained in the Notaries Ordinance and section 437 of the Civil Procedure code.

With regard to the Notaries Ordinance our attention was drawn to sections 31 and 32 and the learned President's Counsel for the petitioner submitted that section 32 of the Notaries Ordinance specifically states that the failure of Notary to observe the Rules specified in section 31 of the Notaries Ordinance, shall not invalidate the instrument attested by such Notary.

The Notaries Ordinance deals with the law relating to Notaries, whereas the Oaths and Affirmations Ordinance, as stated earlier relates to Oaths and Affirmations in judicial proceedings and other matters. The Notaries Ordinance does not deal with any such matter. Moreover, section 33 of the Notaries Ordinance has specifically stated that no instrument shall be deemed to be invalid by reason only of the failure of any Notary to observe any provision of any Rule set out in section 31 in respect of any matter of form. However, there is no such provision contained in the Oaths and Affirmations Ordinance with regard to section 12(2), which states that an affidavit administered contrary to the provisions contained in the proviso to section 12(2) of the said Ordinance would nevertheless be valid. In such circumstances, although there is provision contained in the Notaries Ordinance granting relief when there is failure by the Notary to observe the Rules, a similar interpretation cannot be given to the proviso to section 12(2) of the Oaths and Affirmations Ordinance, in the absence of such provision to that effect.

Learned President's Counsel for the petitioner submitted that the disability imposed upon a Commissioner for Oaths in terms of the proviso to section 12 of the Oaths and Affirmations Ordinance has been impliedly repealed and rendered nugatory regarding the affidavits filed in Court proceedings, by the introduction of section 437 of the Civil Procedure Code under the Amendment to the Code of Civil Procedure Act, No. 79 of 1988. This section reads as follows:

> "Whenever any order has been made by any Court for the taking of evidence on affidavit, or whenever evidence on affidavit is required for production in any application or action of summary procedure, whether already instituted or about to be instituted, an affidavit or written statement of facts conforming to the provisions of section 181 may be

> sworn or affirmed to by the person professing to make the statement embodied in the affidavit before any Court or Justice of the Peace or Commissioner for Oaths or in the case of an affidavit sworn or affirmed in a country outside Sri Lanka, before any person qualified to administer oath or affirmation according to the law of that country, and the fact that the affidavit bears on its face the name of the Court, the number of the action and the names of the parties shall be sufficient authority to such Court or Justice of the Peace, or Commissioner for Oaths or such person qualified to administer the oath or affirmation."

Section 437 of the Code of Civil Procedure Act deals with the evidence on affidavits. The provisions contained in section 437 of the Code of Civil Procedure Act, clearly refers to the applicability of the provisions contained in section 181 of the Code and in **Kanagasabai v Kirupamoorthy** ((1959) 62 NLR 54) the Court had held that when affidavits are filed in the course of civil proceedings, it is the duty of the Judges, Justices of the Peace and Proctors to see that the rules governing affidavits in sections 181, 437 etc. of the Civil Procedure Code are complied with. It is in this background that an interpretation has to be given to the words 'such person qualified to administer the oath or affirmations', stated in section 437 of the Code.

In the present application, the preliminary objections that were raised by the learned President's Counsel for the respondent relates to the person, who had administered the affirmation in the affidavit filed in Court. Section 437 on the other hand refers to a person, who had prepared the affidavit. In such circumstances, as rightly contended by the learned President's Counsel for the respondent, the provisions contained in section 437 of the Code of Civil Procedure Act, has not made the provisions contained in the proviso to section 12(2) of the Oaths and Affirmations Act irrelevant.

Learned President's Counsel for the petitioner took up another ground in support of his position.

In this regard reference was made to the Supreme Court Rules 1990 with particular reference to Rule 6. It was contended that Rule 6 allows for the affidavit that should be filed along with the application for special leave to appeal to be sworn or affirmed to even by the Instructing Attorney-at-Law or the petitioner himself. Accordingly learned President's Counsel for the petitioner contended that in such circumstances, it is inconceivable that this Court would strike out an affidavit as invalid, which was sworn or affirmed to before a Commissioner for Oaths, who is otherwise interested in the proceeding or matter, in which such affidavit is filed.

Rule 6 of the Supreme Court Rules, 1990 refers to the filing of affidavits in support of allegations contained in an application filed before the Supreme Court. This Rule reads as follows:

> "Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original Court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarent is able of his own knowledge and observation to testify to: provided that statements of such declarent's belief may also be admitted, if reasonable grounds for such belief be set forth in such affidavit."

Rule 6 of the Supreme Court Rules 1990, deals with a situation where there is a need to file an affidavit in support of allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is

sought. In such circumstances such an affidavit may be sworn to or affirmed by the petitioner, his Instructing Attorney-at-Law, his recognized agent or by any other person having personal knowledge of such acts. Rule 6 of the Supreme Court Rules, 1990 therefore refers to an affidavit that is sworn to or affirmed by the aforementioned persons in order to support the allegations referred to in the petition.

By section 12(2) of the Oaths and Affirmations Ordinance, provision has been made for a Commissioner for Oath to administrate any oath or affirmation or take any affidavit for the purpose of any legal proceedings or otherwise in all cases in which a Justice of the Peace is authorized by law. The proviso to section 12(2) of the said Ordinance however has restricted this function as a Commissioner for Oath shall not exercise the power enumerated in section 12(2) in any proceeding or matter in which he is Attorney-at-Law to any of the parties or in which he is otherwise interested.

The provisions contained in Rule 6 of the Supreme Court Rule, 1990 and section 12(2) of the Oaths and Affirmations Ordinance therefore are clearly different. Whilst Rule 6 provides for an Attorney-at-Law to file an affidavit in support of the allegation referred to in the petition, section 12(2) and its proviso of the Oaths and Affirmations Ordinance deals with the administering of any oath or affirmation or take any affidavit. In such circumstances even in a situation, where an affidavit of an Instructing Attorney-at-Law is to be filed in support of an application for special leave to appeal, such an affidavit would also have to be made strictly in terms of the provisions contained in the Oaths and Affirmations Ordinance, whereas the provisions contained in section 12(2) of the Oaths and Affirmations Ordinance would undoubtedly be applied to such an affirmation.

The provisions contained in the proviso to section 12(2) of the Oaths and Affirmations Ordinance clearly states that an Attorney-at-Law shall not exercise his powers in any proceeding or matter in which he is the Attorney-at-Law to any of the parties or in which he is otherwise interested. The word 'proceeding' is described in Stroud's Judicial Dictionary of Words and Phrases (6th edition, Vol. 2. Pg. 2060) as follows:

> "The primary sense of 'action' as a term of legal art is the invocation of the jurisdiction of a court by writ; 'proceeding'

> the invocation of the jurisdiction of a court by process other than writ (*per* Lord Simon in **Berry (Herbert) Associates v I.R.C.** [1977] 1 W.L.R. 1437). "Any proceeding" (Judicature Act 1873 (C.66) S. 89) is equivalent to "any action" and does not mean any step in an action (**Pryor v City Offices Co.** 10 Q.B.D. 504)."

The Oxford English Dictionary (2nd edition, Vol. XII pg. 545) also refers to an action in clarifying the meaning of proceeding, which reads as follows:

> "The instituting or carrying on of at action at law; a legal action or process; any act done by authority of a court of law; any step taken in a cause by either party."

As stated earlier, the respondent in this application, being the claimant, had referred the dispute between the petitioner and the respondent to arbitration. At that time, the petitioner being the respondent in the arbitration proceedings had filed the statement of defence (X_2), which stated as follows:

> "The statement of defence of the respondent above named appearing by Champika Mahipala and **Malpethi Ratnashighe** its Attorneys-at-Law state as follows:" (emphasis added).

The said statement of defence of the respondent was subscribed to by Malpethi Ratnasinghe, as an Attorney-at-Law for the respondent. The seal of the said Malpethi Ratnasinghe was placed below her signature, which stated that she is the Assistant Legal Officer of the petitioner. It is not disputed that the said Malpethi Ratnasinghe, Attorney-at-Law and Assistant Legal Officer of the petitioner had subscribed to the admissions and issues, which were submitted by the petitioner at the arbitral proceedings. The arbitral proceedings were held on several dates and Malpethi Ratnashighe as Attorney-at-Law and

Assistant Legal Officer of the petitioner Company had been present at the arbitral proceedings as employee and Attorney-at-Law of the petitioner.

The arbitral proceedings of 14.06.2004 stated as follows:

> "Malpethi Ratnasinghe, Attorney-at-Law with Mr. Rafeek are present on behalf of the respondent Company."

The arbitral proceedings of 23.09.2004 stated as follows:

> "Malpethi Ratnasinghe, Attorney-at-Law, Legal Officer of Airport and Aviation Services (Sri Lanka) Ltd. for the respondent Company."

The arbitral proceedings of 29.10.2004 stated as follows:

> "Ms. M. Ratnasinghe, Attorney-at-Law appears for respondent."

On a consideration of the totality of the aforementioned, it is evident that the Statement of Defence, Issues and the arbitral proceedings establish that Ms. Malpethi Ratnasinghe was the Attorney-at-Law for the petitioner at the arbitration and also that she was a permanent employee of the petitioner Company as she is the Assistant Legal Officer of the Airport and Aviation Services (Sri Lanka) Ltd.

Thereafter whilst the respondent filed an application before the High Court for the enforcement of the arbitral Award, the petitioner instituted action in the High Court to set aside the arbitral Award. The petition filed by the petitioner in the High Court clearly stated as follows:

> "The petition of the petitioner above named appearing by Manorie Champika Gunaratne Mahipala Attorney-at-Law and her Assistant Malpethi Ratnasinghe Attorney-at-Law state as follows:

The High Court had entered its judgment in favour of the respondent enforcing the Arbitration Award and had dismissed the application filed by the petitioner in the High Court seeking to set aside the Award. Being aggrieved, the petitioner came before the Supreme Court seeking leave to appeal against the said judgment of the High Court. The petition was filed along with an affidavit of Shums Mufees Rahumathulla Rafeek, being the Chief Engineer (Projects) of the petitioner, viz., Airport and Aviation Services (Sri Lanka) Ltd., dated 10.02.2009. The affidavit was affirmed by Malpethi Ratnasinghe, Attorney-at-Law and Commissioner for Oaths.

The question which arises at this point is, in a situation where the said Malpethi Ratnasinghe was the Attorney-at-Law for the petitioner at the arbitration and the Instructing Attorney-at-Law of the petitioner in the High Court, whether she could administer the affirmation in the affidavit filed in the leave to appeal application before the Supreme Court.

Learned President's Counsel for the respondent contended that the leave to appeal application is a part of the proceedings in the matter, which was before the High Court and at the Arbitration. Also it was submitted that the word 'matter' referred to in the proviso to section 12(2) of the Oaths and Affirmations Ordinance, has a wider meaning than the word 'proceeding' and therefore the word matter would include the entire arbitral and High Court proceedings relating to the arbitral Award and its enforcement by the High Court.

Burton's Legal Thesaurus (4th edition, pg. 393) describes the word 'matter' in the following terms:

> "action, causa, cause, cause in court claim, court action, dispute, inquiry, lawsuit, legal accion, **legal proceedings**,

> litigation, pleadings, proceedings, suit, suit at law, trial" (emphasis added).

According to the said description it is apparent that the word 'matter' means legal proceedings that would include entire proceedings commencing from the arbitral proceedings to the final application for leave to appeal before the Supreme Court.

Learned President's Counsel for the respondent also contended that the said Malpethi Ratnasinghe, who had administered the affirmation in the affidavit filed before this Court has an interest in this application. Learned President's Counsel for the petitioner submitted that neither the fact of employment in the petitioner Company nor the fact that she had been the Instructing Attorney-at-Law for the petitioner in the High Court would not create in her an interest, which would be sufficient to disqualify Malpethi Ratnasinghe in terms of the proviso to section 12(2) of the Oaths and Affirmations Ordinance.

It is common ground that the said Malpethi Ratnasinghe is an employee of the petitioner as she is the Assistant Legal Officer of the Airport and Aviation Services (Sri Lanka) Ltd. It is not disputed that employees of an organization are stakeholders, who have an interest in the said organisation.

An affidavit is a statement given in writing made on oath or affirmation. The administration of an oath is therefore an essential requirement of a valid affidavit. It is also an important requirement that such an administration of an oath should be carried out by a person, who is permitted to do so under our law.

There are several decisions which had considered that affidavits sworn before the deponent's own Attorney ought not to be received. In **Jayatillake and another v Kaleel and others** ([1994] 1 Sri L.R. 319) Fernando, J., had referred to the decisions in **Pakir Mohidin v Mohamadu Casim** ((1900) 4 NLR 299), where Bonser, C.J., had stated that,

> "This affidavit ought not to have been received by the District Judge, for it was sworn before the deponent's own Solicitor, Mr. Abeysingha. The practice in England has been uniform,

> that an affidavit sworn under such circumstances will not be received, and we think that the English practice should be followed here, and I have in previous cases so held."

This position was carefully considered by Mark Fernando, J. in **Jayatillake and another v Kaleel and others** (supra), where it was clearly stated that,

> "In the course of the submissions it was observed that the counter-affidavits dated 29.01.92 of both petitioners had been sworn before one of the junior counsel appearing for them. Although it was suggested that he been retained only after 29.01.92, in fact his appearance had been mentioned on 13.01.92 and 27.01.92. In **Pakir Mohidin v Mohamadu Casim**, it was held by Bonser, C.J., that an affidavit sworn before the deponent's own Proctor ought not to be received in evidence (see also **Cader Saibu v Sayadu Beebi** ((1900) 4 NLR 130). This rule of practice has been consistently observed and would apply to an Attorney-at-Law today. . . .Mr. Athulathmudali moved for permission to file fresh affidavits in identical terms, but sworn before an independent Justice of the Peace. However, Mr. Choksy stated that the respondents did not object to the affidavits being received. It is in those circumstances that we refrained from rejecting these affidavits, without in any way intending to weaken the authority of **Pakir Mohidin v Mohamadu Casim**."

As stated earlier, learned President's Counsel for the respondent raised the preliminary objection stating that the affidavit being defective should be rejected and in these circumstances this matter differs from the situation which occurred in **Jayatillake and another v Kaleel and others** (supra), where there was no objection raised for filing fresh affidavits. In the circumstances, it is necessary to follow the decision of this Court in **Pakir Mohidin v Mahamadu Casim**, (supra) and **Jayatillake and another v Kaleel and others** (supra).

Considering the totality of the aforementioned circumstances thus it is apparent that the said Malpethi Ratnasinghe, being the Assistant Legal Officer of the petitioner Company and the Attorney-at-Law for the petitioner at the arbitration proceedings and in the High Court, is a person, who has an interest in the leave to appeal application before the Supreme Court. Accordingly the affidavit filed along with the petition is not in compliance with the proviso to section 12(2) of the Oaths and Affirmations Ordinance. In such circumstances considering all the aforementioned, the affidavit filed by the petitioner has to be rejected.

For the reasons aforesaid, I uphold the preliminary objection raised by the learned President's Counsel for the respondent and this leave to appeal application is dismissed *in limine*. I make no order as to costs.

Judge of the Supreme Court

P.A. Ratnayake, J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

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

S.C. (Spl.) L.A. No. 335/2008

Court of Appeal No. 260/2003 (Writ)

Woodman Exports (Pvt.) Ltd.,
No. 7, Station Road,
Colombo 03.

Petitioner-Petitioner

Vs.

1. Commissioner-General of Labour,
   Labour Secretariat,
   Colombo 05.

2. M.N.S. Fernando,
   Deputy Commissioner-General of Labour
   (Termination Unit),
   Labour Secretariat,
   Colombo 05.

3. All Ceylon Commercial and Industrial Workers Union,
   No. 257, Union Place,
   Colombo 02.

4. G. Keerthiratne,
   Usgodella Watte,
   Pannipitiya.

5. G. Ajith Kumara,
   Sarasi Lane,
   Thalpitiya North,
   Wadduwa.

6. Thanuja Nishantha Silva,
   No. 150, Punyananda Mawatha,
   Digbadda,
   Panadura.

7. W.G. Kamalawathi,

8. F.H. Madura H. Silva,

9. S.M.D.M.A.K. Senaratne,

10. N.D.C.I. Senanayake,

11. R.C. Lakpriya Fernando,

12. Basil Milton Silva,

13. P.L. Kamal Perera,

14. H. Nimal Ranjith de Silva,

15. G.C. Rupasinghe,

16. M.S. Asoka Silva,

17. K.P.M.D. Roshan Perera,

18. A. Somawathie de Silva,

19. P.D.R. Priyanjalie,

20. B.A.D. Wathsala,

21. Aruna Deva Ranasinghe,

22. K.M.P.J. Saman Silva,

23. L.Sathis Piyasiri Silva,

24. Nuwan Kumara Abeysinghe,

25. Kaumadhi A. Kandamulla,

26. Indika Aruna Kumara,
27. K.L. Sumith Somawansa,

28. R. Mendis Perera,

29. L.E.L.D.C. Senanayake,

30. B.K. Nirendra Fernando,

31. I.D. Thusith,

32. G.Ajith Perera,

33. P.S.P. Rodrigo,

34. H.A.C.P. Hettiarachchi,

35. M.B. Wanigasekera,

36. L.R. Milton Silva,

37. B.H. Sujith Peiris,

38. M. Ajith Rohana Ferdinando,

39. A.W. Tranchel.

Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Chandra Ekanayake, J.

COUNSEL : Romesh de Silva, PC., with Sugath Caldera for
Petitioner-Petitioner

N. Wigneswaran, SC, for 1st and 2nd Respondents-Respondents

S. Sinnathamby with Srinath Perera for 3rd Respondent-Respondent

ARGUED ON: 13.05.2010

WRITTEN SUBMISSIONS
TENDERED ON: Petitioner-Appellant : 15.06.2010
1st & 2nd Respondents-Respondents: 15.06.2010
3rd Respondent-Respondent : 12.07.2010

DECIDED ON: 13.12.2010

Dr. Shirani A. Bandaranayake, J.

This is an application for Special Leave to Appeal filed by the petitioner-petitioner (hereinafter referred to as the petitioner) from the judgment of the Court of Appeal dated 21.11.2008. By that judgment the Court of Appeal had dismissed the petitioner's application for the issue of a mandate in the nature of a writ of certiorari and/or mandamus. The petitioner came before this Court by way of a Special Leave to Appeal application.

When this matter was taken for support for Special Leave to Appeal, learned State Counsel for the 1st and 2nd respondents-respondents (hereinafter referred to as the 1st and 2nd respondents) took up the following preliminary objections.

1. the petitioner had failed and/or neglected to tender with his application such numbers of copies as is required for service on the respondents?

2. that the petitioner has failed to name the necessary parties to this application

and therefore the petitioner had failed to comply with Rules 8(3) and 8(5) of the Supreme Court Rules 1990.

Learned Counsel for the 3rd respondent-respondent (hereinafter referred to as the 3rd respondent), whilst agreeing with the aforementioned preliminary objections raised by the learned State Counsel for the 1st and 2nd respondents, also took up the following preliminary objection.

> "The petitioner had failed to file an amended petition with the amended caption."

At the stage of hearing learned Counsel for the 3rd respondent submitted that he would be relying on the preliminary objections raised by the learned State Counsel for the 1st and 2nd respondents. Accordingly the objections were taken up on the basis that the petitioner had not complied with Rules 8(3) and 8(5) of the Supreme Court Rules of 1990.

The said Rules 8(3) and 8(5) are as follows:

> "8(3) - The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any of the Attorney-at-law, if any, who has been retained to appear for him at the hearing

of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars.

8(5) - The petitioner shall, not less than two weeks and not more than three weeks after the application has been lodged, attend at the Registry in order to verify that such notice has not been returned undelivered. If such notice has been returned undelivered, the petitioner shall furnish the correct address for the service of notice on such respondent. The Registrar shall thereupon dispatch a fresh notice by registered post, and may in addition dispatch another notice, with or without copies of the annexures, by ordinary post."

Both Rules 8(3) and 8(5) are contained in Part I of the Supreme Court Rules 1990, which deals with Special Leave to Appeal applications. Considering the contents of the said Rules 8(3) and 8(5), it is quite obvious that the preliminary objections are raised only on the basis of the 1st ground, viz., that the petitioner had failed and/or neglected to tender with his application such number of copies as is required for service on the respondents.

Learned State Counsel for the 1st and 2nd respondents contended that the petitioner had not taken steps to tender the notices to the Registry of the Supreme Court for 5 months from the date of filing of the petition. Learned State Counsel further submitted that even after the Court had directed the petitioner to issue notice, the said notices were tendered nearly 2 months after the said direction of the Court.

Learned President's Counsel for the petitioner contended that the petition was filed on 23.12.2008 and thereafter on 20.03.2009, as the notices were not served, the Court had directed that the matter be supported with notice to the respondents. Learned President's Counsel for the petitioner therefore contended that on 14.05.2009, notices with documents were sent to the 1st to 6th respondents. Learned President's Counsel for the petitioner relied on the decision in **Nanayakkara v Kyoko Kyuma and two others** (S.C. (Spl.) L.A. No. 115/2008 – S.C. Minutes of 01.10.2009), where it had been stated that,

> "Supreme Court Rules too should be interpreted in a comparable manner, wherever it permits, in order to avoid the said Rules too becoming a juggernaut car on the fast tract, that would leave a litigant maimed and broken on the road which leads to justice."

Having stated the submissions made by both learned Senior State Counsel for the 1st and 2nd respondents and the learned President's Counsel for the petitioner, let me now turn to consider whether the petitioner had complied with Rules 8(3) and 8(5) of the Supreme Court Rules, 1990.

The Journal Entries of the original Record of this Court clearly indicate that the petitioner had filed this application for Special Leave to Appeal in the Supreme Court on 23.12.2008. Thereafter the petitioner, by way of his motion dated 22.01.2009, had tendered the document marked Y_5 and had moved to list the application for support. On 03.02.2009, the Registrar had made an entry stating that the notices had not been tendered. Thereafter on 20.03.2009, this application had been listed for support. On that day the Court had made the following order:

> "Notices have not been given to the respondents in this matter. Court directs the petitioner to support this application with notice to the parties.
>
> To be supported on 20.05.2009."

Thereafter on 14.05.2009, it is noted that notices (with documents) had been sent by registered post to the 1st to 6th respondents. When the matter came up on the next date there had been no appearance for the respondents and on 25.05.2009 it is mentioned that the notices sent to the 4th and 6th respondents had been returned undelivered with the endorsement that "no such name at Pannipitiya" and "no such person". The Registrar of the Supreme Court had taken steps to inform the Attorney-at-Law for the petitioner of this position in order to take necessary action, which had been carried out on 29.05.2009. Thereafter the petitioner by way of a motion dated 05.06.2009 had informed that the correct address of the 4th respondent is the address that was given in the Writ application, which was before the Court of Appeal and had requested that the notices to be dispatched to the said address. Notices were thereafter sent to the respondents on 09.06.2009. When this matter was taken up for support on 15.07.2009, learned State Counsel appeared for the 1st and 2nd respondents and there was no appearance for the other respondents. Learned State Counsel on that day had taken up the preliminary objection stating that no notices were tendered in terms of Supreme Court Rules to the Registry to be severed on the respondents and the matter was fixed for support to consider the said preliminary objection.

It is not disputed that the Special Lave to Appeal application was filed on 23.12.2008. It is also not disputed that the petitioner had dispatched the notices only on 14.05.2009.

Rule 7 of the Supreme Court Rules, 1990 refers to the mandatory requirement of making an application for Special Leave to Appeal within six weeks of the order, judgment, decree or sentence of the Court of Appeal on which Special Leave to Appeal is sought. Rule 8(3) of

the said Rules, specifies that along with the application for Special Leave to Appeal the petitioner shall tender such number of notices as is required for service on the respondents. Therefore in terms of Rule 8(3) of the Supreme Court Rules 1990, it is a mandatory requirement that notices be tendered along with the petitioner's application for Special Leave to Appeal. In terms of that requirement it is clear that the petitioner should have tendered the requisite notices on 23.12.2008.

This requirement referred to in Rule 8(3) of the Supreme Court Rules have been laid down for a specific purpose and such purpose is clearly illustrated in Rule 8(4), where it has been stated that when the petitioner has lodged his application for Special Leave to Appeal, the Registrar should insert in the said notices,

a) the Supreme Court number allotted to the said application; and

b) the date for hearing of that application.

The requirements that should be fulfilled by the petitioner regarding his application for Special Leave to Appeal are not limited to the above. In terms of Rule 8(5), the petitioner, not less than two weeks and not more than three weeks after the application for Special Leave to Appeal has been lodged, should attend at the Registry in order to verify that such notice has not been returned undelivered. In the event if such notice has been returned undelivered, the petitioner should furnish the correct address for the Registrar to dispatch a further notice by registered post on the respondents. The said requirements under Rule 8(5) clearly indicate that the petitioner should tender the notices on the day he filed the petition, and in the event there had been a situation where the notices were returned, then the petitioner should furnish the correct address for the service of notice on such respondent, within three weeks from the date of the filing of the application.

As stated earlier, the petitioner had tendered the relevant notices 4½ months after the filing of the petition for Special Leave to Appeal.

In **Samantha Niroshana v A.M.S.S. Abeyruwan nee Gunasekera** (S.C. (Spl.) L.A. Application No. 145/2006 – S.C. Minutes of 02.08.2007), the petitioners had filed 3 sets of notices **18 weeks** after the filing of the application for Special Leave to Appeal. This Court, after considering all the circumstances of that application, held that this was clear non-compliance with Rules 8(3) and 8(5) of the Supreme Court Rules. In **Samantha Niroshana** (supra) consideration was also given to the applicability of Rule 40 of Supreme Court Rules, 1990.

Rule 40 of the Supreme Court Rules, refers to both Rules 8(3) and 8(5) and spells out the procedure that should be followed in the event there is a need for a variation on an extension of time. The said Rule 40 reads as follows:

> "An application for a variation, or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge nominated by the Chief Justice, in Chambers:
>
> a) tendering notices as required by Rules 8(3) and 25(2);
>
> . . . .
>
> d) furnishing the address of a respondent as required by Rules 8(5) and 27(3);
>
> . . . . "

Rule 40 of the Supreme Court Rules therefore specifically refers to the need for a petitioner to carefully follow the procedure laid down in Rules 8(3) and 8(5). If the petitioner needs for a variation or an extension of time for the purpose of tendering notices for service as required in Rule 8(3) or to furnish the correct address in terms of Rule

8(5), then it would be necessary to follow the procedure laid down in Rule 40 of Supreme Court Rules, 1990.

As stated earlier, the application for Special Leave to Appeal was filed on 23.12.2008 and notices had been sent to 1st to 6th respondents only on 14.05.2009. It is not disputed that during the period 23.12.2008 to 14.05.2009, none of the steps referred to in Rules 8(3), 8(5) and 40 had been carried out by the petitioner.

Thus on a careful consideration of all the aforementioned circumstances, it is obvious that there is clear non-compliance by the petitioner, not only with Rules 8(3) and 8(5), but also with Rule 40 of the supreme Court Rules.

As has been stated in **Samantha Niroshana** (supra) and in **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd.** (S.C. (Spl.) L.A. Application No. 286/2007 – S.C. Minutes of 27.02.2008), I am quite mindful of the fact that mere technicalities should not be thrown in the way of the administration of justice. Furthermore, I am also mindful of what I had stated in **Nanayakkara V Kyoko Kyuma and two others** (supra) that the Supreme Court Rules should be interpreted in a comparable manner. Moreover, I am in respectful agreement with the observations made by Bonser, C.J., in **Wikramatillake v Marikar** ((1895) 2 N.L.R. 9) referring to Jessel, M.R., in **Re Chenwell** (8 Ch.D. 506) that,

> "It is not the duty of a Judge to throw technical difficulties in the way of the administration of Justice, but when he sees that he is prevented receiving material or available evidence merely by reason of a technical objection, he ought to remove the technical objection out of the way upon proper terms as to costs and otherwise."

Having referred to the above it was also stated in **Samantha Niroshana** (supra) and in **A.H.M. Fowzie and two others** (supra) that it has also to be borne in mind that the purpose of the Supreme Court Rules is to ensure that all parties are properly notified in order to give a hearing to all parties.

Accordingly as I had stated in **Samantha Niroshana** (supra) and **A.H.M. Fowzie and two others** (supra), an objection raised on the basis of non-compliance with a mandatory Rule such as Rule 8 of the Supreme Court Rules, 1990 cannot be considered as a mere technical objection.

It is thus apparent that the non-compliance with a mandatory Rule by a party could lead to serious erosion of well established Court procedures maintained by our Courts throughout several decades and therefore the failure to comply with Rule 8(3) of the Supreme Court Rules would necessarily be fatal.

A long line of cases of this Court had decided that non-compliance with Rule 8(3) would result in the dismissal of the application (**K. Reaindran v K. Velusomasunderam** (S.C. (Spl.) L.A. Application No. 298/99 – S.C. Minutes of 07.02.2000), **N.A. Premadasa v The People's Bank** (S.C. (Spl.) L.A. Application No. 212/99 – S.C. Minutes of 24.02.2000), **Hameed v Majbdeen and others** (S.C. (Spl.) L.A. Application No. 38/2001 – S.C. Minutes of 23.07.2001), **K.M. Samarasinghe v R.M.D. Ratnayake and others** (S.C. (Spl.) L.A. Application No. 51/2001 – S.C. Minutes of 27.07.2001), **Soong Che Foo v Harosha K. De Silva and others** (S.C. (Spl.) L.A. Application No. 184/2003 – S.C. Minutes of 25.11.2003), **C.A. Haroon v S.K. Muzoor and others** (S.C. (Spl.) L.A. Application No. 158/2006 – S.C. Minutes of 24.11.2006), **Samantha Niroshana v Senerath Abeyruwan** (S.C. (Spl.) L.A. Application No. 145/2006 – S.C. Minutes of 02.08.2007), **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd.** (S.C. (Spl.) L.A. Application No. 286/2007 – S.C. Minutes of 27.02.2008).

For the reasons aforesaid, I uphold the preliminary objection raised by the learned State Counsel for the 1st and 2nd respondents and dismiss the petitioner's application for Special Leave to Appeal for non-compliance with the Supreme Court Rules, 1990.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court