SRI LANKA
SUPREME COURT
Judgements Delivered (2009)

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

In the matter of an application under and in terms of Article 99(13)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Mohamed Shihabdeen Seyed Ameer Ali alias Ameer Ali Shihabdeen

Petitioner

SC Application Special [Expulsion] No. 01/2009

Vs.

1. Sri Lanka Muslim Congress
   "Dharussalam",
   51, Vauxhall lane, Colombo 2.
2. Rauff Hakeem
   Leader
   Sri Lanka Muslim Congress
   "Dharussalam",
   51, Vauxhall lane, Colombo 2.

3. M.T. Hassan Ali
   Secretary General
   Sri Lanka Muslim Congress
   "Dharussalam",
   51, Vauxhall lane, Colombo 2.

4. Dammika Kitulgoda
   Acting Secretary General of Parliament
   Parliament of Sri Lanka
   Sri Jayawardenapura, Kotte

5. Dayananda dissanayake
   Commissioner of Elections
   Elections Secretariat
   Sarana Road, Rajagiriya.

Respondents

Before : **J.A.N. de Silva J.**
Jagath Balapatabendi J.
S.I. Imam J.

Counsel: D.S. Wijesinghe P.C. with N.M. Shaheid and Kaushalya Molligoda instructed by Earnest Law Chambers for the Petitioner.

M. Nizam Kariappar with A.M. Faiz, M.C.M. Nawaz, M.I.M. Iynullah and A. Rajah instructed by R. Rupasinghe for 1st to 3rd Respondents.

S. Rajaratnam D.S.G. for 4th and 5th Respondents**.**

Argued on :

Decided on:

J.A.N. de Silva J

The Petitioner in this application has been a member of the 1st Respondent party Sri Lanka Muslim Congress (SLMC). He contested the general elections held in April 2004 from the Batticoloa district as a candidate nominated by the SLMC and returned to Parliament as the only successful candidate of the SLMC from that district.

The Petitioner has filed this application in terms of the proviso to Article 99(13) (a) of the Constitution seeking a declaration from this court that his purported expulsion from the SLMC on the ground he lost his membership is invalid and the seat held by him in Parliament has not become vacant consequent to such expulsion. This case has deep tangled roots.

The circumstances leading to the impugned expulsion is as follows.

After the General Elections in the year 2004 there had been some conflicting opinions amongst the members of the SLMC whether to support the government in power or to sit in the opposition.

The Petitioner has been of the view that it was important to extend support to the government in its endeavour to arrive at a lasting solution to the ethnic issue in the larger national interest as well as in the interest of the Muslim community of the country. Hence the Petitioner with some other SLMC members joined the government.

On or about 30-10-2004, the Petitioner took oaths as Minister of Rehabilitation and District development (Batticoloa district) of the United People's Freedom Alliance (UPFA) government.

Consequent to the Petitioner taking oaths as Minister of Rehabilitation and District Development in the UPFA government, the SLMC and its leader initiated disciplinary proceedings against him. The Petitioner alleged that the whole process was illegal, violative of the basic principles of natural justice and tainted with arbitrariness and mala fides. However the process culminated in the SLMC deciding to expel the Petitioner from the membership of that party. That decision was communicated to the Petitioner on 4-4-2005.

The Petitioner challenged the said purported decision of the SLMC in this court (in application no 2/2005) and the Supreme Court on 1-7-2005 declared that the expulsion of the Petitioner was invalid. According to the Petitioner after the decision of the Supreme Court he continued to

be a member of the SLMC. However the SLMC did not thereafter invite him for any of its Parliamentary group meetings or other group or party meetings.

The Petitioner states that thereafter he continued to serve the people of Batticoloa in his capacity as a Member of Parliament.

The Petitioner states that he became aware that on or about October 2005 a group of SLMC members had joined hands in forming a political party by the name of All Ceylon Muslim Congress (ACMC). This was a political party established under and in terms of the provisions of the Parliamentary Elections Act no 1 of 1987. According to the Petitioner All Ceylon Muslim Congress was formed to carry forward the principles and standards introduced by the late leader of SLMC Mr. Ashroff and which principles and standards were being grossly disregarded by the current leadership of the SLMC.

The Petitioner has admitted in the above circumstances he was openly supportive of the cause of the ACMC and its underlying Policies and attended several meetings and public gatherings.

According to the Petitioner the 2nd Respondent the leader of the SLMC too was seen and present at those meetings. The Petitioner's position is that despite the close association and participation in the activities of the ACMC he continued to be a member of the SLMC with the full knowledge and acquiescence of the leader of the SLMC, Mr. Rauf Hakeem.

In the year 2005 with the election of the new president his Excellency Mahinda Rajapakse the Petitioner took oaths as the Minister of Disaster and Relief services, a Minister of non cabinet rank.

Approximately one year after Petitioner joined the government the 2nd Respondent the leader of the SLMC too crossed to the government with other elected members of SLMC. He was given a Cabinet rank ministry viz. Minister of Post and Telecommunications. According to the Petitioner, in December 2007, Just before the 3rd reading of the Budget the 2nd Respondent crossed back to the opposition with the idea of destabilizing the government. (The Respondents of course state that they crossed back due to non fulfillment of promises given to them)

On 16-11-2008 the Petitioner received an invitation by the ACMC to participate in a conference at Ammer Hall Puttalam. Among the invitees there had been several SLMC members and Parliamentarians. At the said conference various names were suggested for various office bearers of ACMC. The Petitioners name was suggested for the post of Chairman of the ACMC. On or about 27-11-2008 a press conference had been organized by ACMC at Galadari Hotel Colombo and at the said press conference the Petitioner had been referred to as the Chairman of the ACMC although his name had merely been suggested for the said post at the delegate conference of the ACMC, to which he had not expressed any objection as ACMC ideology was identical to that of SLMC.

According to the Petitioner soon after the press conference the secretary general of the ACMC met the Petitioner and handed over to him a membership application from ACMC informing him that in order to be appointed as Chairman it was necessary that he submits his application form for obtaining membership of the Party. It was also brought to the notice of the Petitioner that to be an office bearer of ACMC the constitution requires that a membership is a must. At this stage the Petitioner had promptly informed the Secretary General of ACMC that he is unable to become a member of ACMC and confirmed his position in writing.

In these circumstances the Petitioner states that he was never appointed as the Chairman of the ACMC and/or became a member of that party.

By letter dated 15th December 2008 the secretary general of SLMC the 3rd Respondent in this case wrote to the Petitioner informing him amongst other things that

> "It was reported in many news papers and electronic media that you are elected as Chairman of a political party viz. All Ceylon Muslim Congress: as a result you have lost your membership in SLMC the party from which you were nominated to contest the; last general election".

The same letter directed the Petitioner to publish a correction if the facts referred to therein were false and also in the event of his failure to do so SLMC will take action on the basis that the Petitioner has lost his membership in SLMC.

The Petitioner received this letter on the 29th of December on his return from India and on the 30th in writing protested to the contents of the letter and gave a detailed account of what transpired at the conference and the subsequent press briefing. In this letter the Petitioner stated thus.

"The high command appears to have arrived at its decision on news paper reports without verifying the correct position". The Petitioner has released a copy of his reply to several media agencies as per the request of SLMC in the letter date 15-12-2008. He further stated that to his knowledge the island newspaper and daily news on 6-1-2009 carried this explanation.

On the 24th of February 2009, the Secretary General of SLMC wrote back to the Petitioner (P12) informing him that the party high command rejected his explanation as he had not complied with the directions given in the earlier letter. Amongst other things the letter also carried the following passage.

> "Therefore the high command of Sri Lanka Muslim Congress came to the conclusion that the matters contained in your letter dated 30-12-2008 are not correct and written only for the purpose of retaining the membership in Parliament".

Thereafter the Petitioner by his letter dated 5-3-2009 again protested against the said purported decision of the high command specifically to the reference that he "lost" his membership in the Sri Lanka Muslim Congress. But the 3rd respondent has reiterated that there is no change in the position of the SLMC by letter dated 20-3-2009.

MR. Nizam Kariappar who appeared for the Respondents raised the objection that the Petitioner's application as presently constituted is misconceived in law and the Petitioner is not entitled to challenge the decision as there has been no expulsion of the Petitioner from the party and he has ipso facto ceased to be a member of the party.

Mr. D.S. Wijesinghe P.C. submitted that the SLMC rejected the explanation and the subsequent publication of the same on the basis that it was not up to the expectation of the high command even without telling the Petitioner what they really expected. He submitted that the Petitioner did what was told to him in P9 and released it to the press. The Petitioner was not called upon by the letter of the 3rd respondent dated 15-12-2008 to hold a press conference and inform the public that he has not accepted the post of chairmanship of ACMC he was only called upon to correct unspecified news item if it were false, which the Petitioner had complied with what was told to him. In the above circumstances the learned counsel submitted that the contents of P12 i.e. the decision of the high command is illegal, contrary to all basic norms of reasonableness and natural justice, capricious and highly loaded with mala fides.

In summary the learned counsel submitted that

(a) The said letter and the purported decision of the high command is based on a nonexistent factual platform and based on a completely erroneous assumption that the Petitioner had failed to correct unspecified and erroneous news items.

(b) The Petitioner was not informed of any specific newspaper or papers which carried this news in the letter sent to him (P9).

(c) The contents of the said letter are self contradictory and perverse in as much as it is unconceivable as to what action could be taken against the Petitioner if he has already lost his membership in the SLMC.

(d) In the letter there is no reference to the provisions of the constitution of the SLMC under which the Petitioner is alleged to have lost his membership of the SLMC.

(e) In the totality of circumstances the said purported decision of the high command of the SLMC as communicated by the letter of the 3rd respondent dated 24-2-2009 for all intents and purposes, a decision to expel the Petitioner from SLMC. The phrase "lost your membership" is a ruse adopted by the SLMC to prevent the Petitioner from invoking the jurisdiction of this court.

In terms of Article 99(13)(a) there are three situations in which a member of a political party can cease from his membership in that party. Firstly the member can cease to be a member by "resignation". The second situation is that he is expelled from his party. The third situation, "otherwise" exist independent of resignation and expulsion, for example death.

Mr. Wijesinghe P.C. contended that the cessation of membership of a Member of Parliament cannot be determined by the label that has been affixed to a situation by the high command of the SLMC. It is indeed a question of fact and a determination has to be made after considering

all the attendant circumstances whether a member resigned his seat or was expelled or that he "otherwise" ceased to be a member. We are inclined to agree with the submissions of the learned counsel.

When the jurisdiction of the Supreme Court is invoked under Article 99(13)(a) there is duty cast on this court to examine the basis upon which the Petitioner is seeking relief.

In the expulsion case of Gamini Dissanayake v. M.C.M. Kaleel (1993 2SLR 135) Kulatunga J observed that "the right of a member of Parliament under Article 99(13)(a) is a legal right and forms part of his constitutional rights as a member of Parliament. If his complaint is that he has been expelled from the membership of his party in breach of the rules of natural justice he will be ordinarily entitled to relief and this court may not determine such expulsion to be valid unless there are overwhelming reasons warranting such a decision".

Again Justice Dheeraratne in Thilak Karunaratne v. Bandaranayake (1993 1 SLR 91) discussing the same Article of the constitution stated that "if the expulsion is determined to be valid the seat of the member becomes vacant. It is this seriousness of the consequences of expulsion which has prompted the framers of the constitution to invest unique original jurisdiction in the highest court of the island, so that a Member of Parliament be amply shielded from being expelled from his party unlawfully and/or capriciously".

Somewhat similar situation to the case in hand was discussed by the Supreme Court in Galappati v. Bulegoda (1997 1 SLR 393) where the Respondents claimed that the Petitioner was not expelled but he ceased to be a member of the party due to nonpayment and/or refusal to pay his membership fees for the year. The Supreme Court held that apart from the fact that the Respondents failed to prove that he ceased to be a member "there has been a violation of the audi alteram partem rule by the failure of the Respondents to hold an inquiry and to give opportunity to the Petitioner to meet the case against him" held that the expulsion was invalid.

Mr. Wijesinghe finally submitted that the SLMC has copied the disciplinary provisions of the United National Party and grafted them to the SLMC constitution without giving due consideration to the ill effects of those provisions.

The Petitioner has stated in his affidavit to this court as well as in the letters sent to the SLMC that he did not join the All Ceylon Muslim Congress nor at any time conducted his affairs to the detriment of the SLMC, but acted all the time with a view of furthering the fundamental founding principles of the SLMC. The Secretary General of the ACMC too has filed an affidavit denying that the Petitioner is a member of that party. He has named the person who is holding the position of chairmanship of ACMC.

In the light of the above circumstances it was the burden of the Respondents to place some evidence before the court to justify the conclusion they reach. Mr. Kariappar submitted that the Petitioner should have published his denial in Tamil papers as most of the members of the SLMC are Tamil speaking people from the eastern province. However it is noted that P9 does

not refer to any Tamil language papers. Even the high command refers to Thinakaran paper only at the meeting of 07th February 2009 vide (R6). One cannot expect the Petitioner to read the mind of the Respondents and the high command of SLMC and take remedial action accordingly. This court is satisfied that the Petitioner has complied with what was requested of him in P9.

On a consideration of the submission made by counsel and the other material placed before court we hold that the Respondents have failed in every respect to notify this court as to the validity of the conclusion they reached.

We accordingly declare that the contents of the letters dated 24-2-2009 marked P12 and confirmed by P14 is bad in law and quash the same. This application is allowed with costs payable to the Petitioner by the 1st, 2nd and 3rd Respondents. We also declare that the Petitioner has not ceased to be a Member of Parliament and that he continues to be and remain a member Parliament.

J.A.N. de Silva J

Jagath Balapatabendi J

S.I. Imam J

Judges 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.

International Cement Traders (Pvt) Ltd.,
No. 504/1, R.A. De Mel Mawatha,
Colombo 3.

- Petitioner-Petitioner -

S.C. Appeal No. 62/2003
C.A. No. 801/2000

Vs.

1. Hon. Sirimavo Bandaranaiake
   Prime Minister

2. Hon. Ratnasiri Wickremanayake
   Minister of Public Administration
   Home Affairs & Plantation Industries

3. Hon. Richard Pathirana
   Minister of Education and Higher Education

4. Hon. Amarasiri Dodangoda
   Minister of Vocational Training &
   Local Industries

5. Hon. Alavi Moulana
   Minister of Provincial Councils and
   Local Government

6. Hon. Mahinda Rajapakse
   Minister of Fisheries and Aquatic Resources

7. Hon. D.M. Jayaratne
   Minister of Agriculture and Lands

8. Hon. Mahinda Wijesekera
   Ministry of Forestry and Environment

9. Hon. Lakshman Jayakody
   Minister of Buddha Sasana and Cultural Affairs

10. Hon. D.P. Wickremasinghe
    Minister of Cooperative Development

11. Hon. Maithpala Sirisena
    Minister of Mahaweli Development

12. Hon. Sumedha Jayasena
    Minister of Social Services

13. Hon. Jayaraj Fernandopulle
    Minister of Plan Implementation
    and Parliamentary Affairs

14. Hon. Nimal Siripala de Silva
    Minister of Health and Indigenous Medicine

15. Hon. D.M.S.B. Dissanayake
    Minister of Samurdhi and Youth Affairs

16. Hon. Kingsley Wickremaratne
    Minister of Internal and International Affairs Commerce & Food

17. Hon. Batty Weerakoon
    Minister of Science and Technology

18. Hon. Dharmasiri Senanayake
    Minister of Tourism and Civil Aviation

19. Hon. A.H.M. Ashraff
    Minister of Port Development and Rehabilitation

20. Hon. Anuruddha Ratwatte
    Minister of Irrigation and Power

21. Hon. Indika Gunawardene
    Minister of Housing and Urban Development

22. Hon. A.H.M. Fowzie
    Minister of Transport and Highways

23. Hon. Lakshman Kadirgarmar
    Minister of Foreign Affairs

24. Hon. Prof. G.L. Peiris
    Minister of Justice, Constitutional Affairs,
    Ethnic Affairs and National Integration

25. Hon. A. Thondaman
    Minister of Livestock Development
    and Estate Infrastructure

26. Hon. Mangala Samaraweera
    Minister of Posts, Telecommunication and
    Media

27. Hon. Hema Ratnayake
    Minister of Women's Affairs

28. Hon. W.D.J. Seneviratne
    Minister of Labour

29. Hon. Nanda Mathew
    Minister of Shipping and Shipping
    Development

30. Hon. Sarath Amunugama
    Minister of Northern Rehabilitation

31. The Secretary, The Office of the Cabinet of
    Ministers,
    Republic Building,
    Colombo 01.

32. Director General of Customs,
    Sri Lanka Customs,
    Customs House,
    Colombo 01.

33. Hon. Attorney-General,
    Attorney General's Chambers,
    Colombo 12.

Respondents- Respondents

Before : **Sarath N. Silva, CJ.**

K.Sripavan, J.

P.Ratnayaka, J.

Counsel : L.C. Seneviratne, P.C., with Dinal Phillips and R. Panabokke for Petitioner-Petitioner.

(Mrs.) S.W.F. Jameel , Deputy Solicitor General for the Respondents - Respondents

Argued on : 20.03.2009

Written Submissions of the Petitioner-Petitioner filed on : 30.03.2009

Reply of the Respondents-Respondents filed on : 03.04.2009

Decided on : 28.05.2009

SRIPAVAN, J.,

The Petitioner- Petitioner (hereinafter referred to as the Petitioner) is a limited liability company engaged in the import of Portland cement into Sri Lanka in bulk from Malaysia. The petitioner company alleges that on or about 23rd June 2000, the then Minister of Finance and Planning purported to act under Section 2 of the Revenue Protection Act No. 19 of 1962, made an order imposing a preferential rate of Import duty of 9.5% on cement of Indian origin and increased the Import duty on cement imported from other countries from 10% to 25%. The said Order was published in the Government Gazette (Extra Ordinary) No. 1137/36 dated 23rd June 2000, marked **P6,** in terms of Section 2 (5) of the said Act.

The Petitioner challenges the said Order in so far as it relates to the importation of cement from countries other than India on the following grounds :

(1) That the said Order is ultra vires the powers conferred upon the Minister of Finance under Section 2 of the Revenue Protection Act.

(2) That it is arbitrary, capricious and discriminatory against the petitioner, the foreign investors and Malaysian nationals/companies who export cement to Sri Lanka.

(3) That is grossly unreasonable, misconceived in Law and is an abuse of the provisions of Section 2 of Act No. 19 of 1962 in that it is contrary to all notions of fair trading and favouring Indian Manufacturers to enable them to secure virtual monopoly of the Sri Lankan market.

Thus, the petitioner sought a Writ of Certiorari to quash the Order made by the then Minister of Finance and contained in the Customs notification (Revenue Protection Order No. 2 of 2000) marked **P6** in so far as it relates to cement imported from countries other than India. The Petitioner also moved for a Writ of Mandamus on the Director General of Customs to refund the excess Duty paid from 23rd June 2000 till the date of filing this application aggregating Rs. 8,445,996/=.

The Respondents-Respondents (hereinafter referred to as the Respondents), in their statement of objections filed by the Director General of Customs took upon the position that in view of the Bi-lateral Free Trade Agreement signed with India,

the Import duty on cement had to be phased out over a period of 8 years commencing with a reduction of Duty at 9.5%. Thus, the Import duty on cement from India was reduced to 9.5% and a rate of 25% Import duty was levied in respect of import of cement from all countries including Malaysia.

The reliefs sought by the petitioner was refused and the application was dismissed by the Court of Appeal on 25th March 2003. Special Leave to Appeal was granted by this Court on 11th September 2003 on the following questions of Law :

(1) Whether the notification in the Government Gazette marked **P6** constitutes delegated legislation, the validity which would be determined by a Court of Law.

(2) Whether the said notification marked **P6**, was arbitrary and ultra vires the provisions of Section 2 of the Revenue Protection Act, No. 19 of 1962.

(3) Has the Court of Appeal erred in Law in failing to consider whether the reasons given for the increased Duty on imported cement (other than from India) to 25% can be accepted in the light of the fact of this case as being genuine or justified.

(4) Whether the Court of Appeal has erred in law in failing to consider that the Gazette notification marked **P6** is not law, having regard to the fact that the Gazette notification marked **P12©** annexed to Dr. P.B.Jayasundera's affidavit deals with another Revenue Order.

(5) Whether the Petitioner, in Law, is entitled to a refund of the Duty paid in excess of 10% during the relevant period.

(6) Though the Government has wide latitude in imposing tax provisions, the increase of Import duty on cement was without any acceptable or valid grounds and was unreasonable, arbitrary and hence illegal.

Delegated legislation takes place when the legislature delegates its law making power relating to a subject matter to another body or authority. Though Acts of Parliament have sovereign force, the legislation made under delegated power can be valid so long as it conforms exactly to the power granted. It is therefore the duty of the Court to see that the statutory authority keeps itself within the bounds set forth by the Act. Though the notification in the Government Gazette marked **P6** is delegated legislation, I am unable to conclude that the Minister has transgressed the bounds so set forth by publishing the Gazette marked **P6.** In the case of an exercise of discretionary power, the Court cannot question the propriety of the discretionary decision of the Minister or the manner of exercising of such discretionary power except in cases of mala fides. In the present application, it is observed that no malice is specifically pleaded against the Minister. Granting a waiver or exemption of the Import duty may be absolute or conditional. It may be used for regulating the economy or to encourage or discourage the import of cement from certain countries or for securing the social objectives of the State.

The power to select the persons or goods on whom the import duty is to be imposed, the power to amend the schedule of exemption, the determination of the rates at which the imported goods are to be charged etc. are matters that fall within the competence of the legislature. The learned D.S.G. submitted that the Revenue Protection Order marked **P6** was approved by the Parliament by way of a resolution made in terms of Section 10 of the Customs Ordinance on 16th August 2000 and published in the Government Gazette (Extra Ordinary) No. 1156/6 dated 30th October 2000. Thus, it is observed that the Revenue Protection Order marked **P6** was in fact approved by the Parliament, by a resolution made in terms of Section 10 of the Customs Ordinance and published in Gazette as provided by law.. Accordingly, the relevant gazette notification which approved the decision contained in the Revenue Protection Order marked **P6** is not the Gazette notification marked **P12©,** but the Gazette (Extra Ordinary) No. 1156/6 dated 30th October 2000 and annexed in these proceedings marked X.

If the relief of Writ of Certiorari is granted by Court as sought by the petitioner, then cement could be imported from any country other than India without payment of any import duty. It may be appropriate to reproduce the following passage from the determination made by the Supreme Court in S.C. Special Determination No. 17/97 (Decided on 10.6.97) which followed the judgment of *Venkatachaliah* J. in the case of *Ashwathanarayana Setty* vs. *State of Karnataka* 1989 Sup. 1 SCC 696 :-

> "Though other legislative measures dealing with economic regulations are not outside article 14, it is well recognized that the State enjoys the widest latitude where measures of economic regulations are concerned. These measures for fiscal and economic regulations involve as evaluation of diverse and quite often conflicting economic criteria and adjustment and balancing of various conflicting social and economic values and interests. It is for the State to decide what economic and social policy it should pursue and what discriminations advance those social and economic policies. In view of the inherent complexity of these fiscal adjustments, courts give a larger discretion to the legislature in the matter of its preferences of economic and

social policies and effectuate the chosen system in all possible and reasonable ways".

In view of the foregoing, I hold that the impugned Revenue Protection Order marked **P6 ,** which was subsequently approved by Parliament is not open to attack on the ground that it imposes an import duty on a discriminating basis amongst different countries as the State has a wide discretion in selecting persons , countries or objects it will tax.

If the contention of the Petitioner Company is that it has paid Duty in excess of what was due, then it should have resorted to the provisions contained in Section 18 of the Customs Ordinance which deals with the manner in which any excess payment be refunded. The Petitioner, without resorting to the provisions of Section 18 of the Customs Ordinance cannot seek an Order of Mandamus from this Court for a refund. It has been constantly held by this Court that mandamus is not granted at the fancy of mankind. Since the Petitioner Company has failed to make any claim for a refund as provided in Section 18 of the Customs Ordinance, the Writ of Mandamus sought is also refused.

For the reasons stated, the judgment of the Court of Appeal dated 25.03.2003 is affirmed. The appeal is dismissed in all the circumstances without cost.

Judge of the Supreme Court

Sarath N. Silva, CJ.

I agree.

Chief Justice

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 under and in terms of Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

Liyanaarachchige Samurddhi Chakra Tillekeratne,
"Rajasri", 879 /30,
Waragoda Road,
Singharamulla,
Kelaniya

- *Petitioner*-

S.C.(F.R.) Application No. 653/2009

Vs.

1. The University Grants Commission,
   No. 20, Ward Place,
   Colombo 7.

2. The University of Sri Jayawardenapura,
   Gangodawila,
   Nugegoda.

3. The University of Colombo,
   "College House",
   94, Cumaratunga Munidasa Mawatha,
   Colombo 3.

4. Thirani Gimhani Pathirana,
   No. 44, Athurugiriya Road,
   Homagama.

5. Hon. Attorney-General,
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.

- *Respondents* –

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

K.Sripavan, J.,

Chandra Ekanyake, J.

Counsel : D.S. Wijesinghe, P.C., with Priyantha Jayawardana and K. Molligoda for Petitioner.

Arjuna Obeysekera, SSC for 1st to 3rd & 5th Respondents.

Asitha Devendra for the 4th Respondent.

Argued on : 09.09.2009

Decided on : 11.09 .2009

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

Having granted leave to proceed for the alleged infringement of Article 12 (1) of the Constitution, Learned President's Counsel for the Petitioner and the Learned State Counsel for the 1st to 3rd and 5th Respondents invited Court to take up the application for hearing in view of the grave urgency in the matter which relates to an inter-university transfer.

The 1st Respondent is the University Grants Commission established by the Universities Act No. 16 of 1978 as amended (hereinafter referred to as the said Act) and has the power to select students for admission to each Higher Educational Institution in terms of Section 15(vii) of the said Act. The Petitioner gained admission to the MBB.S. Degree Programme for the academic year 2008/2009 at the Faculty of Medicine of the 2nd Respondent whilst the 4th Respondent gained admission to the M.B.B.S. Degree Programme for the same academic year at the Faculty of Medicine of the 3rd Respondent.

Learned President's Counsel submitted that on 31st July 2009, the date on which the Petitioner registered at the 2nd Respondent University, she submitted an appeal to the 1st Respondent Commission seeking a transfer to the Medical Faculty of the 3rd Respondent University. It is not in dispute that the Petitioner received an

acknowledgement from the 1st Respondent Commission dated 8th August 2009, marked **P4,** stating that an appeal for an inter-University transfer would depend on the availability of vacancies and the order of the Z score and that the Petitioner should continue her studies at the University which had been already assigned until the formal letter of transfer is sent by the 1st Respondent Commission. Learned President's Counsel urged that at the Orientation Programme held on 24th August 2009, the Petitioner met another student who informed that her twin sister who got admission to the Faculty of Medicine of the 3rd Respondent University had made an application for a transfer to the Faculty of Medicine of the 2nd Respondent University. The said twin sister is the 4th Respondent in this application.

Learned State Counsel did not contest the reasons contained in the appeal letters of both the Petitioner and the 4th Respondent, marked **P3** and **P7** respectively. Thus, the only question to be considered by the Court is whether in the circumstances referred to in the two appeal letters, the inter-University transfers have to be permitted or not.

The admission Handbook of the 1st Respondent Commission marked **P2b** spells out the admission procedure. The following Clauses may become relevant for consideration by Court.

> **Clause 11.3 -** The successful candidates will be informed of their course of study and the University to which they have been selected. If they accept the offer, they should register with the University concerned when called upon to do so within the time period stipulated by the UGC.
>
> **Clause 12a** - Vacancies due to no registration of students selected under the merit quota, will be filled on an all island merit basis.

Clause 12b – Vacancies due on no registration of students selected under the District quota, will be filled on a district merit basis. Vacancies in a particular district will be filled with students from the same district.

Thus, it could be seen that once the vacancies are filled in the aforesaid manner, the assignment of students to the Universities comes to an end. However, in terms of Clause 14.1 , any student who wishes to get an inter-University transfer may make an appeal to the Appeals Committee appointed by the 1st Respondent Commission in terms of Clause 15. Such an appeal may be entertained by the Appeals Committee subject to certain conditions laid down in the said Clause.

The Learned State Counsel was unable to refer to any statutory provision under the said Act which empowers the 1st Respondent Commission to appoint an Appeals Committee. Thus, a further issue arises as to whether the creation of an Appeals Committee was intra vires, the powers of the 1st Respondent as contained in Section 15 of the said Act.

Learned President's Counsel contended that the Petitioner would be at a severe disadvantage by reason of the inordinate delay in effecting her transfer, in as much as, the academic programmes at the Faculty of Medicine of the 3rd Respondent University has commenced. The only contention of the learned State Counsel was that if a vacancy occurs in the 3rd Respondent University, the said vacancy has to be filled by C. Raguraj (Index No. 9372741) whose Z Score was higher than that of the Petitioner. The Court is at a loss to understand the basis on which C. Raguraj with a Z Score of 2.3311 has been assigned to the University of Peradeniya by the Appeals Committee. The Court is of the view that the requests made by the Petitioner and the 4th Respondent by the documents marked **P3** and **P7** respectively, being fair and reasonable, would not cause any hardship or prejudice to the students already selected to follow a course of study in Medicine. The question of "availability of vacancy" to accommodate the Petitioner as alleged in **P4** too does not arise.

In the totality of the foregoing circumstances, the Court declares that the Fundamental Rights guaranteed to the Petitioner by Article 12(1) have been violated by the 1st Respondent by its failure to effect the inter-University transfer. Having carefully considered that contents of **P3** and **P7** and the hardships caused to the Petitioner and the 4th Respondent, acting in terms of Article 126(4) of the Constitution, this Court makes the following directions :

a. The 1st Respondent is forthwith directed to transfer the 4th Respondent to the Faculty of Medicine of the 2nd Respondent University for its M.B.B.S. Degree Programme for the academic year 2008/2009; and

b. The 1st Respondent is forthwith directed to transfer the Petitioner to the Faculty of Medicine of the 3rd Respondent University for its M.B.B.S. Degree Programme for the academic year 2008/2009.

The aforesaid Orders are personal to the Petitioner and the 4th Respondent and would not create a precedent to any inter-University transfers that may be effected by the 1st Respondent Commission in the future.

Chief Justice

K. Sripavan, 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 (FR) Application
No. 209/2007

Vasudeva Nanayakkara,
Attorney-at-Law,
Advisor to His Excellency
The President,
Secretary,The Democratic
Left Front,
49 1/1, Vinayalankara
Mawatha,
Colombo 10.

Petitioner

Vs.

1. K.N. Choksy, PC., MP.,
Former Minister of
Finance,
No. 23/3, Sir Ernest de
Silva Mawatha,
Colombo 07.

2. Karu Jayasuriya, MP.,
Former Minister of Power
and Energy,
No. 2, Amarasekera
Mawatha,
Colombo 05.

3. Ranil Wickremesinghe,
MP,Former Prime Minister,
No. 115, 5th Lane,
Colombo 03.

and 28 others

RESPONDENTS

And now between,

Dr. P.B. Jayasundera,
No. 761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.

8th Respondent-Petitioner

Vs.

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

31st Respondent-Respondent

BEFORE : J.A.N. de Silva, CJ.
Dr. Shirani A.Bandaranayake, J.
Shiranee Tilakawardane, J.
S. Marsoof, PC, J.
Jagath Balapatabendi, J.
K. Sripavan, J. &
P.A. Ratnayake, PC,J.

COUNSEL : M.A. Sumanthiran with Viran Corea for the Petitioner

Faiz Musthapha, PC., with Anura Meddegoda and Lakdini Perera for the 8th Respondent-Petitioner

Mohan Pieris,PC AG., with Y.J. Wijayatilake, PC, ASG., Sanjaya Rajaratnam, DSG, and Nerin Pulle, SSC., as amicus.

Nihal Sri Amarasekera for 22nd Respondent
appears in person

ARGUED ON : 24.09.2009

DECIDED ON : 13.10.2009

Dr.Shirani A.Bandaranayake., J

I have had the advantage of reading in draft the judgment of His Lordship the Chief Justice of which I am in agreement. I would however, wish to include the following as reasons for my decision in agreeing with the majority of six to one for granting relief to the 8th respondent-petitioner on 24.09.2009.

The 8th respondent-petitioner had filed an amended petition dated 31.07.2009, praying for relief in order to enable him to comply with the direction of His Excellency the President who had indicated that the 8th respondent-petitioner's services are required in the national interest.

The 8th respondent-petitioner submitted that the order dated 08.10.2008 relates to the inclusion of a firm statement in the affidavit which the 8th respondent-petitioner was required to file in terms of the said order, that he would not hold any public office or exercise any executive or administrative functions in the future. In the circumstances, the 8th respondent-petitioner prayed for relief by vacating the order dated 08.10.2008, making an order relieving the 8th respondent-petitioner of the undertaking contained in paragraph 13 of the affidavit dated 16.10.2008 and/or by granting him such other relief that would seem to be appropriate.

The background to the present application based on the decision in SC (Application) No.209/2007, the subsequent orders made therein and the effect of those had been examined by His Lordship the Chief Justice with which I had agreed and accordingly I do not wish to analyse the said matters in detail. Instead, let me turn to consider briefly a few aspects which are of direct relevance to the matter in issue.

The 8th respondent- petitioner had filed the affidavit dated 16.10.2008 not on the basis of his own free will, but on the directions given by this Court on 08.10.2008. On that day, viz., 08.10.2008, learned President's Counsel for the 8th respondent-petitioner had informed Court that within four (4) days of the main judgment in SC (Application) N0.209/2007 was delivered, the 8th respondent-petitioner had tendered his resignation from the post of Secretary, Ministry of Finance, but had continued to function in that post to discharge official duties since the resignation was not accepted until much later. Learned President's Counsel had further submitted that the 8th respondent-petitioner does not hold any office in any Government Establishment nor in any other Establishment in which Government has any interests. Learned President's Counsel had further submitted that the 8th respondent-petitioner tenders an unreserved apology to Court for having continued functioning after the judgment of this Court. At that stage the Court had made order thus:

> "Hence the 8th respondent is given time to file appropriate affidavit in which he may consider including the said expression of regret and a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or

> administrative functions. **Further affidavit to be filed as early possible. Mention for a final order on the matter on 20.10.2008**"(emphasis added).

This Court had taken up the issue of the filing of the affidavit by the 8th respondent-petitioner on 20.10.2008. On that day the Court had noted that 8th respondent-petitioner had filed his affidavit on 16.10.2008, but quite interestingly had made no order on the affidavit. The relevant Journal Entry of 20.10.2008 stated that,

> "Counsel for the 8th respondent submits that the 8th respondent has pursuant to the proceedings had in Court on 08.10.2008 filed an affidavit dated 16.10.2008 together with the annexure A-E. Mr.Sumanthiran for the petitioner submits that the annexures are only letters sent by the respective parties and that the 8th respondent has not included a copy of any letter said to have written by him. Subject to that, he submits that the affidavit is insufficient compliance with the undertaking given by the 8th respondent ".

In the said affidavit dated 16.10.2008, the 8th respondent-petitioner had averred that he does not hold any office under the Republic of in any establishment in which the Government of Sri Lanka has an interest purporting to represent the Government of Sri Lanka and that he will not hold office in any Governmental institutions either directly or indirectly or purport to exercise in any manner executive and administrative functions.

It was not disputed at any stage of the previous application or in this application that the 8th respondent-petitioner had been a high ranking Government official, who had been functioning not only as the Secretary, Ministry of Finance and Planning, but also as the Secretary to the Treasury including memberships of the Monetary Board of the Central Bank of Sri Lanka, Finance Commission and Institute of Policy Studies. In simple terms, at the time this Court had directed the petitioner to tender the aforementioned affidavit the 8th respondent-petitioner was holding high ranking employment in the Government of Sri Lanka and was a professional of his chosen area of discipline.

Accordingly, as a citizen of this Democracy, the 8th respondent-petitioner enjoyed what every citizen of this country was entitled to in terms of Article 14(1)g of the Constitution, viz., the freedom to engage by himself or in association with others in any lawful occupation, profession, trade, business or enterprise, until the decision of this Court that a firm statement be given that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions. Article 14 of our Constitution guarantees to our citizens, nine different types of fundamental freedoms, which are exercisable by them throughout this island Republic. These fundamental freedoms are generally known as basic civil rights upon which all the other freedoms in a democratic society would lie. Article 19(1) of the Indian Constitution contains provisions, which corresponds to Article 14 of our Constitution and referring to Article 19(1) of the Indian Constitution, it has been stated in **State of West Bengal V. Subodh Gopal** (AIR (1954) SC 92) tha t,

> "Those great and basic rights are recognized and guaranteed as the natural rights inherent in the status of a citizen of a free country".

The rights conferred by Article 14(1) g can be subjected only to restrictions that are stipulated in Article 15 (5) of the Constitution. These restrictions indicate very clearly that in an organized society there cannot be any absolute or unfettered rights with regard to any matter whatever that maybe. Referring to the rationale in such restrictions in the corresponding provisions of the Indian Constitution, Justice Mukherjea, in **Gopalan V. State of Madras** (AIR (1950) SC 27) had stated thus:

> "There cannot be any such thing as absolute or uncontrolled liberty wholly freed from restraint, for that would lead to anarchy and disorder. . . . Ordinarily, every man has the liberty to order his life as he pleases, to say what he will, to go where he will, to follow any trade, occupation or calling at his pleasure and to do any other thing which he can lawfully do without let or hindrance by other person. On the other hand, for the very protection of these liberties the society must arm itself with certain powers . . . . What the Constitution, therefore, attempts to do in declaring the rights of the people is to strike a balance between individual liberty and social control . . . . Article 19 of the [Indian] Constitution gives a list of individual liberties and prescribes in the various clauses the restraints that may be placed upon them by law so that they may not conflict with public welfare or general morality".

The restrictions with regard to the freedom to engage in any lawful occupation, profession, trade, business or enterprise enumerated in Article 14(1) g of the Constitution are stipulated in Article 15(5) of the Constitution and Article 15(5) a clearly states that the exercise and operation of the fundamental right pertaining

to Article 14(1) g shall be subject to such restrictions as may be prescribed by law in the interests of national economy or in relation, inter *alia*, to **disciplinary control of the person entitled to such fundamental right.**

It is therefore quite obvious that a citizen of this country has a fundamental right to engage in a lawful occupation and such right is guaranteed in terms of Article 14(1) g of the Constitution and also such right, if it is to be restricted in terms of Article 15(5) of the Constitution such restrictions would only be based on the disciplinary procedure in terms of his employment.

A citizen's right to work, so guaranteed in terms of the Constitution, would also be protected by the Courts, again in terms of the Constitution. The basic principle that the Court being the final protector of all citizens was clearly enumerated in **Nagle V Feilden** ([1966] 1 All E.R. 689), where Lord Denning had stated thus:

> " . . . a man's right to work at his trade or profession is just as important to him as, perhaps more important than, his rights of property. Just as the Courts will intervene to protect his rights of property, so they will also intervene to protect his right to work".

It is therefore the paramount duty of Courts to ensure that a citizen's right to work is protected. The right to employment being a fundamental right guaranteed by the Constitution, it would be the duty of the Court to exercise their authority in the interest of the individual citizen and of the general public to safeguard that right. The importance of the fundamental rights safeguarded by the Constitution is clearly stipulated in Article 4 (d) of the Constitution where it is emphasized that,

> "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided".

A careful consideration of the aforementioned constitutional provisions clearly elaborate the fact that the right to employment is a fundamental right declared and recognized by the Constitution which should not be abridged, restricted or denied in any manner other than to the extent provided by the Constitution itself. Article 118 of the Constitution clearly stipulates that the Supreme Court of Sri Lanka shall be the highest and final superior Court of record in the Republic and shall subject to the provisions enumerated in the Constitution exercise the jurisdiction **for the protection of fundamental rights.**

In fact the Supreme Court had been quite mindful of the provisions referred to above and specially to the fact that in the event that there has been evidence to the effect that a Government official who had been named as a respondent in the matter in question had acted in violation of a petitioner's fundamental rights by way of executive and/or administrative action that the said respondent's appointing authority/supervising officer should be notified of such action in order to take relevant steps, if and when necessary.

There is a long line of cases under Articles 11.13(1) and 13(2) of the Constitution that would bear witness to the said practice that even after finding a particular officer responsible for the violation of any one or more of Articles 11, 13(1) and 13(2) of the Constitution, this Court had taken no steps to order such

respondents to cease employment. In the event if they are found guilty, even after ordering to make payment personally as compensation, no directives have been given with regard to the cessation of their employment. The only step that has been taken consistently by the Supreme Court is to direct the Registrar of the Supreme Court to send a copy to the Inspector General of Police for the purpose of taking appropriate steps in terms of the procedure governing the respondent's employment. The purpose for informing the appointing authority the outcome of an action before the Supreme Court, without this Court taking steps to remove citizens from their employment is for the relevant establishment to follow due process of law, if the employee in question is to be deprived of his employment. Since the right guaranteed in terms of Article 14(1) g is not an absolute right, but one which is subject to permissible restrictions, if an employee is accused of any wrongdoing, necessary steps would have to be taken to inquire into such allegations in terms of his contract of employment.

In such circumstances for all the reasons aforementioned it would not be possible for this Court, which possess the jurisdiction for the protection of fundamental rights, to insist for an affidavit from a respondent that **' he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions'** so as to deprive him from the freedom to engage in any lawful occupation or profession. In fact a question would arise as to whether the aforementioned difficulty was the reason for Court not to have made any order on the affidavit filed by the 8th respondent-petitioner on 20.10.2008 or even on 15.12.2008, when finally the proceedings were terminated. Be that as it may, it must clearly be borne in mind that in terms of the provisions contained in the Constitution protecting the fundamental rights of the citizens and the Supreme Court having the jurisdiction for the protection of fundamental rights, this Court has no jurisdiction to compel and dictate a respondent to file affidavits **with firm statements** affirming/swearing that they would not hold office in

any governmental institutions. As stated by Francis Bacon (Of Judicature), `**Judges must beware of hard constructions and strained inferences, for there is no worse torture than the torture of laws**.'

The 8th respondent-petitioner in his amended petition had stated that he had received a letter dated 25th May 2009 from the Secretary to His Excellency the President directing the 8th respondent-petitioner to resume duties as Secretary, Ministry of Finance and Planning and Secretary to the Treasury. In the said letter the Secretary to His Excellency the President had stated, *inter alia,*

a. that with the successful liberation of the North and East the country needs to embark on a massive development programme and that the country is confronted with several challenges that required to be managed to restore the desired socio economic progress, the impact of the global economy that is confronted with a financial crisis being one such major challenge;

b. that several major infrastructure development activities are in the final stage of implementation and many others are to be launched for which domestic and external funding and other resources need to be mobilized;

c. that the implementation of post-war development programme in the North and East also demand experienced and committed public officers.

The said communication sent by the Secretary to His Excellency the President had further stated thus:

> "As we know, His Excellency the President accepted your resignation from the post of Secretary, Ministry

> of Finance and Planning and other positions in the Government reluctantly in view of your insistence. Considering the vast knowledge and experience you command while acknowledging your honesty and integrity, His Excellency the President is of the view that it is a waste that your services are not available to the Government particularly in the present context. In this background, His Excellency the President has instructed me to inform you to resume duties as Secretary, Ministry of Finance and Planning and assist the Government in its endeavours" (E).

The appointments of Secretaries to Ministries are made by His Excellency the President of the Republic of Sri Lanka in terms of Article 52(1) of the Constitution. This Court has no power to make such an order or to give directives to that effect when the prerogative of making such appointments have been vested with His Excellency the President of the Republic. This position had been clearly laid down by Amerasinghe,J., (Wijetunga,J., and Bandaranayake, J., agreeing) in **Brigadier Rohan Liyanage V Chandrananda de Silva, Secretary, Ministry of Defence and others** (SC (Application) No.506/99 SCM of 18.07.2000).

The 8th respondent-petitioner in his amended petition dated 31.07.2009 had prayed for the following:

1. vacate the order dated 08.10.2008 in so far as it relates to the inclusion in the Affidavit of a firm statement that the present petitioner "would not hold any office in any Governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" ;

2.make an order relieving the present petitioner of the undertaking contained in Paragraph 13 of the said affidavit dated 6.10.2008;

3. grant such other and further relief that this Court may seem fit.

As referred to earlier, either on 08.10.2008, 20.10.2008 or even thereafter no order had been made by this Court either accepting or rejecting the affidavit filed by the 8th respondent-petitioner. With out such valid acceptance and/or a clear order made to that effect, the question of vacating an order or relieving of an undertaking would not arise, since the 8th respondent-petitioner is not bound by its contents. Furthermore, it is also relevant to note at this juncture that the original petition filed by the petitioner in SC (Application) No.209/2007, was heard and decided before a bench consisting of Sarath N.Silva, CJ., Amaratunga, J., and Balapatabendi J. However, the Bench which sat on 08.10.2008 and 20.10.2008 comprised of Sarath N.Silva, CJ., Tilakawardane, J., and Ratnayake J. It is well settled law, as clearly stated by Amerasinghe J., in **Brigadier Rohan Liyanage** (supra) that the Bench of the Court which heard and determined a matter should hear any application touching its earlier decision. Therefore it would not be possible to grant the relief prayed under items 1 and 2 of the amended petition dated 31.07.2009. However, considering the circumstances of this application and the provisions contained in Article 52(1) of the Constitution His Excellency the President, being the appointing authority in terms of Article 52(1) of the Constitution would be free to consider appointing the 8th respondent-petitioner to the Post of Secretary Ministry of Finance and Planning/ Secretary to the Treasury, notwithstanding any undertaking given to Court by the said 8th respondent-petitioner.

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 conviction and sentence of the Court of Appeal as per Judgement dated 8th October 2002.

Upali Dharmasiri Welaratne,
No. 654/13, Halangahadeniya, Gothatuwa,
Angoda.

Now at

No. 57/14, Jayaweera Mawatha,
Kotte.

DEFENDANT- RESPONDENT-RESPONDENT-APPELLANT

S. C. Appeal No. 65/2003
S. C. (Spl.) L. A. No. 271/2002
C.A. No. 312/1999
D.C. Colombo No. 18335/L

Vs-

Wesley Jayaraj Moses,
No. 57/14 A, Jayaweera Mawatha,
Ethul-Kotte.

PLAINTIFF-PETITIONER-PETITIONER-RESPONDENT

BEFORE : Dr. Shirani A. Bandaranayake, J.,
Saleem Marsoof, P.C., J., &
D. J. de S. Balapatabandi, J.

COUNSEL : L. C. Seneviratne, P.C. for the Defendant-Respondent-Respondent-Appellant.

Ransiri Fernando with Sarath Walgamage for the Plaintiff-Petitioner-Petitioner-Respondent.

ARGUED ON : 29-07-08 and 16-12-08

WRITTEN SUBMISSIONS : 17-12-08 – Plaintiff-Petitioner-Petitioner-Respondent
23-12-08–Defendant-Respondent-Respondent-Appellant

DECIDED ON : 27-05-2009

MARSOOF, J.

I have had the advantage of perusing the judgement prepared by my brother Balapatabandi, J., in draft, and I regret that I cannot agree with his findings, for the reasons outlined below.

This appeal is against the decision of the Court of Appeal dated 8th October 1999, holding that the Defendant-Respondent-Respondent-Appellant (hereinafter referred to as "the Appellant") is guilty of contempt of court, and imposing on him a sentence of 2 years rigorous imprisonment and a fine of Rs. 500,000/- along with a further term of 6 months rigorous imprisonment upon default thereof. The said conviction and sentence arose from the alleged violation of an undertaking given by the Appellant in the context of a revision application filed by the Plaintiff-Petitioner-Petitioner-Respondent (hereinafter referred to as "the Respondent") in the Court of Appeal challenging an order of the District Court of Colombo refusing an interim injunction to restrain the Appellant, his agents and servants from destroying the wall and roof of premises No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte belonging to the Respondent and continuing the construction of structures on or within the northern boundary of lot 2B in Plan No. 2451 dated 4th November 1986 made by N.E. Weerasooriya, Licenced Surveyor, on which the said premises is situated. Along with the said revision application, the Respondent had also filed CA Leave to Appeal application bearing No. 47/99 seeking leave to appeal against the said order, which was pending at the time of the contempt inquiry.

After the Appellant filed his Objections dated 10th June 1999 with respect to the application to revise the said order of the District Court and the application for interim relief, the inquiry into the application for interim relief commenced on 22nd June 1999. At this inquiry, Mr. A.K. Premadasa, P.C. with Mr. C.E. de Silva appeared for the Respondent and Mr. Harsha Soza appeared for the Appellant. As the inquiry could not be concluded on that date, it was adjourned for 30th June 1999, on which date, the matter was settled before the Court of Appeal by the following order:

> "Before :- Edussuriya, J., CP/CA
> Udalagama, J.
>
> Same appearances as before.
>
> At this juncture, the Defendant-Respondent (present Appellant) undertakes not to effect further constructions and to maintain the status quo. The interim injunction is accordingly issued *restraining the Defendant-Respondent from continuing to build hereafter.*"

It is the violation of this undertaking / interim-injunction that was held by the Court of Appeal to be in contempt of court, which decision is the subject matter of this appeal. Before dealing with the specific questions on which leave to appeal was granted by the Supreme Court, which are fully set out in the judgment of my brother Balapatabendi, J., it is necessary to consider a question of fundamental importance which has been raised, namely, whether

the Court of Appeal gravely misdirected itself and exceeded its jurisdiction by issuing an interim-injunction against the Appellant based on a general undertaking and without hearing both parties on the facts.

Does the Violation of an Irregular Order Amount to Contempt?

It has been strenuously contended on behalf of the Appellant that he cannot in law be found guilty of contempt of court since the issue of the interim injunction which the Appellant is alleged to have violated, was irregular as the Court of Appeal had not heard both parties on the facts (either on affidavits, documents or oral evidence with consent). It may be noted at the outset that it is trite law, as was held in *Silva v. Appuhamy* 4 NLR 178, that "an injunction granted by a competent court must be obeyed by the party whom it affects until it is discharged, and that disobedience can be punished as for a contempt of court, notwithstanding irregularity in the procedure". The competence of the Court of Appeal to issue an injunction by way of interim relief is well recognized. The Court of Appeal is vested under Article 143 of the Constitution with jurisdiction to grant and issue injunctions to prevent any irremediable mischief that might ensue before a party making an application for such injunction could bring an action in any court of first instance to prevent the same. It also has appellate and revisionary jurisdiction in regard to decisions of courts of first instance such as the District Court, and has the power in terms of Article 145 of the Constitution, to revise any order of such a court issuing or refusing an injunction, whether interim or final. In terms of Rule 2 of the Court of Appeal (Appellate Procedure) Rules, 1990, the Court of Appeal also has the power to grant, in appropriate circumstances, a stay order, interim injunction or other interim relief, after notice and inquiry, and in cases of urgency even without such notice, provided the duration of the relief does not exceed two weeks.

In the instant case, the Court of Appeal had issued an interim-injunction after noticing the Appellant and after hearing submissions of his Counsel, except that it did not have to complete the inquiry for the grant of interim relief in view of the undertaking given by the Appellant in open court on 30th June 1999. It is clear from the relevant journal entry that had the Appellant not given the said undertaking, the inquiry in regard to interim relief would have continued and the Court of Appeal would have made an order in terms of Rule 2 of the Court of Appeal (Appellate Procedure) Rules, 1990, published in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka bearing No. 645/4 dated 15th January, 1991. The undertaking given to court by the Appellant effectively put an end to the inquiry into interim relief. When a party or counsel gives an undertaking in court, such undertaking obviates the need to hold an inquiry, but such undertaking has exactly the same force as an order made by the court, and accordingly, it follows that the breach thereof amounts to contempt of court in the same way as a breach of an injunction. In *de Alwis v. Rajakaruna* 68 NLR 180, where by majority decision the Supreme Court, the Respondent was held to be guilty of contempt of court by his failure to honor an undertaking given to court, Basnayake, C.J., at page 184 quoted with approval the following passage from *Oswald on Contempt*-

> An undertaking entered into or given to the Court by a party or his counsel or solicitor is equivalent to and has the effect of an order of the Court, so far as any infringement thereof may be made the subject of an application to the Court to punish for its breach. The undertaking to be enforced need not necessarily be embodied in an order."

As Sir John Donaldson MR observed in *Hussain v. Hussain* [1986] 1 All ER 961 at 963 -

> "Let it be stated in the clearest possible terms that an undertaking to the court is as solemn, binding and effective as an order of the court in the like terms."

In the South African case of *York Timbers Ltd v. Minister of Water Affairs & Forestry* 2003 (4) SALR 477, at page 500 Southwood, J., having cited the above quoted *dicta* of Sir John Donaldson MR, stated that –

> "In my view there is no difference between the legal effect of an undertaking to do something or refrain from doing something which is made an order of court and the legal effect of an order to the same effect made by the court after considering the merits and giving judgment."

Thus, it is obvious that a party that has given an undertaking cannot be heard to say that an interim-injunction has been issued without due hearing as the very purpose of giving such an undertaking is to save for the court as well as to the parties, valuable time that would otherwise be spent on the inquiry into the grant of interim relief. Nor is it open to such a party to later challenge the jurisdiction of the court if the party had voluntarily submitted himself or itself to the jurisdiction of court by the very act of giving the undertaking. Furthermore, where the solemn undertaking given to court is recorded as an order of court, it is the undertaking, and not the order of court that requires the giver of the undertaking to act in accordance with its terms. The power of the Court of Appeal to punish for contempt of itself, whether committed in the court itself or elsewhere, as well as its power to punish for the contempt of any other court, tribunal or institution referred to in Article 105(1)(c) of the Constitution is enshrined in Article 105(3) of the Constitution, and as Samarakoon, C.J., observed in *Regent International Hotels Ltd. v. Cyril Gardiner and Others* [1978-79-80] 1 Sri LR 278 at page 286 -

> "The Supreme Court "being the highest and final Superior Court of Record in the Republic" and the Court of Appeal being a Superior Court of Record with appellate jurisdiction have all the powers of punishing for contempt, wherever committed in the Island in *facie curiae or ex facie curiae."*

The submission that the Court of Appeal had acted in excess of its jurisdiction in treating the violation of such an undertaking as a contempt of court, is therefore, altogether devoid of merit.

Admissibility of Photographic Evidence

The first of the questions on which leave to appeal has been granted by this Court, relates to the very interesting issue of admissibility of photographic evidence, which at the time of the admission of the photographs in question, were governed by the provisions of the Evidence Ordinance No. 14 of 1895 (CLE 1956 Official Ed. Cap. 14, as amended by Act No. 10 of 1988, No. 33 of 1998, No. 32 of 1999 and No. 29 of 2005 and supplemented by The Evidence (Special Provisions) Act No.14 of 1995). The question is: Did the Court of Appeal err in placing reliance on the dates appearing on the photographs produced by the Respondent at the contempt inquiry? The said dated photographs were produced by the Respondent marked P7 to P18 at the contempt inquiry held on 20th July 2001 to show that the Appellant

had acted in disregard of the undertaking given by him to court on 30th June, 1999. These photographs, which contain imprints of dates ranging from 2nd July to 17th July 1999 on which dates it is alleged that the Appellant continued with the building operations which he had undertaken to discontinue and maintain the *status quo* pending the hearing of the revision application filed in the Court of Appeal, are of great value in deciding on the guilt or otherwise of the Appellant.

The Appellant, who at that stage contempt inquiry conducted his own defence without the assistance of counsel (prior to Mr. Sanath Jayathilake appeared as his counsel), took objection to the production of the said dated photographs marked P7 to P18 on the ground that they were not admissible as "documents" under the Evidence Ordinance. The Court of Appeal made order overruling the said objection and admitting the photographs "subject to proof". With the view to proving the said photographs, the Respondent called witness Roshan Seneviratne, the Manager of Salaka Group, who testified that the said photographs were developed at his establishment, and produced marked P7a to P18a respectively, the negatives of the said photographs. When President's Counsel for the Respondent closed his case on 16th May 2002, he moved to read in evidence the said photographs and the negatives, without any objection thereto being taken on behalf of the Appellant. As was observed by Samarakoon, C.J., in *Sri Lanka Ports Authority and Another v. Jugolinija-Boal East* [1981] 1 Sri LR 18, at page 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 civil courts".

Mr. L.C. Seneviratne, P.C., who appeared for the Appellant in this appeal, reformulated the objection against the admission of the photographs marked P7 to P18 on the basis that the Court of Appeal, which has placed reliance on the dates appearing on the photographs, has failed to consider that the date imprint on the photographs taken in the camera belonging to the Respondent could have been manipulated through the controls of the camera. A photograph, according to the *Oxford Concise English Dictionary*, is "a picture made by a camera, in which an image is focused onto film and then made visible and permanent by chemical treatment." All cameras, ranging from the earliest "pin hole" cameras to the modern film or digital cameras, operate on the same principle, namely that the light gathered from a scene or object that is photographed can be used to create an image on a light sensitive medium such as a film or a charge-couple-device (CCD) of a modern digital camera. A photograph is essentially a conversion or transformation of a contemporaneous recording which is made through mechanical or electronic means.

Photographs, and other forms of contemporaneous recordings, have been admissible in evidence in Sri Lanka despite the limitations of Section 3 of the Evidence Ordinance which confined its definition of "evidence" to oral and documentary evidence. Our courts have utilized other provisions of the Ordinance, such as the second proviso to Section 60, which empowered the court to require any material thing that is referred to in oral testimony to be produced in court for its inspection, and Section 165, which empowered court to order the production in court of any thing, to admit in evidence, contemporaneous recordings of public speeches (*Abu Bakr v. The Queen,* 54 NLR 566; *Kularatne and Another v. Rajapakse,* [1985] 1 Sri LR 24), telephone conversations preserved through wire or a tape recording (*See, In re S.A.Wickremasinghe* 55 NLR 511, *K.H.M.H.Karunaratne v. The Queen,* 69 NLR 10; *Cf, Roberts and Another v. Ratnayake and Others,* [1986] 2 Sri LR 36) and photographs (*Shahul Hameed and*

Another v. Ranasinghe and Others [1990] 1 Sri LR 104 and *Peiris and Another v. Perera and Another* [2002] 1 Sri LR 128).

Of course, like any thing else, contemporaneous recordings too could be manipulated, and hence it is necessary to take precautions with the view to preventing or detecting such possibilities, but the attitude of our courts in regard to such matters have generally been permissive rather than prohibitive. As Canakeratne, J., once observed in *The King v. Dharmasena,* 50 NLR 505 at 506, while assessing the value of photographic evidence produced in court, -

> "It may be that, cameras do lie (e.g., one not held at eye-level, one with a long focus lens, &c.), but one does not dispense with all witnesses because there are perjurers. If real evidence (e.g., a knife) can be brought, why not a photograph? If a jury may view a scene, why not a photograph of the scene?"

It is important to note that at the time of the conduct of the contempt inquiry, the production of photographic evidence was governed by the provisions of Section 4 of the Evidence (Special Provisions) Act No. 14 of 1995. Section 4 (1) of the said Act provides that in any proceeding where direct oral evidence of a fact would be admissible, "any contemporaneous recording or reproduction thereof, tending to establish that fact" shall be admissible as evidence of that fact, if it is shown that -

(a) the recording or reproduction was made by the use of *electronic or mechanical* means;

(b) the recording or reproduction is capable of being played, replayed, displayed or reproduced in such a manner so as to make it *capable of being perceived by the senses*;

(c) at all times material to the making of the recording or reproduction the machine or device used in making the recording or reproduction, as the case may be, was *operating properly*, or if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the accuracy of the recording or reproduction; and

(d) the recording or reproduction was *not altered or tampered* with in any manner whatsoever during or after the making of such recording or reproduction, or that it was kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which it was in such custody.

It is expressly provided in Section 4 (2) of the Act that if the conditions set out in Section 4 (1) are satisfied, "the recording or reproduction *shall be admissible in evidence of the fact recorded or reproduced, whether or not such fact was witnessed by any person*." It is also provided in Section 4 (3) of the Act that where any such recording or reproduction cannot be played, replayed, displayed or reproduced in such a manner so as to make it capable of being perceived by the senses, or even if it is capable of being so perceived but is unintelligible to a person not conversant in a specific science, or is of such nature that it is not convenient to perceive and receive in evidence, in its original form, the court may admit in evidence "*a*

transcript, translation, conversion or transformation" of such recording or reproduction as may be appropriate and is intelligible and is capable of being perceived by the senses.

Modern cameras are more electronic than mechanical, but that makes no difference as regards the underlying law that is applicable in regard to the production in court of photographs taken using such cameras, whether they be dated or not. Mr. Seneviratne has submitted that the date on a camera can be changed with ease, and that the camera with which the photographs marked P7 to P18 were taken should have been produced in court. The procedure for the production in legal proceedings of evidence derived from contemporaneous recordings is set out in Part III of the Evidence (Special Provisions) Act, and in particular in Section 7(1) (a) thereof, which requires that a party "proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial file or cause to be filed, in court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence." According to Section 7(2), a party who fails to give notice as aforesaid, shall subject to the provisions of Sections 8 and 9 of the Act, not be permitted to tender such evidence in respect of which the failure was occasioned.

Section 7(1) (b) of the Act specifically provides that any party to whom a notice has been given under Section 7(1) (a) "may within fifteen days of the receipt or such notice apply to the party giving such notice, to be permitted access to, and to inspect-

(i) the *evidence* sought to be produced ;

(ii) the *machine, device or computer*, as the case may be, used to produce the evidence; and

(iii) any *records relating to the production of the evidence* or the system used in such production."

The Act also specifies an outer time limit of fifteen days for a party proposing to produce such evidence to provide a reasonable opportunity to the party against whom such evidence is sought to be produced or his agents or nominees, "to have access to, and inspect, such evidence, machine, device, computer, records or systems." The procedure so laid down in the Act is intended to give an opportunity for a party against whom the evidence is sought to be produced to challenge the same on the ground that it is not an accurate recording or reproduction of what it purports to be.

At not time in these proceedings has the Appellant objected to the production of the photographs marked P7 to P18 on the ground that the notice contemplated by Section 7(1)(a) of the Evidence (Special Provisions) Act of 1995 has not been given to the Appellant, and no submissions in these lines were addressed to court in the Court of Appeal or before this Court. However, I have given my mind to this question, and I hold that the Appellant had notice of the fact that the Respondent was relying on the dated photographs marked P7 to P18 in the contempt proceedings when notice of the Respondent's petition dated 21st July 1999, by which he complained to the Court of Appeal of the alleged contempt, was served on him. In paragraph 11 of the affidavit of the Respondent dated 20th July 1999 attached to

the said petition, the Respondent has specifically listed the said photographs in the following manner:

> "I attach hereto marked C and D photographs showing the construction being carried on 2-7-1999 and photograph marked E showing the position of the building on 4-7-1999 and photographs marked F, G, H and I taken on 5-7-1999 showing the construction done on 5-7-1999, marked J, K, showing the construction done on 15-7-1999, marked L and M showing the construction done on 17-7-1999 and plead them as part and parcel hereof."

The said Petition was supported before Edussuriya, J., on 30th July 1997, and the Court directed the issue of summons on the Appellant for 17th August 1999. On that date, the Appellant appeared in person and moved for a further date, and the matter was re-fixed for 15th October 1999. On 15th October 1999, the chargers were read out to the Appellant who pleaded not guilty to the said charges. After several inquiry dates and calling dates, the contempt inquiry ultimately commenced before a Bench of the Court of Appeal consisting of Shiranee Tilakawardane, J., and Chandradasa Nanayakkara, J., on 20th July 2001. During the one year period that elapsed between the filing of the Petition dated 21st July 1999 and the commencement of the contempt inquiry, the Appellant made no effort to move Court for permission to examine the camera used for the purpose of taking the photographs in question, as he was entitled to do in terms of Section 7 (1) (b) (ii) of the Evidence (Special Provisions) Act 1995.

In the circumstances, and for the reasons outlined above, I am of the opinion that the Appellant is not entitled to take any objections to the admissibility of the said photographs at the appeal stage of this case. Accordingly, I am of the opinion that the Court of Appeal has not erred in placing reliance on the dates appearing on the photographs produced by the Respondent.

Proof of Contempt

The next four questions on which this Court has granted leave to appeal relating to the burden and standard of proof may, for convenience, be considered together. These questions are –

(i) Has the Respondent discharged the burden of proof placed upon him in this inquiry?

(ii) Have their Lordships' of the Court of Appeal erred in accepting the evidence led on behalf of the Respondent?

(iii) Have their Lordships' of the Court of Appeal erred in rejecting the evidence led on behalf of the Petitioner (Appellant)?

(iv) Have their Lordships' of the Court of Appeal erred in taking to consideration extraneous factors / material in convicting and sentencing the Petitioner (Appellant)?

The Appellant was charged in the Court of Appeal for committing contempt of court on 1st July 1999, 2nd July 1999, 4th July 1999, 5th July 1999, 15th July 1999, 16th July 1999 and 17th July 1999 by effecting further constructions and continuing to build after 30th June 1999 in premises bearing Assessment No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte thereby damaging premises bearing Assessment No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte "on the *northern* side." This charge is essentially one of civil contempt, which is an 'offence' of a private nature since it thereby deprived the Respondent of the benefit of the undertaking given to court by the Appellant, and the interim injunction granted by the Court of Appeal on 30th June 1999 at the instance of the Respondent.

The line between civil and criminal contempt is a thin one indeed. The distinction was explained by Barrie and Low in *The Law of Contempt,* (3rd Ed – Butterworths, at page 655) as follows :

> "Criminal contempts are essentially offences of a public nature comprising publications or acts which interfere with the due course of justice as, for example, by tending to jeopardise the fair hearing of a trial or by tending to deter or frighten witnesses or by interrupting court proceedings or by tending to impair public confidence in the authority or integrity of the administration of justice. Civil contempts, on the other hand, are committed by disobeying court judgements or orders either to do or to abstain from doing particular acts, or by breaking the terms of an undertaking given to the court, on the faith of which a particular course of action or inaction is sanctioned, or by disobeying other court orders (for example not complying with an order for interrogatories, etc). "

While the need for society to preserve the rule of law and protect the rights of its citizen as well as those of the State lies at the heart of both civil and criminal contempt, the distinction between the two types of contempt, though clear in theory, is one which may often be difficult to make in the context of the peculiar circumstances of each case in which it may become necessary to determine whether a particular act amounts to a criminal or civil contempt. One of the reasons for this difficulty is that there is a punitive element even in cases of civil contempt, for it must be remembered that the law of contempt as a whole is concerned to uphold the due administration of justice, and it is obvious that disregard of a court order not only deprives the other party of the benefit of that order but also impairs the effective administration of justice. As Cross, J., said in *Phonographic Performance Ltd. v. Amusement Caterers (Peckham) Ltd.* [1964] Ch 195 at 198 :

> "Where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt, what is called contempt in procedure, "bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest"."

Although the contempt, the Appellant has been charged and convicted of is civil in nature, it is clear that the applicable standard of proof is that applicable to criminal cases. As Lord Denning MR observed in *RE Bramblevale Ltd.* [1970] Chancery 128, at 137 –

> "A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him."

On appeal, this Court is called upon to examine whether the Respondent has discharged the burden placed on him to prove, beyond reasonable doubt, that the Appellant violated the solemn undertaking given by him to court, and / or the interim injunction imposed by Court, and whether the Court of Appeal took into consideration extraneous factors or material in convicting and sentencing the Appellant. It is however necessary to bear in mind, that in doing so, that the applicable standard of proof does not require that the guilt of the Appellant should be established beyond any and every shade of doubt, but only beyond doubts which may be called reasonable.

At the contempt inquiry before the Court of Appeal, the Respondent personally gave evidence, and led the evidence of Roshan Seneviratne, the Manager of Salaka Group, and that of Dr. George Nelson Perera, a close neighbour. The Appellant was the only witness for the defence. The Court of Appeal, in my opinion, has carefully analyzed all evidence and arrived at the conclusion that the guilt of the Appellant has been established beyond a reasonable doubt. In convicting the Appellant, the Court of Appeal has observed that-

> "On the consideration of the totality of the evidence and the documents filed in the revision application, including the pleadings referring to the District Court action and the orders, this Court is in no doubt whatsoever that the construction was carried out as complained by the Plaintiff-Petitioner-Petitioner (present Appellant)."

The required elements for a finding of civil contempt are (1) the existence of an undertaking or order; (2) knowledge of the undertaking or order; (3) ability to comply with the undertaking or order; and (4) willful or contumacious disobedience of the undertaking or order. It has been submitted by the learned President's Counsel for the Appellant that his client had no knowledge of the content of the undertaking / order as a copy thereof was not formally served on him. It is, however, material that in this case the undertaking was given on behalf of the Appellant by his Counsel when the inquiry into interim relief resumed after an adjournment, and the wording of the relevant journal entry makes it obvious that the Appellant was consulted by his Counsel *before* the undertaking was given. The undertaking given to court, and the consequent interim-injunction, were in the following terms:-

> *At this juncture*, the Defendant-Respondent (present Appellant) undertakes not to effect further constructions and to maintain the status quo. The interim injunction is accordingly issued *restraining the Defendant-Respondent from continuing to build hereafter*."

The Respondent, in his testimony, has categorically stated that the Appellant was in the precincts of the Court, and was consulted by his Counsel Mr. Harsha Soza, before the undertaking was given, which has been denied by the Appellant, who in the course of his evidence denied that he was in court, although he could not remember where he was when the case was taken up in the Court of Appeal. Significantly, the Appellant who did not call

Mr. Soza to testify on his behalf, did admit that after he became aware of the undertaking given to court on his behalf by his Counsel, he verified the "specifics" of the undertaking and order from the Registry of the Court within three days. The Appellant's testimony in this regard, under cross-examination, is quoted below:-

"Q : You came to know from Mr. Harsha Soza that an undertaking has been given and interim injunction has been issued restraining the Defendant-Respondent (present Appellant) from continuing to build?
A : I asked him. He told me that there was an order against me.
Q : You never asked him what is the order against you? And the Court of Appeal has issued an order against you?
A : I found it subsequently. About two or there days thereafter from the Registry.
Q : Till two or three days after 30.6.1999 you did not know what is the order ? Is that correct ?
A : Yes. The specifics of the order."

It is manifest that on his own admission, at least by 4th July, 1999 the Appellant was aware of the nature and content of the undertaking given by Counsel on his behalf, and the interim-injunction issued by the court, and should have moved the court if there was any lack of clarity or ambiguity in it. Prior to complaining about the alleged violation of the undertaking / interim-injunction by the Appellant to the Court of Appeal, the Respondent has contemporaneously complained to the Welikada Police, and with his petition dated 21st July 1999 filed in the Court of Appeal, he has produced marked A and B respectively copies of the complaints he made to the Police on 1st July 1999 and 5th July 1999, which were subsequently marked in evidence as P5 and P6. The particulars of the damage caused to the house of the Respondent are set out in P6 the relevant portion of which is quoted below:

"99'06'30 jk osk f.dvke.Sï yd boslsrSï kj;k f,ig wNshdpkd wOslrkh u.ska ;Skaÿjla oS,d we;' tal fuu Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska kej; udf.a ksji wi, boslsrSï lrf.k hkjd' ta boslsrSï lrk tajd iïnkaOj uu f*dfgda wrf.k ;sfnkjd' fuu boslsrSï lrk jsgoS udf.a ksjfia jy,h weianeiafgdaia ISÜ folla levS we;' tys jgskdlu re' 1500$ la muK fjs' jy,hg oud we;s wvs 40 l muk ;dr ISÜ ;ekska ;ek levS we;' tajdfha jgskdlu re' 1600$ la muK fjs' we,auSkshï ng folla" ;dr ISÜ Wv oud ;snqkd' wvs 10 la wvs 9 la muk os. ta folo fuu boslsrSï l, fiajlhka fofokd wrf.k we;' tys jgskdlu re' 700$ la muK fjs' uqÿka W¿ leg y;rla muK levS we;' tys jgskdlu re' 50$ la muK fjs' uq,q jgskdlu re' 3800$ la muK fjs' ;jo udf.a jy,h Wv Tjqka jsiska boslsrSï ksid isfuka;a ;Ógq .Kka jegS we;' fuu ksid udf.a ksji we;=,g j;=r .,d f.k tkjd' fuu Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska l=,shg wrf.k kï fkdokakd jev lrk fofokd udf.a jy,h Wv isg ;ud fuu ;dmamh n|skafka' fuu ug w,jx.=j Wiaid urK njg ;¾ckh lr jy,fhka neye,d .shd' udf.a bvfuka wvshl m%udKhla muK w,a,d f.k ;uhs fuu ;dmamh bos lrkafka' wo osk oj,a 12'15 g muk ;ud uu ksjig wdfjs' ta tk jsg ;ud jy,h Wv isgskjd uu oelafla' udj oel,d ;uhs ;¾ckh lr neye,d .sfha' fuu jy,h Wv isgskjd udf.a nsrs| jk tÉ' iS' ndnqIka hk who oelald' udf.a ÿj ksjfia isgshd thd t,shg wejs;a ke;' fus iïnkaOg uu by; kvq ijrd we;s wOslrK ;=kg jd¾:d lrus' ud fmd,sisfhka b,a,d isgskafka wOslrK ksfhda.h mrsos Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska boslsrSï lrk tl kj;d fok f,ig yd ug jS;sfhk w,dNh iïnkaOj ls%hd ud¾.hla .kakd f,igh' ug lSug we;af;a tmuKhs'"

By the time of making the above-quoted statement to the Police, it is apparent that the Respondent had taken some photographs, and he has testified that he did so in accordance with the instructions he received from his lawyer, and he has produced in the course of the contempt inquiry marked P7 to P18, these and the subsequent photographs he took, with

date imprints, which clearly show that the work at the building site had been continued after the Appellant gave his solemn undertaking to court on 30th June 1999, and even after he admittedly perused the court record, and got the "specifics" of the interim-injunction issued by the Court of Appeal at most three days thereafter.

The position of the Appellant, at least at the initial stage of the contempt inquiry, was that he was not the owner of premises No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte, and that it was owned by his son and that the he had nothing to do with the building operations there. However, later in his testimony, under cross-examination, he admitted that he used to go there to see the constructions to give directions on behalf of his son who was abroad. It is also significant that the Appellant when he testified in the contempt inquiry denied that the building shown in the photographs P7 to P18 was his house, or the house in which he resided, and had stressed that none of the photographs showed the assessment number of the house, but when the Respondent and Dr. Perera testified no questions were put to them on these lines. Although the Appellant was at pains to show that he has nothing to do with the premises in which the building operations were alleged to have taken place, he led no evidence whatsoever to show that he lived in another premises located in some other place. He did admit in cross-examination that he made complaints to the Mayor and to the Central Environmental Authority on the nuisance caused by the poultry farm owned by the Respondent, but if he was not residing at premises No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte, the question naturally arises as to how he came to do so, if the Appellant was not living in the very same premises in which the building operations were alleged to have taken place.

Mr. L.C. Seneviratne, P.C has sought to assail the conviction of the Appellant on the basis that the photographs marked P7 to P18 were wrongfully admitted in evidence, which question has been dealt with by me fully earlier in this judgment. He has also submitted that the said photographs, in any event, did not show the site on which the building operations allegedly took place in violation of the undertaking / order of court, namely the building bearing assessment No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte which is to the north of the Respondent's house bearing No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte, the two premises having one common boundary which is the northern boundary of the Respondent's house and the southern boundary of the site on which the building operations were alleged to have taken place. Mr. Seneviratne further submitted that the photographs did not prove beyond reasonable doubt that the Appellant destroyed "*the roof and wall on the Northern side of premises depicted as Lot 2B in Plan No. 2451 dated 04/11/1986 made by A. E. Wijesuriya, Licensed Surveyor, bearing Assessment No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte, and constructed structures on the northern side in the said premises.*"

It is pertinent to note that the undertaking given to court by the Appellant and the interim-injunction issued by court did not specifically refer to the "northern side of the premises" although there is reference to same in the pleadings before the District Court. What the Appellant had undertaken was *not to effect further constructions and to maintain the status quo*. The interim-injunction issued by the Court of Appeal was to restrain the Appellant "*from continuing to build hereafter.*" It is abundantly clear from the testimony of the Appellant and that of Dr. George Nelson Perera that the Appellant did continue building operations on northern side of the Respondent's premises which is the southern side of the neighbouring premises in which the Appellant admittedly resides. The allegations have been denied by the Appellant, who was the sole witness for the defence in the contempt inquiry, and the

Court of Appeal has rejected his testimony as being mutually inconsistent and altogether unconvincing. The Court of Appeal has also held that the Appellant had the ability to comply with the undertaking he gave to court and the interim injunction issued by court, and that he had acted in willful or contumacious disobedience of the said undertaking and order.

In this context, it is important to bear in mind the following oft-quoted words of Viscount Simon from the decision of the House of Lord in *Watt v. Thomas* [1947] 1 All E. R. 582, at pages 583 which were cited with approval by the Privy Council in *Munasinghe v. Vidanage* 69 NLR 97-

> "…….an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

In this case, the Court of Appeal, having heard evidence placed before it by the Respondent and the Appellant, has come to certain findings having regard to the demeanor of witnesses, and the Supreme Court, sitting in appeal, will be extremely reluctant to review these findings. The time tested principle guiding our courts in these matters as enunciated by James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322 and quoted with approval by Viscount Sankey L.C in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, is that an appellate court-

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."

I bow to the wisdom of this dictum, and only wish to add that I did not find any governing fact which in relation to others might have created a wrong impression in the Court of Appeal. Accordingly, I am of the opinion that there is paucity of material even to suggest that the Court of Appeal has erred with regard to the discharge of the burden placed by law on the Respondent to prove beyond reasonable doubt that the Appellant committed contempt of court by his conduct, and in particular, I hold that questions (i), (ii) and (iii) have to be answered against the Appellant.

As regards, question (iv) on which leave was granted, learned President's Counsel for the Appellant has invited the attention of this Court to page 2 of the judgement of the Court of Appeal wherein it has been stated that "the Plaintiff-Petitioner-Petitioner instituted an action against the Defendant-Respondent-Respondent, an attorney-at-law….." He has stressed that the proceedings before the Court of Appeal were not initiated against the Appellant in his capacity as attorney-at-law, and the manner in which the Appellant has been referred to in the judgement of the Court of Appeal, suggests that the said Court has taken into consideration extraneous factors / material in convicting and sentencing the Appellant. In my view, the description of the Appellant by reference to his vocation, which in my opinion is a very noble and responsible profession, does not demonstrate any prejudice on the part of the court, particularly in the context that the Appellant had denied prior knowledge of the content of the undertaking which was given to Court by his Counsel, for the violation of which he had been charged. Accordingly, I am of the opinion that question (iv) also has to be answered against the Appellant.

The Punishment

There remains the question whether the sentence of imprisonment and fine imposed on the Appellant is excessive and / or contrary to law.

No submissions have been addressed to Court on the lawfulness or otherwise of the said sentence, and the only ground urged for the mitigation of the sentence of imprisonment is the advanced age of the Appellant. It has been submitted that he was 63 years of age at the time of his conviction, and that in any event, the sentence imposed is excessive. Contempt of court has been described as an offence *sui generic,* and there is no statutory or other limits on the punishment that may be imposed on an offender, it being a matter entirely for the court imposing the same. The Court of Appeal, when sentencing the Appellant, has given its mind to all the circumstances of this case, and I have no reason to interfere with the sentence so imposed.

I would therefore, dismiss the appeal, but without costs.

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 127 read with Article 128 of the Constitution.

The Director General,
Commission to Investigate Allegations
of Bribery or Corruption,
No.36, Malalasekera Mawatha
Colombo 7.

Complainant

Vs.

SC Appeal No. 99/2007
SC Spl. L.A. No.80/2007
HC Colombo Case No. HCMCA 535/04
Colombo Magistrate's Court Case No.42837/05/02

Kalinga Padmatillake, alias
Sergeant Elpitiya
Siribopura
Hambantota

Accused

And between

Kalinga Padmatilake, alias
Sergeant Elpitiya
Siribopura
Hambantota

Accused-Appellant

Vs.

The Director General,
Commission to Investigate Allegations
of Bribery or Corruption.
No.36, Malalasekera Mawatha,
Colombo 7.

Complainant-Respondent

And Now Between

Kalinga Padmatillake, alias
Sergeant Elpitiya
Siribopura
Hambantota

A**ccused-Appellant-Petitioner**

Vs

The Director General,
Commission to Investigate Allegations
of Bribery or Corruption.
No.36, Malalasekera Mawatha,
Colombo 7.

Complainant-Respondent-Respondent.

****

BEFORE : DR. SHIRANI A. BANDARANAYAKE, J.
D.J.DE S. BALAPATABENDI, J.
CHANDRA EKANAYAKE, J.

COUNSEL : Rienz Arasaculartne P.C. with Wasantha Batagoda and Dharshana Kuruppu for the Accused-Appellant-Petitioner.
Dilan Ratnayake SSC with Ms. Fernando for the Complainant- Respondent-Respondent.

ARGUED ON : 28.01.2009

DECIDED ON : 30.07.2009

CHANDRA EKANAYAKE, J.

This is an appeal preferred by the accused-appellant-appellant from the judgment of the Provincial High Court of the Western Province holden in Colombo dismissing his appeal against the convictions entered and sentences imposed by the Magistrate in Magistrate's Court Colombo Case No. 42837/05/02. The learned Magistrate had convicted the accused-appellant-appellant (hereinafter sometimes referred to as the appellant) for all the charges viz – 2 charges framed under section 16(b) and 2 charges under Section 19(c) of the Bribery Act as amended.

At the trial before the Magistrate's Court the prosecution case was unfolded by the following witnesses namely – Manatungage Sumathipala, Mallawaratchige Swarnalatha (wife of said Sumathipala), Manatungage Sumitrasena- (son of the above witness M. Sumathipala) and K. Amila Madusanka. The case of the appellant had been concluded only with his evidence. After conclusion of the trial the learned Magistrate had convicted the appellant for all 4 counts and had imposed a fine of Rs.5000/= and sentenced to 6 months imprisonment for each count.

The appeal preferred by the appellant against the aforesaid convictions and sentences to the High Court of Western Province holden in Colombo bearing No. HCMCA 535/04 was dismissed by the learned High Court Judge by his judgment dated 14.2.2007 (P7). This is the judgment from which Special Leave to appeal application dated 26.03.2007 was preferred by the appellant to this Court. This Court by its order dated 22.11.2007 has granted special leave to appeal on the questions of law set out in paragraph 20(iv) of the aforesaid special leave to appeal application. The said sub paragraph 20(iv) of the petition is reproduced below:-

"Whether the learned High Court Judge erred in fact and in law by not coming to a finding on the allegations contained in the Written and Oral submissions made on behalf of the Petitioner that it was illegal for the learned Trial Judge to consider evidence pertaining to subsequent incidents i.e. incidents that took place on 08.04.2001and 12.04.2001 as corroborative material of the solicitation and acceptance alleged to have taken place on 05.03.2001 at the Tissamaharama Police Station which is the subject matter of the charge."

By the aforesaid application the appellant has sought the following other reliefs also in addition to special leave:-

b. Issue notices on the respondent.

c. Set aside the judgment of the learned Magistrate dated 29.06.2004 and acquit the Petitioner.

d. Set aside and judgment of the learned High Court judge dated 14.02.2007(P7) and acquit the Petitioner.

After filing of written submissions by both parties, appeal was taken up for hearing before this Court.

At the outset it would be pertinent to consider the 4 counts on which the appellant was charged in the Magistrate's Court. Those are to the following effect-vide charge sheet dated 13.12.2002 filed in the Magistrate's Court :-

1. වර්ෂ 2001 ක්වූ මාර්තු මස 05 වෙනි දින හෙ! ඊට ආසන්න දිනයකදී මෙම අධිකරණ බල සීමාව තුල තිස්සමහාරාමයේදීණී වරදකරුවන්ට නඩු පැවරීමණී ඔවුන් සොයා ගැනීම හෙ! ඔවුන්ට දඩZුවම් දීම පිණිස සේවයේ යොදවා සිටි පොලිස් නිලධාරියකු වූ යුෂ්මතාණී වරද කරන්නෙකු වූ එනම්ණී අංක: එම්" ඩී" 90 - ං 2112352 දරන ලියාපදිංචි නොකරන ලද යතුරු පැදිය ව්‍යාජ අංකයකින් පැදවීමේ වරද සිදුකරන ලද මනතුංගගේ සුමිත්‍රසේන යන අයට විරුද්ධව නඩුවක් නොපැවරීම සඳහා පෙළඹවීමක්

හෙ! න්‍යාගයක් වශයෙන් රුපියල් 2000/-ක්වූ මුදලක තුටු පඩ්‍රුරක් මනතුංගගේ සුමතිපාල යන අයගෙන් අයැදිමෙන් 1965 අංක 02 දරන අල්ලස් පනතේ 09 වන වගන්තියෙන් සංශෝධිත අල්ලස් පනතේ 16(ආ) වගන්තිය යටතේ දඩ්‍රුවම් ලැබිය යුතු වරදක් කළා යැයි මෙයින් ඔබට වෝදනා කරනු ලැබේ"

2. ඉහත 1 වෙනි වෝදනාවේ සඳහන් වේලාවේදිණි ස්ථානයේදී හා එකී ක්‍රියාකලාපයේදීම රජයේ සේවකයකු වූ එනම් තිස්සමහාරාම පොලිස් ස්ථානයේ පොලිස් නිලධාරියෙකු ලෙස සේවයේ යොදවා සිටි යුෂ්මතාණි රුපියල් 2000/-ක්වූ මුදලක තුටු පඩ්‍රුරක් මනතුංගගේ සුමතිපාල යන අයගෙන් අයැදිමෙන් 1974 අංක 38 දරන අල්ලස් (සංශෝධන) නීතියේ 08 වන වගන්තිය මගින් හා 1980 අංක 09 දරන අල්ලස් (සංශෝධන) පනතේ ඡඡ වන වගන්තිය මගින් සංශෝධිත අල්ලස් පනතේ 19(ඇ) වගන්තිය යටතේ දඩ්‍රුවම් ලැබිය යුතු වරදක් කළා යැයි මෙයින් ඔබට වෝදනා කරනු ලැබේ"

3. ඉහත 1 වෙනි වෝදනාවේ සඳහන් වේලාවේදිණි ස්ථානයේදී හා එකී ක්‍රියාකලාපයේදීම වරදකරුවන්ට නඩු පැවරීමණි මවුන් සොයා ගැනීම හෙ! මවුන්ට දඩ්‍රුවම් දීම පිණිස සේවයේ යොදවා සිටි පොලිස් නිලධාරියකු වූ යුෂ්මතාණි වරද කරන්නෙකු වූ එනම්ණි අංක: එම්" ඩී" 90 - ං 2112352 දරන ලියාපදිංචි නොකරන ලද යතුරු පැදිය ව්‍යාජ අංකයකින් පැදවීමේ වරද සිදුකරන ලද මනතුංගගේ සුමතුසේන යන අයට විරුද්ධව නඩුවක් නොපැවරීම සඳහා පෙළඹවීමක් හෙ! න්‍යාගයක් වශයෙන් රුපියල් 2000/-ක්වූ මුදලක තුටු පඩ්‍රුරක් මනතුංගගේ සුමතිපාල යන අයගෙන් හාරගැනීමෙන් 1965 අංක 02 දරන අල්ලස් පනතේ 09 වන වගන්තියෙන් සංශෝධිත අල්ලස් පනතේ 16(ආ) වගන්තිය යටතේ දඩ්‍රුවම් ලැබිය යුතු වරදක් කළා යැයි මෙයින් ඔබට වෝදනා කරනු ලැබේ"

4. ඉහත 1 වෙනි වෝදනාවේ සඳහන් වේලාවේදිණි ස්ථානයේදී හා එකී ක්‍රියාකලාපයේදීම රජයේ සේවකයකු වූ එනම් තිස්සමහාරාම පොලිස් ස්ථානයේ පොලිස් නිලධාරියෙකු ලෙස සේවයේ යොදවා සිටි යුෂ්මතාණි රුපියල් 2000/-ක්වූ මුදලක තුටු පඩ්‍රුරක් මනතුංගගේ සුමතිපාල යන අයගෙන් හාරගැනීමෙන් 1974 අංක 38 දරන අල්ලස් (සංශෝධන) නීතියේ 08 වන වගන්තිය මගින් හා 1980 අංක 09 දරන අල්ලස් (සංශෝධන) පනතේ ඡඡ වන වගන්තිය මගින් සංශෝධිත අල්ලස් පනතේ 19(ඇ) වගන්තිය යටතේ දඩ්‍රුවම් ලැබිය යුතු වරදක් කළා යැයි මෙයින් ඔබට වෝදනා කරනු ලැබේ"

By the petition filed in this Court the appellant has sought to set aside the judgment of the learned Magistrate dated 29.6.2004 and to acquit him – vide sub paragraph (c) of the prayer to the petition. What arises for consideration now is whether on the evidence on record the conviction entered and sentence imposed by the learned Magistrate are justified or they deserve to be set aside.

The prosecution case in nut shell is summed up thus:

The appellant at the relevant time was serving as a Sergeant attached to Hambantota Police Station and the virtual complainant M. Sumathipala's evidence in examination-in-chief was that he had to make a complaint to the Bribery Commission on 06.09.2001 with regard to solicitation of money from him by the appellant after taking the licence and insurance of his three wheeler. His specific position in examination –in-chief had been that the solicitation was made by the appellant and another constable and the appellant asked for Rs.2000/= at Tissamaharama Police Station but he cannot remember the exact date of asking the said amount. His next position was that when money was asked for nobody was present and only the said sergeant and he was present but no one lese was there. According to him when the said amount was requested since he did not have he borrowed Rs.500/= from one Amila – a nephew of his to be given to the appellant. In testifying further in examination-in-chief he had said that after the above incident again on 12th April 2001 the appellant had asked for a further sum of Rs.2000/= as there was going to be a party on 12th April. At that stage Court had adjourned for lunch. When his evidence was resumed his position had been that money was taken on 5th March of last year or the previous year.

In cross-examination above witness had contradicted the evidence given even with regard to the date of the incident . The evidence given on material points in examination –in-chief had been clearly contradicted in cross-examination and he had given different versions. Even as to the date of arrest of his son (Sumitrasena) over the traffic offence was stated as " 4වෙනි මාසේ 3වෙනිදා" whereas he had gone to the police station to see him on the 5th at about 7.30 – 8.00 in the morning. – Vide his evidence in cross – examination at page 35 of the brief;

“ප්‍ර තමා පොලිසියට ගියේ කවදද?

උ 5 වෙනිදා

ප්‍ර කියට විතරද ගියේ?

උ උදේ 7.30 ට 8.00 වගේ වෙලාවට ගියේ.”

With regard to the alleged solicitation on 05.03.2001 which is the subject matter of counts 1 and 2, above witness had given different versions. The other 2 counts are with regard to the alleged acceptance of the said amount by the appellant. The specific stance taken by him with regard to the presence of the Constable-Mahinda when giving the money which is undoubtedly a material point was even contradicted by him later in the course of his evidence. It is evident from the learned Magistrate’s judgment that he had heavily relied on the evidence of the above witness. Thus necessity has arisen to consider whether said witness’s evidence was correctly examined and properly evaluated by the learned Magistrate.

It has to be stressed here that credibility of prosecution witnesses should be subject to judicial evaluation in totality and not isolated scrutiny by the Judge. When witnesses makes inconsistent statements in their evidence either at one stage or at 2 stages, the testimony of such witnesses is unreliable and in the absence of special circumstances, no conviction can be based on the testimony of such witnesses. On the other hand one cannot be unmindful of the proposition that Court cannot mechanically reject the evidence of any witness. With regard to appreciation of evidence in criminal cases it would be of importance to quote what Sir John Woodroffe & Amir Ali had to say in their work on - “ Law of Evidence- 18th Edition- Vol. 1 at pg. 471:-

> “ No hard and fast rule can be laid down about appreciation of evidence. It is after all a question of fact and each case has to be decided on the facts as they stand in that particular case. Where a witness makes two inconsistent

statements in his evidence with regard to a material fact and circumstance, the testimony of such a witness becomes unreliable and unworthy of credence."

Further it is the paramount duty of the Court to consider entire evidence of a witness brought on record in the examination-in-chief, cross-examination and re-examination. In other words Courts must take an overall view of the evidence of each witness. Careful examination of the evidence of M.Sumathipala leads me to the inevitable conclusion that it lacked credibility due to the overwhelming contradictions coupled with inconsistent statements made with regard to material particular in his own evidence.

Next witness called by the prosecution was Swarnalatha- the wife of the above witness Sumathipala. Perusal of her evidence would make it crystal clear that her evidence in entirety had been based on hearsay material and admittedly she was not at the police station on the day in question and/or even does not claim that she saw the alleged incident. This is amply established by her evidence in examination –in-chief itself to the following effect appearing at pg- 67 of the brief:-

"……මම දැක්කේ නැහැ ඇල්පිටිය සාජන් මහත්තයා මුදල් ඉල්ලනවා හෙ! ගන්නවා" මම ළඟ සිටියේ නැහැ" පොලිසියට ගියේ මෙම නඩුවේ පැමිණිලිකරු" මම සිටියේ නැහැ" මම ගියේ නැහැ. "

But the learned Magistrate has stated that her evidence is very vital to corroborate her husband's evidence which appears to be an erroneous statement.

The evidence of Swarnalatha pertaining to subsequent incidents alleged to have taken place on 8/4/2001 and 12/4/2001 too had been considered by the Magistrate as corroborative material for solicitation and acceptance alleged to have occurred on 5/3/2001 at the Police Station, which in my view is also erroneous. Those were incidents alleged to have occurred after the date of incident given in the charges namely 05/03/2001.

For the reasons given as above I am inclined to hold the view that virtual complainant Sumathipala's evidence is found to be highly unreliable and unacceptable. It is a cardinal principle that unreliable and unacceptable evidence cannot be rendered credible, simply because there is some corroborative material. In the case at hand as Swarnalatha's evidence was totally based on hearsay, and the learned Magistrate has grossly erred by accepting the same. Further major portion of her testimony had been focused on an incident alleged to have taken place on 8/4/2001 (being an incident subsequent to the date of the alleged offences) and about going to the Police Station on 13th April, 2001.

The next witness who testified for the prosecution was Sumithrasena – (son of the virtual complainant – M. Sumathipala) who being the person locked up in the Police cell and the alleged solicitations and acceptance of money was to refrain from prosecuting him. His evidence appears to be only with regard to the fact that when he was in the Police cell at Thissamaharama Police Station, in his presence his father (Sumathipala) borrowed the sum of Rs.500/- from Amila since he had fell short of Rs. 500/- for a sum of money to be given to *Mahatthaya* (uy;a;hd). There is absolutely nothing in his testimony to indicate who this *Mahatthaya* was or the name of the person whom he referred to as *Mahatthaya.*

When one considers the evidence of the other prosecution witness Amila Madusanka – his firm position was that having admitted that Sumathipala borrowed a sum of Rs.500/- from him at the Police Station, but failed to disclose the purpose for which same was borrowed and neither he knew nor asked the purpose for which it was borrowed. This is amply established by the testimony of the above witness in examination-in-chief (as appearing at page 110 of the brief.):-

> " සුමතිපාල මගෙන් සල්ලි ඉල්ලුවෙ මොකටද කියලා මම පොලිසියේදි දන්නෙ නැහැ" ගෙදර ආවට පස්සේ තමයි දැන ගත්තේ" එයා ලග රු" 1500/- ක් තිබිලා" රු" 500/-ක මුදලක් මදිවෙලා කියලා තමයි මගෙන් රු" 500/- ක් ඉල්ලුවේ" මෙයාව නිදහස් කරන්න රු"2000/-ක් පොලිසියෙන් ඉල්ලුවා කියලා තමයි කිව්වේ" එහෙම කියලා මම ගෙදරට ආවට පස්සේ

නමයි දැන ගත්තේ" ඒ සල්ලි දුන්නේ කාටද කියලා මම දැන ගත්තේ නැහැ" මම දුන්න රු"500/- ආපසු මට හම්බ වුනා""

Evidence to the above effect remains uncontradicted even in cross-examination. If at all his position had been that Police had asked for Rs.2,000/- to release him and his evidence too does not disclose any evidence with regard to solicitation and acceptance by the Appellant. On the other hand Amila's evidence totally contradicts Sumithrasena's (complainant's son's) evidence with regard to the fact that Sumathipala revealed the purpose for which the money was borrowed to wit – 'මහත්තයට දෙන්න""

The prosecution case had been closed with the evidence of the above witnesses. Perusal of the Magistrate's Court record reveals that none of the Police witnesses listed as Pw5 to Pw8 had been called by the prosecution. Thereafter the Appellant had testified and denied the allegations.

At the hearing before this Court amongst other things it was strenuously urged on behalf of the appellant that the learned High Court Judge erred in fact and in law by not coming to a finding on the allegations contained in the submissions of the appellant and that it was illegal for him to have considered the evidence pertaining to subsequent matters that took place on 08.04.2001 and on 12.4.2001 as corroborative material of the solicitation and acceptance alleged to have taken place on 05.03.2001 at Tissamaharama Police Station, which is the subject matter of the charges. The written submissions filed in the High Court has been tendered to this Court annexed to the petition marked as P6. In my view this merits careful examination by this Court.

The High Court Judge had concluded that although the prosecution witnesses had uttered certain statements pertaining to solicitations alleged to have taken place prior to the alleged solicitation in the charges, the learned Magistrate had only considered the oral

evidence of the witnesses regarding solicitation and acceptance in relation to charges and not any other evidence. However he has not proceeded to give reasons for the above finding. Further it is seen form the said judgment that the learned High Court Judge's conclusion(as appearing at page 4 of the judgment) had been that certain sum of money was solicited and same was accepted by the appellant. The said portion of the judgment appearing at page 4 is reproduced below:

> "උගත් නීතිඥ මහතාගේ ලිඛිත සැල කිරීම්හි උපුටා දක්වා ඇති සාක්ෂි ඛණ්ඩයන් එකිනෙකට සංසන්දනාත්මකව බැලීමේදී එම සාක්ෂි ඛණ්ඩ තුලින් ම යම් අල්ලස් මුදලක් අභියාචක විසින් ඉල්ලා සිටිමත්" එම අල්ලස් මුදල අභියාචක විසින් භාරගෙන ඇති බවත්ණී පෙන්නුම් කෙරේ""

It is seen from the above the learned High Court Judge has grossly erred by not stating on what items of evidence or what influenced him to arrive at the said finding. Perusal of the charges (as per the charge sheet) reveals that in all 1 to 4 counts a specific date of commission of the alleged offence and a specific amount that was alleged to have been solicited and accepted were embodied. In each charge the amount was Rs. 2000/=. As such there has to be clear proof of the fact that the amount solicited and accepted in relation to the charges was nothing but the sum of Rs.2000/=. The learned High Court Judge's basis appears to be that the appellant had solicited and accepted certain amount of money. This in my view is a cardinal error committed by the learned High Court Judge and same would suffice to vitiate his judgment .

Further the learned High Court Judge in the impugned judgment has totally failed to examine whether the learned Magistrate had evaluated and considered the evidence before the Magistrate's Court in the proper perspective in concluding the guilt of the appellant. Further he has failed to arrive at a finding with regard to the legality of Magistrate's consideration of evidence pertaining to subsequent incidents as corroborative material of the solicitation and acceptance which is the subject matter of

the charges. However it is the sacred duty of this Court to consider the entire evidence on record in the Magistrate's Court.

By the impugned judgment the learned High Court Judge had dismissed the appellant's appeal with costs. Right of appeal is undoubtedly a statutory right available to an accused-appellant against the conviction entered and sentence imposed on him. In this regard the pronouncement of His Lordship Justice Nimal Amaratunga in S.C. Appeal No. 108/2006 - R.Ananda vs. The Commissioner General to Investigate Allegation of Bribery or Corruption (2008 1 BLR- Part II 136) too would lend assistance. Per Amaratunge, J. at page 138 :-

> "……. I notice that the learned High Court Judge has dismissed with costs. When a convicted accused's appeal is dismissed Courts do not cast him in costs."

Thus I conclude that the learned High Court Judge had erred in casting the appellant in costs.

At this juncture it would be appropriate to consider the standard of proof that is required in a case of this nature. Undoubtedly 'beyond reasonable doubt' remains as the standard of proof in criminal cases. In proving a bribery charge also same standard of proof is required. It would be pertinent to quote what does the expression 'beyond reasonable doubt' mean? Per John Woordroffe & Amir Ali in their aforementioned book on Law of Evidence - (at page 325):

> "For a doubt to stand in the way of conviction of guilt, it must be a real doubt and a reasonable doubt – a doubt which after full and fair consideration of the evidence, the judge really, on reasonable grounds, entertains."
>
> 'If the data leaves the mind of the trier in equilibrium, the decision must be against the party having the burden of persuasion.' If the mind of the adjudicating tribunal is evenly balanced as to whether the accused is guilty, it is its duty to acquit. If the evidence adduced by the prosecution has been so

> discredited as a result of cross-examination or is as manifestly unreliable that no reasonable tribunal can safely convict on it the prosecution must fail. The court cannot be satisfied beyond reasonable doubt, if there be still open some reasonable hypothesis compatible with innocence. There is no emancipation of the mind unless all reasonable doubts have been eliminated from it. Proof beyond reasonable doubt does not mean proof beyond the shadow of doubt. The benefit of doubt, to which the accused is entitled, is reasonable doubt; the doubt which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind."

The trend of authority in Sri Lanka too amply demonstrates that the standard of proof required in respect of bribery charges is also nothing but beyond reasonable doubt.

An examination of the judgment of the learned High Court Judge reveals that he had totally failed to evaluate the evidence on record and to examine the correctness of the reasoning of the learned Magistrate which led to the finding of guilt of the appellant for all counts. Yet it is incumbent upon this Court to examine whether the inferences drawn and conclusions arrived upon by the learned Magistrate in his judgment are reasonable, rational and within the ambit of the law.

What needs consideration now is when the evidence led for the prosecution in this case is closely scrutinized, whether it could be satisfied that prosecution had discharged the burden of proving the case beyond reasonable doubt. If not the Appellant is liable to be acquitted of the charges. The prosecution must stand or fall on its own legs and it cannot derive any strength from the weakness in the defence, and when the guilt of the accused is not established beyond reasonable doubt he is liable to be acquitted as a matter of right and not as matter of grace or favour.

For the reasons I have stated above it is already concluded that it was highly unsafe to have acted on Sumathipala's evidence. Further the learned Magistrate had relied on hearsay evidence of witness Swarnalatha and Amila Madusanka also. In my view the discrepancies in the evidence of the prosecution witnesses and the contrary positions taken up by witness Sumathipala in his own evidence with regard to material particulars as high-lighted above render their evidence highly unreliable and unworthy of credit, thus making the prosecution version highly doubtful. This being a bribery case it would be apt to quote the pronouncement to the following effect in the Indian case of Gurcharan Singh, Appellant V. State of Haryana, Respondent, - Criminal Law Journal 1994 (2) 1710 :-which too was an instance where the accused was charged under Prevention of Corruption Act (1947):

> "Where the material witnesses make inconsistent statements in their evidence on material particulars, the evidence of such witnesses becomes unreliable and unworthy of credence, thus making the prosecution case highly doubtful."

In the case at hand when an overall view of the evidence is taken the irresistible and inescapable conclusion one could arrive upon is that the prosecution has failed to establish its case beyond reasonable doubt and the appellant is entitled to the benefit of this doubt, which entitles him to earn an acquittal from all the charges. In view of the foregoing analysis I proceed to answer the question of law on which this Court granted special leave in the affirmative. For the above reasons the judgment of the learned High Court Judge dated 14.2.2007 is liable to be set aside and same is accordingly set aside.

Accordingly, this appeal is allowed and the convictions entered and sentences imposed upon the accused - appellant are set aside and he is acquitted of all the charges.

The Registrar of this Court is directed to forward copies of this judgment to the respective High Court and the Magistrate's Court forthwith.

Judge of the Supreme Court

DR.. SHIRANI A. BANDARANAYAKE, J.

I agree.

Judge of the Supreme Court

D.J.DE S. 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. 71/2007
S.C. (Spl.) L.A. No. 218/2006
C.A. No. 592/2001(F)
D.C. Matale No. 4349/L.

1. S. Sivayanama,
   No. 300, Main Street,
   Matale.

2. S. Sivasivaya,
   No. 149, Gongawala Road,
   Matale.

Plaintiffs-Appellants-Appellants

Vs.

1. People's Bank,
   Union Place,
   Colombo.

2. Wanasundarage Aravinda Silva,
   People's Bank,
   Matale.

3. S. Suppammal,
   Matale.

4. Muthukaruppan Kadirai,
   Wariyapola.

5. Arunasalam Suppiah Pandithar,
   Wariyapola.

6. Suppiah Komadyammal,
   Wariyapola.

7. Suppaiah Muthusamy Pandithar,
   Wariyapola.

8. Kanapathipillai Urthrapillai,
Velum Maiulum Stores,
Kilinochchi.

Defendants-Respondents-Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Saleem Marsoof, J.

COUNSEL : A.R. Surendran, PC, with K.V.S. Ganesharajan, Nadarajah Kandeepan and Ms. Dharshini for Plaintiffs-Appellants-Appellants

Manohara de Silva, PC, with D. Weeraratne for 1st Defendant-Respondent-Respondent

ARGUED ON: 16.05.2008

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiffs-Appellants-Appellants : 16.02.2009
1st Defendant-Respondent-Respondent : 18.02.2009

DECIDED ON: 13.05.2009

Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 31.07.2006. By that judgment, the Court of Appeal had held that the order made by the learned District Judge dated 20.06.2001 is a final order as it had disposed of the rights of the parties, and had dismissed the appeal filed by the plaintiffs-appellants-appellants (hereinafter referred to as the appellants). The appellants filed a special leave to appeal application before this Court against the order made by the Court of Appeal for which special leave to appeal was granted by this Court on the following question:

> "Is the judgment of the Court of Appeal which proceeded to decide the appeal on its merits having directed the parties to

file written submissions only on the preliminary objection raised by the 1st respondent Bank without giving the appellants an opportunity of being heard on the merits of their appeal, in violation of the principles of natural justice?"

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

The 1st and 2nd appellants are two brothers, who are the owners of the land and premises, which is the subject matter of this appeal. The 1st defendant-respondent-respondent (hereinafter referred to as the 1st respondent) is the People's Bank and the 2nd defendant-respondent-respondent (hereinafter referred to as the 2nd respondent) had been the Authorized officer of the 1st respondent Bank. The 3rd to 8th defendants-respondents-respondents (hereinafter referred to as the 3rd to 8th respondents) were the 3rd to 8th defendants of the D.C. Matale case No. 4349/L.

The appellants' father had been the owner of the land and premises bearing No. 300, Main Street, Matale for over 30 years and had been in possession and occupation of the place in question during that period. By Deed of Gift No. 3397, dated 02.05.1990 attested by S.M. Haleemdeen, the appellants became the owners of the said land and premises and they have been in possession and occupation of the said land and premises for well over 25 years.

In February 1991, the appellants received undated notices from the 1st respondent Bank, issued in terms of Section 72(5) of the Finance Act, No. 11 of 1963, as amended, with a copy to one Suppammal, which stated *inter alia*, that pursuant to a decision made by the Board of Directors of the 1st respondent Bank acting under the Finance Act, No. 11 of 1963 as amended, the land and premises in suit was vested in the 1st respondent Bank on the publication of an order in the Government Gazette of 11.07.1979. The said notices requested the appellants to hand over the land in suit on 15.03.1991 to the 2nd respondent.

The appellants thereafter instituted action bearing No. 4349/L in the District Court of Matale, praying *inter alia*,

1. for a declaration against the 1st respondent Bank that the property in suit is not liable to be acquired under the provisions of the Finance Act, No. 11 of 1963;
2. for an order declaring that the appellants have a right to possession and ownership of the land and premises in suit;
3. an injunction restraining the 1st respondent Bank from evicting the appellants from the said land and premises.

In the said plaint, the appellants averred that the circumstances under which they and their predecessors in title became entitled to the said land and premises and produced their documents of title along with the plaint. The 1st respondent Bank had filed its statement of objections and answered stating, *inter alia*, that pursuant to a vesting order being published in the Gazette dated 11.07.1979, the said land and premises had vested in the 1st respondent Bank. Accordingly the 1st respondent Bank had pleaded that it was entitled to serve the said notice in terms of Section 72(5) of the Finance Act and evict the appellants from the said land and premises.

When the said case came up for inquiry before the learned Additional District Judge, Matale on 20.06.2001, learned Counsel for the 1st respondent Bank had raised a preliminary issue pertaining to the jurisdiction of the District Court to hear and determine the said action. The said preliminary issue was based on the provisions of Section 70(B)5 of the State Mortgage and Investment Bank Act, which purports to oust the jurisdiction of Courts in respect of certain steps taken by the People's Bank under the provisions of the said Act.

Both parties had thereafter made submissions on the said preliminary issue. The learned Additional District Judge of Matale, by his order dated 20.06.2001, upheld the preliminary objection relating to jurisdiction raised by the 1st respondent Bank and dismissed the said action No. 4349/L stating, *inter alia*, that in view of the finality clause contained in the statute, the Court did not have jurisdiction to hear and determine the said action.

Thereafter, the appellants came before the Court of Appeal against the said order of the learned Additional District Judge of Matale dated 20.06.2001, *inter alia*, on the ground that the failure of the learned Additional District Judge to follow the judgment of the Supreme

Court in the case of **Ranasinghe** v **Ceylon State Mortgage Bank** ([1981] 1 Sri L.R. 121) was erroneous inasmuch as the learned Additional District Judge was not entitled to ignore a binding judgment of the Supreme Court merely on the basis that the facts of the instant case were different from the facts of **Ranasinghe** v **Ceylon State Mortgage Bank** (supra).

When this appeal came up before the Court of Appeal for hearing on 23.08.2004, Counsel for the 1st respondent Bank raised a preliminary objection on the basis that the appellants could not maintain the said appeal as the impugned order of the District Court of Matale was not an appealable order.

The Court of Appeal had reserved order on the preliminary objection. Thereafter by its order dated 31.07.2006, the Court of Appeal had dismissed the 1st respondent Bank's preliminary objection and had held that the appellants were entitled to a right of appeal from the order of the Court of Appeal and having heard submissions only on the preliminary objection and after having reserved its order only on the preliminary objection had proceeded to adjudicate on the merits of the case as well, and had dismissed the appeal without hearing the appellants on the main question raised in the application.

Having set out the facts, let me now turn to consider this appeal.

The contention of the learned President's Counsel for the appellants was that when the appeal came up for hearing before the Court of Appeal on 23.08.2004, learned President's Counsel for the 1st and 2nd respondents had raised a preliminary objection that the order against which the appeal had been lodged was not a final order, but only an interlocutory order and therefore the appellants could not have lodged an appeal against the said order. However, irrespective of the fact that both Counsel had been heard only on the preliminary objections raised by the learned President's Counsel for the respondents, the Court of Appeal had dismissed the appeal on its merits.

Learned President's Counsel for the 1st and 2nd respondents had not disputed the contention of the learned President's Counsel for the appellants.

In fact the judgment of the Court of Appeal dated 31.07.2006 clearly supports the contention of the learned President's Counsel for the appellants, as it had stated thus:

> "When the Appeal came up for hearing before this Court on 23.08.2004, Counsel for the Respondent raised a preliminary objection that the order against which this Appeal has been lodged is not a Final Order, but only an Interlocutory Order. He further submitted that thus the Appellants could not have lodged this Appeal against the aforesaid Order. **This Court directed the parties to tender Written Submissions on the aforesaid Preliminary Objections**" (emphasis added).

Thereafter the Court of Appeal had considered the provisions in Section 754(5) of the Civil Procedure Code, Section 71(3) of the Finance Act and Section 22 of the Interpretation Ordinance and the principle laid down in the decisions in **Siriwardena** v **Air Ceylon Ltd.,** ([1984] 1 Sri L.R. 286), **White** v **Brunton** ([1984] 2 All E.R. 606) and **Ranasinghe** v **Ceylon State Mortgage Bank** (supra). Thus a careful reading of the judgment of the Court of Appeal clearly indicates that it was not restricted to the preliminary objection raised by the learned President's Counsel for the 1st and 2nd respondents. The final paragraph of the judgment, which reads as follows, clearly indicates this position,

> "In **Ranasinghe** v **State Mortgage Bank** ([1981](1) S.L.R. p. 121) the Court held that notwithstanding the provisions of the Interpretation Ordinance, Declaratory relief is available against the Bank where there is a total lack of jurisdiction. Hence the learned District Judge's decision is correct in law. It is my view that the order made by the learned District Judge on 20.06.2001 is a Final Order as it finally disposed of the rights of parties. Although on a Preliminary issue there exists a right of appeal, an Appeal would be futile for the aforesaid reasons. Hence for the aforesaid reasons I see no reason to interfere with the Order of the learned District Judge dated 20.06.2001,

> and hence I dismiss the appeal filed by the Appellants without costs."

It is therefore quite evident that although both parties were heard only on the preliminary objections and both parties had filed their written submissions only on the preliminary objections raised by the learned President's Counsel for the 1st and 2nd respondents, the Court of Appeal had decided the matter not on the basis of the preliminary objection so raised, but on the merits of the appeal.

It is an accepted fact that 'a man's defence must always be fairly heard' (Prof. H.W.R. Wade, Administrative Law, 9th edition, p. 440). A fair hearing, which is regarded as 'a rule of universal application' (**Ridge** v **Baldwin** ([1964] A.C. 40) has been referred to by Lord Loreburn in his oft-repeated words, as 'a duty lying upon every one who decides anything' (**Anisminic Ltd.** v **Foreign Compensation Commission** ([1969] 2 A.C. 147, **A.G.** v **Ryan** ([1980] A.C. 143).

The said need to give a proper hearing prior to the determination of the matter in issue was considered in **State Graphite Corporation** v **Fernando** ([1982] 2 Sri L.R. 590) where it was stated that,

> "The Court of Appeal can dispense with a hearing on granting leave *ex mero motu*. In other cases it seems to me where a party wishes to be heard, or the issues involved are such that the Court ought not to make an order without hearing and determination of the application, would generally require a hearing, however summary or brief that hearing may be."

Considering the facts and circumstances of this appeal, it is quite clear that both parties had made their submissions only on the preliminary objection raised by the learned President's Counsel for the 1st and 2nd respondents. No opportunity had been given to either party to make their submissions on the merits of the appeal. It is not disputed that the arguments were confined only to the said preliminary objections. It is also not disputed that the judgment of the Court of Appeal dated 31.07.2006, whilst as stated earlier, referring to the

preliminary objections so raised had not ruled on the said preliminary objections, but had considered the merits of the appeal and had dismissed it.

The Court of Appeal was correct in its approach when it decided to first consider the preliminary objection taken by the learned President's Counsel for the 1st and 2nd respondents. However, what it should have done thereafter was to consider the said objections and make order on the said preliminary objection. Therefore the decision of the Court of Appeal, which had decided on the merits of the appeal cannot be accepted, as it had not observed the rudimentary norms, which are applicable in hearing an appeal. A decision of a Court of law should be based on a fair hearing of the matters before the Court and cannot contain orders of issues, where parties were not given an opportunity to be heard.

The generality of the application of the maxim *audi alteram partem,* commonly known as the rule that no man is to be condemned unheard, and its flexibility in its operations were succinctly pronounced by Lord Loreburn L.C. in the well known decision of **Board of Education** v **Rice** ([1911] A.C. 179), where it was stated that it applied to 'everyone who decides anything'. As stated by Loreburn L.C. in **Rice** (supra),

> "I need not add that in doing (deciding) either, they must act in good forth and fairly listen to both sides, for that is a duty lying upon everyone who decides anything."

On a consideration of all the aforementioned material of the appeal and for the aforementioned reasons, the question on which special leave to appeal was granted is answered in the affirmative.

This appeal is accordingly allowed and the judgment of the Court of Appeal dated 31.07.2006 is set aside. The Court of Appeal is directed to hear this case *de novo*. Since the appeal against the order of the District Court was dismissed on the merits after considering the preliminary objections, respondents, if they so desire, could raise the said preliminary objection to the appeal in the Court of Appeal.

There will be no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, 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 Article 128(2) of the Constitution of Sri Lanka.

Sri Co-operative Industries Federation Limited,
Ceyesta Building,
No.327, Galle Road,
Colombo 3.

Defendant-Appellant-Appellant

S.C. Appeal No. 02/2005
C.A. No. 1173/2002
D.C. Colombo 24742/MR

-Vs-

Ajith Devapriya Kotalawala,
Dharshana Electrical,
202/106A,
Isurupaya,
Bandaragama Road,
Kesbewa.

Plaintiff-Respondent-Respondent

BEFORE : Ms. Shiranee Tilakawardane, J.,
R. A. N. G. Amaratunga, J., &
Saleem Marsoof, P.C., J.

COUNSEL : Mr. T.M.S. Nanayakkara for Appellant

Mr. C. Ladduwahetty for Respondent

ARGUED ON : 23.10.2008

DECIDED ON : 03.04.2009

MARSOOF, J.

This Court has granted the Defendant-Appellant-Appellant (hereinafter referred to as the "Appellant") special leave to appeal on the questions of law stated in paragraph 16 of his Petition dated 17th November 2004, which are set out below:

a) Is there sufficient evidence for the Appellant to disclaim liability for the payment under item No: 01.01 of P4?

b) In all the circumstances, is the Appellant not liable to pay the sum decreed by the District Court and the Court of Appeal?

It appears from the Appeal Brief that in 1997, the Appellant, a society registered under the Co-operative Societies Law No. 5 of 1972, called for tenders for the installation of the electrical system for its new *Ceyesta* factory in Navinna, Maharagama. The Tender Document issued by the Appellant marked P2 expressly described the *work* involved in the following manner:-

> "The work covered by these tenders include the supply of all equipment and materials and erection at site and the provision of all plant, labour, documents, drawings, services in connection with the works described in these specifications and the tender drawings, all in strict accordance with the conditions set out in this contract Document and as required for handing over the complete Electrical Installation (400/230v) which shall be fully operational in every respect and intent."

Clause 9 of the part headed "Instructions to Tenderers" in the said Tender Document obliged the successful tenderer to furnish with his tender "all relevant information with respect to all equipment and materials included in his offer in order to allow full and detailed evaluation of his tender," and in the part headed "Specification of Work" it expressly provided in paragraph 0.2 that the contractor shall be responsible for *inter alia* "providing detail design, installation drawings, diagrams and schedules" and "completing the works to the satisfaction of Engineer and demonstrating both its satisfactory performance in accordance with the design intent and the accessibility of equipment, plant, wiring and accessories to facilitate maintenance work." He was also responsible for "drawing, the Engineer's attention to any discrepancies in documents, drawings or instructions issued after the time of tender, immediately upon receipt of same and prior to the commencement of any part of the works affected thereby."

The Plaintiff-Respondent-Respondent (hereinafter referred to as the "Respondent") submitted a tender dated 18th September 1997 for the work described in greater detail in the Bill of Quantities marked P4. Though several other tenders were also received, the tender submitted by Respondent aggregating to a sum of Rs. 3,368,775.00, being the lowest, was accepted by the Appellant co-operative society by its letter dated 11th December 1997 marked P3. In the context of the questions on which special leave to appeal has been granted by this Court, it is instructive to refer to the Bill of Quantities marked P4, and in particular to items 01.01, 01.02 and 02.01 therefore, and the amounts tendered by the Respondent with respect to those items, which are quoted below:

Items No.	Description	Quantity	Unit Rate	Amount
01.01	Installation of 165 KVA Transformer	01	No.	627,500.00
01.02	Supplying and laying of 4 x 185 Sq mm PVC X LPE CU Cable from Transformer Room to the Electrical Room	300	Meters	17,500.00
02.01	Supplying and Installation of Main Switch Board consisting of the following complete with internal wiring according to the IEE regulations: one 400 Amp Change Over Switch, three 400 AF / 320 AT MCCB with UVT, one Indicator Lamps set, one Phase Failure Relay, one Earth Fault Relay, one Ammeter 0 – 400 Amp + Sel Sw, one Vold Meter + Sel Sw, one Poer Factor Meter, one 160 Amp MCCB, three 80 Amp MCCB, two 63 Amp MCCB, one 40 Amp MCCB, two 32 Amp MCCB, one 250 Amp MCCB, and three 20 Amp MCCB	01	No.	932,850.00

I note that the Bill of Quantities (P4) is a computer print out on which specific sums of money have been entered in the "Amount" column using a type-writer. This suggests that the Respondent merely typed on the Bill of Quantities provided by the Appellant co-operative society, the specific amounts he quoted for each of the items set out therein, and submitted his tender in accordance with the Tender Document marked P2.

It is common ground that the work has been completed, and the Respondent has been paid all money lawfully payable to the Respondent upon the completion of the work, subject to two exceptions. It is admitted that the Appellant has withheld the sum of Rs. 627,500.00 claimed by the Respondent for the *installation of the transformer* (item 01.01 in the Bill of Quantities), on the basis that the said transformer was supplied and installed by Lanka Electricity Company (Pvt.) Ltd. (hereinafter referred to as "LECO") and that the Respondent had no part to play in the installation of the transformer supplied by LECO. It is also admitted that the Appellant has paid the Respondent only 10% of quoted amount of Rs. 17,500.00 claimed by the Respondent under item 01.02 of the Bill of Quantities for *supplying and laying of 4 x 185 Sq mm copper cable* from the transformer to the electrical room of the factory, the balance 90% being withheld on the ground that the Respondent had to lay only 30 meters of cable.

The Respondent instituted action in the District Court of Colombo praying for judgment in a sum of Rs. 643,250.10, with interest at 22% per annum from the date on which the work was completed to the date of filling of action, and further legal interest from the date of judgement until payment is made in full, on the basis that although the Respondent has completed the work contemplated by items 01.01 and 01.02 of the Bill of Quantities, the payment of the aforesaid sum has been unlawfully withheld by the Appellant despite the recommendation of the Consultant Engineer of the Appellant that the same should be paid. The main questions for the District Court to decide were whether the Respondent had

installed the 165 KVA transformer as contemplated by item 01.01 of the Bill of Quantities and whether he had supplied and laid 300 meters of 4 x 185 Sq mm PVC cable which connected the transformer to the electrical room of the factory.

The District Court, after a brief trial, held that though the transformer was supplied and *affixed* to the ground by the Lanka Electricity Company (Pvt.) Ltd., (LECO), it was the Respondent who *installed* the transformer, laid the cable and provided the electrical connection. The District Court further held that the Respondent was therefore entitled to payment under item 01.01, but it disallowed the Respondent's claim for payment under item 01.02 as the Respondent had, in fact only laid 30 meters of cable for which he had already been paid by the Appellant. Dissatisfied with the said judgement of the District Court, the Appellant appealed to the Court of Appeal. The Court of Appeal, by its judgment dated 7th October 2004, affirmed the decision of the District Court. The simple question that arises in this appeal is whether the Respondent is entitled for payment under item 01.01 for the installation of the 164 KVA transformer at the Appellant' factory in Maharagama.

Before dealing with the submissions made by learned Counsel at the hearing of this appeal, it is necessary to refer to the report of Mr. K. Jagathchandra, Chartered Electrical Engineer, dated 10th July 2006, which was tendered to Court by the Attorney-at-Law for the Appellant with a motion dated 22nd August 2006, with the following recital:-

> "Whereas when this matter came up before the Supreme Court, the Court directed the Defendant-Appellant-Appellant to refer this matter to an independent person; and whereas the Defendant-Appellant-Appellant requested a retired Deputy General Manager of the Ceylon Electricity Board to go into the matter and report;
>
> The Defendant-Appellant-Appellant moves that permission be granted to file the said report and the same is filed herewith and move that Your Lordships' Court be pleased to accept the same."

The report of Mr. Jagathchandra states that there was no necessity for the Respondent to carry out any part of the work contemplated by item 01.01 of the Bill of Quantities as the said work had to be carried out by the authority that supplied and installed the transformer, which in this case was the Lanka Electricity Company (Pvt.) Ltd., (LECO) which carried out the functions of the Ceylon Electricity Board (hereinafter referred to as "the CEB") in the relevant area, and hence no payment is due under that item to the Respondent. However, journal entries and orders made by this Court do not substantiate the position that the Court had referred this matter for a report by "an independent person" as set out in the said motion, nor do they disclose that the said motion has been supported or accepted by this Court. In fact, in paragraph 15 and 16 of the further written submission filed on behalf of the Respondent, objection has specifically been taken to the acceptance of this report, specifically on the ground that apart from the absence of a prior order of this Court calling for a report, the Respondent has not been consulted in the process of selection of this "independent person". Learned Counsel for the Respondent has submitted that this report is a self-serving document which is totally biased in favour of the Appellant, and should therefore be rejected. In the circumstances, in view of the fact that there is no indication in the docket of this appeal and journal entries thereof that such a

report was ever solicited by this Court, I hold that it is not proper to take the opinion expressed by Mr. Jagathchandra into consideration.

At the hearing, learned Counsel for the Appellant submitted that it was only CEB and LECO, that had the authority to supply and install the 165 KVA transformer in question, and that the Respondent could not have done any work under item 01.01 of the Bill of Quantities. He further contended that the parties had in fact contracted on the "misunderstanding" that it was possible for the Respondent to install the transformer when it was supplied by CEB or LECO, but however, in fact it was LECO that installed the transformer which it supplied. Learned Counsel for the Appellant further submitted that the installation of the transformer involves the supply and erection of a high tension spur line from the existing main line to the transformer, erection of supports, stays, cross arms, insulators, lightening arresters, and a meter box with energy meters to measure the energy consumed by the transformer, none of which the Respondent was competent to perform, and which were in fact done by LECO. He invited the attention of Court to the quotation dated 21st April 1998 (D2) made by LECO and the receipt voucher dated 25th May 1998 (D3) issued by LECO showing that a sum of Rs. 596,322.00 was quoted by LECO for the "supply *and installation*" of the transformer and was paid for the said work by the Appellant.

Learned Counsel for the Respondent conceded that the Respondent could not have supplied the transformer which was necessary for the factory, and stressed that it was for that reason that item 01.01 only contemplated the "installation" of the transformer, whereas items 02.01, 03.01, 04.02, 05.01, 05.02, 07.01, 08.01, 08.08 of the Bill of Quantities provided for "supply and installation" of various other apparatus. He therefore submitted that it was intended that the Respondent should *install* the transformer that will be supplied by LECO, and that for this purpose the term "installation" should be given a liberal interpretation taking into consideration the fact that Respondent was obliged on completion of the work to hand over to the Appellant a fully operational electrical installation in accordance with the specifications. It is relevant to note that at the trial before the District Court, the Respondent gave evidence in support of his case and closed the case marking in evidence the documents marked P1 to P13. He produced *inter alia* the relevant Tender Document containing instructions to tenderers, and other conditions marked P2, the Bill of Quantities filled up by the Respondent with the tended amounts for the various items marked P4, and the letter dated 11th December 1997 by which the tender was accepted by the Respondent marked P3.

In the course of his testimony, the Respondent referring to items 01.01 and 01.02, and testified (at page 67 of the Appeal Brief) as follows:-

> [22]''''''''''''''''''''''''''''fus iïnkaOfhka fmdvs m%Yakhla we;s jqkd' me' 4 ys ;sfnk bkaaiagf,aIka T*a g%dkaiaf*dau¾ (installation of transformer) lshk tl jsÿ,s n, uKav,fhka ;uhs imhkafka' tal **ijs l,dg miafia** lïns od,d l¾udka; Yd,dj we;=,g jsÿ,sh f.kshkak /yeka we,a,Su;a hk ishˆ foaj,a ijs lrkafka wms ;uhs' jsÿ,s n, uKav,h lrkafka g%dkaiaf*daurh f.k;a fok tl muKhs' Bg wu;rj fmd,j hgska Tlafldu od,d fïka iajsÉ od,d Tlafldu ijs lrkak Tsk' tal uf.ka bgq fjkak Tsk'[22](*my emphasis*)

From the above extract of his testimony, it is clear that the work that was performed by the Respondent consisted of laying cables and wires and providing the electricity connection to the factory *after* the transformer was supplied and installed (ijs l,dg miafia) by LECO. In

fact, under cross-examination (at page 75 of the Appeal Brief), he was specifically asked about how he quoted for the installation of the transformer under item 01.01 in the Bill of Quantities marked P4, and his answers are quoted below-

²²m% : .sjsiqug w;aika lrk fj,dfjs lshj,d ne,qfjs keoao @
W : .sjsiqug w;aika lrkjd lshkafka ta f.d,af,daa bosrsm;a lrmq fgkav¾ m;%hg us< .Kka oeuSula muKhs wms lf,a' ta whs;uhka i|yd hk us< .Kka lshkak muKhs wmg ;sfnkafka'
m% : ;ukaf.a .sjsiqfus fldgilao keoao lshk tl meyeos,sj lshkak @ me' 4 f,aLKfha 01.01, 01.02 lshk fldgia hgf;a js¥,s g%dkaiaf*daurhla ijs l,do @
W : g%dkaiaf*daurh ijs lrkak wmsg jsosyla keyefka'
m% : ijs l,do @
W : ijs lf,a keye'²²

It is clear from the answer to the last quoted question that the Respondent did not install the transformer, which admittedly was supplied by LECO. This is further evident from the following portion of his further cross-examination at page 80.

²²m% : fusfla whs;sh ;sfnkafka f.dvke.s,af,a whs;slreg' f.dvke.s,af,a whs;slre g%dkaiaf*daurh us,oS .;a nj ;ud okakjdo @ Bg miafia ;udg fïl ÿkakd @
W : us,oS .;a;u ug ÿkafka keye, f.k,a,d ijs l,d'
m% : ljso ijs lf,a @
W : jsÿ,s n, iud.fuka (LECO)
m : ;ud fuu g%dkaiaf*daurh us,oS .;af;;a keye, ;ud ijs lf,;a keye @
W : keye²²

In fact, it appears to be the position taken up by the Respondent, in his evidence that the work done by him was to connect the transformer to the electricity room of the factory by laying 4 x 185 Sq mm cables and supplying and installing the Main Switch, and doing the internal wiring. It has been stressed by learned Counsel for the Appellant that these items of work were in fact covered by items 01.02 and 02.01 of the Bill of Quantities, for which the Respondent, admittedly, has been paid in full.

The entire case of the Respondent was based on the letters dated 10th July 1998 (P6) and 21st October, 1998 (P5) which the Electrical Consultant of the Appellant co-operative society, Rohan Jayasinghe, had sent to its General Manager after the dispute arose. It transpired in evidence that the said Rohan Jayasinghe (hereinafter referred to as the "Engineer") was engaged by the Appellant as the Engineer under whose supervision the work was performed by the Respondent, and that one of his functions was to measure and check the work periodically and recommend payment. When the Respondent claimed payment under items 01.01 and 01.02 of the Bill of Quantities (P4) and the Accountant of the Appellant raised certain queries, the Engineer wrote the letter dated 10th July 1998 (P6) addressed to the General Manager of the Appellant clarifying that item 01.01 of the Bill of Quantities (P4) did not contemplate the *supply* of the transformer and was confined to the *installation* of the transformer that was supplied by LECO. In P6, the Engineer merely stated that-

²²by; l¾udka;dh;kfha jsÿ,s g%dkaiaf*daurh i|yd us,.Kka leojSfu weia;fuka;+ jd¾;dfj we;+,;a lr we;af;a g%dkaiaf*daurh ijslsrSu ioyd muKla nj;a" iemhSu ^jsÿ,s

g%dkaiaf*daurh& thg we;+,;a lr fkdue;s nj;a okajk w;r o¾Yk bf,lag%sl,aia wdh;kh u.ska fgkav¾ uKav,h ms<s.kakd ,o uq,q uqo,g g%dkaiaf*daurh iemhSu ioyd uqo,la we;+,;a lr fkdue;s nj oekajSug leue;af;us'[22]

The gist of P6 is that the cost of the transformer has not been included in the quotation for the installation of the transformer made by the Respondent. It appears that the Appellant co-operative society was not satisfied with this clarification and had requested the Respondent to give a statement of the work he claimed he had done under items 01.01 and 01.02 of P4. This he did by his letter dated 26th August 1998, marked P7, addressed to the General Manager of the Appellant setting out the basis of his claim under these two items aggregating to Rs. 645,000.00. The said letter contained a list of work claimed by the Respondent to have been performed under items 01.01 and 01.02 of P4, which list is quoted below in full in view of its significance:-

[22]kdjskak kj lrAudka; Yd,dfõ jsÿ,s /yeka weoSu ioyd wm us< .Kka bosrsm;a l< fgkavrfha 01-01 yd 01-02 ork whs;uh ioyd jeh l< jshoï igyk

01	4 x 185 fmd<jhg ;ekm;a lrk m%Odk jh¾ uSg¾ 30 la us,oS .ekSug ^tx.,ka;fha kslamdos;&	264"800'00
02	flan,h ;ekam;a lsrSu ioyd ldkqj lemSu" nsu ilia lsrSu yd fldkaIS%Ü ldkqj ieliSu'	43"000'00
03	je,s lshqí 03 la us,oS .ekSu i|yd	3"800'00
04	flan,h u;+msg we;s fldgi ;yvq u.ska wdjrKh lsrSu lsrSu ioyd ^flan,a g%lalska&	18"000'00
05	400 A /Mp m%Odk fïka iqjsph ilia lsrSug wjYH f,day fmÜgsh ieliSu yd tu fmÜgsh ijslr iuznkaO lsrSu	128"000'00
06	185 Sq x 4 m%Odk jhrh m%Odk iqjsp mqjrejg iïnkaO lsrSu yd mrsm:h wx. iïmQ¾K lsrSu ioyd Wm fldka;%d;alreg f.jk ,oS	86"000'00
07	wdh;ksl jshoï m%jdyk .dia;=" js¥,s iud.ug fiajd iemhSu ioyd wjYH m%udKh iemhSu yd wdh;k .dia;+j	91"600'00
08	flan,a ,skala us<oS .ekSu yd tu ,skala ijs lsrSu ioyd hka;%h l=,shg .ekSu	9"800'00[22]

It will be seen that the above-quoted list contains eight heads of expenditure claimed by the Respondent himself to have been incurred under items 01.01 and 01.02 of P4, which I have translated as follows:

01.	Cost of 4x185 Sq mm Cable (produced in England)	264,800.00
02.	Excavation and preparation of ground and construction of concrete base for installing Cable	43,000.00

03.	Cost of 3 cubes of sand	3,800.00
04.	Cable tracking	18,000.00
05.	Supplying and fixing of the metal box to which the 400 Amp primary main switch has to be fixed	128,000.00
06.	Payment to sub-contractor for connecting 4x185 Sq mm cable to the primary main switch and completing circuit	86,000.00
07.	Establishment cost, transport charges, cost of supplying of necessary material for LECO for the supply	91,600.00
08.	Fixing of cable links and hiring of machinery for this purpose	9,800.00

It is significant that at the bottom of P7 there is an endorsement by the Engineer, which the Respondent claims was in effect the certificate of the Engineer that the said work has been performed by the Respondent, and equally significantly, that the total sum of 645,000/- is payable under items 01.01 and 01.02 of the Bill of Quantities. This too did not satisfy the General Manager of the Appellant society, and I would not blame him for the doubts he entertained as it is manifest that items 01, 02, 03, 04, and 08 of P7 relate to item 01.02 of the Bill of Quantities, which is the supplying and laying of 4x185 Sq mm cable, and items 05, 06 and 07 of P7 relate to item 02.01 of the Bill of Quantities, which is the supply and installation of the Main Switch Board, *for all of which admittedly the Respondent had by that time been fully paid.*

It was in these circumstances that the General Manager of the Appellant society, by his letter dated 4th September 1998 (not marked in evidence by either party but referred to in P5) appears to have sought further clarifications from the Engineer. The letter dated 21st October, 1998 (P5) was the Engineer's response to this letter, in which he observes that-

> ²²tys 01-01 whs;ufha g%dkaiafmdaurh iïnkaO lsrSu iïnkaOj ud úiska bosrsm;a lr we;af;a re. 6,57,500/= ls. ud tu uqo, bosrsm;a lf<a g%dkaiaf*daurh iúlsrSu i|yd ú¥,s n, uKav,hg jeh jk uqo, fkdi,ld yerh. Bg fya;+j wka lsisu mqoa.,fhl+g fyda fldka;%d;alrefjl+g ú¥,s g%dkaiaf*daurhla iúlsrSfï whs;shla ke;s ksidh. th ú¥,s n,uKav,fhkau isÿúh hq;a;la nj ud oek isá ksidh. f.ùu isÿ l< yelafla fiajdodhlhdg muKs.
>
> m%udK ì,am;%fhys 01-02 whs;ufha g%dkaiaf*daurfha isg ú¥,s ldurh olajd 4x185 Sq MM flan,h weoSu i|yd ñ. 300 la i|yd re. 17"500/= la olajd we;. tysoS ñ. 300 la i|yka lf<a g%dkaiafmdaurfha bvfï fl,jr mrK g%dkaiafmdaurh wdikakfha iúlsrSug uq,oS ie,iqï l< ksidh. miqj ia:dkh fjkia lsrSu ksid ñ. 30 lska th ksu l< yels úh.
>
> ta i|yd ud bosrsm;a lr we;s ñ, .kkao m%udKj;a fkdjk nj uu ms<s.;sñ. tfy;a wxl 01 whs;ufha tl;+j f,i ie,flk 01-01 g%dkaiafmdaurfha iúlsrSï yd tys isg 01-02 flan,h iemhSu yd t,Su hk jev fldgia folu i|yd ud bosrsm;a lr we;s ñ, .kk idOdrKh. fldka;%d;alref.a fgkav¾ b,a,Sfuys whs;u wxl 01 i|yd bosrsm;a lr we;s uqo, ^6,27,500 + 17,500& = 6,45,500/= ls th b;d idOdrK uqo,ls. …….
>
> wjidk jYfhka ud i|yka l< hq;af;a m%udK ì,a m;%h ilia lsrSfïoS ud w;ska m%udo fodaYhla isÿù we;s nj;a tA ksid ú¥,s /yeka iemhSu yd weoSu iïkaO fldka;%d;a;+fjka

> Tn wdh;khg uQ,Huh jYfhka lsisÿ mdvqjla fyda wjdishla isÿ ù ke;s njhs. fï wkqj fldka;%d;alre 01 whs;uh i|yd b,a,d we;s uqo, f.ùu idOdrK nj uf.a ks¾foaYhhs.[22]

This is a rather interesting letter, in which the focus is on the reasonable nature of the amounts quoted by the Respondent for items 01.01 and 01.02 of the Bill of Quantities, and the only reference to work that has been completed relates to the fact that work contemplated by item 01.02 was performed by laying 30 meters of cable. Nowhere in P5 does the Engineer seek to assert or certify that the Respondent has performed the work envisaged by item 01.01 of the Bill of Quantities, namely the installation of the 165 KVA Transformer, although he has stated categorically that it is reasonable to pay the amount claimed by the Respondent under this item. It is difficult to understand how the Engineer sought to recommend the payment claimed by the Respondent under item 01.01 of the Bill of Quantities in the face of the Respondent's letter P7 in which the Engineer through his endorsement appears to certify that *certain other work* (which did not include the installation of the transformer) has been performed by the Respondent under this item.

In this context, it is important to note that the learned District Judge and the learned Judges of the Court of Appeal have relied heavily on P5 and P6, and empahsised the fact that the Engineer, who was employed by the Appellant society, has recommended the payment of the amounts claimed by the Respondent under items 01.01 of the Bill of Quantities (P4). The Court of Appeal has in fact observed that-

> "…….the evidence had disclosed that the Electrical Consultant of the Defendant-Appellant had *recommended to the Defendant-Appellant by the letters P5 and P6* that the payment for the item 01.01 in the Bill of Quantities (P4) be made to the Plaintiff-Respondent for the reasons mentioned therein." (*My emphasis*)

In my view, the trial court and the Court of Appeal have fallen into the error of being guided solely by the statements of the Engineer contained in the letters marked P5 and P6, in circumstances where the truth of such statements have not been admitted by the Appellant, and are in fact somewhat contradicted by the contents of P7. Furthermore, the Engineer who wrote the letter P5 and P6 and endorsed P7 had not been called to testify in the case. The omission on the part of the Respondent (who had listed him as one of his witnesses) to call the Engineer to testify is glaring in the context that the Respondent had in his testimony (at page 68 of the Appeal Brief) stated that when he sought clarification from the Engineer about the role he was expected to play in the "installation" of the transformer under item 01.01 of the Bill of Quantities, the Engineer did not offer any explanation but indicated that if any problem arises, he will pay.

> [22]fuu ^1& fjks tfla ima,hs ke;af;a" fgkav¾ m;%h yomq frdydka chisxy uy;df.ka uu weyqjd fïfla bkaiafgdf,aIka tl fudllao lsh,d f;areï lrkak lsh,d' t;fldg chisxy uy;d lsõjd fïfla uqo,a f.jSu iïnkaOj ug ;uhs ndr oS,d ;sfnkafka' Thdf.a jefvs lrf.k hkak fudkjd yrs m%Yakhla jqfkd;a uu f.jkak Tsk'

To me, this sounds like the blind leading the blind, but had the Engineer been called into the witness box, he would no doubt have had the opportunity to corroborate or contradict the position taken by the Respondent, whilst clarifying some of the vital matters that were in issue in the case including the manner in which he had discharged his professional responsibilities as Consultant Engineer for the Appellant co-operative society.

Relying on the *truth of the contents of P5 and P6* is clearly contrary to the hearsay rule enunciated by the English courts and recognized by our courts in decisions such as *Eliatamby v. Eliatamby* 27 NLR 396 in which Lord Darling delivering the opinion of the Privy Council at page 400, emphatically rejected the proposition that the Evidence Ordinance "practically swept away all the English law relating to hearsay." The hearsay rule is so firmly established in Sri Lanka that it is instinctively followed and applied by our courts, and in *Sheila Seneviratne v. Shereen Dharmaratne* [1997] 1 Sri L.R. 76, the Supreme Court even set aside an *ex parte* decree which was based on hearsay. Where the court is called upon to rely on any statement contained in a document such as P5 or P6 without the maker of the document being called to vouch for the truth of such statements, it has been observed by the Privy Council in *Subramaniam v Public Prosecutor* [1956] 1 WLR 965, at page 970 that-

> "It is hearsay and inadmissible when the object of the evidence is to establish the truth of what is contained in the statement. It is not hearsay and is admissible when it is proposed to establish by evidence, not the truth of the statement, but the fact that it was made."

It is, therefore, legitimate for the Respondent to rely on P5 and P6 to show that the Engineer had in fact recommended payment, without relying on the truth of any assertion made by the Engineer in either of these documents. Such use would not offend the hearsay rule, but no such recommendation can be deemed to be conclusive in the face of evidence which clearly show that the recommendation is not well founded. In this case, the fact that the Engineer had recommended payment has been virtually admitted by the Appellant society, which very consistently disputed the correctness of the recommendation on the basis that to act thereon and make payment would result in loss to the co-operative society which has already paid LECO for not only the supply but also the installation of the transformer.

The burden is always on the plaintiff to prove his case, and in my opinion, the reception in evidence of the letters marked P5 and P6 would not *per se* relieve the Respondent of the burden of establishing on a preponderance of probabilities that he had in fact performed the work contemplated by item 01.01 of the Bill of Quantities. In my considered view, the Respondent has miserably failed in this respect, and I find it extremely difficult to agree with the conclusion of the Court of Appeal that the learned District Judge has based his findings on a correct analysis and evaluation of the evidence. I am of the opinion that the decisions of the lower courts are clearly contradicted by the evidence in the case, particularly in the context that the Respondent, in his testimony, has consistently taken the position that he *did not* install the transformer but only linked it by laying 30 meters of cable to the electricity room of the factory *after the transformer was installed by LECO*, which position is corroborated by not only the letter P7 sent by the Respondent to the Appellant with the Engineer's endorsement but also the quotation marked D2 and voucher receipt marked D3 which show that the transformer was in fact supplied *and installed by LECO*, for which a sum of Rs. 596,322.00 was paid to it by the Appellant co-operative society. Another intriguing aspect of this case is that the Respondent has claimed a sum of Rs. 627,500.00 to *install* a transformer which had cost the Appellant society only Rs. 596,322.00.

A curious feature of this case is that the Respondent, in his testimony, has consistently taken the position that he *did not* install the transformer. Despite the fact that the

Respondent in his testimony conceded that he could not, and actually did not, install the transformer, the record of proceedings before the District Court reveals that an attempt was made by learned Counsel for the Respondent to suggest to Upali Indrajith Ariyadasa, the General Manger of the Appellant society that the Respondent had in fact provided a metal cover to protect the transformer. I quote below part of the cross-examination (page 90-91 of the Appeal Brief) in which this baseless suggestions was made-

[22]m% : uy;auhd okakjdo g%dkaiaf*dau¾ tl f.kd fj,dfjs tal ijslrkak f,dayj,ska ;kk ,o wdjrKhla iEÿj nj okakjo @
W : g%dkaiaf*dau¾ tl yokak tfyu fohla ;snqfka keye'
m% : g%dkaiaf*dau¾ tl f.akfldg tal wdjrKh lsrSu ilia lsrSu lrkak Tsk meusKs,slre lsh,d okakjo @
W : keye
m% : wdjrKh lsrSu lf,a meusKs,slre lsh,d ;ud okakjo @
W : wdjrKh lsrSula lf,a keye'
m% : ;ud lshkafk wOslrKhg wi;Hhla' ;ud wi;Hhla m%ldY lrkjd lsh,d ;udg uu lshkafka @
W : ke; uu m%ldY lf,a wi;Hhla' fkfjhs'
m% : ;ud okakjd Th g%dkaiaf*daurh T;kg ijs lrkak biafi,a,d talg odkak Tsk flan,a j.hla @
W : Tjs
m% : ta flan,a oeusfus fï meusKs,slre @
W : keye ,xld jsÿ,s n, uKav,h u.ska mdf¾ b|,d flan,a wfma fldïmeKshg oeïfï' iemhSu iy boslsrSu lf,a ,xld jsÿ,s n, uKav,h' tal t;kg .syska n,kak mqˆjka'
m% : ;ud okakjdo g%dkaiaf*daurh f,day wdjrKhlska jy,d ;sfnkafka @
W : wfma g%dkaiaf*daurh tfia jid ke;'[22]

In my opinion, the said suggestion is without foundation, as the Respondent in the course of his testimony never claimed that he had installed a metal cover **(f,day j,ska ;kk ,o wdjrKhla)** for the transformer or drew any cable from the main line to the transformer. It was the position of the Respondent that he only laid the cable to link the transformer to the electricity room of the factory, which is covered by item 01.02 of the Bill of Quantities (P4).

In regard to this item of supplying and laying of cable, it appears that the Respondent had sought relief from the District Court on the basis of the quantity for which he tendered, which was altogether 300 meters, despite his admission that in fact he had only laid 30 meters of cable. This becomes apparent from the letter of the Engineer dated 21st October 1998 (P5), in which he himself has explained that it became necessary to lay only 30 meters of cable because the original place where the transformer was to be installed was later shifted to a point much closer to the factory. The Respondent has, however, testified at the trial that he had to incur much higher expenses than what had been quoted by him for item 01.02 to complete the work of "supplying and laying" copper cable from the transformer to the electrical room. According to the Respondent, the said cable was imported from the United Kingdom, and cost Rs. 7,500 per meter. His testimony (at page of the Appeal Brief) refers to this matter in the following manner:-

[22]m% : ;ud fuu 01.01 hgf;a ;sfnk g%dkaiaf*daurh ijs l,do @
W : g%dkaiaf*daurh ijs lf,a keye' g%dkaiaf*daurfha b|,d jsÿ,sh ,nd ÿkakd l¾udka; Yd,dj ;=,g

m% : whs;u 01.02 ;sfnkafka jsÿ,sh jh¾ weo,d f.dvke.s,a, ;=,g oeuSu @
W : 01.02 fjks tfla uu woyia lf,a tal i|yd hk f,an¾ pd¾ca j,g;a us,suSg¾ 185) 4 orK jh¾ uSgrhlau fj<|fmdf,a us, re(7500 la fjkjd tajdg hk jshou'[22]

If this be so, 30 meters of the copper cable would have cost him a tidy sum of Rs. 225,000.00, which is very much more than the sum of Rs. 1,750.00 quoted by him and paid under item 01.02 of the Bill of Quantities. The learned District Judge has in fact, summarily dismissed his meager claim of Rs. 17,500.00 under this item on the basis of an admission made before the trial court before which the only issue was whether the Respondent had laid 300 meters of cable. It may very well be that the amount quoted by the Respondent under item 01.02 was Rs. 17,500.00 per meter, which will take the Respondent to a sum of Rs. 525,000.00 for this item alone, but that was not the basis on which his case was presented in the trial court. Here we can only speculate, but the question may again be posed as to why the Respondent did not call his best possible witness, Consultant Engineer Rohan Jayasinghe, to clarify this matter and support the Respondent's claim that the sum of Rs. 17,500.00 was only the labour rate and excluded the cost of the cable supplied by him. The answer probably is that item 01.02 of P4 very clearly contemplates the "*supplying and* laying of 4 x 185 Sq mm PVC XLPE CU cable" from the transformer to the electrical room of the factory, and persistence with this line of reasoning would have exploded the distinction drawn by Counsel for the Respondent between item 01.02 which provided for only the installation of the transformer, and certain other items such as item 01.02 providing for "supplying and laying" and item 02.01 providing for "supplying and installing".

It is also important to stress that the Respondent has not appealed against the decision of the learned District Judge with respect to item 01.02, and hence it is not possible to re-agitate this matter in the course of this appeal as the doctrine of *res judicata* would clearly preclude such a course. It is therefore my firm view that there is no justification for the Respondent to include in P7 the sum of Rs. 264,800.00 as the cost 4x185 Sq mm cable imported from England, or the other amounts specified in items 02, 03, 04 and 08 which I presume were incidental to the work of laying the said cable, which add up to an additional Rs. 74,600.00. The Respondent had already been paid the amount quoted by him for supplying and laying the cable in question, and he can claim no more.

The same observation may also be made regarding the claims made by the Respondent in his letter dated 26th August 1998 (P7) under items 05, 06, and 07. Under these items, he has claimed Rs. 128,000.00 for supplying and fixing the metal box to which the 400/AP primary main switch has to be fixed, Rs. 86,000.00 on account of money alleged to have been paid to LECO as sub-contractor for connecting the 4x185 Sq mm cable to the primary main switch for completing the circuit, and a further sum of Rs. 91, 600.00 as establishment cost, transport charges and the cost of supplying of necessary material to LECO for this purpose. It is manifest that these items relate to the "supplying and installation" of the 400 AP Main Switch Board, which falls under item 02.01 of the Bill of Quantities, for which the Respondent had already been paid a sum of Rs. 932,850.00 on the basis of his own quotation. In fact, here, there is even less justification for including these items in P7, as there is neither any allegation nor any evidence to the effect that the Respondent had incurred any extra costs on account of this work.

Although I am compelled by the foregoing to disagree with the assessment of the evidence made by the lower court and the Court of Appeal in the peculiar circumstances of this case,

I am not unmindful of the fact that an appellate court would not lightly interfere with the decision of the trial judge who had the advantage of seeing and hearing the testimony of witnesses who are called to give evidence. In *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, Viscount Sankey L.C. quoting James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322, emphasized that an appellate court-

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour *unless they find some governing fact which in relation to others has created a wrong impression.*"

In *Munasinghe v. Vidanage* 69 NLR 97, the Privy Council quoted with approval an extract from the speech of Viscount Simon in the decision of the House of Lord in the oft-quoted case of *Watt vs. Thomas* [1947] 1 All E. R. 582, at pages 583 observing that-

> "…….an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

In *Attorney General v. Gnanapiragasam* 68 NLR 49, H. N. G. Fernando, S. P. J. (as his Lordship then was) quoting the observations of Lord Reid, in the case of *Benmax v. Austin Motor Co. Ltd.* [1955] AC 370 noted that "where the point in dispute is the proper inference to be drawn from proved facts, an appellate court is generally in as good a position to evaluate the evidence as the trial judge and ought not to shrink from that task," when overruling the findings of fact of the trial judge where such findings were in "no way based upon credibility or demeanour and were referable solely to inferences and assumptions. . ."

I am of the opinion that in this case too the District Court did not have to choose between the conflicting testimony of witnesses on the basis of credibility or demeanor, as on the most vital question whether the Respondent had in fact installed the transformer, the testimony of the Respondent as well as that of the General Manager of the Appellant co-operative society was to the effect that he did not, and in fact the District Court as well as the Court of Appeal had been swayed mainly by the contents of the letters marked P5 and P6. Unfortunately, the District Court which did not have the advantage of hearing the testimony of the Engineer who wrote those letters, had arrived at its findings in total disregard of the cautionary hearsay rule and in the face of oral and documentary evidence

which clearly contradict the contents of these letters, to infer that the Respondent's claim under item 01.01 of P4 was reasonable, when the real issue for determination was whether he had in fact performed the work envisaged thereby. I also consider it repugnant to all notions of justice for a contractor to be paid for work he admittedly did not perform, where he has altogether failed to discharge the burden placed upon him by law to prove his case.

I am firmly of the opinion that the two questions on which special leave to appeal has been granted should be answered in the affirmative, despite the fact that the Appellant has in fact taken over a higher burden than what is expected of it in formulating the first of these questions (question (a). Accordingly, I set aside the decision of the District Court insofar as it relates to item 01.01 of the Bill of Quantities (P4), allow the appeal and vacate the judgment of the Court of Appeal appealed from, and formerly enter judgment as prayed for in the answer of the Appellant filed in the District Court and dismiss the action filed in that Court with costs. I make no order for costs of appeal in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. TILAKAWARDANE, J.

I agree.

JUDGE OF THE SUPREME COURT

HON. 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 to the Supreme Court from a Judgement of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka.

Francis Samarawickrema of
Wilegoda,
Kalutara North.

Plaintiff-Respondent-Appellant

SC Appeal No. 7/2004
SC Special L/A No. 111/2003
CA No. 388/93 (f)
DC Kalutara No. 2443/L

-Vs-

1. Dona Enatto Hilda Jayasinghe

2. Don Stephen Jayasinghe, both of
No. 260,
Wilegoda,
Kalutara North.

Defendants-Appellants-Respondents

BEFORE	:	S. N. Silva, P.C., C.J., Shiranee Tilakawardane, J., & Saleem Marsoof, P.C., J.
Counsel	:	Mr. S. C. B. Walgampaya, P.C., and Mr. L.K.J. Perera for Appellant. Ms. Maureen Seneviratne, P.C., and Mr. S.A.D.S. Suraweera for Respondents
Argued on	:	24th October 2005, 21st June 2006, 4th July 2006, 21st September 2006 and 4th July 2007.
Written Submissions	:	Appellant - 12th October 2007 Respondent - 14th November 2007

Decided on : 7th May 2009

MARSOOF, J.

This appeal is a sequel to the decision of the Court of Appeal of Sri Lanka dated 3rd May 1982 in C.A. Appeal No. 469/78 (F) and reported as *Hilda Jayasinghe v. Francis Samarawickrema* [1982] 1 Sri LR 249. Both appeals arose from an action instituted in the District Court of Kalutara by the Plaintiff-Respondent-Appellant (hereinafter referred to as "the Appellant" on 24th November 1976, against the 1st and 2nd Defendant-Appellant-Respondents, the 3rd Defendant (who is the mother of the 1st and 2nd Respondents, and who died pending the trial) and the 4th Defendant, Yasantha Ajith Kahatapitiya (who was the minor son of Mr. L.G. Kahatapitiya, Attorney at law and Notary Public) seeking a declaration of title to the land described in the schedule to the plaint and for ejectment and damages. The subject matter of the action is a land called "Pokunuwattekattiya" in extent 11.94 perches and situated at Wilegoda in Kalutara North, which is admittedly the ancestral and residential property of the 1st and 2nd Defendant-Appellant-Respondents (hereinafter referred to as "the Respondents") and the original 3rd Defendant.

In his plaint, the Appellant pleaded that the Respondents and the 3rd Defendant, sold to him the said land upon Deed No. 4880 dated 24th March 1976 (P4), attested by Mr. L. G. Kahatapitiya, Notary Public for a consideration of Rs. 8,000/- and though they were paid the money on the day they executed the said deed, they have failed to deliver possession of the land and are in wrongful possession thereof. By way of answer it was pleaded that the said land belonged to the Respondents and their mother the 3rd Defendant; that upon Deed No. 4753 dated 12th August 1975 (P2), attested by Mr. L. G. Kahatapitiya, Notary Public the said land was sold to the 4th Defendant Yasantha Ajith Kahatapitiya, for a consideration of Rs. 3,500.00, subject to the right to obtain a re-conveyance of the same within three years; that about seven months after the execution of the said Deed P2, the signature of the Respondents and the 3rd Defendant was obtained on three blank papers by the said notary purportedly to assign the rights upon Deed No. 4753 (P2) to the Appellant and that it was never their intention to transfer the land to the Appellant outright, and that the Appellant has perpetrated a fraud in having a deed of transfer executed; that Deed No. 4880 (P4) ought therefore to be set aside, and the Appellant's action dismissed with costs.

The case first went to trial on 1st March 1978, and the only witnesses for the Appellant, who did not himself get into the witness box, were the surveyor E. D. P. K. Premaratne and Mr. L. G. Kahatapitiya, Notary Public. The 1st and 2nd Defendants-Appellants-Respondents testified on their own behalf, but did not call any other witnesses. A number of documents too were produced and marked in evidence. On 13th November 1978, the learned District Judge pronounced judgment for the Appellant as prayed for in the plaint.

Aggrieved by the said decision of the District Court,, the Respondents appealed to the Court of Appeal, which by its judgment dated 3rd May 1982, delivered by H.D. Tambiah, J. (with Parinda Ranasinghe, J. concurring) and reported as *Hilda Jayasinghe v. Francis Samarawickrame,* [1982] 1 Sri LR 249, decided to set aside the decision of the District Court, in what I would, for convenience, call the first trial, and remitted the case for re-trial primarily on the ground that the learned District Judge had misdirected himself on

two vital factual matters highlighted in pages 355 and 356 of the said judgment, and that the learned District Judge had considered the *due execution* of the impugned deeds P3 and P4 as being proved despite the fact that apart from the notary neither of the two attesting witnesses had given evidence at the trial.

The second trial, which commenced on 20th October 1983 and was heard by several successive judges, did not yield a different result from the first, and the District Court by its judgment dated 16th June 1993 once again held in favour of the Appellant as prayed for in the plaint. The Respondents appealed against this decision to the Court of Appeal, which by its judgment dated 9th May 2003, reversed the decision of the District Court and while dismissing the action filed by the Appellant also granted the Respondents relief as prayed for in their answer and set aside deed No. 4880 (P4).

On 27th January 2004 this Court granted special leave to appeal against the said judgment of the Court of Appeal dated 9th May 2003 on the following substantial questions:

A. Did the Court of Appeal err in holding that P4 was fraudulently executed when the same has not been proved with the high degree of proof required to prove fraud?

B. Did the Court of Appeal err in law in not considering the evidence of the notary in terms of Section 33 of the Evidence Ordinance, when the said evidence was part of the record?

Proof of Due Execution

As the Court of Appeal has rightly observed in both of its judgments in this case, proof of due execution of Deed No. 4879 (P3) dated 24th March 1976 by which Yasantha Ajith Kahatapitiya purported to re-convey title to the Respondents and the original 3rd Defendant, and Deed No. 4880 (P4) by which the latter purported to convey their title to the Appellant (hereinafter referred to as the "impugned deeds"), is essential for the Appellant to succeed in his case against the Respondents in what is essentially a *rei vindicatio* action in which the Appellant claims title to the property in suit purely on the faith of the said deeds. The view of the Court of Appeal in the first appeal reported as *Hilda Jayasinghe v. Francis Samarawickrame* [1982] 1 Sri LR 249 was that since the Respondents alleged that the notary Mr. Kahatapitiya had *fraudulently* obtained their signatures and the thumb impression of the 3rd Defendant on blank papers which he subsequently used to prepare the said deed P4 without any consideration passing, the circumstances of the case required that one of the two attesting witnesses be called to give evidence, to prove due attestation of the deed.

In the course of his judgment, Tambiah, J. examined Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 and Section 68 of the Evidence Ordinance No. 14 of 1895 in the light of 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 and concluded that as a general rule, the notary before whom a deed is executed is an attesting witness, and is competent to prove the due execution of the deed, provided the grantor was personally known to him. However, His Lordship noted at page 359 of his judgment, following the decision of Lawrie, A.C.J. and Moncreiff, J. in *Baronchy Appu v. Poidohamy* 2 Browns's Reports 221, that-

> "…..where the execution of a deed is challenged *on the ground that it had been signed before it was written*, then, where at least one of the two attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant, is not sufficient; at least one of the two attesting witnesses should also be called." (*emphasis added*).

Applying this principle to the circumstances of the case, Tambiah, J. held that since it is alleged that the signatures of the Respondents and the original 3rd Defendant had been obtained on blank papers, and the attesting witnesses are alive, the case is incomplete without at least one of them being called to give evidence regarding the execution of the deed. The Court of Appeal decided to send the case back for fresh trial, mainly in view of the fact that the trial judge had misdirected himself on certain factual matters and only the notary had testified to prove the due execution of the impugned deeds.

However, it is relevant to note that when the appeal was argued before the Court of Appeal, an application was made on behalf of the Respondents to admit fresh evidence touching the conduct of Mr. Kahatapitiya as a notary. The new evidence related to five cases filed in the Magistrate's Court of Kalutara, bearing numbers 32243, 43613, 43614, 7320 and 7321 against Mr. Kahatapitiya charging him with certain offences under the Notaries Ordinance, No. 1 of 1907. In the first of these cases, the offence was alleged to have been committed prior to the conclusion of his testimony in the first trial before the District Court, but the prosecution before the Magistrates Court resulted in the conviction of Mr. Kahatapitiya and the imposition of a fine after he concluded the said testimony. In the other four cases, Mr. Kahatapitiya was charged, convicted and fined for offences alleged to have been committed by him after he concluded his testimony at the first trial on 1st March 1978.

The offences of which Mr. Kahatapitiya was convicted and fined arose from his alleged failure to send duplicates of deeds, executed and attested by him, to the Registrar of Lands, Kalutara. When questioned by learned Counsel for the Respondents in the course of his cross-examination in the District Court, Mr. Kahatapitiya had admitted that there were certain cases pending against him in the Magistrates Court. It would appear from the judgement of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrema* [1982] 1 Sri LR 249, particularly from pages 359 to 360 thereof that the said Court took into consideration the said convictions as "further circumstances" that justified the admission of these items of new evidence in a fresh trial. Tambiah, J. observed at page 360 of the judgement that-

> "We allowed the application of learned Attorney for the defendants-appellants [present Respondents] to admit this new evidence. These items of evidence could have an important bearing on the credibility of Mr Kahatapitiya, particularly because the conduct of Kahatapitiya which is being impugned in this case, is also his conduct as a notary. It is only fair, and justice requires, that Mr Kahatapitiya be afforded an opportunity to explain his conduct and the circumstances in which he came to be charged and fined in these cases."

Fresh trial commenced on 20th October 1983, and although some issues were raised on that day and amended on a later date and some witnesses had testified, with judges changing and parties not agreeing to adopt even the issues that had been raised

previously, 23 fresh issues were raised before a new judge who commenced trial *de novo* on 9th May 1988. In the proceedings that followed, the surveyor Premaratne, the Appellant himself, Upamalika Wijesuriya, then attached to the Land Registry, Kalutara and Dharmasena, who was one of the attesting witnesses to the impugned deeds, were called to testify on behalf of the Appellant *inter alia* to establish due execution of the impugned deeds.

It is important to note that in the course of the second trial it was reported to court that the notary Mr. Kahatapitiya had died on 25th February 1985, and his death certificate was produced in court by the Appellant marked P6. The application made on behalf of the Appellant to read into the record, under Section 33 of the Evidence Ordinance, the testimony given by Mr. Kahatapitiya in the course of the first trial, was refused by the District Court. At the second trial, the two Respondents testified on their own behalf and marked in evidence several documents, but they did not call any other witnesses. As already noted, the second trial also ended in the same way as the first, and by the judgment delivered on 16th June 1993, the learned District Judge held that the due execution of the impugned deeds has been proved, and entered judgment for the Appellant as prayed for.

The Respondents appealed to the Court of Appeal from the said judgement of the learned District Judge. The Court of Appeal, by its judgment dated 9th May 2003, held that the due execution of impugned deeds had not been proved, set aside the decision of the learned District Judge and directed the District Court to enter judgment in favor of the Respondents as prayed for in their answer. It is against this decision of the Court of Appeal dated 9th May 2003 that this Court has granted special leave to appeal on the two questions which have been set out at the commencement of this judgment.

Adoption of Evidence under Section 33

It is convenient to examine at the outset the second of the two questions on which special leave to appeal has been granted by this Court, namely, did the Court of Appeal err in law in not considering the evidence of the notary in terms of Section 33 of the Evidence Ordinance, when the said evidence was part of the record? On 4th July 1988, after the conclusion of the evidence of surveyor Premaratne, who was the first witness called by the Appellant, an application was made to adopt the evidence of notary Mr. Kahatapitiya which had been recorded in the course of the first trial, under Section 33 of the Evidence Ordinance, on the basis that Mr. Kahatapitiya had since died. Upon objection been taken by the Respondents to this application, learned District Judge made order on 20th September 1988 (pages 486 to 493 of the Appeal Brief) that the said evidence cannot be adopted as the Court of Appeal, when setting aside the decision of the District Court in the first trial, had contemplated that the evidence of Mr. Kahatapitiya would be led afresh to enable him to clarify certain doubts as to his credibility and integrity arising from his convictions in the aforementioned cases. The learned District Judge observed as follows in the course of the said order, at page 492:

> "lygmsgsh uy;d ush hEfuka wNshdpkdOdlrKfha wNsm%dh bgq l, fkdyelsj we;' …….. m%:u jsNd.fhaoS ¥ka idlaIs fuu jsNd.fhaoSu bosrsm;a lsrSfuka fmr lS mrsos wNshdpkdOdlrKfha wjYH;djhka imqrd ,sh fkdyel'

fus wkqj lygmsgsh uy;df.a idlaIs" idlaIs wd{d mKf;a 33 jk j.ka;sfha jHd;sf¾Lh wkQj bosrsm;a lsrSug fkdyels nj ks.ukh lrus'"

The application was renewed later on in the course of the testimony of the Appellant on 29th March 1990, and in the face of strong objections raised on behalf of the Respondents *inter alia* on the basis that the Court has already ruled on this matter, the learned District Judge by his order dated 13th August 1990, (pages 515 to 517 of the Appeal Brief) refused to receive in evidence the previous testimony of Mr. Kahatapitiya. Despite these setbacks, the fact that the Appellant went on to win his case against the Respondents in the District Court, which by its judgement dated 16th June 1993 entered judgement for the Appellant as prayed for by him in the plaint, is a glowing tribute to the glorious certainties of litigation.

However, the Court of Appeal, which heard the appeal lodged by the Respondents against this decision, overturned the decision of the District Court on the basis that the Appellant has failed to establish due execution of his title deeds bearing Nos. 4879 (P3) and 4880 (P4), without taking into consideration the evidence of Mr. Kahatapitiya. After referring to the judgement of Tambiah, J. arising from the first trial, the Court of Appeal in its judgement dated 17th October 2002, merely observed that-

> "…..Tambiah J after setting aside the judgement of the District Judge has sent the case back for retrial with directions that in addition to the evidence of the Notary Public to record the evidence of at least one of the attesting witnesses……It is interesting to observe that by the time this case was taken for trial *de novo* at the District Court, Kahatapitiya the notary who attested the deed was dead. An application by the Plaintiff-Respondent [present Appellant] to adopt his evidence given at the earlier trial made under Section 33 of the Evidence Ordinance had been refused by the learned District Judge."

Strangely, the question whether the testimony of Mr. Kahatapitiya recorded in the course of the first trial, should be considered under Section 33 of the Evidence Ordinance has not been considered by the Court of Appeal, which concluded that the due execution of the impugned deeds has not been established by the Appellant without taking the evidence of Mr. Kahatapitiya into consideration. It is in this context that the question as to whether the evidence of Mr. Kahatapitiya has been properly and lawfully shut out from the second trial has to be considered.

It has been strenuously argued by learned President's Counsel for the Respondents that as the Appellant did not challenge by way of interlocutory appeal the orders made by the District Courts on 20th September 1988 and 13th August 1990 to exclude the evidence of Mr. Kahatapitiya, he is precluded from raising this question in a final appeal. This submission, in my view, goes against sound and established principle enunciated by our courts, which as pointed out by Bertram C.J. in *Fernando v. Fernando* 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 be granted from every incidental order relating to the admission or rejection of evidence, for to do so would be to open the floodgates to interminable litigation *(Balasubramaniam v. Valliappar Chettiar* 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,* 15 NLR 253 at page 255; *Girantha v. Maria* 50 NLR 519 at page 521). As observed by Vythialingam, J. in *K.A. Mudiyanse v. Punchi Banda Ranaweera* 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 at the second trial in this case, where the Appellant, who was aggrieved by the decision of the District Court to disregard the evidence of Mr. Kahatapitiya recorded at the first trial, went on regardless to succeeded in the final judgement, only to be reversed by the Court of Appeal, which without considering the evidence of this vital witness, came to the conclusion that the due execution of the impugned deeds 4779 (P3) and No. 4880 (P4) had not been established by the Appellant.

Section 33 of the Evidence Ordinance, under which the Appellant moved to adopt into the record in the second trial, the evidence of Mr. Kahatapitiya led at the first trial, provides as follows:

> "Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant, for the purpose of proving, in a subsequent judicial proceeding, or *in a later stage of the same judicial proceeding*, the truth of the facts which it states, *when the witness is dead* or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if his presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable;
>
> Provided-
>
> (a) that the proceeding was between the same parties or their representatives in interest;
> (b) that the adverse party in the first proceeding had the right and opportunity to cross-examine;
> (c) that the questions in issue were substantially the same in the first as in the second proceeding.
>
> ***Explanation-A*** criminal trial or inquiry shall be deemed to be a proceeding between the prosecutor and the accused within the meaning of this section." (*emphasis added*).

In determining the questions on which leave has been granted by this Court, it is important to decide whether the application made in this case to adopt and consider the evidence of Mr. Kahatapitiya falls within the parameters of Section 33 of the Evidence Ordinance.

This is not a case in which it was sought to adopt evidence previously given in some other judicial proceedings. The application relates to evidence given by Mr. Kahatapitiya in an earlier stage (first trial) in the same judicial proceedings, but it is plain that Section 33 could apply in either situation. The basis of the application was that Mr. Kahatapitiya was dead, and that therefore evidence given by him in the course of the first trial in the same action "is relevant, for the purpose of proving, ….the truth of the facts which it states …." Section 33 one of the many exceptions found in the Evidence Ordinance to the hearsay rule, and has been considered by this Court in decisions such as *Herath v. Jabbar* 41 NLR 217, *Cassim v. Suppiah Pulle* 41 NLR 275, *Kobbekaduwa v. Seneviratne* 53 NLR 354 and *Sheela Sinharage v. The Attorney-General* [1985] 1 Sri LR 1.

It is manifest that the conditions set out in the proviso to Section 33 are fulfilled in this case, as the parties and the issues are the same and the Respondents had the right and the opportunity to cross-examine Mr. Kahatapitiya in the course of the first trial. I have compared the 13 issues formulated at the first trial with the 23 issues raised at the second, and though the issues settled in the second trial are more elaborate, they are substantially similar and Mr. Kahatapitiya, as the notary who prepared the impugned deeds and before whom it was executed, is definitely an important witness to answer the said issues. The only question that arises for determination in this appeal is, therefore, whether the trial court had any discretion not to apply Section 33 in the peculiar circumstance that although all conditions for its application were fulfilled, the untimely death of Mr. Kahatapitiya has defeated the judicially conceived objective of providing him with the opportunity of explaining his conduct as a notary in the context of the above mentioned issues.

In this connection, it is relevant to note that E. R. S. R. Coomaraswamy, *The Law of Evidence*, Vol. I, at pages 492-493 states as follows:

> "The court has to exercise the power given in Section 33 with great caution and must insist on strict proof before holding that the witness is dead or cannot be found or has become incapable of giving evidence or has been kept out of the way by the adverse party or his presence cannot be secured without an unreasonable amount of delay and expense. But once any of the first four conditions of death, not being found, incapacity to give evidence or being kept out of the way by the adverse party has been proved, *the court has no discretion* and must admit the deposition, since Section 33 declares such deposition to be relevant and, therefore, admissible." (*emphasis added*).

Coomaraswamy concedes that a court of law does have the discretion with respect to the last condition in Section 33 relating to a witness whose presence in court cannot be obtained without an amount of delay or expense which "*the court* considers unreasonable". The present case does not arise from such a situation, and there is no way in which the dead witness can be made to give evidence. Accordingly, I am firmly of the opinion that Section 33 of the Evidence Ordinance is applicable in the circumstances of this case, and that the Court had no discretion in the matter.

The only reason adduced by the District Court for rejecting the application to adopt the testimony previously given by Mr. Kahatapitiya was that the expectation of the Court of Appeal that the Respondents could confront Mr. Kahatapitiya with his convictions, in

the light of which he too could clarify his conduct as notary, had been frustrated by his death. In my view, too much cannot be made out of this expectation, as it is difficult to predict how Mr. Kahatapitiya would have fared or what he would have had to say in regard to his conduct as notary, if he had been able to testify at the second trial. It is trite law that subject to any statutory exception, evidence that a person has been convicted on a charge arising out of the same incident as that on which the civil claim is based is not admissible to establish his liability in the civil suit, because as pointed out by Goddard, L.J. in *Hollington v. F. Hewthorn and Co. Ltd.,* [1943] 2 All E.R. 35 at page 40, in the context of an appeal on a damages action arising from a road accident, –

> "The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court: it cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision."

Hence, as Goddard, L.J. observed in the said judgement at page 40, "on the trial of the issue in the civil court, the opinion of the criminal court is equally irrelevant". Of course, the application of the *Hollington* principle has been curtailed in Sri Lanka by Sections 41A, 41B and 41C of the Evidence Ordinance introduced by Section 3 of the Evidence (Amendment) Act No. 33 of 1998, but since the conviction of Mr. Kahatapitiya was not a fact in issue in the instant case and none of the other new provisions are applicable thereto, the conviction will not have any relevance to the case. When Mr. Kahatapitiya testified at the first trial he was asked in cross-examination about the prosecutions that were then pending against him in the Magistrates' Court, and it was open to the Respondents to have led evidence regarding any facts that may have been relevant relating to his conduct as a notary in general, and the fact that he had subsequently been convicted in those cases cannot add any value to his cross-examination so as to make any difference.

Furthermore, it is clear from the judgement of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrema* [1982] 1 Sri LR 249, that the appellate court set aside the decision of the District Court and directed a fresh trial primarily on the basis that the learned District Judge had misdirected himself on certain factual matters and had erred in considering deeds 4779 (P3) and 4880 (P4) as having been duly executed despite the failure of either of the two attesting witnesses to give evidence, and the possibility of clarifying matters giving rise to the said convictions were only incidental and were not sought to be imposed by the Court of Appeal as a condition precedent for the adoption of the testimony of Mr. Kahatapitiya. I therefore hold that the District Court clearly erred in refusing to adopt his evidence recorded in the first trial upon proof of his death, and the Court of Appeal aggravated the situation by failing to take into consideration this vital deposition which was already part of the record.

The Quantum of Proof in Civil Cases Involving Fraud

I shall now come to the first of the two questions on which special leave to appeal has been granted by this Court, namely, did the Court of Appeal err in holding that P4 was *fraudulently* executed when the same has not been proved with the high degree of proof required to prove fraud? In dealing with this question it is necessary to consider whether the decision of the Court of Appeal turned on mere due execution of the impugned deeds or whether it also involved the question of fraud. It is important to observe at the outset that the Court of Appeal has concluded that the Appellant "had

failed to establish *due execution* of his title deeds 4879 (P3) and 4880 (P4)" and that therefore he cannot maintain his action "which is one of declaration of title based upon deeds 4879 (P3) and 4880 (P4)", and that in arriving at this conclusion the Court has not expressly considered the question of the quantum of proof required to prove a civil case involving fraud.

Learned President's Counsel for the Appellant submits that the decision of the Court of Appeal involved a finding of fraud, and that the Court had erred in applying the ordinary standard of preponderance of probability to the facts and circumstances of this case. On the other hand, learned President's Counsel for the Respondents submits that the Court of Appeal, in arriving at its decision, has not made any finding that there was fraud, and the basis of its decision was that the Appellant has failed to discharge the burden placed on him by law to show that the impugned deeds P3 and P4 had been duly executed, and that this decision did not encompass a finding of fraud. He has further submitted that even in a civil case involving fraud the applicable standard of proof is a balance of probabilities.

In order to determine whether the decision of the Court of Appeal involved a finding of fraud, it is necessary to consider the issues that arose for determination in the case. The 23 issues on which the case went to trial for the second time were settled on 9th May 1988 and are found in pages 450 to 456 of the Appeal Brief. It will be seen that issues 13 to 18, which are reproduced below, seek to establish that Mr. Kahatapitiya perpetrated a fraud on the Respondents and the 3rd Defendant by converting blank papers on which he obtained their signatures and thumb impression into the impugned deeds 4779 (P3) and 4880 (P4) on which the Appellant claims title to the property in suit:

"13& 1976'3'24 fyda Bg wdikak oskloS js;a;slrejkaf.a iy ush.sh js;a;sldrshf.a w;aik ysia lvodis fld, 3lg by; lS lygmsgsh uy;d jsiska ,ndf.k weoao@

14& tfia w;aika ,nd f.k we;af;a wxl 4753 ork fmdfrdkaÿ Tmamqfjs whs;sh meusKs,slreg mejrSfus kHdfhkao @

15& tfia ysia lvodis j,g w;aika lr we;af;a lygmsgsh uy;d flfrys ;snQ wp, jsYajdih u;o @

16& wxl 1 iy 2 js;a;slrejka g by; lS wxl 4880 ork Tmamqfjs i|yka m%;sYaGd uqo,a ,nd we;ao @

17& by; lS wxl 4880 ork Tmamqj fm%davdldr mejrSulao @

18& th meusKs,slre yd t,a' cS' lygmsgsh fkd;drsia uy;df.a jxl iyfhda.S ls%hdjl m%;sM,hlao @"

These issues demonstrate that the question of fraud loomed large at the trial, and in particular issue 17, which was identical with issue 10 framed at the first trial, specifically raised the question "Was Deed No. 4880 (P4) a fraudulent transfer?" Furthermore, issue 18 sought to assert that the said deed was the product of fraudulent collusion between Mr. Kahatapitiya and the Appellant. It is relevant to note that both these issues were answered in the negative by the learned District Judge in his judgement dated 16th June 1993, by which he granted relief to the Appellant as prayed for in the plaint on the basis

that the impugned deeds P3 and P4 were duly executed. It was this decision that was overturned by the Court of Appeal.

In my considered view, it is not possible to decide the question of due execution of the impugned deeds without dealing with the allegation of fraud leveled against the notary, as these issues are so closely interwoven and cannot be extricated from one another. This becomes clear from the following crucial passage in the judgment of the Court of Appeal appealed from:

> "Let us now examine the evidence to see whether the plaintiff-respondent had established due execution. As Notary Public Kahatapitiya was dead his evidence was not available at the second trial only the evidence of Dharmasena one of the attesting witnesses was available with regard to due execution of deeds No. 4879 and 4880 (P3) and (P4). Therefore it appears that the plaintiff-respondent [present Appellant] has not established due execution of deeds No. 4879 (P3) and 4880 (P4), in terms of the decision of Tambiah, J. in *Hilda Jayasinghe v. Francis Samarawickrame (Supra)."*

The Court of Appeal has itself referred to the decision of the Court of Appeal in *Hilda Jayasinghe v. Francis Samarawickrame* [1982] 1 Sri LR 249, which arose from the first trial, in regard to the question of due execution of the impugned deeds. That decision is helpful in understanding the background to the questions that arose for determination in the second trial, and shed some light on the question of proof of due execution of the impugned deeds. At page 359 of the said judgment, Tambiah, J., after citing a passage from Sarkar's *Law of Evidence,* went on to observe that –

> "The two cases *(Baronchy Appu and Seneviratne, supra)* illustrate the distinction drawn by Sarkar in the passage cited, between the mode of proof of a document required to be attested and the quantum of evidence required to prove such a document. The principles laid down in both cases are not in conflict with each other and can be reconciled. *Seneviratne's* case was concerned with the *mode of proof*; it decided-that the notary is an attesting witness and is competent to prove the execution of the document if he knew the maker of the document. *Baronchy Appu's* case was concerned more with the *quantum of evidence* required. The principle to be discerned from the judgment of Lawrie, A.C.J. is that where *the execution of a deed is challenged on the ground that it had been signed before it was written*, then, where at least one of the two attesting witnesses is alive, the evidence of the notary alone, even where he knew the executant is not sufficient; at least one of the two attesting witnesses should also be called.
>
> *The case of the defendants-appellants is that Mr Kahatapitiya fraudulently obtained their signatures and thumb impression on blank papers which were subsequently filled up in the form of a deed of sale* (P4); that no consideration passed and that the two attesting witnesses were not present at the time of the execution. The circumstances of this case require that one of the two attesting witnesses be called, in addition to the notary. To use the words of Lawrie, C.J., "the case is incomplete" without him." *(emphasis added)*.

What Tambiah, J. was saying in the above passage is that where fraud is alleged against the notary, his evidence standing alone does not satisfy the "quantum of evidence"

required by law to prove due execution, and that one or both attesting witnesses, provided they are living and able to testify, must be called to the witness box. Although his Lordship did not expressly say so in that judgment, it follows as a natural corollary to what he did say, that where one or both attesting witnesses have testified, the evidence so elicited has to be assessed adopting the standard of proof applicable to a civil case involving allegations of fraud.

Section 101 of the Evidence Ordinance deals with the burden of proof in cases, and lays down that who ever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. This provision is based on the rule *ei incumbit probation quit dicit, non qui negat,* and as Lord Maugham observed in *Joseph Constantine Steamship Line Ltd. v. Imperial Smelting Corp. Ltd.* [1942] A.C. 154; [1941] 2 A.E.R. 165 "it is an ancient rule founded on consideration of good sense and should not be departed from without strong reasons". Accordingly, the legal burden of proving all facts essential to his claim ordinarily rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings, and it was therefore the burden of the Appellant in this case to prove due execution of the impugned deeds on which he based his claim to title. As it is apparent from Section 102 of the Ordinance, the Appellant's action would be liable to be dismissed if he fails to discharge this legal burden.

While the legal burden to prove his claim in a civil action generally rests on the plaintiff, it is expressly provided in Section 103 of the Evidence Ordinance that the burden of proof if any particular fact lies on that person who wishes the court to believe in its existence, unless it is provided by any law that the proof of the fact shall lie on any particular person. As the two illustrations provided in Section 103 are from criminal prosecutions, it might be useful to quote from E.R.S.R. Coomaraswamy's *The Law of Evidence* Vol II, Book 1 page 259 in which it is stated that-

> "Numerous illustrations may be given from civil cases to illustrate the application of Section 103. Where a deaf and dumb person has executed a deed, conveying immovable property to another, and the notary (since dead) has stated in his attestation that he read over and explained the instructions to such person, the burden on such person, when he challenges the validity of the deed for want of proper understanding as to its purport at the time of execution, is a heavy one."

This illustration is derived from the decision of this Court in *Subramaniam v. Thanarase* 61 NLR 355, in which the Supreme Court considered the declaration made in the attestation clause by the notary, who was dead when the case went into trial, that he read over and explained the instructions to the executant would be *prima facie* evidence of the truth of that declaration. This was not a case where fraud was alleged, and the only issue was whether the executant of the deed, being deaf and dumb, understood the purport of the deed, but nevertheless it is a useful decision that illustrates the principle that a defendant who relies on a particular fact has the burden of proving such fact. Accordingly, in the context of the present appeal, it may be said that while the burden is on the Appellant to prove due execution of the impugned deeds, it is the burden of the Respondents to show that its execution was tainted with fraud.

So much for the burden of proof, but it is now necessary to deal with the *standard* of proof. In this context, it is important to remember that unlike a criminal case, which has

to be proved beyond reasonable doubt, a civil claim may be decided on a preponderance of evidence or on a balance of probabilities. Adverting to this fundamental distinction, Denning, J., in *Miller v. Minister of Pensions*, [1947] 2 A.E.R. 372 observed at pages 373 – 374 that the standard of proof in a criminal case was proof beyond a reasonable doubt, which carries a high degree of probability, but "does not mean proof beyond the shadow of a doubt" to the exclusion of even "fanciful possibilities." He went on to observe that by contrast, proof in a civil case –

> "….must carry a reasonable degree of probability, but not so high as is required in a criminal case. If the evidence is such that the tribunal can say, 'we think it more probable that not', the burden is discharged, but if the probabilities are equal it is not."

The English courts have taken the view that the standard of proof required for a criminal offence in civil proceedings is not higher than the standard of proof ordinarily required in civil proceedings, (vide *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. 247, [1956] 3 W.E.R. 1034; [1956] 3 Q.E.R. 970 – C.A; *Re Dellow's Will Trusts* [1964] 1 W.L.R. 451; *Post Office v. Estuary Radio* [1967] 1W.L.R. 847; *Nishina Trading v. Chiyoda Fire Co.* [1969] 2 Q.B. 449) but within that standard, as Denning, L.J., put it in *Hornal v. Neuberger Products Ltd.* [1957] 1 Q.B. …… at page 258, "the more serious the allegation the higher the degree of probability that is required." The degree of proof depends on the subject matter, and as Denning L.J. observed in *Bater v. Bater* [1951] P. 35 at 37-

> "A civil court when considering a charge of fraud will naturally require for itself a higher degree of probability than that which it would require when asking itself if negligence is established. It does not expect so high a degree as a criminal court even when it is considering a charge of a criminal nature; but it still does require a degree of probability which is commensurate with the occasion."

Our Evidence Ordinance does not anywhere draw the distinction between the two standards of proof in criminal and in civil cases, but our courts have recognized and consistently applied the English distinction. The key to the question lies in the definitions of "proved" and "disapproved" in Section 3 of the Evidence Ordinance, which postulate either belief or a consideration of its existence being so probable that a prudent man ought under the circumstances of the particular case, to act on the supposition that it exists or does not exist. It is legitimate to presume that in a criminal case the prudent man would require a very high degree of proof – proof beyond reasonable doubt, whereas in a civil case, he would not require the same high standard, and would be satisfied if the fact is more probably than not.

The first question that arises in this appeal is simply what is the standard applicable to the proof of fraud in civil proceedings in Sri Lanka? In *Lakshmanan Chettiar v. Muttiah Chettiar* 50 NLR 337, which was a civil action filed by a professional money lender against his agent claiming that he had fraudulently and in breach of trust assigned a decree made in his favour to a third party without any consideration, the court had to decide whether the assignment was fraudulent, and Howard, C.J. (with Canakaratne, J. concurring) held that the standard applicable to the proof of fraud was the criminal standard. His Lordship observed at page 344, that "fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt" as such a finding "cannot be based on suspicion and

conjecture." This decision was followed in *Yoosoof v. Rajaratnam* 74 NLR 9, in which in the context of an inquiry under Section 325 of the Civil Procedure Code, G.P.A. Silva A.C.J., observed at page 13 that-

> "Both principle and precedent would support the view that when a transfer is effected for valuable consideration the burden of proving that it was fraudulent rests on the plaintiff in these circumstances. It is an accepted rule that such a burden even in a civil proceeding must be discharged to the satisfaction of a Court. For that degree of satisfaction to be reached, the standard of proof that is required is the equivalent of proof beyond reasonable doubt."

However, in *Associated Battery Manufacturers (Ceylon) Ltd. v. United Engineering Workers Union* 77 NLR 541 at 544, and *Caledonian Estate Ltd., v. Hilaman* 79 - 1 NLR 421 at 426, it has been observed by this Court that allegations of misconduct in labour tribunal proceedings may be proved on a balance of probabilities. It is clear from these decisions that while the civil standard is generally applicable, the more serious the imputation, the stricter is the proof which is required. As explained by Lord Nicholls in *Re H (Minors)* [1996] AC 563, at page 586 –

> "The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was *more likely than not.* When assessing the probabilities, the court will have in mind the factor, to whatever extent is appropriate in the particular case, that *the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury."(*emphasis added*).

Explaining the principles enunciated by the courts in this regard, *Phipson on Evidence* (16th Edition – 2005) at page 156, emphasizes that "attention should be paid to the nature of the allegation, the alternative version of facts suggested by the defence (which may not be that the event did not occur, but rather that it occurred in a different way, or at someone else's hand), and the inherent probabilities of such alternatives having occurred."

It is necessary to bear these principles in mind in examining the relevant evidence to answer the main question that arises on this appeal: has the Appellant discharged the burden placed on him by law to prove the due execution of the impugned deeds P3 and P4? As already noted, this question is intrinsically linked to another question: have the Respondents discharged their burden to show that the execution of Deed No. 4880 (P4) was tainted with fraud? It is common ground that on 24th March 1976, the 1st and 2nd Defendant-Appellant-Respondents placed their signatures and the 3rd Defendant-Appellant-Respondent placed her thumb impression on certain sheets of paper which were presented to them by Mr. Kahatapitiya at his residence, and the parties are at variance only in regard to the nature of the transaction and the manner in which the deeds in question were executed.

The Appellant in his testimony claimed that what the parties signed were duly perfected deeds bearing Nos. 4779 (P3) and 4880 (P4) intended to transfer title in the land

constituting the subject matter of this appeal to the Appellant. According to him, the Respondents, who were related to him and who were his neighbors, approached him with a view to selling the land in questioned which he agreed to buy for Rs. 8000/-. The Appellant has also testified that on 24th March 1976, when by prior arrangement, he went to the residence of Mr. Kahatapitiya, the said Respondents and Defendant were already there and the deeds were prepared only thereafter. According to the Appellant, in view of the conveyance in favour of Yasantha Ajith Kahatapitiya effected by Deed No. 4753 (P2) two deeds had to be prepared, one to retransfer the title from Yasantha, the minor son of Mr. Kahatapitiya to the 1st and 2nd Defendant-Appellant-Respondents and the 3rd Defendant, and the other, for the latter to convey the title to the Appellant. At pages 498-499 of the Appeal Brief, his testimony regarding the financial aspect of the transaction was as follows:-

> "tosk uu re' 8000$- la ÿkakd ux ys;kafka' uu re' 8000$- ;a wrf.k .shd' Tmamq ,Sjsjd' uu uqo,a ÿkakd iagSjka chisxyg' ^2 jeks js;a;s;reg&' Tyq ta uqo,ska re' 3752$- la ÿkakd t,a' cS' lygmsgsh uy;dg' fmdfrdkaÿ iskaklalf¾g wjYHh uqo,q;a" fkd;drsia .dia;=;a" fmd<sh;a i|yd th ÿkafka'

His position was that he took with him Rs. 8000/- , which he paid to the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe out of which Jayasinghe paid Rs. 3,752/- to Mr. L. G. Kahatapitiya as money payable to secure the retransfer of title in terms of P2, which included interest and notarial charges. He further testified that while Yasantha Ajith Kahatapitiya placed his signature on P3 the said Respondents signed and the Defendant placed her thumb impression on Deed No. 4880 (P4) by which they conveyed their title to him by way of sale.

The version of the Respondents is that they were under the impression that their title to the property in question had been transferred by Deed No. 4753 dated 12th August 1975 (P2) to Mr. L.G Kahatapitiya and not to his minor son Yasnatha Ajith Kahatapitiya; that on 24th March 1976, they signed printed deed forms commonly used for the making of deeds with several blank spaces, in the expectation that the signed papers will be perfected by Mr. Kahatapitiya to constitute an assignment of what they thought were his rights under the said Deed No. 4753 (P2) to the Appellant; that there was no intention to sell the property outright to the Appellant; that in the circumstances no money changed hands at the time of signing these papers; and that the 2nd Defendant-Appellant-Respondent was not present at the time when the 1st Defendant-Appellant-Respondent signed the papers and the 3rd Defendant placed her thumb impression thereon. Both Respondents were consistent in their testimony that what they signed were printed deed papers with unfilled blanks. Elaborating on this position, the 2nd Defendant-Appellant-Respondent stated in evidence (at page 625 of the Appeal Brief) that he signed on "Tmamq ,shk ysia fld,j," in which there were unfilled blanks which he described saying: "ysia;eka ;sfnkjd' ta ysis;eka mqrjd keye'"

The 1st Defendant-Appellant-Respondent testified to the same effect, but went on to assert an additional fact, which if true, might have contributed to her belief that the transaction was an assignment to the Appellant of the rights of Yasantha Ajith Kahatapitiya under Deed No. 4753 (P2) and not an outright sale, namely that the deed formats were in the English language. She described the papers she signed in the following words:

"wms w;aika l,d ysia Tmamq fld, j,g' uql=;a ,sh,d ;snqfka keye' bx.s%isfhka tfyu ,sh,d ;snqkq wÉpq .ymq fld,hl mukhs" ta wjia:dfjs uu w;aika lf,a' ta wjia:dfjs uu w;aika lf,a W.ig' jslsKSula lshd uu oek isgsfha keye'"
(page 631 of the Appeal Brief)

The learned District Judge has accepted the Appellant's story and rejected the version presented by the Respondents. An important fact that the learned District Judge took into consideration was that, apart from the signatures of the two attesting witnesses and Mr. Kahatapitiya, nothing was written on Deed No. 4880 (P4) in the English language. Not only was the entire deed P4 in the Sinhalese language, it commenced with the Sinhalese words "iskaklalrh re"""""""""""""""""""""""", printed in large letters, with the space meant for indicating the amount filled using a typewriter with the figure "8000/=". Even if one assumes that the amount had not been filled in at the time the deed was signed by the Respondents, the deed format in the Sinhalese language, which they well understood, clearly showed that it is an outright sale. The printed deed format refer to the executants as "jsl=Kqïldr" and also include words such as "fuhska iskaklalrfha jsl=Kd whs;slr" ysuslr" mjrd Ndr ÿks"""""", which clearly militate against the version of the Respondents that they genuinely believed that the transaction was an assignment by Mr. Kahatapitiya of his rights under Deed No. 4753 (P2), and not an absolute sale of the property.

It is also relevant to note that the learned District Judge has concluded in the light of all the evidence, documentary and oral, placed before the District Court in the second trial, that the executants as well as the attesting witnesses of the impugned deeds had placed their signatures on the deeds in the presence of the notary, and that the said deeds were duly executed. When reversing this decision of the learned District Judge. the Court of Appeal (at page 6 and 7 of the judgement) has highlighted the following three factors as lending credence to the story of the Respondents that deed No. 4753 (P2) was a conditional transfer and signatures on deeds 4879 (P3) and 4880 (P4) were obtained in blank sheets before they were written into deeds on the pretext of assigning the conditional transfer P2 to the Appellant:-

1) The execution of deed No. 4753 of 12th August 1975 (P2) as a conditional transfer in the name of son of Kahatapitiya who was a minor, when the respondents needed money from Kahatapitiya and expected Kahatapitiya to be the transferee.

2) Before the effluxion of three years specified in the deed, Kahatapitiya calling for repayment of the loan from the respondents.

3) Kahatapitiya was found guilty of not forwarding duplicates of deeds and not sending weekly and monthly returns to the Registrar General.

The circumstance in which Mr. Kahatapitiya advanced a loan of Rs. 3,500/- to the Respondents and the 3rd Defendant, utilizing money deposited in a pass book opened in the name of his minor son, Yasantha Ajith Kahatapitiya, and the execution of the deed P2 in his favor was explained by Mr. Kahatapitiya when he testified in the first trial (vide page 242 of the Appeal Brief). It is unfortunate that the District Court refused an application to adopt this evidence under Section 33 of the Evidence Ordinance upon the death of Mr. Kahatapitiya being brought to the notice of Court, and I have to add with great respect, that it is even more unfortunate that the Court of Appeal concluded that

these circumstances support the position taken up by the Respondents, without taking into consideration the testimony of Mr. Kahatapitiya. In fact, he has expressly stated in evidence that he informed the Respondents and the 2nd Defendant-Appellant-Respondent that the deed will be executed in his son Ajith's name, which position was denied in the first trial by the Respondents, but was accepted by the learned District Judge as credible. It is significant that Ajith who was born on 13th April 1964, filed his answer dated 22nd September 1986 in the District Court after he attained majority, and specifically admitted in paragraph 4 of the said answer that upon the sum of money advanced by him and interest been repaid, he had on 24th March 1976 by deed No. 4879 (P3) re-conveyed title in the property in question to the Respondents.

In regard to the view expressed by the Court of Appeal, that calling for the repayment of the loan before the expiry of the 3 year period stipulated in P2, supports the position that P3 and P4 were fraudulently executed, I say with great respect that I cannot agree for several reasons. In the first place, Mr. Kahatiapitiya has vehemently denied that he demanded the money within a few months of the execution of P2, and it is his position that the Respondent wanted to sell the property outright as they needed the money. In any event, it is unreasonable to attribute to Mr. Kahatapitiya an intention to defraud the Respondents even if he had wanted the money back before the effluxion of the 3 year period, as any failure on the part of the Respondents to repay the sum advanced with interest within the said period would only have benefited Mr. Kahatapitiya's minor son, who would have become the absolute owner of the property. Furthermore, the fact that Mr. Kahatapitiya was found guilty of failing to comply with the provisions of Section 31 of the Notaries Ordinance is altogether irrelevant to this case for the reasons already noted, and in any event, would not affect the validity of deeds P3 and P4 as Section 33 of the Notaries Ordinance expressly provides 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".

In this connection, it is also relevant to note that the Court of Appeal has considered the discrepancy in the date of attestation of deed No. 4880 (P4) as an additional factor that supports the Respondent's story that Mr. Kahatapitiya fraudulently fabricated the impugned deed P4. Learned President's Counsel for the Respondents has highlighted the fact that on the first page of P4 the date of attestation is given as 24th March 1976, but the attestation clause on the last page gives the date as 24th April 1976, the existence of which discrepancy was admitted by witness Upamalika Wijesooriya, a clerk of the Land Registry, Kalutara, who was called to give evidence by the Appellant himself. However, the said witness has produced marked P9 (at page 556 of the Appeal Brief) the deed attested by Mr. Kahatapitiya bearing No. 4881 which is dated 25th March 1976, which corroborates the evidence of Mr. Kahatapitiya recorded in the first trial (at page 239-240 of the Appeal Brief) that the said discrepancy was caused by a "typing error". Wijesooriya also produced marked "jS2" the Register maintained at the Land Registry which shows that deed No. 4880 (P4) was registered on 30th June 1976 ahead of deed No. 4879 (P3) which has been registered only on 8th July 1976.

It is significant that in the plaint filed by the Appellant as well as in his testimony, he has stated that the deed P4 was executed on 24th March 1976, and even the Respondents have admitted the fact that they signed the so called "blank papers" on this date. The only attesting witness who testified at the second trial, Dharmasena, has also stated in his evidence that the deed was executed, signed and attested on 24th March 1976. It is also

relevant to note that 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe, has signed an endorsement across the protocol of P4 to the effect that "wo osk isg udi folla (24-5-76) hkakg m%:u ïïmQ¾K N=la;sh Ndr fokjd we;", which tends to show that the deed was executed on 24th March 1976. None of this material has been considered by the Court of Appeal.

Learned Counsel who appeared for the Respondents in the original court as well as in the appellate proceedings have argued that all executants of the impugned deed P4 did not sign the deed at the same time and no consideration passed and that the deed was therefore not duly executed. The Respondents have testified that when summoned by Mr. Kahatapitiya to sign the deed, the 2nd Defendant-Appellant-Respondent stayed at home to look after the sister's baby and sent his sister, the 1st Defendant-Appellant-Respondent, and his mother, who is the original 3rd Defendant, to sign the deed, and that he went to Mr. Kahatapitiya's residence and signed the deed only after they returned home. Although the learned District Judge has dealt with this aspect of the matter, the Court of Appeal, surprisingly, has not. During the argument of this appeal, learned President's Counsel for the Respondents relied heavily on the following answer given by Dharmasena, the only surviving attesting witness to the impugned deed, to a question put to him under cross-examination (at page 570 of the Appeal Brief) with respect to the persons present at the time of execution of the impugned deeds –

"m% : Th wjia:dfjs ljqo ysgsfha ?
W : uu" lygmsgsh uy;d" ikafodarsia" ys,avd" frdia,ska" lygmsgsh uy;df.a mq;d Th lÓgsh ysgshd""

It was stressed by Counsel that the omission, on the part of Dharmasena, to name the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe, is significant in view of the requirement of Section 2 of the Prevention of Frauds Ordinance No. 7 of 1840 that any party making a sale and transfer of immovable property shall place his or her signature "*in the presence of a licensed notary public and two or more witnesses present at the same time*, and unless the execution of such writing deed, or instrument be duly attested by such notary and witnesses." As against this, learned President's Counsel for the Appellant has submitted that witness Dharmasena was not questioned specifically regarding the 2nd Defendant-Appellant-Respondent's presence on that occasion, nor was it put to him in cross-examination that he was not present at the time the other two executants placed their signatures on the deed P4. He has invited the attention of Court to the examination in chief of Dharmasena where he had categorically stated that the three executants of P4 were present when the contents of the deeds were explained to the parties and they placed their signatures thereon. The evidence reads as follows:-

"m% : fuh w;aika lrk wjia:dfjs ;ud ysgsho ?
W : TÚ' Tmamqj lshjd ÿkakd jsl=Kqïlrejkag' uu;a wks;a idlaIslre;a isgshd' ta jsl=Kqïlrejka 3 fokd w;aika l,d' uymgeÕs,s i,l=Kla ;sfnkjd frdia,ska fmf¾rdf.a th"" (at page 565 of the Appeal Brief)

Learned President's Counsel has also emphasized that a few minutes prior to putting the particular question which elicited the answer on which so much reliance is placed by the Respondents, he had been asked in cross-examination (at page 569 of the Appeal Brief) about the signing of the impugned deeds and who were present at that time, and he had stated that all those whose signatures and thumb impressions appear in the deeds were

present. It is also significant that the learned Counsel for the Respondents failed to suggested to the Appellant in cross-examination that the 2nd Defendant-Appellant-Respondent was not present at the time the deeds were signed, in the face of the Appellant's testimony at page 499 of the Appeal Brief, which was as follows:-

> "uu Tmamq w;aika lrk wjia:dfjs ysgshd' uq,ska w;aika lf,a uu ys;kafka''''''''''iAgSjka' B,Õg ys,avd chisxy' wïud wka;sug w;aika lf,a' wxl 4880 orK Tmamqjg uu w;aika l,d' msgm;a 3g w;aika l,d' tajd ysia tajd fkdfjhs' idlaIs jYfhka ikafodarsia iy Ou_fiak uy;=ka w;aika l,d'"

I must confess that I cannot fault the learned District Judge for disbelieving the story of the Respondents that the 2nd Defendant-Appellant-Respondent did not go with the other executants to sign the deed and remained at home to look after the sister's baby, as the 2nd Defendant-Appellant-Respondent who is the bread winner to his family, has been an active and vigilant individual, who had after discovering the alleged fraud committed on them by Mr. Kahatapitiya, had gone by himself to the Land Registry in Kalutara to verify the situation about the registration of the impugned deed and had also complained to the Police about the alleged fraud. By nature, he is not the type of person who would baby-sit while his sister and mother were signing an important deed.

In this context, it is noteworthy that the most important reason advanced by the Court of Appeal to set aside the decision of the District Court in the second trial was the insufficiency of evidence that the monetary consideration for the execution of the impugned deeds had been paid. It was the position of the Respondents and the original 3rd Defendant that no payment was made to them or to Mr. Kahatapitiya or his son during the time when they were present at the residence of Mr. Kahatapitiya and singed the blank papers. As against this, the Appellant has testified that he took Rs. 8,000/- with him and he paid that sum to the 2nd Defendant-Appellant-Respondent, Stephen Jayasinghe who paid Rs. 3,752/- to Mr. Kahatapitiya and kept the balance sum, which according to my calculation amounts to Rs. 4,248/-. This conflict of testimony presented the District Court with two versions, that of the Respondents that no money changed hands, and that of the Appellant that Rs. 8,000/- was paid, and the District Court has accepted the Appellant's version as the more plausible, only to be reversed by the Court of Appeal.

The Court of Appeal has highlighted the admission made by witness Dharmasena that while he was at the residence of Mr. Kahatapitiya, he did not observe any monetary transaction. At page 577 of the Appeal Brief, Dharmasena answered the question put to him as follows:-

> "m% : i,a,s .kqfokq .ek ;ud okafka keye ?
> W : keye". uu jskdvs 15la muK ysgshd' uu w;aika lr .shd' Tmamqj ,shd w;aika lrk ;=re uq, isg w.gu uu ysgshd'"

The Court of Appeal has in its judgment stressed that this evidence is contradictory to the attestation clauses in deeds No. 4879 (P3) and 4880 (P4), which state that consideration passed in the presence of the notary. Learned President's Counsel for the Respondents has referred us to the decision in *E. A. Diyes Singho v. E. A. Herath*, 64 NLR 492, where T.S. Fernando J observed at pages 494-495 that he is "unable to agree that proof of the existence of a statement in the deed or instrument by the notary that

consideration was paid is sufficient to establish the truth of the payment of such consideration", in the context of a case involving the issue of prior registration in which proof of valuable consideration was indispensable for a subsequent deed to receive priority. Consideration may not be an ingredient to prove "due attestation", but in a case such as this, where the question is whether the execution of the impugned deeds was tainted with fraud, proof of payment of the amounts stated as consideration for the execution of the deeds may be equally relevant.

However, it is necessary to bear in mind that according to Dharmasena, he was present at Mr. Kahatapitiya's residence only for about 15 minutes, and that he left the place soon after the deeds were signed. The evidence of the Appellant (at page 523 of the Appeal Brief) which is quoted below is that Dharmasena came while the deeds were being prepared.

m% : fldhs fj,dfjso ,Sfjs
W : / 7'00 g js;r' lygmsgsh uy;df.a f.oroS'
m% : ta fj,dfjs ysgsfha ljqo ?
W : uu" js;a;slrefjda" lygmsgsh uy;d" ikafodarsia ,shk uy;a;h ysgshd' wms jev lrf.k hk jsg Ou_fiak ,shk uy;a;h;a wdjd'"

According to the operative part of Deed No. 4880 the Respondents and the 3rd Defendant have acknowledged receipt of Rs. 8,000/-. Since it is in evidence that Dharmasena came to Mr. Kahatapitiya's residence while the deed was being prepared, it is possible that the consideration was paid before his arrival at a time when the deeds were being prepared or even prior to that. It is therefore unfortunate that the Court of Appeal did not consider that possibility as well as the evidence of Mr. Kahatapitiya led at the first trial that the consideration was paid in his presence, and the testimony of the Appellant to the same effect. It is also significant to note that the Appellant has categorically stated in evidence that he paid the money to the 2nd Defendant-Appellant-Respondent on the date of execution of the deed, and that the Respondents have failed to put to him in cross-examination that this position is false, if that be the case.

I find it difficult to believe the story of the Respondents that they signed the deed papers intending to transfer rights and obligations of Mr. Kahatapitiya under P2 to the Appellant and that no money was paid to them, when the word "iskaklalrh" was prominent in the papers they signed and they were aware that the land was surveyed by surveyor Premaratne a short time before, which should have made them realize that what was taking place was an outright sale. It is, in my view most likely that it is the prospect of getting approximately Rs. 4,248/- from the Appellant that motivated the Respondents and the 3rd Defendant to respond so readily to Mr. Kahatapitiya's request to come to his residence and sign the deed P4. It is also probable, that as claimed by the Appellant, the money was paid to the 2nd Defendant-Appellant-Respondent, which also explains the necessity for the Respondents to make up a story that the 2nd Defendant-Appellant-Respondent was prevented from being present when they signed the deed as he had to look after his sister's baby.

It is my considered opinion that the Court of Appeal should have taken into consideration the evidence of Mr. Kahatapitiya led at the first trial (at page 240 of the Appeal Brief) that the 2nd Defendant-Appellant-Respondent was present at the time of exchanging the deeds, and that he accepted the consideration. The Respondents had not

suggested to Mr. Kahatapitiya when he testified at the first trial that the 2nd Defendant-Appellant-Respondent was not present along with the other executants at the time of the execution of the impugned deeds. The Respondents have clung onto a very small part of the evidence of Dharmasena to assert that 2nd Defendant-Appellant-Respondent was not present at the time of the execution of the deeds, whereas on a consideration of the totality of the evidence it appears to be more likely than not that all three executants of P4 along with Yasantha Ajith Kahatapitiya who was the executant of P3 were present, and there was due attestation and execution of both deeds P3 and P4 as required by Section 2 of the Prevention of Frauds Ordinance. The Court of Appeal, when applying the standard of balance of probability to the facts in issue in this case, has also failed, in my view, to bear in mind the principle that the more serious the allegation the stronger the evidence that is required to establish the allegation, a matter which is of great importance in a case where the parties who have placed their signatures on deed formats, albeit with some blanks, are claiming that they have been defrauded by the notary.

An important submission that was made by learned President's Counsel for the Appellant is that the decision of the Court of Appeal that the Appellant has failed to prove due execution of the deeds P3 and P4 would have the effect of reviving the title of Yasatha Ajith Kahatapitiya to the property in question. This, no doubt would be altogether absurd as the latter has filed answer and got himself discharged from the action on the basis that he has no claim as he conveyed his title to the Respondents through P3. None of the Respondents nor any other party has prayed for the setting aside of the deed P2 by which the Respondents and the original 3rd Defendant have conveyed title to Yasantha Ajith Kahatapitiya, and in view of the effluxion of the 3 year period specified therein for making payment of the moneys mentioned therein as condition precedent for the re-conveyance, the latter will become the absolute owner of the property, unless the decision of the Court of Appeal is set aside.

While I am compelled by the foregoing to disagree with the assessment of the evidence made by the Court of Appeal and its ultimate decision, in doing so, I take comfort in the following oft-quoted words of Viscount Simon from the decision of the House of Lord in *Watt v. Thomas* [1947] 1 All E. R. 582, at pages 583 which were cited with approval by the Privy Council in *Munasinghe v. Vidanage* 69 NLR 97-

> "…….an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal

testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

In this case, which was commenced in the District Court of Kalutara more than 3 decades ago, there have been two trials, and both trial judges have come to the same conclusion in what I would regard as essentially the same factual scenario, even though the stories of the two sides were unraveled through different witnesses. The Court of Appeal has in this case failed to observe the time tested principle enunciated by James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322 which was quoted with approval by Viscount Sankey L.C in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, that an appellate court-

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."

I am of the opinion that in this case too the District Court had to choose between two conflicting versions of facts on the basis of credibility or demeanor of the witnesses who testified at the trial, and the circumstances outlined by the Court of Appeal to differ from the decision of the District Court were, with great respect, neither substantiated by the totality of the evidence presented in the case nor sufficiently convincing. In the factual context of this case, I therefore hold that the Appellant has discharged the burden placed on him by law to prove the due execution of the impugned deeds, and the Respondents have failed to discharge the burden placed on them by law to establish that P4 was executed fraudulently.

For the foregoing reasons, I am of the opinion that the two questions on which special leave to appeal has been granted should be answered in the affirmative. Accordingly, I allow the appeal, vacate the judgment of the Court of Appeal appealed from and affirm the judgment of the District Court dated 16th June 1993. I make no order for costs of appeal in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

HON. S. N. SILVA, C.J.
I agree.

CHIEF JUSTICE

HON. TILAKAWARDANE, J.
I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (Appeal) No. 12/2006
S.C. (Spl.) L.A. No. 66/2005
C.A. No. 4/2001
Land Acquisition Board
of Review No. CL 1214

1. Mohamed Thawfeek Mukthar,
No. 610, Galle Road,
Colombo 03.
(now deceased)

1A. Mohamed Sahad Mukthar,
No. 26/3, Alwis Place,
Colombo 03.

Substituted 1A Appellant-
Respondent-Appellant

2. Mohamed Fhamy Mukthar,
No. 221/3, Dharmapala Mawatha,
Colombo 03.

3. Mohamed Luthfi Mukthar,
No. 1, Anderson Road,
Colombo 05.

4. Mohamed Nawaaf Mukthar,
No. 26, Alwis Place,
Colombo 03.

5. Mohamed Rila Mukthar,
No. 26, Alwis Place,
Colombo 03.
(now deceased)

5A. Fathima Shezaa Deen nee Mukthar,
No. 26, Alwis Place,
Colombo 03.

Substituted 5A Appellant- Respondent-Appellant

6. Sithy Aadila Mukthar,
No. 26, Alwis Place,
Colombo 03.

Appellants-Respondents-Appellants

Vs.

J.I. Ratnasiri,
Divisional Secretary,
Acquiring Officer,
Divisional Secretariat,
Kolonnawa.

Respondent-Appellant-Respondent

BEFORE : Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
P.A. Ratnayake, J.

COUNSEL : Faiz Musthapha, PC, with Faizer Marker and Hussaain Ahamed for Appellants-Respondents-Appellants

M.N.B. Fernando, DSG, with Rajiv Gunatillake, SC, for Respondent-Appellant-Respondent

ARGUED ON: 04.11.2008

WRITTEN SUBMISSIONS
TENDERED ON: Appellants-Respondents-Appellants: 05.02.2009
Respondent-Appellant-Respondent: 26.02.2009

DECIDED ON: 18.06.2009

Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 11.03.2005. By that judgment the Court of Appeal allowed the appeal of the respondent-appellant-respondent (hereinafter referred to as the respondent), set aside the decision of the Board of Review and affirmed the award of compensation made by the acquiring officer based on the market value of the property as at the commencement of Act, No. 15 of 1968. The appellants-respondents-appellants (hereinafter referred to as the appellants) appealed to the Supreme Court against the said judgment of the Court of Appeal for which this Court granted Special Leave to Appeal on the following questions:

1. Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?
2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?
3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?
4. Did the Court of Appeal misdirect itself on the burden of proof?

The facts of this appeal, as stated by the appellants, *albeit* brief, are as follows:

The appellants had filed an appeal before the Land Acquisition Board of Review against an award made by the respondent regarding an undivided ½ share of late Ummu Shifa Musthar, one of the respondents of the application before the Court of Appeal and who had died during the pendency of that appeal and 1/12th share each of the 2nd to 7th appellants respectively. The property acquired bears assessment No. 13, Horadehipitiya Road, Kolonnawa, containing in extent 11A–0R–31.00P.

The Board of Review was, *inter alia*, entrusted with the task of deciding the relevant date on which the market value of the acquired property should be determined. The main dispute therefore involved the question as to whether compensation of the property to be acquired was to be arrived at in terms of Section 4(2) of the Colombo District (Low Lying Areas) Reclamation and Development Board, Act No. 15 of 1968 (hereinafter referred to as Act, No. 15 of 1968) or in terms of Section 7 of the Land Acquisition Act.

The appellants maintained that the relevant date for valuation should be the date on which notice under Section 7 of the Land Acquisition Act was published in the Gazette, viz., 24.04.1981, whereas the respondent took up the position that compensation should be awarded on the basis that acquisition falls within the purview of Section 4(2) of Act, No. 15 of 1968 and therefore the date of commencement of that Act, viz. 22.09.1968, should be adopted as the relevant date for the purpose of computing compensation.

The appellants had admitted that Act, No. 15 of 1968 came into effect on 22.09.1968 and the Gazette Notification of the intention to acquire the property in question in terms of the Land Acquisition Act was published on 12.08.1970. The appellants have also admitted that the said property was acquired on 02.03.1979, when Section 38(a) notice was published in the Gazette.

The Board of Review, which initially heard this matter, by their order dated 20.02.1995 had held that the market value would be determined as at 22.09.1968, only if the land acquired at the time of acquisition was in the same condition it was on 22.09.1968.

According to the appellants, the land acquired was not in a marshy, waste or swampy state, but in an improved condition at the time of acquisition on 02.03.1979 and in those circumstances determination of the question of compensation had to be made in terms of Section 7 of the Land Acquisition Act, the material date being 24.04.1981, the date on which Section 7 notice of the Land Acquisition Act was published in the Gazette.

Accordingly, it was held that the relevant date for the purpose of computing the quantum of compensation for the property in question was 24.04.1981 that date being the date of publication of Section 7 Notice under the Land Acquisition Act, and not 22.09.1968, viz., the date of commencement of Act, No. 15 of 1968.

The total award of compensation by the respondent was Rs. 350,000/- and the appellants were awarded same in proportion to their respective shares. The appellants' original claim after certain restrictions had amounted to Rs. 8,860,150/- as compensation.

The Board of Review, which subsequently heard the appeal by the appellants had by their order dated 20.12.2000 quashed the award made by the respondent in respect of the amount of compensation and substituted the total amounting to Rs. 6,621,500/- stating that the appellants will be entitled to compensation in proportion to their respective shares.

The respondent being dissatisfied with the decision of the Board of Review preferred an appeal to the Court of Appeal. Learned Counsel for the appellants took up a preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981. The Court of Appeal, by their judgment dated 11.03.2005 held against the appellants and allowed the appeal of the respondent. The Court of Appeal thereby had set aside the decision by the Board of Review dated 20.12.2000 and had affirmed the Award of compensation made by the respondent based on the market value of the property at the commencement of Act, No. 15 of 1968.

Having stated the facts of this appeal let me now turn to consider the questions raised in this appeal on the basis of the submissions made by both learned Counsel for the appellants and the respondent.

1. **Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?**

Learned President's Counsel for the appellants contended that although the appellants' original restricted claim was Rs. 8,860,150/- as compensation, the respondent had awarded only Rs. 350,000/-. The Board of Review had quashed the Award made by the respondent in respect of the amount of compensation and had substituted the total amount to be Rs. 6,621,500/-. The respondent being dissatisfied with the said decision of the Board of Review had preferred an appeal to the Court of Appeal and had sought to appeal from the decision of the Board of Review on the following questions of law:

1. Should the relevant date on which the market value of the acquired property be determined according to the date on which Notice under Section 7 of the Land Acquisition Act was published in the Gazette or should the relevant date be determined according to the date of commencement of the Colombo District (Low Lying Areas) Reclamation and Development Board Act, No. 15 of 1968?

2. Whether the part of Section 4(2) of which reads as "the market value of that land for the purposes of determining the amount of compensation to be paid in respect of that land shall, notwithstanding anything to the contrary in that Act, be deemed to be the market value which that land would have had at the date of commencement of that Act if it then was in the same condition as it is at the time of acquisition" should be interpreted as if the condition of the land has changed from the time of acquisition, the provisions of the said Section 4(2) will not be applicable and the relevant date for the valuation should be taken as Section 7 date?

The appellants had taken up a preliminary objection before the Court of Appeal that the said questions are only pure questions of fact and that no questions of law had been disclosed. Their position was that the comparison of the condition of the land as at the date of acquisition and as at the date of Act, No. 15 of 1968, came into being (which was on 19.09.1968) was a pure question of fact.

It is not disputed that the question to be considered before the Land Acquisition Board of Review was whether the land in question was in the same condition at the time of acquisition, as was at the date of commencement of the Act, No. 15 of 1968. The said Board of Review had accordingly examined the applicability of Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act. Considering the issue in question, the said Board of Review had stated that,

> "Learned Counsel for appellants submitted that, according to the description given in the tenement list R1(a) dated 30.07.80, this land has been described as a garden containing eight temporary buildings and 25 coconut trees 10 to 25 years old, and therefore if one keeps in mind the fact that at the commencement of the Reclamation and Development Board Act it applied to "low lying, marshy, waste or swampy areas" the land acquired was not in that state, but in an improved condition at the time of acquisition, namely on 02.03.79. Learned Counsel for appellants' contention is that in view of the aforesaid circumstances, determination of the questions of compensation had to be made under Section 7 of the Land Acquisition Act, the material date being the date on which the Section 7 notice was published in the Gazette, namely 24.4.81".

It is therefore quite clear that the question of condition of the land had to be considered by the Board of Review. On a careful examination of the proceedings and the order made by the Board of Review, it is apparent that the condition of the land as of the date of acquisition compared with the condition of the land as at the date of Act, No. 15 of 1968 was not arrived at by the Board of Review on an assessment of facts. Further the Board of Reviews had led no evidence on the condition of the land in 1968 at the time the said Act, No. 19 of 1968 came into

operation and had come to the conclusion of the condition of the land, not on an assessment of the facts, **but purely by inference**.

In fact the Court of Appeal had given its mind to this question and had correctly found that no evidence had been led before the Board of Review with regard to the condition of the land in 1968, viz., at the time Act, No. 15 of 1968 came into operation. Since no evidence had been led before the Board of Review, it was erroneous for the Board to have concluded that the land in question earlier had been marshy and swampy and that 'the land acquired was not in that state, but in an improved condition at the time of acquisition'. On that basis the Board of Review had decided that the relevant date for the purpose of computing the quantum of compensation for the land is 24.04.81 and not 22.09.68, which was the date Act, No. 15 of 1968, came into operation.

What constitute a question of law was considered and determined by this Court in **Collettes Ltd.** v **Bank of Ceylon** ([1982] 2 Sri L.R. 514), where it had been stated *inter alia*, that,

i. **inferences from the primary facts found are matters of law**;
ii. whether there is or not evidence to support a finding, is a question of law; and
iii. whether the provisions of a statement applying to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect of such provision are all questions of law.

As stated earlier the Board of Review had drawn inferences from the primary facts, which were before them and no evidence was led to support their findings. Further the Board of Review interpreted the statutory provisions in arriving at the date for the purpose of computing the quantum of compensation for the land in question. The Court of Appeal, after considering the matter before it, quite correctly came to the conclusion that the questions referred to the Court of Appeal for determination were questions of law that had to be decided by that Court.

It is not disputed that before the Board of Review the appellants and the respondent were relying respectively on the applicability of Section 7 of the Land Acquisition Act and Section 4(2) of the Act, No. 15 of 1968 for the purpose of arriving at the relevant date to compute the quantum of compensation. Considering the submissions made before the Board of Review and for the reasons stated above it is quite apparent that the Board had arrived at a decision, not on the basis of the facts before the Board, but on an interpretation of the aforementioned statutory provisions.

Accordingly it is apparent that the Court of Appeal was not wrong in rejecting the preliminary objection that 'no question of law had been disclosed and what was referred to was a pure question of fact', which was in relation to the state of the land in 1968 and 1981.

2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?

Learned President's Counsel for the appellants contended that he relied on the decision in **Mahawitharana** v **Commissioner of Inland Revenue** ((1962) 64 N.L.R. 217), where H.N.G. Fernando, J. (as he then was) had adopted a statement by Gajendragadkar, J. in **Naidu and Co.** v **The Commissioner of Income Tax** ((1959) A.I.R. S.C. 359).

The contention of the learned President's Counsel for the appellants was that what was held in the decision in **Naidu and Co.** (supra) by Gajendragadkar, J., was that finding of facts could be challenged only within narrow limits and limited to improper admission of evidence or exclusion of proper evidence or not supported by legal evidence or is not rationally possible. Learned President's Counsel submitted that the Court of Appeal had distinguished this decision on the basis that what was considered in that case relates to a pure question of fact, which is not the issue in question in this case.

In **Mahawitharana** v **Commissioner of Inland Revenue** (supra), the Supreme Court had to consider the question as to whether 'on the facts and circumstances proved in the case, the inference that the transaction in question was *an adventure or concern in the nature of trade* is in law justified? While answering the said question of law in the affirmative, the Supreme Court had held that in a case stated under Section 78 of the Income Tax Ordinance, the Supreme Court could consider the correctness of the inference drawn by the Board of Review as to the Assessor's intention, only a) if that inference had been drawn on a consideration of inadmissible evidence or after excluding admissible and relevant evidence, b) if the inference was a conclusion of fact drawn by the Board, but unsupported by legal evidence, or c) if the conclusion drawn from relevant facts was not rationally possible and was perverse and should therefore be set aside. This was laid down on the basis of the decision in **Naidu and Co.** (supra) and in both **Naidu and Co.** (supra) and in **Mahawitharana** (supra) the questions in issue were based on pure questions of fact.

The issue in question in this matter, as was stated earlier, was on the basis of the condition of the land in 1968 and the condition of the land at the time of acquisition. Whilst, the respondent contended that the applicable date should be the date when Act, No. 15 of 1968 came into operation, the appellants submitted that what should be taken into consideration was the date of acquisition. Admittedly it is necessary to arrive at the correct date for the purpose of computing compensation to be payable and for that purpose it is necessary to know whether there had been a change in the condition of the land between 1968 and the date of acquisition, as, if there had been such a change in the condition of the land, Section 4(2) of Act, No. 15 of 1968 would not be applicable for the payment of compensation.
It is not disputed that although the condition of the land at the date of acquisition was arrived at by the Board of Review based on evidence, there had been no evidence with regard to the condition of the land in 1968.

Accordingly as stated earlier, under question No. 1, the Court of Appeal had accepted that the Board of Review, in determining the condition of the land in 1968, had arrived at a decision, not purely on fact, but on **an inference** on the applicability of the Act, No. 15 of 1968 and an

interpretation given to Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act.

It is not disputed that the appellants' Valuers and the state Valuer had given evidence with regard to the valuation of the land, but no evidence was led as stated earlier, in relation to the condition of the property in question in 1968. The Land Acquisition Board of Review, in considering the question of computation of compensation had considered the question on the basis that the land had been 'in an improved condition' at the time of its acquisition and it is important to note that the Board of Review had arrived at this conclusion on the premise that Act, No. 15 of 1968 was applicable to low lying, marshy, waste or swampy areas and therefore this land was marshy in the year 1968. It is therefore apparent that the Board of Review in order to arrive at its finding had interpreted the provisions of Act, No 15 of 1968 and such a cause of action could not be accepted as considering a pure question of fact.

Accordingly the Court of Appeal was correct in concluding that the decision in **Mahawitharana** (supra) could be distinguished on that basis.

It is therefore evident that the Court of Appeal did not interfere with a finding of pure fact.

3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?

Learned Counsel for the appellants contended that the Court of Appeal misdirected itself in interfering with questions of fact and determining that the land had not undergone any changes.

As stated earlier, the Board of Review, after interpreting the provisions of Act, No. 15 of 1978 and the Land Acquisition Act, had determined erroneously that the land in question had undergone changes after 1968.

The Court of Appeal after determining that there was a question of law that whether there was a proper interpretation and application of Section 4(2) of Act No. 15 of 1968, had proceeded to examine the documents relating to the land in question, which included the Deed of Transfer at the time the said land was purchased by the appellants' predecessors and the condition of the land as referred to in the said Deed of Transfer.

It is not disputed that the said land was purchased by the appellants on 04.10.1968. Accordingly, the Court of Appeal considered a question of law based on the determination made by the Board of Review and had correctly examined the relevant documents, which were tendered to the Court of Appeal. Since the land in question had been purchased by the appellants' predecessors in 1968, and that being the year in which the condition of the land was relevant, after examining the said Deed, the Court of Appeal had correctly held that there had been no change in the condition of the land.

4. Did the Court of Appeal misdirect itself on the burden of proof?

Learned President's Counsel for the appellants submitted that the respondent had taken up the position that the computation of compensation should be calculated on the basis of Section 4(2) of Act, No. 15 of 1968 and therefore the burden of establishing the fact that the condition of the land had not changed after 1968 until the date of acquisition on 24.04.1981 was on the respondent.

As stated earlier, the following facts were common ground in this appeal: the land in question was purchased by the appellants' predecessors on 04.10.1968 and the Act, No. 15 of 1968 came into being on 22.09.1968. In terms of the acquisition process, the Section 4 notice under the Land Acquisition Act was dated 12.08.1970, order had been made in terms of Section 38(a)7 of the Land Acquisition Act on 02.03.1979 and the Section 7 notice in terms of the said Act was issued on 24.04.1981.

It is also common ground that the land was vested in terms of Section 38(a) of the Land Acquisition Act on 02.03.1979 and that at that time there was no Condition Report prepared for the land in question. In such circumstances when the Acquiring Officer took over the land it was presumed that there had been no change in the condition of the land. Accordingly the respondent had decided to compute the amount of compensation in terms of Section 4(2) of Act, No. 15 of 1968, where it is stated that,

> ". . . . notwithstanding anything to the contrary to that Act, be deemed to be the market value which that land would have had at the date of commencement of this Act **if it then was in the same condition as it is at the time of acquisition**" (emphasis added).

If the appellants had been of a contrary view to the effect that the land in question had changed from its original position at the time of its acquisition, then in terms of Section 101 of the Evidence Ordinance the burden of proving that assertion lies on the appellants. Section 101 of the Evidence Ordinance stated that,

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Accordingly if the appellants had asserted that the condition of the land in question had changed from its original position at the time of its acquisition, in terms of Section 101 of the Evidence Ordinance, the appellants should lead evidence to prove that position. Further in terms of Section 102 of the Evidence Ordinance, the burden of proof lies on the appellants, who required the Court to determine the amount of compensation they would be entitled to which

was different from what the respondent had computed as compensation. When the appellants claimed that the compensation should be computed in terms of the Land Acquisition Act as the condition of the land had changed from the time it was purchased by the appellants' predecessors and when the respondent had stated that there had been no change in the condition of that land, the burden of proof lies on the appellants to lead evidence that the land had undergone a change in its condition. Further as correctly pointed out by learned Deputy Solicitor General for the respondent, if no evidence is given by either party, in terms of Section 57(9) of the Evidence Ordinance it would be presumed that in the ordinary course of nature there would be no change in the condition of the land. Section 57(9) clearly states that there is no need to prove the ordinary course of nature and if there is no evidence of the condition of the land in 1968 to the contrary by the appellants, it is presumed that in terms of the ordinary course of nature that there was no change in the condition of the land. Therefore the burden of proving that there had been a change in the condition of the land solely rests on the appellants.

For the reasons aforesaid the questions of law for which special leave to appeal was granted are answered in the negative.

This appeal is accordingly dismissed and the judgment of the Court of Appeal dated 11.03.2005 is affirmed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, 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. 12/2006
S.C. (Spl.) L.A. No. 66/2005
C.A. No. 4/2001
Land Acquisition Board
of Review No. CL 1214

1. Mohamed Thawfeek Mukthar,
No. 610, Galle Road,
Colombo 03.
(now deceased)

1A. Mohamed Sahad Mukthar,
No. 26/3, Alwis Place,
Colombo 03.

Substituted 1A Appellant-
Respondent-Appellant

2. Mohamed Fhamy Mukthar,
No. 221/3, Dharmapala Mawatha,
Colombo 03.

3. Mohamed Luthfi Mukthar,
No. 1, Anderson Road,
Colombo 05.

4. Mohamed Nawaaf Mukthar,
No. 26, Alwis Place,
Colombo 03.

5. Mohamed Rila Mukthar,
No. 26, Alwis Place,
Colombo 03.
(now deceased)

5A. Fathima Shezaa Deen nee Mukthar,
No. 26, Alwis Place,
Colombo 03.

Substituted 5A Appellant- Respondent-Appellant

6. Sithy Aadila Mukthar,
No. 26, Alwis Place,
Colombo 03.

Appellants-Respondents-Appellants

Vs.

J.I. Ratnasiri,
Divisional Secretary,
Acquiring Officer,
Divisional Secretariat,
Kolonnawa.

Respondent-Appellant-Respondent

BEFORE : Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
P.A. Ratnayake, J.

COUNSEL : Faiz Musthapha, PC, with Faizer Marker and Hussaain Ahamed for Appellants-Respondents-Appellants

M.N.B. Fernando, DSG, with Rajiv Gunatillake, SC, for Respondent-Appellant-Respondent

ARGUED ON: 04.11.2008

WRITTEN SUBMISSIONS
TENDERED ON: Appellants-Respondents-Appellants: 05.02.2009
Respondent-Appellant-Respondent: 26.02.2009

DECIDED ON: 18.06.2009

Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the Court of Appeal dated 11.03.2005. By that judgment the Court of Appeal allowed the appeal of the respondent-appellant-respondent (hereinafter referred to as the respondent), set aside the decision of the Board of Review and affirmed the award of compensation made by the acquiring officer based on the market value of the property as at the commencement of Act, No. 15 of 1968. The appellants-respondents-appellants (hereinafter referred to as the appellants) appealed to the Supreme Court against the said judgment of the Court of Appeal for which this Court granted Special Leave to Appeal on the following questions:

1. Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?
2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?
3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?
4. Did the Court of Appeal misdirect itself on the burden of proof?

The facts of this appeal, as stated by the appellants, *albeit* brief, are as follows:

The appellants had filed an appeal before the Land Acquisition Board of Review against an award made by the respondent regarding an undivided ½ share of late Ummu Shifa Musthar, one of the respondents of the application before the Court of Appeal and who had died during the pendency of that appeal and 1/12th share each of the 2nd to 7th appellants respectively. The property acquired bears assessment No. 13, Horadehipitiya Road, Kolonnawa, containing in extent 11A–0R–31.00P.

The Board of Review was, *inter alia*, entrusted with the task of deciding the relevant date on which the market value of the acquired property should be determined. The main dispute therefore involved the question as to whether compensation of the property to be acquired was to be arrived at in terms of Section 4(2) of the Colombo District (Low Lying Areas) Reclamation and Development Board, Act No. 15 of 1968 (hereinafter referred to as Act, No. 15 of 1968) or in terms of Section 7 of the Land Acquisition Act.

The appellants maintained that the relevant date for valuation should be the date on which notice under Section 7 of the Land Acquisition Act was published in the Gazette, viz., 24.04.1981, whereas the respondent took up the position that compensation should be awarded on the basis that acquisition falls within the purview of Section 4(2) of Act, No. 15 of 1968 and therefore the date of commencement of that Act, viz. 22.09.1968, should be adopted as the relevant date for the purpose of computing compensation.

The appellants had admitted that Act, No. 15 of 1968 came into effect on 22.09.1968 and the Gazette Notification of the intention to acquire the property in question in terms of the Land Acquisition Act was published on 12.08.1970. The appellants have also admitted that the said property was acquired on 02.03.1979, when Section 38(a) notice was published in the Gazette.

The Board of Review, which initially heard this matter, by their order dated 20.02.1995 had held that the market value would be determined as at 22.09.1968, only if the land acquired at the time of acquisition was in the same condition it was on 22.09.1968.

According to the appellants, the land acquired was not in a marshy, waste or swampy state, but in an improved condition at the time of acquisition on 02.03.1979 and in those circumstances determination of the question of compensation had to be made in terms of Section 7 of the Land Acquisition Act, the material date being 24.04.1981, the date on which Section 7 notice of the Land Acquisition Act was published in the Gazette.

Accordingly, it was held that the relevant date for the purpose of computing the quantum of compensation for the property in question was 24.04.1981 that date being the date of publication of Section 7 Notice under the Land Acquisition Act, and not 22.09.1968, viz., the date of commencement of Act, No. 15 of 1968.

The total award of compensation by the respondent was Rs. 350,000/- and the appellants were awarded same in proportion to their respective shares. The appellants' original claim after certain restrictions had amounted to Rs. 8,860,150/- as compensation.

The Board of Review, which subsequently heard the appeal by the appellants had by their order dated 20.12.2000 quashed the award made by the respondent in respect of the amount of compensation and substituted the total amounting to Rs. 6,621,500/- stating that the appellants will be entitled to compensation in proportion to their respective shares.

The respondent being dissatisfied with the decision of the Board of Review preferred an appeal to the Court of Appeal. Learned Counsel for the appellants took up a preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981. The Court of Appeal, by their judgment dated 11.03.2005 held against the appellants and allowed the appeal of the respondent. The Court of Appeal thereby had set aside the decision by the Board of Review dated 20.12.2000 and had affirmed the Award of compensation made by the respondent based on the market value of the property at the commencement of Act, No. 15 of 1968.

Having stated the facts of this appeal let me now turn to consider the questions raised in this appeal on the basis of the submissions made by both learned Counsel for the appellants and the respondent.

1. **Was the Court of Appeal wrong in rejecting the preliminary objection that no question of law had been disclosed and what was referred to was a pure question of fact, which was in relation to the state of the land in 1968 and 1981?**

Learned President's Counsel for the appellants contended that although the appellants' original restricted claim was Rs. 8,860,150/- as compensation, the respondent had awarded only Rs. 350,000/-. The Board of Review had quashed the Award made by the respondent in respect of the amount of compensation and had substituted the total amount to be Rs. 6,621,500/-. The respondent being dissatisfied with the said decision of the Board of Review had preferred an appeal to the Court of Appeal and had sought to appeal from the decision of the Board of Review on the following questions of law:

1. Should the relevant date on which the market value of the acquired property be determined according to the date on which Notice under Section 7 of the Land Acquisition Act was published in the Gazette or should the relevant date be determined according to the date of commencement of the Colombo District (Low Lying Areas) Reclamation and Development Board Act, No. 15 of 1968?

2. Whether the part of Section 4(2) of which reads as "the market value of that land for the purposes of determining the amount of compensation to be paid in respect of that land shall, notwithstanding anything to the contrary in that Act, be deemed to be the market value which that land would have had at the date of commencement of that Act if it then was in the same condition as it is at the time of acquisition" should be interpreted as if the condition of the land has changed from the time of acquisition, the provisions of the said Section 4(2) will not be applicable and the relevant date for the valuation should be taken as Section 7 date?

The appellants had taken up a preliminary objection before the Court of Appeal that the said questions are only pure questions of fact and that no questions of law had been disclosed. Their position was that the comparison of the condition of the land as at the date of acquisition and as at the date of Act, No. 15 of 1968, came into being (which was on 19.09.1968) was a pure question of fact.

It is not disputed that the question to be considered before the Land Acquisition Board of Review was whether the land in question was in the same condition at the time of acquisition, as was at the date of commencement of the Act, No. 15 of 1968. The said Board of Review had accordingly examined the applicability of Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act. Considering the issue in question, the said Board of Review had stated that,

> "Learned Counsel for appellants submitted that, according to the description given in the tenement list R1(a) dated 30.07.80, this land has been described as a garden containing eight temporary buildings and 25 coconut trees 10 to 25 years old, and therefore if one keeps in mind the fact that at the commencement of the Reclamation and Development Board Act it applied to "low lying, marshy, waste or swampy areas" the land acquired was not in that state, but in an improved condition at the time of acquisition, namely on 02.03.79. Learned Counsel for appellants' contention is that in view of the aforesaid circumstances, determination of the questions of compensation had to be made under Section 7 of the Land Acquisition Act, the material date being the date on which the Section 7 notice was published in the Gazette, namely 24.4.81".

It is therefore quite clear that the question of condition of the land had to be considered by the Board of Review. On a careful examination of the proceedings and the order made by the Board of Review, it is apparent that the condition of the land as of the date of acquisition compared with the condition of the land as at the date of Act, No. 15 of 1968 was not arrived at by the Board of Review on an assessment of facts. Further the Board of Reviews had led no evidence on the condition of the land in 1968 at the time the said Act, No. 19 of 1968 came into

operation and had come to the conclusion of the condition of the land, not on an assessment of the facts, **but purely by inference**.

In fact the Court of Appeal had given its mind to this question and had correctly found that no evidence had been led before the Board of Review with regard to the condition of the land in 1968, viz., at the time Act, No. 15 of 1968 came into operation. Since no evidence had been led before the Board of Review, it was erroneous for the Board to have concluded that the land in question earlier had been marshy and swampy and that 'the land acquired was not in that state, but in an improved condition at the time of acquisition'. On that basis the Board of Review had decided that the relevant date for the purpose of computing the quantum of compensation for the land is 24.04.81 and not 22.09.68, which was the date Act, No. 15 of 1968, came into operation.

What constitute a question of law was considered and determined by this Court in **Collettes Ltd.** v **Bank of Ceylon** ([1982] 2 Sri L.R. 514), where it had been stated *inter alia*, that,

i. **inferences from the primary facts found are matters of law**;
ii. whether there is or not evidence to support a finding, is a question of law; and
iii. whether the provisions of a statement applying to the facts; what is the proper interpretation of a statutory provision; what is the scope and effect of such provision are all questions of law.

As stated earlier the Board of Review had drawn inferences from the primary facts, which were before them and no evidence was led to support their findings. Further the Board of Review interpreted the statutory provisions in arriving at the date for the purpose of computing the quantum of compensation for the land in question. The Court of Appeal, after considering the matter before it, quite correctly came to the conclusion that the questions referred to the Court of Appeal for determination were questions of law that had to be decided by that Court.

It is not disputed that before the Board of Review the appellants and the respondent were relying respectively on the applicability of Section 7 of the Land Acquisition Act and Section 4(2) of the Act, No. 15 of 1968 for the purpose of arriving at the relevant date to compute the quantum of compensation. Considering the submissions made before the Board of Review and for the reasons stated above it is quite apparent that the Board had arrived at a decision, not on the basis of the facts before the Board, but on an interpretation of the aforementioned statutory provisions.

Accordingly it is apparent that the Court of Appeal was not wrong in rejecting the preliminary objection that 'no question of law had been disclosed and what was referred to was a pure question of fact', which was in relation to the state of the land in 1968 and 1981.

2. Having erroneously held that a question of law had arisen, did the Court of Appeal thereafter further err by making a pronouncement, which interferes entirely with a finding of pure fact?

Learned President's Counsel for the appellants contended that he relied on the decision in **Mahawitharana** v **Commissioner of Inland Revenue** ((1962) 64 N.L.R. 217), where H.N.G. Fernando, J. (as he then was) had adopted a statement by Gajendragadkar, J. in **Naidu and Co.** v **The Commissioner of Income Tax** ((1959) A.I.R. S.C. 359).

The contention of the learned President's Counsel for the appellants was that what was held in the decision in **Naidu and Co.** (supra) by Gajendragadkar, J., was that finding of facts could be challenged only within narrow limits and limited to improper admission of evidence or exclusion of proper evidence or not supported by legal evidence or is not rationally possible. Learned President's Counsel submitted that the Court of Appeal had distinguished this decision on the basis that what was considered in that case relates to a pure question of fact, which is not the issue in question in this case.

In **Mahawitharana** v **Commissioner of Inland Revenue** (supra), the Supreme Court had to consider the question as to whether 'on the facts and circumstances proved in the case, the inference that the transaction in question was *an adventure or concern in the nature of trade* is in law justified? While answering the said question of law in the affirmative, the Supreme Court had held that in a case stated under Section 78 of the Income Tax Ordinance, the Supreme Court could consider the correctness of the inference drawn by the Board of Review as to the Assessor's intention, only a) if that inference had been drawn on a consideration of inadmissible evidence or after excluding admissible and relevant evidence, b) if the inference was a conclusion of fact drawn by the Board, but unsupported by legal evidence, or c) if the conclusion drawn from relevant facts was not rationally possible and was perverse and should therefore be set aside. This was laid down on the basis of the decision in **Naidu and Co.** (supra) and in both **Naidu and Co.** (supra) and in **Mahawitharana** (supra) the questions in issue were based on pure questions of fact.

The issue in question in this matter, as was stated earlier, was on the basis of the condition of the land in 1968 and the condition of the land at the time of acquisition. Whilst, the respondent contended that the applicable date should be the date when Act, No. 15 of 1968 came into operation, the appellants submitted that what should be taken into consideration was the date of acquisition. Admittedly it is necessary to arrive at the correct date for the purpose of computing compensation to be payable and for that purpose it is necessary to know whether there had been a change in the condition of the land between 1968 and the date of acquisition, as, if there had been such a change in the condition of the land, Section 4(2) of Act, No. 15 of 1968 would not be applicable for the payment of compensation.
It is not disputed that although the condition of the land at the date of acquisition was arrived at by the Board of Review based on evidence, there had been no evidence with regard to the condition of the land in 1968.

Accordingly as stated earlier, under question No. 1, the Court of Appeal had accepted that the Board of Review, in determining the condition of the land in 1968, had arrived at a decision, not purely on fact, but on **an inference** on the applicability of the Act, No. 15 of 1968 and an

interpretation given to Section 4(2) of Act, No. 15 of 1968 and Section 7 of the Land Acquisition Act.

It is not disputed that the appellants' Valuers and the state Valuer had given evidence with regard to the valuation of the land, but no evidence was led as stated earlier, in relation to the condition of the property in question in 1968. The Land Acquisition Board of Review, in considering the question of computation of compensation had considered the question on the basis that the land had been 'in an improved condition' at the time of its acquisition and it is important to note that the Board of Review had arrived at this conclusion on the premise that Act, No. 15 of 1968 was applicable to low lying, marshy, waste or swampy areas and therefore this land was marshy in the year 1968. It is therefore apparent that the Board of Review in order to arrive at its finding had interpreted the provisions of Act, No 15 of 1968 and such a cause of action could not be accepted as considering a pure question of fact.

Accordingly the Court of Appeal was correct in concluding that the decision in **Mahawitharana** (supra) could be distinguished on that basis.

It is therefore evident that the Court of Appeal did not interfere with a finding of pure fact.

3. In any case was the Court of Appeal wrong in concluding that the land had not undergone any change without contrary to evidence being led either before the Board of Review or the Court of Appeal itself?

Learned Counsel for the appellants contended that the Court of Appeal misdirected itself in interfering with questions of fact and determining that the land had not undergone any changes.

As stated earlier, the Board of Review, after interpreting the provisions of Act, No. 15 of 1978 and the Land Acquisition Act, had determined erroneously that the land in question had undergone changes after 1968.

The Court of Appeal after determining that there was a question of law that whether there was a proper interpretation and application of Section 4(2) of Act No. 15 of 1968, had proceeded to examine the documents relating to the land in question, which included the Deed of Transfer at the time the said land was purchased by the appellants' predecessors and the condition of the land as referred to in the said Deed of Transfer.

It is not disputed that the said land was purchased by the appellants on 04.10.1968. Accordingly, the Court of Appeal considered a question of law based on the determination made by the Board of Review and had correctly examined the relevant documents, which were tendered to the Court of Appeal. Since the land in question had been purchased by the appellants' predecessors in 1968, and that being the year in which the condition of the land was relevant, after examining the said Deed, the Court of Appeal had correctly held that there had been no change in the condition of the land.

4. Did the Court of Appeal misdirect itself on the burden of proof?

Learned President's Counsel for the appellants submitted that the respondent had taken up the position that the computation of compensation should be calculated on the basis of Section 4(2) of Act, No. 15 of 1968 and therefore the burden of establishing the fact that the condition of the land had not changed after 1968 until the date of acquisition on 24.04.1981 was on the respondent.

As stated earlier, the following facts were common ground in this appeal: the land in question was purchased by the appellants' predecessors on 04.10.1968 and the Act, No. 15 of 1968 came into being on 22.09.1968. In terms of the acquisition process, the Section 4 notice under the Land Acquisition Act was dated 12.08.1970, order had been made in terms of Section 38(a)7 of the Land Acquisition Act on 02.03.1979 and the Section 7 notice in terms of the said Act was issued on 24.04.1981.

It is also common ground that the land was vested in terms of Section 38(a) of the Land Acquisition Act on 02.03.1979 and that at that time there was no Condition Report prepared for the land in question. In such circumstances when the Acquiring Officer took over the land it was presumed that there had been no change in the condition of the land. Accordingly the respondent had decided to compute the amount of compensation in terms of Section 4(2) of Act, No. 15 of 1968, where it is stated that,

> ". . . . notwithstanding anything to the contrary to that Act, be deemed to be the market value which that land would have had at the date of commencement of this Act **if it then was in the same condition as it is at the time of acquisition**" (emphasis added).

If the appellants had been of a contrary view to the effect that the land in question had changed from its original position at the time of its acquisition, then in terms of Section 101 of the Evidence Ordinance the burden of proving that assertion lies on the appellants. Section 101 of the Evidence Ordinance stated that,

> "Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person."

Accordingly if the appellants had asserted that the condition of the land in question had changed from its original position at the time of its acquisition, in terms of Section 101 of the Evidence Ordinance, the appellants should lead evidence to prove that position. Further in terms of Section 102 of the Evidence Ordinance, the burden of proof lies on the appellants, who required the Court to determine the amount of compensation they would be entitled to which

was different from what the respondent had computed as compensation. When the appellants claimed that the compensation should be computed in terms of the Land Acquisition Act as the condition of the land had changed from the time it was purchased by the appellants' predecessors and when the respondent had stated that there had been no change in the condition of that land, the burden of proof lies on the appellants to lead evidence that the land had undergone a change in its condition. Further as correctly pointed out by learned Deputy Solicitor General for the respondent, if no evidence is given by either party, in terms of Section 57(9) of the Evidence Ordinance it would be presumed that in the ordinary course of nature there would be no change in the condition of the land. Section 57(9) clearly states that there is no need to prove the ordinary course of nature and if there is no evidence of the condition of the land in 1968 to the contrary by the appellants, it is presumed that in terms of the ordinary course of nature that there was no change in the condition of the land. Therefore the burden of proving that there had been a change in the condition of the land solely rests on the appellants.

For the reasons aforesaid the questions of law for which special leave to appeal was granted are answered in the negative.

This appeal is accordingly dismissed and the judgment of the Court of Appeal dated 11.03.2005 is affirmed.

I make no order as to costs.

Judge of the Supreme Court

Jagath Balapatabendi, 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 the conviction and sentence of the Court of Appeal as per Judgement dated 8th October 2002.

Upali Dharmasiri Welaratne,
No. 654/13, Halangahadeniya, Gothatuwa,
Angoda.

Now at

No. 57/14, Jayaweera Mawatha,
Kotte.

DEFENDANT- RESPONDENT-RESPONDENT-APPELLANT

S. C. Appeal No. 65/2003
S. C. (Spl.) L. A. No. 271/2002
C.A. No. 312/1999
D.C. Colombo No. 18335/L

Vs-

Wesley Jayaraj Moses,
No. 57/14 A, Jayaweera Mawatha,
Ethul-Kotte.

PLAINTIFF-PETITIONER-PETITIONER-RESPONDENT

BEFORE : Dr. Shirani A. Bandaranayake, J.,
Saleem Marsoof, P.C., J., &
D. J. de S. Balapatabandi, J.

COUNSEL : L. C. Seneviratne, P.C. for the Defendant-Respondent-Respondent-Appellant.

Ransiri Fernando with Sarath Walgamage for the Plaintiff-Petitioner-Petitioner-Respondent.

ARGUED ON : 29-07-08 and 16-12-08

WRITTEN SUBMISSIONS : 17-12-08 – Plaintiff-Petitioner-Petitioner-Respondent
23-12-08–Defendant-Respondent-Respondent-Appellant

DECIDED ON : 27-05-2009

MARSOOF, J.

I have had the advantage of perusing the judgement prepared by my brother Balapatabandi, J., in draft, and I regret that I cannot agree with his findings, for the reasons outlined below.

This appeal is against the decision of the Court of Appeal dated 8th October 1999, holding that the Defendant-Respondent-Respondent-Appellant (hereinafter referred to as "the Appellant") is guilty of contempt of court, and imposing on him a sentence of 2 years rigorous imprisonment and a fine of Rs. 500,000/- along with a further term of 6 months rigorous imprisonment upon default thereof. The said conviction and sentence arose from the alleged violation of an undertaking given by the Appellant in the context of a revision application filed by the Plaintiff-Petitioner-Petitioner-Respondent (hereinafter referred to as "the Respondent") in the Court of Appeal challenging an order of the District Court of Colombo refusing an interim injunction to restrain the Appellant, his agents and servants from destroying the wall and roof of premises No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte belonging to the Respondent and continuing the construction of structures on or within the northern boundary of lot 2B in Plan No. 2451 dated 4th November 1986 made by N.E. Weerasooriya, Licenced Surveyor, on which the said premises is situated. Along with the said revision application, the Respondent had also filed CA Leave to Appeal application bearing No. 47/99 seeking leave to appeal against the said order, which was pending at the time of the contempt inquiry.

After the Appellant filed his Objections dated 10th June 1999 with respect to the application to revise the said order of the District Court and the application for interim relief, the inquiry into the application for interim relief commenced on 22nd June 1999. At this inquiry, Mr. A.K. Premadasa, P.C. with Mr. C.E. de Silva appeared for the Respondent and Mr. Harsha Soza appeared for the Appellant. As the inquiry could not be concluded on that date, it was adjourned for 30th June 1999, on which date, the matter was settled before the Court of Appeal by the following order:

> "Before :- Edussuriya, J., CP/CA
> Udalagama, J.
>
> Same appearances as before.
>
> At this juncture, the Defendant-Respondent (present Appellant) undertakes not to effect further constructions and to maintain the status quo. The interim injunction is accordingly issued *restraining the Defendant-Respondent from continuing to build hereafter.*"

It is the violation of this undertaking / interim-injunction that was held by the Court of Appeal to be in contempt of court, which decision is the subject matter of this appeal. Before dealing with the specific questions on which leave to appeal was granted by the Supreme Court, which are fully set out in the judgment of my brother Balapatabendi, J., it is necessary to consider a question of fundamental importance which has been raised, namely, whether

the Court of Appeal gravely misdirected itself and exceeded its jurisdiction by issuing an interim-injunction against the Appellant based on a general undertaking and without hearing both parties on the facts.

Does the Violation of an Irregular Order Amount to Contempt?

It has been strenuously contended on behalf of the Appellant that he cannot in law be found guilty of contempt of court since the issue of the interim injunction which the Appellant is alleged to have violated, was irregular as the Court of Appeal had not heard both parties on the facts (either on affidavits, documents or oral evidence with consent). It may be noted at the outset that it is trite law, as was held in *Silva v. Appuhamy* 4 NLR 178, that "an injunction granted by a competent court must be obeyed by the party whom it affects until it is discharged, and that disobedience can be punished as for a contempt of court, notwithstanding irregularity in the procedure". The competence of the Court of Appeal to issue an injunction by way of interim relief is well recognized. The Court of Appeal is vested under Article 143 of the Constitution with jurisdiction to grant and issue injunctions to prevent any irremediable mischief that might ensue before a party making an application for such injunction could bring an action in any court of first instance to prevent the same. It also has appellate and revisionary jurisdiction in regard to decisions of courts of first instance such as the District Court, and has the power in terms of Article 145 of the Constitution, to revise any order of such a court issuing or refusing an injunction, whether interim or final. In terms of Rule 2 of the Court of Appeal (Appellate Procedure) Rules, 1990, the Court of Appeal also has the power to grant, in appropriate circumstances, a stay order, interim injunction or other interim relief, after notice and inquiry, and in cases of urgency even without such notice, provided the duration of the relief does not exceed two weeks.

In the instant case, the Court of Appeal had issued an interim-injunction after noticing the Appellant and after hearing submissions of his Counsel, except that it did not have to complete the inquiry for the grant of interim relief in view of the undertaking given by the Appellant in open court on 30th June 1999. It is clear from the relevant journal entry that had the Appellant not given the said undertaking, the inquiry in regard to interim relief would have continued and the Court of Appeal would have made an order in terms of Rule 2 of the Court of Appeal (Appellate Procedure) Rules, 1990, published in the Gazette Extraordinary of the Democratic Socialist Republic of Sri Lanka bearing No. 645/4 dated 15th January, 1991. The undertaking given to court by the Appellant effectively put an end to the inquiry into interim relief. When a party or counsel gives an undertaking in court, such undertaking obviates the need to hold an inquiry, but such undertaking has exactly the same force as an order made by the court, and accordingly, it follows that the breach thereof amounts to contempt of court in the same way as a breach of an injunction. In *de Alwis v. Rajakaruna* 68 NLR 180, where by majority decision the Supreme Court, the Respondent was held to be guilty of contempt of court by his failure to honor an undertaking given to court, Basnayake, C.J., at page 184 quoted with approval the following passage from *Oswald on Contempt*-

> An undertaking entered into or given to the Court by a party or his counsel or solicitor is equivalent to and has the effect of an order of the Court, so far as any infringement thereof may be made the subject of an application to the Court to punish for its breach. The undertaking to be enforced need not necessarily be embodied in an order."

As Sir John Donaldson MR observed in *Hussain v. Hussain* [1986] 1 All ER 961 at 963 -

> "Let it be stated in the clearest possible terms that an undertaking to the court is as solemn, binding and effective as an order of the court in the like terms."

In the South African case of *York Timbers Ltd v. Minister of Water Affairs & Forestry* 2003 (4) SALR 477, at page 500 Southwood, J., having cited the above quoted *dicta* of Sir John Donaldson MR, stated that –

> "In my view there is no difference between the legal effect of an undertaking to do something or refrain from doing something which is made an order of court and the legal effect of an order to the same effect made by the court after considering the merits and giving judgment."

Thus, it is obvious that a party that has given an undertaking cannot be heard to say that an interim-injunction has been issued without due hearing as the very purpose of giving such an undertaking is to save for the court as well as to the parties, valuable time that would otherwise be spent on the inquiry into the grant of interim relief. Nor is it open to such a party to later challenge the jurisdiction of the court if the party had voluntarily submitted himself or itself to the jurisdiction of court by the very act of giving the undertaking. Furthermore, where the solemn undertaking given to court is recorded as an order of court, it is the undertaking, and not the order of court that requires the giver of the undertaking to act in accordance with its terms. The power of the Court of Appeal to punish for contempt of itself, whether committed in the court itself or elsewhere, as well as its power to punish for the contempt of any other court, tribunal or institution referred to in Article 105(1)(c) of the Constitution is enshrined in Article 105(3) of the Constitution, and as Samarakoon, C.J., observed in *Regent International Hotels Ltd. v. Cyril Gardiner and Others* [1978-79-80] 1 Sri LR 278 at page 286 -

> "The Supreme Court "being the highest and final Superior Court of Record in the Republic" and the Court of Appeal being a Superior Court of Record with appellate jurisdiction have all the powers of punishing for contempt, wherever committed in the Island in *facie curiae or ex facie curiae."*

The submission that the Court of Appeal had acted in excess of its jurisdiction in treating the violation of such an undertaking as a contempt of court, is therefore, altogether devoid of merit.

Admissibility of Photographic Evidence

The first of the questions on which leave to appeal has been granted by this Court, relates to the very interesting issue of admissibility of photographic evidence, which at the time of the admission of the photographs in question, were governed by the provisions of the Evidence Ordinance No. 14 of 1895 (CLE 1956 Official Ed. Cap. 14, as amended by Act No. 10 of 1988, No. 33 of 1998, No. 32 of 1999 and No. 29 of 2005 and supplemented by The Evidence (Special Provisions) Act No.14 of 1995). The question is: Did the Court of Appeal err in placing reliance on the dates appearing on the photographs produced by the Respondent at the contempt inquiry? The said dated photographs were produced by the Respondent marked P7 to P18 at the contempt inquiry held on 20th July 2001 to show that the Appellant

had acted in disregard of the undertaking given by him to court on 30th June, 1999. These photographs, which contain imprints of dates ranging from 2nd July to 17th July 1999 on which dates it is alleged that the Appellant continued with the building operations which he had undertaken to discontinue and maintain the *status quo* pending the hearing of the revision application filed in the Court of Appeal, are of great value in deciding on the guilt or otherwise of the Appellant.

The Appellant, who at that stage contempt inquiry conducted his own defence without the assistance of counsel (prior to Mr. Sanath Jayathilake appeared as his counsel), took objection to the production of the said dated photographs marked P7 to P18 on the ground that they were not admissible as "documents" under the Evidence Ordinance. The Court of Appeal made order overruling the said objection and admitting the photographs "subject to proof". With the view to proving the said photographs, the Respondent called witness Roshan Seneviratne, the Manager of Salaka Group, who testified that the said photographs were developed at his establishment, and produced marked P7a to P18a respectively, the negatives of the said photographs. When President's Counsel for the Respondent closed his case on 16th May 2002, he moved to read in evidence the said photographs and the negatives, without any objection thereto being taken on behalf of the Appellant. As was observed by Samarakoon, C.J., in *Sri Lanka Ports Authority and Another v. Jugolinija-Boal East* [1981] 1 Sri LR 18, at page 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 civil courts".

Mr. L.C. Seneviratne, P.C., who appeared for the Appellant in this appeal, reformulated the objection against the admission of the photographs marked P7 to P18 on the basis that the Court of Appeal, which has placed reliance on the dates appearing on the photographs, has failed to consider that the date imprint on the photographs taken in the camera belonging to the Respondent could have been manipulated through the controls of the camera. A photograph, according to the *Oxford Concise English Dictionary*, is "a picture made by a camera, in which an image is focused onto film and then made visible and permanent by chemical treatment." All cameras, ranging from the earliest "pin hole" cameras to the modern film or digital cameras, operate on the same principle, namely that the light gathered from a scene or object that is photographed can be used to create an image on a light sensitive medium such as a film or a charge-couple-device (CCD) of a modern digital camera. A photograph is essentially a conversion or transformation of a contemporaneous recording which is made through mechanical or electronic means.

Photographs, and other forms of contemporaneous recordings, have been admissible in evidence in Sri Lanka despite the limitations of Section 3 of the Evidence Ordinance which confined its definition of "evidence" to oral and documentary evidence. Our courts have utilized other provisions of the Ordinance, such as the second proviso to Section 60, which empowered the court to require any material thing that is referred to in oral testimony to be produced in court for its inspection, and Section 165, which empowered court to order the production in court of any thing, to admit in evidence, contemporaneous recordings of public speeches (*Abu Bakr v. The Queen,* 54 NLR 566; *Kularatne and Another v. Rajapakse,* [1985] 1 Sri LR 24), telephone conversations preserved through wire or a tape recording (*See, In re S.A.Wickremasinghe* 55 NLR 511, *K.H.M.H.Karunaratne v. The Queen,* 69 NLR 10; *Cf, Roberts and Another v. Ratnayake and Others,* [1986] 2 Sri LR 36) and photographs (*Shahul Hameed and*

Another v. Ranasinghe and Others [1990] 1 Sri LR 104 and *Peiris and Another v. Perera and Another* [2002] 1 Sri LR 128).

Of course, like any thing else, contemporaneous recordings too could be manipulated, and hence it is necessary to take precautions with the view to preventing or detecting such possibilities, but the attitude of our courts in regard to such matters have generally been permissive rather than prohibitive. As Canakeratne, J., once observed in *The King v. Dharmasena,* 50 NLR 505 at 506, while assessing the value of photographic evidence produced in court, -

> "It may be that, cameras do lie (e.g., one not held at eye-level, one with a long focus lens, &c.), but one does not dispense with all witnesses because there are perjurers. If real evidence (e.g., a knife) can be brought, why not a photograph? If a jury may view a scene, why not a photograph of the scene?"

It is important to note that at the time of the conduct of the contempt inquiry, the production of photographic evidence was governed by the provisions of Section 4 of the Evidence (Special Provisions) Act No. 14 of 1995. Section 4 (1) of the said Act provides that in any proceeding where direct oral evidence of a fact would be admissible, "any contemporaneous recording or reproduction thereof, tending to establish that fact" shall be admissible as evidence of that fact, if it is shown that -

(a) the recording or reproduction was made by the use of *electronic or mechanical* means;

(b) the recording or reproduction is capable of being played, replayed, displayed or reproduced in such a manner so as to make it *capable of being perceived by the senses*;

(c) at all times material to the making of the recording or reproduction the machine or device used in making the recording or reproduction, as the case may be, was *operating properly*, or if it was not, any respect in which it was not operating properly or out of operation, was not of such a nature as to affect the accuracy of the recording or reproduction; and

(d) the recording or reproduction was *not altered or tampered* with in any manner whatsoever during or after the making of such recording or reproduction, or that it was kept in safe custody at all material times, during or after the making of such recording or reproduction and that sufficient precautions were taken to prevent the possibility of such recording or reproduction being altered or tampered with, during the period in which it was in such custody.

It is expressly provided in Section 4 (2) of the Act that if the conditions set out in Section 4 (1) are satisfied, "the recording or reproduction *shall be admissible in evidence of the fact recorded or reproduced, whether or not such fact was witnessed by any person*." It is also provided in Section 4 (3) of the Act that where any such recording or reproduction cannot be played, replayed, displayed or reproduced in such a manner so as to make it capable of being perceived by the senses, or even if it is capable of being so perceived but is unintelligible to a person not conversant in a specific science, or is of such nature that it is not convenient to perceive and receive in evidence, in its original form, the court may admit in evidence "*a*

transcript, translation, conversion or transformation" of such recording or reproduction as may be appropriate and is intelligible and is capable of being perceived by the senses.

Modern cameras are more electronic than mechanical, but that makes no difference as regards the underlying law that is applicable in regard to the production in court of photographs taken using such cameras, whether they be dated or not. Mr. Seneviratne has submitted that the date on a camera can be changed with ease, and that the camera with which the photographs marked P7 to P18 were taken should have been produced in court. The procedure for the production in legal proceedings of evidence derived from contemporaneous recordings is set out in Part III of the Evidence (Special Provisions) Act, and in particular in Section 7(1) (a) thereof, which requires that a party "proposing to tender such evidence shall, not later than forty-five days before the date fixed for inquiry or trial file or cause to be filed, in court, after notice to the opposing party, a list of such evidence as is proposed to be tendered by that party, together with a copy of such evidence or such particulars thereof as is sufficient to enable the party to understand the nature of the evidence." According to Section 7(2), a party who fails to give notice as aforesaid, shall subject to the provisions of Sections 8 and 9 of the Act, not be permitted to tender such evidence in respect of which the failure was occasioned.

Section 7(1) (b) of the Act specifically provides that any party to whom a notice has been given under Section 7(1) (a) "may within fifteen days of the receipt or such notice apply to the party giving such notice, to be permitted access to, and to inspect-

(i) the *evidence* sought to be produced ;

(ii) the *machine, device or computer*, as the case may be, used to produce the evidence; and

(iii) any *records relating to the production of the evidence* or the system used in such production."

The Act also specifies an outer time limit of fifteen days for a party proposing to produce such evidence to provide a reasonable opportunity to the party against whom such evidence is sought to be produced or his agents or nominees, "to have access to, and inspect, such evidence, machine, device, computer, records or systems." The procedure so laid down in the Act is intended to give an opportunity for a party against whom the evidence is sought to be produced to challenge the same on the ground that it is not an accurate recording or reproduction of what it purports to be.

At not time in these proceedings has the Appellant objected to the production of the photographs marked P7 to P18 on the ground that the notice contemplated by Section 7(1)(a) of the Evidence (Special Provisions) Act of 1995 has not been given to the Appellant, and no submissions in these lines were addressed to court in the Court of Appeal or before this Court. However, I have given my mind to this question, and I hold that the Appellant had notice of the fact that the Respondent was relying on the dated photographs marked P7 to P18 in the contempt proceedings when notice of the Respondent's petition dated 21st July 1999, by which he complained to the Court of Appeal of the alleged contempt, was served on him. In paragraph 11 of the affidavit of the Respondent dated 20th July 1999 attached to

the said petition, the Respondent has specifically listed the said photographs in the following manner:

> "I attach hereto marked C and D photographs showing the construction being carried on 2-7-1999 and photograph marked E showing the position of the building on 4-7-1999 and photographs marked F, G, H and I taken on 5-7-1999 showing the construction done on 5-7-1999, marked J, K, showing the construction done on 15-7-1999, marked L and M showing the construction done on 17-7-1999 and plead them as part and parcel hereof."

The said Petition was supported before Edussuriya, J., on 30th July 1997, and the Court directed the issue of summons on the Appellant for 17th August 1999. On that date, the Appellant appeared in person and moved for a further date, and the matter was re-fixed for 15th October 1999. On 15th October 1999, the chargers were read out to the Appellant who pleaded not guilty to the said charges. After several inquiry dates and calling dates, the contempt inquiry ultimately commenced before a Bench of the Court of Appeal consisting of Shiranee Tilakawardane, J., and Chandradasa Nanayakkara, J., on 20th July 2001. During the one year period that elapsed between the filing of the Petition dated 21st July 1999 and the commencement of the contempt inquiry, the Appellant made no effort to move Court for permission to examine the camera used for the purpose of taking the photographs in question, as he was entitled to do in terms of Section 7 (1) (b) (ii) of the Evidence (Special Provisions) Act 1995.

In the circumstances, and for the reasons outlined above, I am of the opinion that the Appellant is not entitled to take any objections to the admissibility of the said photographs at the appeal stage of this case. Accordingly, I am of the opinion that the Court of Appeal has not erred in placing reliance on the dates appearing on the photographs produced by the Respondent.

Proof of Contempt

The next four questions on which this Court has granted leave to appeal relating to the burden and standard of proof may, for convenience, be considered together. These questions are –

(i) Has the Respondent discharged the burden of proof placed upon him in this inquiry?

(ii) Have their Lordships' of the Court of Appeal erred in accepting the evidence led on behalf of the Respondent?

(iii) Have their Lordships' of the Court of Appeal erred in rejecting the evidence led on behalf of the Petitioner (Appellant)?

(iv) Have their Lordships' of the Court of Appeal erred in taking to consideration extraneous factors / material in convicting and sentencing the Petitioner (Appellant)?

The Appellant was charged in the Court of Appeal for committing contempt of court on 1st July 1999, 2nd July 1999, 4th July 1999, 5th July 1999, 15th July 1999, 16th July 1999 and 17th July 1999 by effecting further constructions and continuing to build after 30th June 1999 in premises bearing Assessment No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte thereby damaging premises bearing Assessment No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte "on the *northern* side." This charge is essentially one of civil contempt, which is an 'offence' of a private nature since it thereby deprived the Respondent of the benefit of the undertaking given to court by the Appellant, and the interim injunction granted by the Court of Appeal on 30th June 1999 at the instance of the Respondent.

The line between civil and criminal contempt is a thin one indeed. The distinction was explained by Barrie and Low in *The Law of Contempt,* (3rd Ed – Butterworths, at page 655) as follows :

> "Criminal contempts are essentially offences of a public nature comprising publications or acts which interfere with the due course of justice as, for example, by tending to jeopardise the fair hearing of a trial or by tending to deter or frighten witnesses or by interrupting court proceedings or by tending to impair public confidence in the authority or integrity of the administration of justice. Civil contempts, on the other hand, are committed by disobeying court judgements or orders either to do or to abstain from doing particular acts, or by breaking the terms of an undertaking given to the court, on the faith of which a particular course of action or inaction is sanctioned, or by disobeying other court orders (for example not complying with an order for interrogatories, etc). "

While the need for society to preserve the rule of law and protect the rights of its citizen as well as those of the State lies at the heart of both civil and criminal contempt, the distinction between the two types of contempt, though clear in theory, is one which may often be difficult to make in the context of the peculiar circumstances of each case in which it may become necessary to determine whether a particular act amounts to a criminal or civil contempt. One of the reasons for this difficulty is that there is a punitive element even in cases of civil contempt, for it must be remembered that the law of contempt as a whole is concerned to uphold the due administration of justice, and it is obvious that disregard of a court order not only deprives the other party of the benefit of that order but also impairs the effective administration of justice. As Cross, J., said in *Phonographic Performance Ltd. v. Amusement Caterers (Peckham) Ltd.* [1964] Ch 195 at 198 :

> "Where there has been wilful disobedience to an order of the court and a measure of contumacy on the part of the defendants, then civil contempt, what is called contempt in procedure, "bears a two-fold character, implying as between the parties to the proceedings merely a right to exercise and a liability to submit to a form of civil execution, but as between the party in default and the state, a penal or disciplinary jurisdiction to be exercised by the court in the public interest"."

Although the contempt, the Appellant has been charged and convicted of is civil in nature, it is clear that the applicable standard of proof is that applicable to criminal cases. As Lord Denning MR observed in *RE Bramblevale Ltd.* [1970] Chancery 128, at 137 –

> "A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt. It is not proved by showing that, when the man was asked about it, he told lies. There must be further evidence to incriminate him. Once some evidence is given, then his lies can be thrown into the scale against him."

On appeal, this Court is called upon to examine whether the Respondent has discharged the burden placed on him to prove, beyond reasonable doubt, that the Appellant violated the solemn undertaking given by him to court, and / or the interim injunction imposed by Court, and whether the Court of Appeal took into consideration extraneous factors or material in convicting and sentencing the Appellant. It is however necessary to bear in mind, that in doing so, that the applicable standard of proof does not require that the guilt of the Appellant should be established beyond any and every shade of doubt, but only beyond doubts which may be called reasonable.

At the contempt inquiry before the Court of Appeal, the Respondent personally gave evidence, and led the evidence of Roshan Seneviratne, the Manager of Salaka Group, and that of Dr. George Nelson Perera, a close neighbour. The Appellant was the only witness for the defence. The Court of Appeal, in my opinion, has carefully analyzed all evidence and arrived at the conclusion that the guilt of the Appellant has been established beyond a reasonable doubt. In convicting the Appellant, the Court of Appeal has observed that-

> "On the consideration of the totality of the evidence and the documents filed in the revision application, including the pleadings referring to the District Court action and the orders, this Court is in no doubt whatsoever that the construction was carried out as complained by the Plaintiff-Petitioner-Petitioner (present Appellant)."

The required elements for a finding of civil contempt are (1) the existence of an undertaking or order; (2) knowledge of the undertaking or order; (3) ability to comply with the undertaking or order; and (4) willful or contumacious disobedience of the undertaking or order. It has been submitted by the learned President's Counsel for the Appellant that his client had no knowledge of the content of the undertaking / order as a copy thereof was not formally served on him. It is, however, material that in this case the undertaking was given on behalf of the Appellant by his Counsel when the inquiry into interim relief resumed after an adjournment, and the wording of the relevant journal entry makes it obvious that the Appellant was consulted by his Counsel *before* the undertaking was given. The undertaking given to court, and the consequent interim-injunction, were in the following terms:-

> *At this juncture*, the Defendant-Respondent (present Appellant) undertakes not to effect further constructions and to maintain the status quo. The interim injunction is accordingly issued *restraining the Defendant-Respondent from continuing to build hereafter*."

The Respondent, in his testimony, has categorically stated that the Appellant was in the precincts of the Court, and was consulted by his Counsel Mr. Harsha Soza, before the undertaking was given, which has been denied by the Appellant, who in the course of his evidence denied that he was in court, although he could not remember where he was when the case was taken up in the Court of Appeal. Significantly, the Appellant who did not call

Mr. Soza to testify on his behalf, did admit that after he became aware of the undertaking given to court on his behalf by his Counsel, he verified the "specifics" of the undertaking and order from the Registry of the Court within three days. The Appellant's testimony in this regard, under cross-examination, is quoted below:-

"Q : You came to know from Mr. Harsha Soza that an undertaking has been given and interim injunction has been issued restraining the Defendant-Respondent (present Appellant) from continuing to build?
A : I asked him. He told me that there was an order against me.
Q : You never asked him what is the order against you? And the Court of Appeal has issued an order against you?
A : I found it subsequently. About two or there days thereafter from the Registry.
Q : Till two or three days after 30.6.1999 you did not know what is the order ? Is that correct ?
A : Yes. The specifics of the order."

It is manifest that on his own admission, at least by 4th July, 1999 the Appellant was aware of the nature and content of the undertaking given by Counsel on his behalf, and the interim-injunction issued by the court, and should have moved the court if there was any lack of clarity or ambiguity in it. Prior to complaining about the alleged violation of the undertaking / interim-injunction by the Appellant to the Court of Appeal, the Respondent has contemporaneously complained to the Welikada Police, and with his petition dated 21st July 1999 filed in the Court of Appeal, he has produced marked A and B respectively copies of the complaints he made to the Police on 1st July 1999 and 5th July 1999, which were subsequently marked in evidence as P5 and P6. The particulars of the damage caused to the house of the Respondent are set out in P6 the relevant portion of which is quoted below:

"99'06'30 jk osk f.dvke.Sï yd boslsrSï kj;k f,ig wNshdpkd wOslrkh u.ska ;Skaÿjla oS,d we;' tal fuu Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska kej; udf.a ksji wi, boslsrSï lrf.k hkjd' ta boslsrSï lrk tajd iïnkaOj uu f*dfgda wrf.k ;sfnkjd' fuu boslsrSï lrk jsgoS udf.a ksjfia jy,h weianeiafgdaia ISÜ folla levS we;' tys jgskdlu re' 1500$ la muK fjs' jy,hg oud we;s wvs 40 l muk ;dr ISÜ ;ekska ;ek levS we;' tajdfha jgskdlu re' 1600$ la muK fjs' we,auSkshï ng folla" ;dr ISÜ Wv oud ;snqkd' wvs 10 la wvs 9 la muk os. ta folo fuu boslsrSï l, fiajlhka fofokd wrf.k we;' tys jgskdlu re' 700$ la muK fjs' uqÿka W¿ leg y;rla muK levS we;' tys jgskdlu re' 50$ la muK fjs' uq,q jgskdlu re' 3800$ la muK fjs' ;jo udf.a jy,h Wv Tjqka jsiska boslsrSï ksid isfuka;a ;Ógq .Kka jegS we;' fuu ksid udf.a ksji we;=,g j;=r .,d f.k tkjd' fuu Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska l=,shg wrf.k kï fkdokakd jev lrk fofokd udf.a jy,h Wv isg ;ud fuu ;dmamh n|skafka' fuu ug w,jx.=j Wiaid urK njg ;¾ckh lr jy,fhka neye,d .shd' udf.a bvfuka wvshl m%udKhla muK w,a,d f.k ;uhs fuu ;dmamh bos lrkafka' wo osk oj,a 12'15 g muk ;ud uu ksjig wdfjs' ta tk jsg ;ud jy,h Wv isgskjd uu oelafla' udj oel,d ;uhs ;¾ckh lr neye,d .sfha' fuu jy,h Wv isgskjd udf.a nsrs| jk tÉ' iS' ndnqIka hk who oelald' udf.a ÿj ksjfia isgshd thd t,shg wejs;a ke;' fus iïnkaOg uu by; kvq ijrd we;s wOslrK ;=kg jd¾:d lrus' ud fmd,sisfhka b,a,d isgskafka wOslrK ksfhda.h mrsos Wmd,s O¾uisrs fjs,dr;ak hk wh jsiska boslsrSï lrk tl kj;d fok f,ig yd ug jS;sfhk w,dNh iïnkaOj ls%hd ud¾.hla .kakd f,igh' ug lSug we;af;a tmuKhs'"

By the time of making the above-quoted statement to the Police, it is apparent that the Respondent had taken some photographs, and he has testified that he did so in accordance with the instructions he received from his lawyer, and he has produced in the course of the contempt inquiry marked P7 to P18, these and the subsequent photographs he took, with

date imprints, which clearly show that the work at the building site had been continued after the Appellant gave his solemn undertaking to court on 30th June 1999, and even after he admittedly perused the court record, and got the "specifics" of the interim-injunction issued by the Court of Appeal at most three days thereafter.

The position of the Appellant, at least at the initial stage of the contempt inquiry, was that he was not the owner of premises No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte, and that it was owned by his son and that the he had nothing to do with the building operations there. However, later in his testimony, under cross-examination, he admitted that he used to go there to see the constructions to give directions on behalf of his son who was abroad. It is also significant that the Appellant when he testified in the contempt inquiry denied that the building shown in the photographs P7 to P18 was his house, or the house in which he resided, and had stressed that none of the photographs showed the assessment number of the house, but when the Respondent and Dr. Perera testified no questions were put to them on these lines. Although the Appellant was at pains to show that he has nothing to do with the premises in which the building operations were alleged to have taken place, he led no evidence whatsoever to show that he lived in another premises located in some other place. He did admit in cross-examination that he made complaints to the Mayor and to the Central Environmental Authority on the nuisance caused by the poultry farm owned by the Respondent, but if he was not residing at premises No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte, the question naturally arises as to how he came to do so, if the Appellant was not living in the very same premises in which the building operations were alleged to have taken place.

Mr. L.C. Seneviratne, P.C has sought to assail the conviction of the Appellant on the basis that the photographs marked P7 to P18 were wrongfully admitted in evidence, which question has been dealt with by me fully earlier in this judgment. He has also submitted that the said photographs, in any event, did not show the site on which the building operations allegedly took place in violation of the undertaking / order of court, namely the building bearing assessment No. 57/14, Jayaweera Mawatha, Ethul Kotte, Kotte which is to the north of the Respondent's house bearing No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte, the two premises having one common boundary which is the northern boundary of the Respondent's house and the southern boundary of the site on which the building operations were alleged to have taken place. Mr. Seneviratne further submitted that the photographs did not prove beyond reasonable doubt that the Appellant destroyed "*the roof and wall on the Northern side of premises depicted as Lot 2B in Plan No. 2451 dated 04/11/1986 made by A. E. Wijesuriya, Licensed Surveyor, bearing Assessment No. 57/14A, Jayaweera Mawatha, Ethul Kotte, Kotte, and constructed structures on the northern side in the said premises.*"

It is pertinent to note that the undertaking given to court by the Appellant and the interim-injunction issued by court did not specifically refer to the "northern side of the premises" although there is reference to same in the pleadings before the District Court. What the Appellant had undertaken was *not to effect further constructions and to maintain the status quo*. The interim-injunction issued by the Court of Appeal was to restrain the Appellant "*from continuing to build hereafter.*" It is abundantly clear from the testimony of the Appellant and that of Dr. George Nelson Perera that the Appellant did continue building operations on northern side of the Respondent's premises which is the southern side of the neighbouring premises in which the Appellant admittedly resides. The allegations have been denied by the Appellant, who was the sole witness for the defence in the contempt inquiry, and the

Court of Appeal has rejected his testimony as being mutually inconsistent and altogether unconvincing. The Court of Appeal has also held that the Appellant had the ability to comply with the undertaking he gave to court and the interim injunction issued by court, and that he had acted in willful or contumacious disobedience of the said undertaking and order.

In this context, it is important to bear in mind the following oft-quoted words of Viscount Simon from the decision of the House of Lord in *Watt v. Thomas* [1947] 1 All E. R. 582, at pages 583 which were cited with approval by the Privy Council in *Munasinghe v. Vidanage* 69 NLR 97-

> "…….an appellate Court has, of course, jurisdiction to review the record of the evidence in order to determine whether the conclusion originally reached upon that evidence should stand; but this jurisdiction has to be exercised with caution. If there is no evidence to support a particular conclusion (and this is really a question of law) the appellate court will not hesitate so to decide. But if the evidence as a whole can reasonably be regarded as justifying the conclusion arrived at the trial, and especially if that conclusion has been arrived at on conflicting testimony by a tribunal which saw and heard the witnesses, the appellate Court will bear in mind that it has not enjoyed this opportunity and that the view of the trial judge as to where credibility lies is entitled to great weight. This is not to say that the judge of first instance can be treated as infallible in determining which side is telling the truth or is refraining from exaggeration. Like other tribunals, he may go wrong on a question of fact, but it is a cogent circumstance that a judge of first instance, when estimating the value of verbal testimony, has the advantage (which is denied to Courts of Appeal) of having the witnesses before him and observing the manner in which their evidence is given".

In this case, the Court of Appeal, having heard evidence placed before it by the Respondent and the Appellant, has come to certain findings having regard to the demeanor of witnesses, and the Supreme Court, sitting in appeal, will be extremely reluctant to review these findings. The time tested principle guiding our courts in these matters as enunciated by James L.J. in *The Sir Robert Peel*, 4 Asp. M. L. C. 321, at 322 and quoted with approval by Viscount Sankey L.C in *Powell and Wife v. Streatham Manor Nursing Home* [1935] AC 243 at 248, is that an appellate court-

> "will not depart from the rule it has laid down that it will not over-rule the decision of the Court below on a question of fact in which the Judge has had the advantage of seeing the witnesses and observing their demeanour unless they find some governing fact which in relation to others has created a wrong impression."

I bow to the wisdom of this dictum, and only wish to add that I did not find any governing fact which in relation to others might have created a wrong impression in the Court of Appeal. Accordingly, I am of the opinion that there is paucity of material even to suggest that the Court of Appeal has erred with regard to the discharge of the burden placed by law on the Respondent to prove beyond reasonable doubt that the Appellant committed contempt of court by his conduct, and in particular, I hold that questions (i), (ii) and (iii) have to be answered against the Appellant.

As regards, question (iv) on which leave was granted, learned President's Counsel for the Appellant has invited the attention of this Court to page 2 of the judgement of the Court of Appeal wherein it has been stated that "the Plaintiff-Petitioner-Petitioner instituted an action against the Defendant-Respondent-Respondent, an attorney-at-law….." He has stressed that the proceedings before the Court of Appeal were not initiated against the Appellant in his capacity as attorney-at-law, and the manner in which the Appellant has been referred to in the judgement of the Court of Appeal, suggests that the said Court has taken into consideration extraneous factors / material in convicting and sentencing the Appellant. In my view, the description of the Appellant by reference to his vocation, which in my opinion is a very noble and responsible profession, does not demonstrate any prejudice on the part of the court, particularly in the context that the Appellant had denied prior knowledge of the content of the undertaking which was given to Court by his Counsel, for the violation of which he had been charged. Accordingly, I am of the opinion that question (iv) also has to be answered against the Appellant.

The Punishment

There remains the question whether the sentence of imprisonment and fine imposed on the Appellant is excessive and / or contrary to law.

No submissions have been addressed to Court on the lawfulness or otherwise of the said sentence, and the only ground urged for the mitigation of the sentence of imprisonment is the advanced age of the Appellant. It has been submitted that he was 63 years of age at the time of his conviction, and that in any event, the sentence imposed is excessive. Contempt of court has been described as an offence *sui generic,* and there is no statutory or other limits on the punishment that may be imposed on an offender, it being a matter entirely for the court imposing the same. The Court of Appeal, when sentencing the Appellant, has given its mind to all the circumstances of this case, and I have no reason to interfere with the sentence so imposed.

I would therefore, dismiss the appeal, but without costs.

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 Section 31 D D (1) of the Industrial Disputes Act No. 43 of 1950 as amended by Act No. 32 of 1990.

W. K. P. Indrajith Rodrigo
No. 110/1, Daham Mawatha,
Kaldemulla, Moratuwa.
And presently at No. 19, First Lane,
Jambugasmulla Road,
Nugegoda.

Applicant-Respondent-Appellant

S. C. Appeal No. 57/2004
S. C. (Spl.) L. A. No. 126/2004
H. C. Appeal No. 105/2001
L. T. Application No. 13/1793/97

-Vs-

Central Engineering Consultancy Bureau,
No. 493/1, T. B. Jayah Mawatha,
Colombo 10.

And presently at
No. 415,
Bauddhaloka Mawatha,
Colombo 7.

Respondent-Appellant-Respondent

BEFORE : Dr. Shirani A. Bandaranayake, J.,
N. G. Amaratunga, J., and
Saleem Marsoof, P.C., J.

COUNSEL : Manohara de Silva, P.C., for Appellant.

A. Srinath Perera, P.C., with Shammil J. Perera and P. Sarathchandra instructed by Ms. Chandrika Silva for Respondent.

ARGUED ON : 25-09-2008

WRITTEN SUBMISSIONS : 30-10-2008

DECIDED ON : 17-12-2009

MARSOOF, J.

This is an appeal from the decision of the High Court of the Western Province dated 25th March 2004. The said decision of the Provincial High Court was made pursuant to the appeal filed by the Appellant-Respondent-Appellant (hereinafter referred to as "the Appellant") against the decision of the President of the Labour Tribunal dated 8th November 2001, whereby he was reinstated in service as an Engineer (Grade III) in the Respondent-Appellant-Respondent Bureau (hereinafter referred to as "the Respondent") and awarded Rs. 190,080/- as compensation (as equivalent to two years salary as back-wages) for the period he had been out of employment consequent to his interdiction and subsequent dismissal from service. In his appeal to the Provincial High Court, the Appellant had sought only to have the said compensation enhanced. There was also a cross-appeal filed in the Provincial High Court by the Respondent *inter alia* on the basis that the learned President of the Labour Tribunal had failed to take into consideration the fact that the termination of service on the basis of which the Appellant had come before the Labour Tribunal had subsequently been set aside by a decision of the Supreme Court by virtue of which he was paid back wages and consequential dues on the assumption that he had continued in service for nearly two more years, and that the subsequent termination of his services was not the subject of the application filed in the Labour Tribunal. The Provincial High Court held with the Respondent on both appeals and made order that the application made by the Appellant to the Labour Tribunal should stand dismissed.

Before adverting to the several questions of law on which leave to appeal was granted by this Court, it is necessary to refer briefly to the facts of this case which will make it easier to comprehend the said questions of law.

The Appellant had initially joined the service of the Respondent on 31st January 1986 on "contract basis" and from 3rd November 1986 he had been absorbed into the permanent cadre as a Grade III Engineer. It transpires that while so serving, the Appellant was served with a charge sheet dated 14th June 1995 (R1) alleging that he "had failed to comply with the directions that had been given". Following a disciplinary inquiry, the proceedings or report of which were not produced by either party at the Labour Tribunal, the Appellant was served with a letter dated 19th December 1995 (R2) informing him of the decision of the inquiry, which was against him, and asking the Appellant to resign from his post as a "merciful" alternative to dismissal by the Respondent. The Appellant refused to resign and was subsequently dismissed from service by the letter dated 14th November 1996 (R3) issued by the Chairman of the Respondent Bureau.

Invoking the jurisdiction of the Labour Tribunal against his dismissal in terms of Section 31B of the *Industrial Disputes Act* No. 43 of 1950, as subsequently amended, the Appellant filed his application dated 9th May 1997 praying for reinstatement with back wages, or

alternatively, for compensation in a sum of Rs. 1 million for loss of livelihood, and Rs. 4 million for promotions and scholarships which he had allegedly been deprived of, and for gratuity. The Respondent filed its answer on 30th June 1997, expressly admitting in paragraph 7 thereof, the termination of the Appellant's services by its letter dated 14th November 1996 (R3), and seeking to justify the same on the basis that the said termination of services was just and reasonable in view of the Appellant's alleged grave misconduct.

Since the Appellant had also filed SC Application No. 220/96 (FR) in this Court challenging the aforesaid termination of his services under Article 126 of the Constitution, by his order dated 7th November 1997 the President of the Labour Tribunal directed that the application filed by the Appellant be laid by pending the final determination of the said fundamental rights application. Based on the admission made by the learned Counsel for the Respondent that it was the Board of Directors, and not the Chairman of the Respondent, that had the power to dismiss the Appellant under the provisions of the *State Industrial Corporations Act* No. 49 of 1957, as subsequently amended, on 11th June 1998 this Court by its order marked 'R5' set aside the purported dismissal of the Appellant and directed the Board of Directors of the Respondent "to take a decision after considering the report of the inquiring officer and the disciplinary proceedings." Thereafter, by a letter dated 6th July 1998 (R8), the Respondent informed the Appellant that upon considering the disciplinary inquiry report dated 17th November 1995 and other relevant documents relating to the said inquiry, the Board of the Respondent had made a decision to dismiss the Appellant from its service.

The Appellant, being aggrieved by the said decision of the Board filed another fundamental rights application, SC Application No. 438/98 (FR), against the second dismissal. An amicable settlement was reached by the parties based on which this court made its order dated 16th March 2000 (R10) granting the Appellant limited relief to the extent of considering the Appellant as being in employment from 14th November 1996 to 6th July 1998 during which period he was out of employment. It appears from the said order that it was expressly agreed that the Appellant shall be entitled to "the wages and all other consequential dues on the assumption that he has in fact worked during that period" and that the amounts thus due to the Appellant shall be set off against the money payable by the Appellant to the Respondent Bureau *inter alia* on a car loan and distress loan taken by him. Subject to the aforesaid, the fundamental rights application filed by the Appellant was *pro-forma* dismissed.

Upon the conclusion of the said fundamental rights proceedings, the application filed by the Appellant in the Labour Tribunal which had, as already noted, been laid by, was called in the Labour Tribunal on 5th May 2000 and was fixed for trial on 20th July 2000. It is significant to note that on 5th May 2000 neither was an objection taken by the Respondent to the maintainability of the application filed by the Appellant in the Labour Tribunal, nor was any application made on behalf of either the Appellant or the Respondent to amend the pleadings filed by them in the Labour Tribunal. On 20th July 2000 the case was not taken up for trial, and was re-fixed for trial on 29th September 2000. On the latter date too at the commencement of the trial, no objection was taken to the maintainability of the application filed by the Appellant in the Labour Tribunal. Instead, on behalf of the Respondent, its General Manager Sarath Piyadasa, was called to give evidence. In the course of his testimony, he stated that the purported letter of termination

dated 14th November 1996 (R3) had been withdrawn by the Respondent's subsequent letter dated 1st July 1998 (R7) pursuant to the decision of this court in S.C. Application No. 220/96 (F.R.), and that in the circumstances the Appellant cannot have and maintain the application filed by him in the Labour Tribunal.

It is significant to note that witness Sarath Piyadasa was subjected to cross-examination by learned Counsel for the Appellant on that date and on the next date of trial, namely 21st November 2000. Under cross-examination the witness admitted that the letters of termination dated 14th November 1996 (R3) and 6th July 1998 (R8) were based on the same disciplinary proceedings and the report of the inquiry officer dated 17th November 1995, copies of which were not produced before the Labour Tribunal. It is material to note that although by the aforesaid letters of termination of service, the Appellant had been found guilty of charge (a) of the Charge Sheet dated 14th June 1995 (R1), for certain alleged acts of insubordination, the said witness did not in the course of his testimony, furnish any particulars of the said acts of insubordination or in any other way seek to justify the termination of the Appellant's services. No other witnesses were called by the Respondent, and the Appellant too closed his case without getting into the witness box or calling any other witnesses on his behalf.

The proceedings in the Labour Tribunal culminated in its order of 8th November 2001 in the course of which the President of the Labour Tribunal dismissed the objection to the maintainability of the application before the Labour Tribunal as a mere technicality. The President of the Tribunal adverted to the admission contained in Paragraph 7 of the answer filed by the Respondent to the effect that the Appellant's services were terminated by the Respondent's letter dated 14th November 1996 (R3), and emphasised that in the absence of any amendment "the answer still remains." He accordingly held that "the services of the applicant (the Appellant) terminated on 14.11.1996 and the said termination was unjust and unreasonable." Accordingly, the Tribunal granted relief to the Appellant by way of reinstatement in service of the Respondent with effect from 1st January 2002 along with back wages computed on the basis of the basic salary drawn on 6th July 1997 which was Rs. 7,920/- per month for two years aggregating to Rs. 190,080/-.

As stated earlier, both the Appellant as well as the Respondent appealed to the Provincial High Court against the order of the Labour Tribunal. These appeals were taken up together in the High Court which decided in favour of the Respondent overturning the decision of the Labour Tribunal, and dismissed the appeal of the Appellant. In coming to its decision, the High Court stressed that the failure of the Appellant to amend his application to the Labour Tribunal to make reference to the subsequent letter of termination has resulted in uncertainty regarding the specific date of termination of service which considered relevant to the time-bar for making applications for relief against wrongful termination of service to the Labour Tribunal under the Industrial Disputes Act. The High court emphasized the fact that the Appellant was for all purposes deemed to have continued in service at the Respondent Bureau till 7th July 1998, and therefore the application dated 9th May 1997 filed by the Appellant in the Labour Tribunal was fatally defective insofar as it sought to redress a termination of service alleged to have occurred on 14th November 1996.

The Appellant sought leave to appeal against the said decision of the High Court, and leave to appeal was granted by this Court on the following questions of law:

(a) Did the learned High Court Judge err in failing to consider that the termination letter dated 14th November 1996 and the subsequent termination letter dated 6th July 1998 has been made based on the findings of the same disciplinary proceedings / disciplinary report, and the only difference between the two letters being the authority that made the decision?

(b) Did the learned High Court Judge err in failing to consider that the Respondent has failed to submit any evidence to justify termination and even failed to produce the purported disciplinary inquiry report dated 17th November 1995 which the Board is said to have relied on for the termination of the Appellant's service?

(c) Did the learned High Court Judge err in failing to consider that the punishment given to the Appellant is totally disproportionate to the charge contained in the charge sheet dated 14th June 1995?

(d) Did the learned High Court Judge err in not taking into consideration the purpose of Labour Tribunal, which is to grant a just and equitable remedy and to dispense with strict procedure?

(e) Did the learned High Court Judge err in failing to consider that the learned President of the Labour Tribunal erred in assessing back wages in as much as the learned President of the Labour Tribunal erred in taking into account the last drawn salary as at 14.11.1996 for the assessment of back wages when it should be the monthly salary which he would be entitled to on 06.07.1998?

The question of maintainability of the LT application

The submissions of President's Counsel appearing for the Appellant as well as the Respondent focused on questions (a) and (d) above, which have been raised by the Appellant in the face of the decision of the High Court that the Appellant's application filed in the Labour Tribunal was not maintainable insofar as the purported termination of his services by the letter dated 14th November 1996 (R3), against which he sought redress, has been rectified by an order of this Court in S.C Application No. 220/96 (FR) and also withdrawn by the Respondent's subsequent letter dated 1st July 1998 (R7). The learned High Court Judge had taken the view that the effect of the subsequent order of this Court in S.C Application No. 438/98 (FR) dated 16th March 2000 (R10), awarding the Appellant all wages and other consequential dues up to 6th July 1998 (being the operative date of the second letter of termination of services marked 'R8'), was to restore him in service up to that date, and that the Appellant could not in law maintain his application for redress against a termination of services which allegedly took place on 14th November 1996. The High Court held that this went to the root of the jurisdiction of the Labour Tribunal, and that by reason of the failure of the Appellant to amend his application specifying the date of his subsequent termination of services by the letter dated 6th July 1998 (R8), the said application was fatally defective and has necessarily to be rejected.

Mr. Srinath Perera, P.C., appearing for the Respondent Bureau, sought to justify the decision of the High Court by arguing that the Appellant's application to the Labour Tribunal was not maintainable insofar as the purported termination of his services by 'R3' against which he sought redress, has been subsequently withdrawn, and he has not complained against the subsequent termination letter dated 6th July 1998 (R8). He submitted that in terms of Section 31B of the Industrial Disputes Act, the jurisdiction of the Labour Tribunal may be invoked by a workman directly or through his trade union only for "relief or redress" in respect of the termination of his services, terminal benefits and "such other matters relating to the terms of employment, or the conditions of labour, of a workman as may be prescribed." Learned President's Counsel submitted that by reason of the fact that the termination of services against which relief was sought by the Appellant has been rectified, the Tribunal was not competent to grant him redress. Mr. Perera relied on Section 101 of the Evidence Ordinance which enacts that the burden of proof lies upon "him who affirms, not upon him who denies", to contend that the burden of proof in establishing a valid basis for his application lay on the Appellant. He invited the attention of the Court to *AG v Windsor* 24 Beav 679 at 706 to support the position that the Appellant's failure to specify the second date of termination of his services furnishes a strong inference against him. He submitted that the Respondent was under no obligation in law to lead any evidence whatsoever of any misconduct on the part of the Appellant as the Appellant had failed to submit a valid application to the Tribunal specifying the actual date of his termination of services, and that the High Court of the Western Province quite rightly set aside the decision of the Labour Tribunal.

Mr. Manohara de Silva, P.C., appearing for the Appellant, submitted that the learned High Court Judge erred in failing to consider that the endeavour to terminate the services of the Appellant, which commenced with the letter marked 'R3'and culminated with the second letter marked 'R8', tantamount to a single act of termination and that the said letters of termination of service, though emanating from different sources, have been based on the findings of the same purported disciplinary proceedings and the disciplinary report dated 17th November 1995, the only difference between the said letters being the dates on which the said terminations of service were intended to take effect. He stressed that the Respondent Bureau, after withdrawing the original letter of termination, neither served fresh charges against the Appellant nor held a fresh disciplinary inquiry, and that the same disciplinary inquiry report was submitted to the Board of Directors and the decision to terminate was arrived at.

Adverting to the question of adequacy of pleadings, Mr. de Silva emphasised that since the action taken by the Respondent to terminate the services of the Appellant were challenged in the Labour Tribunal as well as in the Supreme Court in two fundamental rights applications, namely SC Application No. 220/96 (FR) and SC Application No. 438/98 (FR), the Labour Tribunal application was laid by, and was taken up for inquiry only after the conclusion of the second fundamental rights application, and that since the decisions contained in 'R3' and 'R8' related to the same alleged act of misconduct with respect to which there had been only one disciplinary proceeding and report, there was no necessity for the Applicant to either amend his application filed in the Labour Tribunal or file a fresh application. Mr. de Silva submitted that since there is no requirement that the date of termination should be pleaded, this was purely a matter of evidence. He further submitted that under the applicable legislation, the Labour Tribunal was required to make a "just and equitable" order and that the equitable jurisdiction of

the Tribunal should not be, and has never been, impeded by technicalities. In support of this contention, he referred to the decision in *Manager, Ury Group, Passara v. the Democratic Workers Congress* 71 NLR 47, in which this Court showed leniency to a workman who had failed to state the name of his employer correctly in the application filed by him in the Labour Tribunal.

I am of the opinion that there is merit in the submissions of the learned President's Counsel for the Appellant. It is expressly laid down in Section 31C(1) of the Industrial Disputes Act that every Labour Tribunal is bound "to make all such inquiries into any application filed before it" and "hear all such evidence as the Tribunal may consider necessary, and thereafter make such orders as may appear to the Tribunal to be just and equitable". In decisions such as *Up Country Distributors (Pvt.) Ltd v Subasinghe* [1996] 2 Sri LR 330 and *Associated Cables Ltd. v Kulatunga* [1999] 2 Sri LR 314, this Court gave effect to the said statutory provision and held that Labour Tribunals should not be bound by strict procedural requirements in the process of making just and equitable awards. In *Millars Ltd., v. Ceylon Mercantile Industrial and General Workers Union* [1993] 1 Sri LR 179 at page 183 G. R. T. D. Bandaranayake, J. observed that –

> "An award is just and equitable only if it takes into consideration the interest of all the parties."

The equitable nature of the jurisdiction of Labour Tribunals has consistently been recognized in the decisions of our courts. However, in the process of redressing grievances of workmen in a just and equitable manner, one cannot lose sight of procedural propriety and evidentiary legitimacy. In this context, it is always important to bear in mind the following *dictum* of Weerasekera, J. in *Associated Cables Ltd., v Kalutarage* [1999] 2 Sri LR 314 at 320:-

> "Although the Labour Tribunal was required to make a just and equitable order in my opinion it must not only be just and equitable but the procedure adopted to that end must be legal and every judicial body exercising judicial powers must so arrive at an order only on legal evidence."

It was not contended by the Respondent that the application filed by the Appellant was *ab initio* void. According to the Respondent, the application cannot be maintained by reason of supervening events such as the vacation by this Court of the original termination of the Appellant's services, the withdrawal by the Respondent of the original letter of termination R3, and the payment of all emoluments for the period during which by reason of his dismissal, the Appellant had not reported for work from 14th November 1996 to 6th July 1998 (subject to set off amounts due from the Appellant on certain loans taken by him). It was the contention of learned President's Counsel for the Respondent that these supervening circumstances had the effect of remedying the Appellant's grievance and sending the "termination of services", for which the Appellant had sought relief from the Labour Tribunal, into oblivion.

I am unable to agree with the Respondent's line of reasoning. It is important to remember that the Appellant had to file two applications in this Court, SC Application No. 220/96 (FR) and SC Application No. 438/98 (FR), with respect to alleged violations of his fundamental rights, and the payment of emoluments was agreed upon only in the

second of these cases. The order made by this Court in SC Application No. 220/96 (FR) merely set aside the original termination to enable the Board of Directors of the Respondent, which admittedly was the single authority having the power to terminate the services of an officer such as the Appellant, to consider the Appellant's case afresh, but when the said Board of Directors also decided to terminate the Appellant's services, he sought redress against the second termination in SC Application No. 438/98 (FR), which led to the order of this court dated 16th March 2000 (R10) by which the Appellant was awarded his salaries and other emoluments for the period 14th November 1996 to 6th July 1998, during which admittedly his removal from service was invalid.

The question is whether the amicable settlement reached by the Appellant in SC Application No. 438/98 (FR), which resulted in the order of this Court dated 16th March 2000 (R10), in any way affected the maintainability of the application dated 9th May 1997 filed by the Appellant in the Labour Tribunal. It is noteworthy that while the Supreme Court makes no mention of the Appellant's application then pending before the Labour Tribunal that had been laid by, it refrained from making its order of 16th March 2000 a "full and final" settlement of all disputes between the Appellant and Respondent. A careful scrutiny of the brief order made by this Court leaves no doubt that in dismissing the Appellant's application *pro forma* in view of the settlement reached, the Court confined the relief it thereby granted to wages and other dues that would have, if not for the invalid interruption of his service, been lawfully earned by the Appellant between the dates of the first (and admittedly invalid) letter of termination and the second letter of termination. This Court has been careful not to endow the said order with a gloss of finality.

In my considered opinion, an award of withheld emoluments up to the date of the valid, though not necessarily just, termination of services of an employee would not adequately redress the grievance of such employee. What this Court had sought to do in the two fundamental rights cases filed by the Appellant was to give him redress by setting aside the first letter of termination of services and directing the payment of his wages and all other consequential dues up to the date of the second letter of termination "*on the assumption that he has in fact worked during that period*", leaving it to the Labour Tribunal, as it lawfully might, to determine the question whether the termination of the Appellant's services was just, and if not, what relief should be granted to him. The attitude of the Supreme Court is understandable in the light of my own observation in the course of my recent judgement in *Vasudeva Nanayakkara v K. N. Choksy and Others*, SC Application No. 209/07 SC Minutes dated 13.10.2009, that the affidavit procedure applicable for the determination of fundamental rights cases "is ill-equipped" to deal with disciplinary procedures, which may in appropriate cases result in the termination of employment.

It needs to be observed that the fact that the Appellant was successful in obtaining certain relief from this Court through the above mentioned fundamental rights applications, which included payments of wages and other consequential dues for the period 14th November 1996 to 6th July 1998, does not necessarily mean that his services were terminated only on the latter date, since receiving remuneration is not the only incident in the contract of services. Such a contract encompasses mutual rights and obligations, which in fact regulate and harmonise the relationship between the employer and workman. The relationship between master and servant, in a broad sense, is a

partnership between capital and labour, and the common understanding familiar to all who engage mind and body in entering the services of another, is that employment brings with it not mere material emoluments, but also the benefit of what is commonly called "job satisfaction", which provides the employee the feeling of contentment and a sense of participation in the enterprise of the employer, whether it be the State, a public corporation, a company or an individual. This mental element is of fundamental importance to a dignified human condition, and conversely, the deprivation of employment on any grounds is a rejection of an individual's right to this basic dignity.

I am in agreement with the submission of the learned President's Counsel for the Appellant that the letters of termination of services, dated 14th November 1996 (R3) and 6th July 1998 (R8), arose from the same charge sheet (R2) and purported disciplinary proceedings and disciplinary report, and were part of the process that led to the Appellant being deprived of his employment in the Respondent Bureau. In my opinion, the learned President of the Labour Tribunal very correctly held that the effective date of termination of the Appellant's services was 14th November 1996, as from that date he had not only been deprived of his emoluments but had also lost the opportunity to work in the Respondent Bureau. The fact that through the intervention of this Court the invalid exercise of authority by the Chairman of the Respondent Bureau was rectified by the setting aside and withdrawal of the letter of termination of services dated 14th November 1996 (R3) paving the way for the Board of Directors of the Respondent having disciplinary authority over the Appellant to consider the disciplinary report afresh and make a decision, does not in any way affect the maintainability of the application already made by the Appellant to the Labour Tribunal as the said Board had simply completed the process set in motion by the Chairman by adding its *imprimatur* to the decision to terminate the services of the Appellant taken in 1996.

I am also of the view that the failure on the part of the Appellant to amend his application, to specify the date of the second letter of termination as the date of his alleged termination of services, did not in any way prejudice the maintainability of the application filed by him in the Labour Tribunal. This is because, in my opinion, the Appellant had invoked the jurisdiction of the Labour Tribunal on the basis that his services were terminated on 14th November 1996, and none of the intervening circumstances adverted to by Counsel have in any way affected the reality of such termination. It is noteworthy that the averment that the Appellant's services in the Respondent Bureau was terminated by the letter dated 14th November 1996 (R3), as set out in paragraph 6 of the application filed by the Appellant in the Labour Tribunal, has been expressly admitted in paragraph 7 of the answer dated 30th June 1997 filed by the Respondent, and neither party had sought to amend their original pleadings which therefore stand, and upon these pleadings it is manifest that the Respondent has admitted termination of the Appellant's services with effect from 14th November 1996, which was apparently the basis on which evidence was led at the ensuing Labour Tribunal inquiry.

After this Court made its order dated 16th March 2000 in SC Application No. 438/98 (FR), the Labour Tribunal case filed by the Appellant was called on two dates, namely on 5th May 2000 and 20th July 2000, on which dates the Respondent did not raise any objection to the maintainability of the application of the Appellant. Neither was any such objection raised on 29th September 2000 before the Labour Tribunal when the Respondent called its

only witness, General Manager Sarath Piyadasa, to testify. While as pointed out by M.D.H. Fernando J in *Amarajeewa v University of Colombo* [1993] 2 Sri LR 327 at page 321, the Industrial Disputes Act does not prescribe the procedure for the conduct of inquiries before Labour Tribunals, and under Section 31C(2) of the said Act it is for Labour Tribunal to devise a suitable procedure, it is the inveterate practice in Labour Tribunal proceedings for the Respondent to lead evidence to justify termination of service of a workman where the fact of termination is admitted. Thus, when the Respondent called Sarath Piyadasa to give evidence it was presumably to justify the termination of the Appellant's services, which according to the pleadings had admittedly taken place on 14th November 1996.

The witness, however, took the Appellant as well as the Tribunal by surprise when he took up the position towards the end of his examination in chief, that by reason of the settlement reached and the order made by this Court in the said fundamental rights case, the application filed by the Appellant in the Labour Tribunal cannot be maintained in law. The gravamen of his testimony was that the Appellant's application to the Labour Tribunal dated 9th May 1997 cannot be maintained as the effective date of the termination of his services was 6th July 1998. The testimony, however, was altogether inconsistent with the Respondent's pleadings and previous conduct before the Labour Tribunal.

For the aforesaid reasons I hold that questions (a) and (d) above should be answered in the affirmative and in favour of the Appellant, and, more specifically, that the learned High Court Judge erred in failing to consider the two letters of termination of services dated 14th November 1996 (R3) and 6th July 1998 (R8) in their perspective as constituting one single process which led to the termination of the Appellant's services, and in adopting an unduly technical approach towards the salutary and equitable remedy provided by Section 31B of the Industrial Disputes Act.

Sufficiency of evidence to justify termination of services

Question (b) on which leave to appeal was granted in this case, is whether the learned High Court Judge erred in failing to consider that the Respondent has not led any evidence in the Labour Tribunal to justify termination of the Appellant's services and had even failed to produce the purported disciplinary inquiry report dated 17th November 1995 which the Board is said to have relied upon for the termination of the Appellant's services. As noted already, in Labour Tribunal proceedings where the termination of services of a workman is admitted by the Respondent, the onus is on the latter to justify termination by showing that there were just grounds for doing so and that the punishment imposed was not disproportionate to the misconduct of the workman. In this appeal, the question of proportionality has specifically been raised through question (c) on which leave to appeal was granted. It is convenient to consider both these questions together, but it may be observed at the outset that the learned High Court Judge, who had taken the view that the application filed in the Labour Tribunal by the Appellant was fatally defective and should therefore stand dismissed, had understandably not looked at these questions too closely.

It is trite law that the burden of proof lies upon him who affirms, not upon him who denies as expressed in the maxim *ei incimbit probatio, qui dicit, non qui negat,* and in view of the admission of termination of the Appellant's services in paragraph 7 of the answer

of the Respondent dated 30th June 1997, the burden was clearly on the Respondent to justify the decision to terminate the services of the Appellant. The only witness called by the Respondent to testify in the inquiry before the Labour Tribunal was the General Manager of the Respondent Surath Piyadasa, and it is remarkable that in the course of his testimony, no attempt was made to either substantiate the allegation contained in the charge sheet dated 14th June 1995 (R1) that the Appellant "had failed to comply with the directions that had been given" on 11th May 1995 and 6th June 1995, or to show that the Appellant was guilty of any misconduct. In particular, the witness failed to produce the purported disciplinary inquiry proceedings and the report on the basis of which the decision to terminate the Appellant's services had been arrived at. All this clearly demonstrates that there was absolutely no justification for the termination of the Appellant's services or even for the imposition of a less severe punishment.

I note that the Appellant has not chosen to testify or call any witnesses on his behalf in the Labour Tribunal, but this omission will only affect the relief that may be granted by that tribunal, and as far as the termination of his services is concerned, which is an admitted fact, the onus was clearly on the Respondent to lead evidence to justify the decision to dismiss the Appellant from service, and in the absence of any such evidence, the only possible inference is that the termination of the Appellant's services cannot be justified in law. I accordingly hold that questions (b) and (c) have to be answered in the affirmative and in favour of the Appellant, as the Learned High Court Judge had erred in not taking into consideration either the failure of the Respondent to lead any evidence to justify the termination of services of the Appellant, or the appropriateness of the punishment of dismissal imposed on the Appellant.

Just and equitable relief

I now turn to the question of relief. In this regard, this Court has granted leave to appeal on the following question:-

(e) Did the learned High Court Judge err in failing to consider that the learned President of the Labour Tribunal erred in assessing back wages in as much as the learned President of the Labour Tribunal erred in taking into account the last drawn salary as at 14.11.1996 for the assessment of back wages when it should be the monthly salary which he would be entitled to on 06.07.1998?

This question has to be viewed in the context of the application made by the Appellant to the Labour Tribunal, the relief awarded by the Tribunal and the substantive questions that have come up for determination in this appeal from the decision of the High Court. It is noteworthy that in his application to the Labour Tribunal, the Appellant has prayed for reinstatement with back wages, or alternatively, for compensation in a sum of Rs. 1 million for loss of livelihood, and Rs. 4 million for promotions and scholarships which he had allegedly been deprived of, and for gratuity. After due inquiry, the learned President of the Labour Tribunal by his order dated 8th November 2001 held that the termination of the services of the Appellant was "unjust and unreasonable" and directed that the Appellant be reinstated in service as an Engineer (Grade III) in the Respondent Bureau with effect from 1st January 2002 and be paid Rs. 190,080/- as compensation (as equivalent to two years salary as back-wages) for the period he had been out of employment consequent to his interdiction and subsequent dismissal from service.

The Appellant had appealed to the High Court against this order *inter alia* on the ground that the President of the Labour Tribunal erred in computing the back wages based on the last drawn salary as at 14th November 1996 (date of the first termination letter R3) when it should have been based on the monthly salary which he would have been entitled to on 06th July 1998 (date of second termination letter R8). The High Court, which took the view that there was no proper application before the Labour Tribunal on the basis of which any relief can be granted to the Appellant, had summarily dismissed the Appellant's appeal, and when granting leave to appeal against the decision of the High Court, question (e) above was formulated to enable this aspect of the matter to be considered if this Court is of the opinion that the High Court was in error when it held that the Appellant was not entitled to any relief.

The Labour Tribunal is endowed with a wide discretion in regard to the grant of just and equitable relief to any workman invoking its beneficial jurisdiction. As Wijetunga J observed in *Up Country Distributors (Pvt) Ltd., v Subasinghe* [1996] 2 Sri LR 330 at page 335,

> "The legislature has in its wisdom left the matter in the hands of the tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order".

His Lordship Kulatunga, J. in the course of his judgment in *Saleem v Hatton National Bank* [1994] 3 Sri LR 409 at page 415, set out the parameters for the exercise of this discretion in the following words:

> "Whilst the question is not free from difficulty, it appears that in each case the Court has evolved a formula for making the order which it considered to be consonant with the spirit of labour law and practice and social justice. In doing so, the Court has been guided by three cardinal principles namely, the jurisdiction of the Labour Tribunal is wide; relief under the Industrial Disputes Act is not limited to granting benefits which are legally due; and the duty of the tribunal is to make the order which may appear to it to be just and equitable."

It is necessary to bear in mind the aforesaid principles in reviewing the decision of the Labour Tribunal in regard to the question of relief. In considering what relief should be granted to the Appellant in all the circumstances of this case, the question arises as to whether it is legitimate to consider the contents of the pleadings and affidavits filed by the Appellant in SC Application No. 220/96 (FR) and SC Application No. 438/98 (FR), which no doubt have a veneer of truth and show at least on a *pima facie* basis that the Appellant has been subjected to continuous harassment by his superiors, including the General Manager of the Respondent, allegedly because he had complained about the misuse of company vehicles by a Project Manager under whom he worked. However, since the aforesaid fundamental rights applications were amicably resolved, this Court has not arrived at any findings in regard to these matters, and even if it had, such findings cannot legitimately supply the omission of the Appellant to testify before the Labour Tribunal and be subjected to cross-examination, which, after all, is the time tested

tool used in the adversarial system to get at the truth. Nevertheless, I have already (under the heading "Sufficiency of Evidence to Justify Termination of Services") answered question (d) above in the affirmative, as the only reasonable inference that can be drawn from the failure of the Respondent to adduce any evidence before the Tribunal to show that the Appellant was guilty of some serious misconduct sufficient to justify dismissal, is that the decision to terminate his services was unjust and unreasonable. The Respondent only called one witness to testify on its behalf in the Labour Tribunal, and the thrust of the testimony of this witness was that for the various reasons adduced by him, the application filed by the Appellant in the Labour Tribunal is not maintainable, and his testimony does not shed any light in regard to the question of relief that the Appellant may be reasonably entitled to.

In view of the fact that the Respondent has admitted that the Appellant's services were terminated with effect from 14th November 1996 and has also made no attempt to prove that the Appellant was guilty of any misconduct or even to place before the Labour tribunal any material circumstances that would make an order of reinstatement inappropriate, and in view of the decision of this Court on questions (a) to (d) on which leave to appeal has been granted, I hold that the order of reinstatement made by the Labour Tribunal should be affirmed. It is a well established principle that the primary (albeit discretionary) remedy for harsh, unjust or unreasonable termination of employment is reinstatement to the same position or re-engagement to a comparable position held prior to the said termination. Compensation is a secondary cure and is only ordered where, in the discretion of the Court or Tribunal Court, it is held that reinstatement or re-engagement is not appropriate. Reinstatement has always been awarded at the discretion of the Labour Tribunal or Court and such discretion has to be exercised judicially taking into consideration all the circumstances of the case. *See, The Caledonian (Ceylon) Tea and Rubber Estates Ltd., v. J. S. Hillman* (1977) 79 (1) NLR 421, *Sithamparanathan v Peoples Bank* [1989] 1 Sri LR 124, *Jayasuriya v. Sri Lanka State Plantations Corporation* [1995] 2 Sri LR *379, Hatton National Bank v Perera* [1996] 2 Sri LR 231. In the absence of any evidence that would have any bearing in regard to the question of reinstatement, such as whether or not the Appellant has got himself gainfully employed elsewhere during the pendency of the appeals to the High Court and to this Court, I hold that it would be just and equitable to reinstate the Appellant in service as an Engineer (Grade III) in the Respondent Bureau with effect from 1st January 2010.

I have also considered the question as to whether the Appellant should be reinstated in a higher grade in the service in view of the fact that, had he not been unjustly dismissed from service, he would have had opportunities of promotion to a higher grade. However, in the absence of evidence in this regard, and in particular, the failure of the Appellant to get into the witness box and testify in regard to his promotional prospects, it is not possible to consider reinstating the Appellant to a higher position. I also find that there is no basis for awarding to the Appellant compensation for loss of livelihood or for scholarships which he has allegedly been deprived of, as the Appellant has failed to place any evidence before the Labour Tribunal in support of these claims, and these claims are all very speculative. In view of the decision of this Court that the Appellant should be reinstated in service with effect from 1st January 2010, there is no question of paying him any gratuity.

There remains the question of back-wages, and in particular whether the learned President of the Labour Tribunal was in error in regarding the salary drawn by the Appellant on 14th November 1996 as his terminal salary instead of the salary he would have drawn as on 6th July 1998 on the assumption that he has in fact worked till that date. This is the gist of question (e) on which leave to appeal has been granted, and I have no hesitation in answering it in the negative and in favour of the Respondent. I find it difficult to agree with the submission of the learned President's Counsel for the Appellant that back wages should be computed on the basis of what would have been the terminal salary of the Appellant on 6th July 1998, which was the date from which his dismissal from service was confirmed by the Board of Directors of the Respondent Bureau, since it is necessary to take a realistic view of the sequence of events material to this case. If the fictional basis on which this Court gave effect to a settlement reached by the parties in SC Application No. 438/98 (FR) is taken too literally to the extent of deeming the Appellant to have been in employment till 6th July 1998, the Appellant would not have been able to lawfully maintain the application he made in the Labour Tribunal prior to that date. He cannot have it both ways, and in view of the reality of the termination of his services with effect from 14th November 1996, on the basis of which I have already held that the Appellant is entitled to have and maintain his application filed in the Labour Tribunal, back wages payable to the Appellant have to be computed on the basis of the terminal salary drawn by him on the last day he actually worked for the Respondent, which was 14th November 1996. This is, for reasons set out more fully above, the material date of termination in determining the questions of law in this application. Accordingly, I hold that the President of the Labour Tribunal did not err in computing back wages payable to the Appellant on the basis of the last drawn monthly salary as on 14th November 1996, which was Rs. 7,920 per month.

However, I note that when the Labour Tribunal made its order dated 8th November 2001, that the Appellant be reinstated in service from 1st January 2002, it also directed that he be paid back wages computed on the basis of the terminal salary as on 14th November 1996 for a period of two years, taking into consideration the fact that in terms of the order of this Court in SC Application No. 438/98 (FR) marked 'R10' the Appellant has been paid wages and all other consequential dues for the period between 14th November 1996 to 6th July 1998. In view of the decision of this court to reinstate the Appellant in service with effect from 1st January 2010, it is necessary to accordingly increase the back wages payable to the Appellant in a just and equitable manner. Accordingly, I am of the opinion that in all the circumstances of this case, it would be reasonable to award the Appellant back wages from 15th November 1996 to the date of his reinstatement, namely 1st January 2010, on the terminal monthly salary of Rs 7,920.

Conclusion

For the reasons fully set out above, I allow the appeal and vacate the order of the High Court dated 25th March 2004. I affirm the decision of the Labour Tribunal dated 8th November 2001, subject to the variation that the Appellant be reinstated in service as an Engineer (Grade III) in the Respondent Bureau with effect from 1st January 2010, with back wages computed for the period 15th November 1996 to 31st December 2009 on his terminal salary of Rs 7,920 per month.

To facilitate the expeditious payment of back wages, it is hereby declared that the Appellant is entitled to withdraw forthwith the sum of Rs. 285,120 which has been deposited to the credit of this case in the People's Bank by the Respondent Bureau on 3rd December 2001, along with all accrued interest thereon. It is further declared that the said sum of Rs. 285,120 (excluding interest) and the amount already paid to the Appellant as "wages and all other consequential dues" in terms of the order of this court in SC Application No. 438/98 (FR) dated 16th March 2000 (R10) may be set off against the aggregate amount due as back wages, and the balance sum shall be paid to the Appellant on or before 15th January 2010.

I award the Appellant Rs. 25,000 as costs of this appeal, which amount too shall be paid by the Respondent to the Appellant on or before 15th January 2010.

JUDGE OF THE SUPREME COURT

BANDARANAYAKE, 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.

R. A. Senanayake
No. 43, Gregory's Road,
Colombo 7.

1st Respondent-Appellant

S. C. Appeal No. 52/2003
S. C. (Spl) L. A. No. 26/2003
C. A. No. 418/2001
C. H. P. B/R No. 2660
C. N. H. CH/0/1033

-Vs-

1. R. B. L. E Wijesooriya,
No. 43 2/2, Gregory's Road,
Colombo 07.

Petitioner-Respondent

2. The Commissioner for National Housing
CHP Branch, Sethsiripaya,
Battaramulla.

3. G. H. A. Suraweera

4. C. R. S. Gunawardena

5. K. Bandara

6. A. Gooneratne

All members of C. H. P. Board of Review,
Colombo 10.

Respondent-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.,
N. G. Amaratunga, J., and
Saleem Marsoof, P.C., J.

COUNSEL : Romesh de Silva, P.C., Rohan Sahabandu, and Sugath Caldera for the 1st Respondent - Appellant.

L. C. Seneviratne, P.C., and Kirthi Sri Gunawardena for the Petitioner-Respondent.

Anil Gooneratne, Deputy Solicitor General for 2nd to 6th Respondent-Respondents.

ARGUED ON : 06th February 2007

WRITTEN SUBMISSIONS : 13th March 2007

DECIDED ON : 29th January 2009

MARSOOF, J.

Premises No. 43 2/2, Gregory's Road, Colombo 7, is a housing property of which the Petitioner-Respondent (hereinafter referred to as the 'Respondent') was the tenant on 13th January 1973, which was the date on which the Ceiling on Housing Property Law No. 1 of 1973 came into operation. It appears from the pleadings that the 1st Respondent-Appellant R. A. Senanayake, who is also known as Rohan Senanayake, (hereinafter referred to as the Appellant) was the owner of the said premises along with four other houses bearing Nos. 43, 43 1/1, 43 1/2, and 43 2/1 of Gregory's Road, Colombo 7. Since at the relevant time the Appellant was married but did not have any children, in terms of Section 2(1) of the Ceiling on Housing Property Law, he was entitled to own (as the "permitted number of houses") only two out of the aforesaid five houses. Accordingly, having made the declaration dated 9th June 1973 under Section 8 of the said Law, he opted to retain the ownership of the houses bearing assessment Nos. 43 and 43 1/1, and the remaining housing property bearing assessment Nos. 43 1/2, 43 2/1 and 43 2/2, Gregory's Road, Colombo 7 (hereinafter sometimes referred to as the 'surplus houses'), vested in the Commissioner for National Housing under Section 11 of the Ceiling on Housing Property Law. The present appeal relates to one of these surplus houses, namely premises No. 43 2/2, Gregory's Road, Colombo 7.

The bone of contention in this appeal is the legality and validity of the order to divest the said house bearing assessment No. 43 2/2, Gregory's Road, Colombo 7, (hereinafter sometimes referred to as the 'house in question'). The salient facts relating to this appeal are as follows: Pursuant to an application made on behalf of the Appellant, the Commissioner for National Housing made the recommendation dated 5th August 1985 (A11) to divest the house in question subject to the approval of the Minister. Thereafter, having presumably obtained the approval of the Minister, the Commissioner made the order dated 20th August 1985 under the provisions of Section 17A (1) of the Ceiling on Housing Property Law, which was published in the Government Gazette bearing No. 365 of 30th August 1985 (A12), purporting to divest the ownership of the said house. The said order was affirmed on appeal by the Ceiling on Housing Property Board of Review by its order dated 14th February 2001 (A18). The said recommendation and orders were challenged by the Respondent in writ proceedings commenced in the Court of Appeal which resulted in the order of that Court dated 11th February 2002 by which the aforesaid recommendation and order of the Commissioner for National Housing marked A11 and A12 and the order of the Ceiling on Housing Property Board of Review marked A18 were quashed by the grant of a mandates in the nature of *certiorari*. The main ground on which the Court of Appeal decided to quash the above mentioned recommendation and orders was that the Commissioner for National Housing acted without jurisdiction in divesting the house in question bearing No. 43 2/2, Gregory's Road, Colombo 7, on account of the birth of a child to the Appellant on 1st June 1977, when already by the order dated 1st March 1979 (A9) and the order published in the Government Gazette bearing No. 29 of 23rd March 1979 (A 10) another surplus house bearing assessment No. 43 2/1 had been divested in respect of the same child.

Special leave to appeal from the aforesaid decision of the Court of Appeal was granted by this Court on 14th July 2003 on the following questions:-

Question suggested by learned President Counsel for Appellant

(1) Did the Court of Appeal fail to duly, properly and correctly consider the law in relation to the facts arising from the application of the Appellant for divesting of the premises?

Questions suggested by learned President Counsel for Respondent

(2) Has the Commissioner for National Housing by Order A9 already made a decision to divest premises No. 43 2/1, Gregory's Road on account of the birth of a child to the Appellant?

(3) Is the Order A11 also divesting of the premises No. 43 2/2, Gregory's Road, in respect of the birth of the same child?

In order to place these questions in context, it is necessary to refer to the rather complex circumstances relating to this appeal in chronological sequence. In doing so, it is also necessary to refer to the relevant provisions of the Ceiling on Housing Property Law.

As stated in its preamble, the objective of the Ceiling on Housing Property Law, was to regulate the ownership, size and cost of construction of houses and to provide for matters incidental thereto or connected therewith. Section 2 of the Law provided a mechanism for computing the permitted number of houses, which is the maximum number of houses an individual or a body of persons, corporate or unincorporate, may own. Sections 3 to 7 of the Law contained elaborate provisions for the determination of the permitted number of houses in certain special situations, and Section 8 made provision for the making of declarations by persons or bodies of persons who owned houses in excess of the permitted number of houses. Section 8(5) expressly provided that-

> "Any house the ownership of which is not proposed to be retained in terms of any declaration made under this section, and in the case of a determination made by the Commissioner under subsection (3), any house the ownership of which is not retained as a result of such determination, is hereinafter referred to as a 'surplus house'."

It is common ground that at the time the Ceiling on Housing Property Law came into operation the Appellant was a married person who did not have any dependant children. Accordingly, in terms of Section 2(1) of the Law, the permitted number of houses the Appellant could lawfully own was two. It is also apparent from the declaration made by him under Section 8 of the said Law, that the Appellant had opted to retain the ownership of houses bearing Nos. 43 and 43 1/1, and that the remaining housing property bearing Nos. 43 1/2 and 43 2/1 and 43 2/2 of Gregory's Road, Colombo 7, became surplus houses. Under the Ceiling on Housing Property Law, an owner of one or more surplus house may dispose of such surplus house or houses within the grace period allowed for this purpose by the said Law. It has been submitted on behalf of the Appellant that the surplus houses of the Appellant were flats forming parts of an old building, and that they could not be disposed of within the time permitted by law due to the delay in registering the relevant condominium plan in terms of the Apartment Ownership Law No. 11 of 1973 and owing to

the existence of certain mortgages which had to be discharged. Learned President's Counsel for the Appellant has submitted that in view of this delay, the Appellant was compelled to seek further time from the Commissioner for National Housing to dispose of the surplus houses, and that the letters dated 29th June 1974, 16th December 1974, 7th February 1975 and 15th December 1975 were written by, or on behalf of, the Appellant appealing for further time. However, there was another, and in my view insurmountable, reason for the failure to dispose of the house in question, namely the fact that an application made by the Respondent to the Commissioner to purchase the house under Section 9 of the Ceiling on Housing Property Law was pending before the Commissioner.

A tenant of a surplus house was entitled to apply to the Commissioner to purchase the said house under Section 9 or Section 13 of the Ceiling on Housing Property Law. Section 9 of the Law expressly provided that-

> "The tenant of a surplus house or any person who may succeed under section 36 of the Rent Act, No. 7 of 1972, 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."

It is common ground that as determined by this Court in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263 at page 272 in proceedings to which the present Appellant and Respondent were parties, the Respondent as the lawful tenant of premises No 43 2/2, Gregory's Road, Colombo 7, had duly applied to purchase the house in question under and in conformity with Section 9 of the said Law.

Although by Section 10 of the Ceiling on Housing Property Law, an individual owner of houses in excess of the permitted number could have disposed of such houses within 12 months from 13th January 1973 being the date of commencement of the said Law, the Appellant was not entitled to do so as the Respondent, who was the Appellant's tenant of the said house, had already made an appeal to purchase the same. The relevant portion of Section 10, as it stood prior to the amendment of the said Law by Law No. 34 of 1974, is quoted below:-

> "Where, on the date of commencement of this Law, any person owns any house in excess of the permitted number of houses, such person may *within a period of twelve months from such date*, dispose of such house with notice to the Commissioner, *unless the tenant of such house or any person who may under section 36 of the Rent Act, No. 7 of 1972, succeed to the tenancy of such house, has made application with simultaneous notice to the owner for the purchase of such house.*" (Emphasis added)

The grace period of twelve months granted by the Law to an individual owner for the disposal of surplus houses ended on 13th January 1974, and any surplus house not disposed of by that date would have vested on the Commissioner on that date in terms of Section 11(1) of the Ceiling on Housing Property Law. This Section, in its original version, provided as follows:-

> "Any house owned by any person in excess of the permitted number of houses which has not been disposed of within a period of twelve months of the date of commencement of this Law shall *on the termination of such period vest in the Commissioner*:

> Provided, however, that where the Commissioner, on application made to him by the owner of the house, is satisfied that the failure to dispose of the house was due to circumstances beyond the control of the owner, the Commissioner may, by Notification published in the Gazette, defer the vesting of the house for a further period not exceeding twelve months."(Emphasis added)

There is no evidence of any application having being made by the Appellant prior to 13th January, 1974, seeking the deferment of the vesting of the surplus houses, nor is there any evidence of any Notification published in the Gazette relating to the said house in terms of the proviso to Section 11(1). The letters dated 29th June 1974, 16th December 1974, 7th February 1975 and 15th December 1975 by which extension of time was sought to dispose of the said houses, could not have prevented the ownership of the surplus houses vesting on the Commissioner on 13th January 1974 in terms of Section 11(1) of the Law.

Learned President's Counsel for the Appellant, has however submitted that in view of the amendment to Section 10 of the aforesaid Law introduced in 1974 by the Ceiling on Housing Property (Amendment) Law No. 34 of 1974, the grace period for the disposal of a surplus house should be computed from the date the Commissioner communicated to the Appellant his determination regarding the maximum number of houses that may be owned by the latter. He submitted that according to folio 34 of the file maintained by the National Housing Department, the Commissioner's determination was communicated to the Appellant on 17th February 1976, and accordingly, the Appellant could have disposed of the surplus house *within twelve months from the date of such communication*, namely on or before 17th February 1977, and that on 26th July 1976 the application marked 1R was made on his behalf seeking permission to do so.

An examination of Section 10 of the Ceiling on Housing Property Law as amended by Law No. 34 of 1974 exposes the fallacy of this submission insofar as it concerns the Appellant, who is an individual, and not a body of persons. As amended, the Section reads as follows:

> "Where, on the date of commencement of this Law, any person owns any house in excess of the permitted number of houses, such person may, *if such person is an individual, within a period of twelve months from such date*, and if such person is a body of persons, within a period of six months of the date on which the determination under this Law by the Commissioner or as the case may be, by the Board of Review, of the maximum number of houses that may be owned by such body was communicated to such body, or where such body applies for, and is granted an extension of time by the Commissioner, within six months from November 1, 1974, dispose of such house with notice to the Commissioner, unless the tenant of such house or any person who may under section 36 of the Rent Act succeed to the tenancy of such house, has made application with simultaneous notice to the owner for the purchase of such house."

It is relevant to note that the amendment was not intended to bring about any change in the grace period applicable to individual owners of surplus houses, who had only twelve months from the date the Ceiling on Housing Property Law came into force, to dispose of one or more of their surplus houses. The amendment only effected a change in the grace period applicable to a body corporate, by permitting a body of persons to dispose of any surplus house within a period of six months from the date of the communication of the determination of the Commissioner or the Board of Review in regard to the maximum

number of houses that may be owned by such body of persons. There is no way in which an individual owner such as the Appellant could claim a longer grace period than the one year period ending on 13th January 1974 for disposing a surplus house or suffering its vesting in the Commissioner.

It is also significant that by the affidavit dated 26th July 1976 filed with the application marked 1R, the father of the Appellant, Chandra Upali Senanayake, who held his power of attorney, requested the Commissioner to divest the surplus houses to enable him "to offer same to present Tenants of the said premises." This application was refused by the Commissioner, and his decision was affirmed on appeal by the Ceiling on Housing Board of Review. It is inconceivable that an application to have the said houses divested would have been made at that point of time had the ownership thereof not vested on the Commissioner on 13th January 1974. The Appellant's father has in fact in his affidavit `dated 26th July 1976 specifically admitted that the ownership of the said houses, including the house in question, vested on the Commissioner on 13th January 1974. I therefore hold that the ownership of the said surplus houses did vest in the Commissioner on 13th January 1974.

This brings me to the first question on which special leave was granted, namely, whether the Court of Appeal had failed to duly, properly and correctly consider the law in relation to the facts arising from the application of the Appellant to have the house in question divested. According to the Appellant, an application dated 20th October 1978 (A8) was made on his behalf by his father Chandra Upali Senanayake, as his Attorney, seeking to have all three surplus houses, namely, premises Nos. 43 1/2, 43 2/1 and 43 2/2, Gregory's Road, Colombo 7, divested on the basis that the Appellant was entitled to own one more house in consequence of the birth of a child to him in 1977, and that in view of certain amendments made to the Ceiling on Housing Property Law by amending Law No. 34 of 1974, he was also entitled to further time to dispose of the other two surplus houses. The relevant portion of paragraph 6 of the said application addressed to the Commissioner marked A8 is quoted below:-

> "I am now requesting you to divest by Gazette Notification, premises Nos. 43 1/2, 43 2/1 and 43 2/2, of which I am entitled to retain one flat under Section 11(3) of the Ceiling on Housing Property Law, as I have now a child of one year's age. I will dispose of the other two flats within one year of the date of publication of the divesting order in the Gazette. Therefore, I request time of one year from the date of publication of the divesting notice in the Gazette."

According to the Respondent, this was not the only application made to the Commissioner by or on behalf of the Appellant in this connection, and he has produced with his writ application filed in the Court of Appeal a copy of an order made by the Commissioner for National Housing on 5th August 1985 marked A11, allegedly on a subsequent application made by or on behalf of the Appellant, a copy of which application it is alleged by the Respondent, was never served on him. Neither the Appellant nor the Respondent-Respondents have made available a copy of the subsequent application to this court, but it appears from the inquiry notes contained in A11 that Mr. Nimal Senanayake, P.C who appeared for the Respondent at the inquiry held in that connection on 19th June 1985 had emphasized the importance of perusing the said application. It is important to note in this context, that the learned President's Counsel had at the very commencement of the said inquiry, pointed out that this was necessary "firstly because the application will give the precise grounds for requesting the divesting orders, and secondly because there had been

an order and an appeal on an application already with regard to divesting." This appeal for greater transparency appears to have fallen on deaf years, and none of the parties have been able shed any light in regard to the question whether there had been any fresh application for divesting as alleged by the Respondent, or whether it was the continuation of the same proceedings commenced by A8.

Be that as it may, the aforesaid inquiry led to the impugned order of the Commissioner dated 20th August 1985 that was published in the Government Gazette bearing No. 365 of 30th August 1985 (A12). By the said order, the ownership of the house in question, namely, premises No. 43 2/2 Gregory's Road, Colombo 7 was sought to be divested purportedly under the powers vested in the Commissioner under Section 17A(1) of the Ceiling on Housing Property Law. It is this order that was affirmed by the Board of Review by its order dated 14th February 2001 (A18), leading to the writ proceedings filed by the Respondent to have the said orders quashed.

The learned President's Counsel for the Appellant has submitted that the Court of Appeal, in quashing the impugned orders made by the Commissioner and the Board of Review, has altogether overlooked the provisions of Section 17A of the Ceiling on Housing Property Law and has assumed erroneously that the only provision under which the Appellant can be afforded relief is Section 11(3) of the said Law. It is therefore necessary to examine the application or applications made by, or on behalf of, the Appellant in the light of Section 11(3) of the Law, which was expressly referred to in the application A8, and Section 17A which was introduced into the Law in 1974, of which no specific mention was made in the said application. Section 11(3) of the Ceiling on Housing Property Law provided that-

> "Where on any day after the date of commencement of this Law any person becomes entitled to own any house in excess of the permitted number of houses as on such date, he shall so notify to the Commissioner who may, if any house owned by such person and vested in the Commissioner under the provisions of this Law continues to be so vested at the time of such notification, by Order published in the Gazette, divest himself of the ownership of such house, and on the publication in the Gazette of such Order, such house shall be deemed never to have vested in the Commissioner."

There is no controversy regarding the fact that a male child named Pascal was born to the Appellant in London, United Kingdom on 1st June 1977 through his marriage to a non-national of Swiss origin as evidenced by the extract of Certification of Registration of Birth outside Sri Lanka marked 1R1, and that he thereby became entitled to own one more house. In computing the permitted number of houses which may be owned by an individual who is a member of a family under Section 2(1) of the Ceiling on Housing Property Law, the number of dependant children in a family had to be taken into consideration. As the Appellant was childless though married at the time the said Law came into effect, he became entitled to retain the ownership only two houses under the Law. However, in terms of Section 2(1) read with Section 11(3) of the Law, upon the birth of an additional child, the Appellant became entitled to one more house, and it is common ground that one out of the three surplus houses may be divested to the Appellant on account of this child.

In view of the peculiar, and I might add, intriguing, circumstances of this case, it is also necessary to consider the legal implications of Section 17A of the Ceiling on Housing

Property Law, which was introduced in 1974 through the Ceiling on Housing Property (Amendment) Law No. 34 of 1974. The said Section is quoted below in its entirety:-

> "(1)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*.
>
> (2) Where any house has vested in the Commissioner under section 11 and the person who was the owner thereof immediately prior to such vesting makes application to the Commissioner requesting that he be allowed a further period of time to dispose of such house, the Commissioner may, if satisfied that adequate grounds exist for granting such request and with the approval in writing of the Minister, by Order published in the Gazette, divest himself of the ownership of such house, and on publication of such Order in the Gazette, *such house shall be deemed never to have vested in the Commissioner*. Where such person fails to dispose of such house within a period of twelve months from the date on which the Order divesting the Commissioner of the ownership of such house was published in the Gazette, *the Commissioner may by Order published in the Gazette, vest such house in the Commissioner with effect from such date as may be specified therein*."

At the outset, it may be observed that the two sub-sections of Section 17A are inherently different in character. While Section 17A(2) seeks to provide a further opportunity to an owner of a surplus house that had got vested under Section 11 to dispose of the same, Section 17(1) is an independent provision which can be invoked to grant redress to any person whose house has got vested under any provision of the Ceiling on Housing Property Law, not necessarily Section 11.

Furthermore, while a person in whose favor an order is made under Section 17A(2) is required to dispose of the house within twelve months from the order of divesting, no such requirement exists where a house is divested under Section 17A(1). Indeed, to my mind, Section 17A(1) which seeks to confer on the Commissioner for National Housing, the power to divest any house vested in him, albeit with the prior approval of the relevant Minister, without specifying any conditions precedent or subsequent or any guidelines for the exercise of such power, appears to suffer from over-breadth and renders some of the other more stringent provisions of the Law, including Section 17A(2) altogether superfluous. Nevertheless, I am of the opinion that such broad power should be exercised reasonably, and without violating the objectives of the Ceiling on Housing Property Law as may be gathered from the rest of its provisions.

There is considerable confusion, however, in regard to the relief purportedly granted by the Commissioner on the said application or applications of the Appellant, and in particular, in regard to the question whether the Commissioner sought to act under Section 11(3) or Section 17A(1) of the Ceiling on Housing Property Law. The main thrust of the submissions of the Counsel who appeared for the Respondent at the inquiry held by the Commissioner on 19th June 1985, and on appeal before the Board of Review, was that premises No. 43 2/1, Gregory's Road, Colombo 7, was divested by the Commissioner on account of the Appellant's son Pascal under Section 11(3) by the order dated 1st March 1979 marked A9, and that the Commissioner's powers under this provision being thus

exhausted, the Commissioner did not have the jurisdiction to divest the house in question, namely, premises No. 43 2/2 of Gregory's Road, Colombo 7, under the same provision with respect to the same child. It is this position that is sought to be highlighted by the second and third questions on which Special Leave has been granted by this Court. Apart from this jurisdictional objection, it was also very strongly urged on behalf of the Respondent that the Appellant, who had been guilty of long delay in applying for relief, was not entitled to any, particularly by reason of the fact that it had given "hopes" to the Respondent who had on 11th March 1977 entered into an agreement to purchase the house from the Commissioner, and had been paying to the Commissioner Rs. 440 per month for nearly nine year towards the said purchase.

These submissions were not good enough to persuade the Commissioner and the Ceiling on Housing Property Board of Review to hold in favor of the Respondent, and it would appear from the order dated 14th February 2001(A18) that the Board of Review was clearly swayed by the equities in favor of the minor child Pascal, born to the Appellant for whose benefit the house in question was purportedly divested. The Court of Appeal has, however, by its order dated 11th December 2002 concluded that the entitlement of the Appellant for an additional house on account of the new born child has been met by the order of the Commissioner dated 1st March 1979 (A9 and A10) by which premises No. 43 2/1, Gregory's Road, Colombo 7 was divested, with the result that the Appellant retaining three out of the five houses owned by him at the time the said Law came into force, one each for his wife and himself and one on account of the child Pascal.

Learned President's Counsel appearing for the Appellant sought to assail the decision of the Court of Appeal on the basis that the Court has overlooked the provisions of Section 17A introduced by the 1974 amendment in arriving at the said conclusion, and he also emphasized that that the power conferred by Section 17A(1) on the Commissioner to be exercised with the approval of the Minister was a very broad one, and that it was under this provision that the house bearing No. 43 2/1 Gregory's Road, Colombo 7 was divested by A9 and A10. It was strenuously argued by the learned President's Counsel for the Appellant that the order marked A9, was made in terms of Section 17A(1) of the Ceiling on Housing Property Law, and this position is supported by the "Order under Sub-Section (1) of Section 17A" dated 1st March 1979 published in Gazette No. 29 dated 23rd March 1979 marked A10, which relates to the same premises. It is on this basis that it is contended on behalf of the Appellant that the divesting of the house in question by the impugned order of the Commissioner dated 20th August 1985 (A12) can be justified under Section 11(3) of the Law. Learned Counsel invited the attention of Court to A11 containing the notes of the inquiry held on 19th June 1985 and the recommendation of the Commissioner dated 5th August 1985 constituting, what learned Counsel described as "the reasoning for the divesting of 43 2/2" which disclosed that the house in question was indeed being divested on account of the birth of the child Pascal.

However, Senior Counsel appearing for the Respondent and the Respondent-Respondents strongly disputed this position and submitted that the order marked A9 was clearly made under Section 11 (3) and that the reference to Section 17A(1) on the face of the gazetted order marked A10 was an obvious error. They invited the attention of Court to the fact that the said order marked A9 is captioned as an "Order under Section 11(3)" and the body of the order also expressly refers to the powers vested in the Commissioner by Section 11(3). It was therefore, their position that the Commissioner had no jurisdiction to divest the house in question, namely premises bearing No 43 2/2 on account of the same child in whose favour the divesting order marked A9 has been made by the Commissioner.

In order to resolve this issue, it is first necessary to decide whether the Gazette Notification A10 was published to inform the public of the order marked A9 made under Section 11(3) of the Ceiling on Housing Property Law, the reference to Section 17A(1) in A10 being made in error, as contended by the Respondents, or whether A10 was a separate and distinct order clearly and lawfully intended to be made under Section 17A(1), as contended by the Appellant. It is clear from paragraph 6 of the application made in this regard on behalf of the Appellant marked A8 that he had sought that his three surplus houses bearing premises Nos. 43 1/2, 43 2/1 and 43 2/2 of Gregory's Road, Colombo 7 be divested, in such a way that one of them would be his entitlement on account of his new born son Pascal in terms of Section 11(3), and the other two are released to enable him to dispose of the same "within one year of the date of the publication of the divesting order in the Gazette."

Although it is not clearly stated in the said application as to whether the divesting of the latter two houses was sought under Section 17A(1) or Section 17A(2), the promise to dispose the same within one year from the date of the Gazette Notification indicates that the Appellant had Section 17A(2) in mind. If, as is now contended on behalf of the Appellant, it was decided by the Commissioner to divest premises No 43 2/1 in terms of Section 17A(1) as specifically stated in A10, some explanation should have been forthcoming as to why the Commissioner, with the approval of the Minister, decided to divest only one house, and more importantly, as to why the Commissioner chose to do so under Section 17A(1) sans the condition the house so divested be disposed of within one year, which the Appellant had promised to do in A8. No such explanation has been offered by the Appellant or the Respondent-Respondents.

Considering therefore, the proximity of the dates and the similarity of the schedules of A9 and A10, the absence of any explanation from the Appellant or the Respondent-Respondents as to why the order marked A9, which was made by the Commissioner ostensibly under Section 11(3), was not published in the Gazette in terms of, and as required by, that section, as well as the omission on their part to produce the original of the signed order made by the Commissioner and / or the approval given by the Minister relating to the Gazette Notification marked A10 purportedly published under Section 17A(1), I am inclined to the view that the order dated 1st March 1979 marked A9 seeking to divest premises bearing assessment No. 43 2/1, Gregory's Road, Colombo 7, was indeed made under Section 11(3) of the said Law, and that it was this very same order that was published in the Gazette marked A10 as required by that section. I am also of the opinion that the reference to Section 17A(1) in A10 was in fact made in error, whether by inadvertence or otherwise.

The other question that arose in the course of this appeal, is whether the order of the Commissioner dated 1st March 1979 (A9 and A10) finally determined all matters raised in the application dated 30th October 1978 marked A8. Clearly, the said order afforded the Appellant relief insofar as the application for an additional house on account of the birth of the minor son Pascal was concerned, but it is noteworthy that by A8 the Appellant had also sought further twelve months time to dispose of the other two surplus houses. It is only under the provisions of Section 17A(2) of the Ceiling on Housing Property Law that it was possible for the Commissioner to consider such an application and to make a divesting order with the approval of the Minister, but significantly, the orders marked A10 and A12 refer to Section 17A(1) and not Section 17A(2). Learned President's Counsel for the Appellant was therefore compelled to rely on Section 17A(1) and seek to justify the impugned order dated 20th August 1985, published in the Government Gazette bearing No.

365, of 30th August 1985 (A12) on the basis of that section. However, in this connection it is necessary to consider the observations made by this Court in the course of its judgment in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263. His Lordship Justice Wadugodapitya adverted to the several applications made by the present Appellant (who was the 3rd Respondent in that case in which the Commissioner was cited as the 2nd Respondent) to have the surplus houses divested under Section 17A(1), after the very first application made under that Section on 26th July 1976 (1R), and made the pertinent observation at page 266 that-

> "…….it appears that in 1976 the 3rd respondent made an application to the 2nd respondent to divest ownership of the said premises under section 17A (1) of the Law, which application was refused by the 2nd respondent. The 3rd respondent thereupon appealed to the Board of Review which disallowed the appeal and upheld the order of the 2nd respondent. Undaunted, the 3rd respondent in 1979, made a further application to the 2nd respondent to divest ownership of the said premises under section 17A (1) of the Law. This too was refused by the 2nd respondent. The 3rd respondent did not appeal therefrom to the Board of Review. It, however, appears that by letter dated 8.7.81, the petitioners were informed that the 3rd respondent had made yet another application to the 2nd respondent to divest ownership of the premises and further that the 1st respondent would hold an inquiry on 25.8.81 to determine whether the ownership of the premises should be divested. In this connection, it appears that in terms of section 39 (3) of the Law, the determination of the Board of Review upon the appeal made by the 3rd respondent in respect of his first application to divest was final and that the 2nd respondent was wrong to have even entertained the 3rd respondent's second and third applications for divesting. The petitioners on their part objected to the holding of such an inquiry."

I am therefore of the opinion, that in view of the finality attached by Section 39 (3) of the Ceiling on Housing Property Law to the said determination of the Board of Review on appeal from the decision made by the Commissioner not to divest any surplus house of the Appellant under Section 17A(1), it was not open to the Commissioner to make any further divesting orders under that provision.

I observe that in the above quoted passage His Lordship Justice Wadugodapitiya does not make any reference to the application made on behalf of the Appellant on 30th October 1978 (A8), probably because that application was not expressly made under Section 17A(1). As already noted, the said application expressly referred to Section 11(3) to have one house divested on account of the child Pascal and also the other two houses divested to enable them to be disposed of within 1 year from the "date of publication of the divesting order in the Gazette" as contemplated by Section 17A(2). It is significant that according to the notes of the inquiry held on 19th June 1985 and the recommendations of the Commissioner dated 5th August 1985 (A11), the said inquiry related to an application "for divesting of flats Nos. 41 2/2, 43 1/2 and 43 2/2". This therefore may not have been the same proceedings that were commenced by A8 by which the father of the Appellant had sought that of the surplus houses bearing Nos. 43 1/2, 43 2/1 and 43 2/2, one house be divested for the child Pascal and the other two be divested to enable the Appellant to dispose of the same. It is significant that premises No. 41 2/2, which was one of the houses that was sought to be divested at the inquiry held on 19th June 1985, was not one of the surplus houses of the Appellant, its owner being F.R. Senanayake, also known as Ranil Senanayake, who is a brother of the Appellant. Although the two brothers are referred to as "applicants" in the

said notes, it is not clear whether they had made a joint application or whether separate applications made on their behalf had been taken up together for convenience.

It was these proceedings that ultimately resulted in the recommendation dated 5th August 1985 addressed to the relevant Minister by the Commissioner for National Housing which is contained in A11. The said recommendation is quoted below in its entirety:-

> "APPLICATION FOR DIVESTING OF PREMISES NOS.
> 41 2/2, 43 1/2 AND 43 2/2.
>
> The main contention for divesting in the above application in the fact that Mr. F. R. Senanayake and Mr. R. A. Senanayake have 3 children born to them as follows:-
>
> They are:-
>
> Charith Upali Senanayake born on 28th March, 1972,
> Pradeep Arjun Senanayake born on 7th July, 1981
> to Mr. Ranil Senanayake.
>
> Mr. Rohan Senanayake has one child, named, Pascal Ajith Senanayake born on 1st June, 1977.
>
> The birth of the children mentioned above information about which has been made available to the Department subsequent to the law can be considered as the "occurrence of a subsequent event".
>
> I, therefore, recommend that the 3 premises mentioned above be divested with the approval of the Hon. Minister under Section 17A(1) of the C.H.P. Law.
>
> Sgd/Y. B. Pussedniya,
> Commissioner for National Housing
>
> 5th August, 1985."

It is clear from the above extract that the Commissioner has recommended that each of the 3 houses mentioned therein be divested in view of the "occurrence of a subsequent event" namely, the birth of two children, namely, respectively Charith in 1972, and Pradeep in 1981 to the Appellant's brother, Ranil Senanayake, and the birth of a child by the name of Pascal to the Appellant, Rohan Senanayake in 1977. Although the recommendation has purported been made in terms of Section 17A (1) of the Ceiling on Housing Property Law, it would appear that the specific provision which provides for divesting on the occurrence of a subsequent event is Section 11 (3) which has been quoted earlier in this judgement.

In order to justify such divesting under this provision, the "subsequent event" that entitles any person to own any house in excess of the permitted number of houses as on 13th January 1973 on which date the Ceiling on Housing Property Law came into operation, should have occurred after the said date. It was absurd, to say the least, for the Commissioner for National Housing, who was statutorily vested with the administration of the said Law, to have recommended that a surplus house of the Appellant be divested under Section 11(3) or under any other provision of the Ceiling on Housing Property Law,

on account of the birth of the child Charith which occurred on 28th March 1972, as the existence of the said child would have been taken into consideration in computing the permitted number of houses under Section 2(1) of the Law. In any event, it was altogether irrational for surplus houses of the Appellant to be divested on account of the birth of one or more children to the Appellant's brother who did not own such houses prior to their ownership vesting on the Commissioner under Section 13 (1). As far as the Appellant's surplus houses are concerned, as already noted, premises bearing No. 43 2/1, Gregory's Road, Colombo 7, had been divested on account of the birth of child Pascal by the order of the Commissioner dated 1st March 1979 (A9) under Section 11(3) of the said Law, and the Commissioner was devoid of power to divest the house in question, namely premises bearing No. 43 2/2, Gregory's Road, Colombo 7, on account of the same child. It is therefore obvious that the Commissioner had acted in total excess of his lawful authority under the said Law in making and implementing his recommendation dated 5th August, 1985.

It is probably due to these infirmities that the Commissioner had purported to make the recommendation under Section 17A(1) which provides the Commissioner with a broader discretion. However, in my opinion, the legal maxim *generelia specialibs non derogant*, which means that general things do not derogate from special things, would not permit the ostensibly wide provisions of Section 17A(1), taken in its most comprehensive sense, to override the most stringent provisions of Section 11 (3) of the Ceiling on Housing Property Law to render the latter provision meaningless. In *Maithripala Senanayake, Governor of North Central Province and Another v. Gamage Don Mahindasoma and Others*, [1998] 2 Sri LR 333 at 370, Amarasinghe, J., quoted with approval the following passage from Halsbury, Laws of England, paragraph 875, which explains the said maxim:-

> "Whenever there is a general enactment in a statute which, if taken in its most comprehensive sense, would override a particular enactment in the same statute, the particular enactment must be operative, and the general enactment must be taken to affect only the other parts of the statute to which it may apply. This is merely one application of the maxim that general things do not derogate from special things."

I am therefore of the opinion that the Commissioner for National Housing had no authority to make the recommendation dated 5th August 1985 contained in A11 for the divesting of his ownership in the house in question under Section 17A(1) of the Law in all the circumstances of this case. As the impugned order dated 20th August 1985 published in the Government Gazette No. 365 dated 30th August 1985 (A12) was made by the Commissioner on the basis of the said recommendation, presumably after obtaining the approval of the relevant Minister, I am of the opinion that the Commissioner was devoid of power to make that order as well.

It is relevant to note that the Respondent, along with the tenant of premises No. 41 2/2, Gregory's Road, Colombo 7, had previously invoked the jurisdiction of the Court of Appeal by way of *certiorari* to have the latter order dated 20th August 1985 published in the Government Gazette No. 365 dated 30th August 1985 (A12) quashed, and was successful on appeal in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263. This Court, in granting the Respondent relief, had also directed that the Commissioner's decision to divest the relevant houses be communicated to the Respondent and the other tenant to enable them to appeal to the Board of Review in terms of Section 39 of the Law, if they so desire. The Respondent was accordingly notified of the decision of the Commissioner to divest the house in question,

namely premises bearing No. 43 2/2 Gregory's Road, Colombo 7 by the Commissioner's letter dated 20th April 1999 (A13). The Respondent thereafter lodged his Petition of Appeal dated 14th May 1999 (A14), which was taken up for hearing before the Ceiling on Housing Board of Review on 19th July 2000. It appears from the notes of proceedings before the Board of Review marked A 15 that Mr. P.A.D. Samarasekara, President's Counsel, who appeared for the Respondent had emphasized that the Commissioner had no power to divest the house in question on account of the child Pascal when another surplus house bearing assessment No. 43 2/1 has already been divested for the benefit of the same child. Learned President's Counsel also drew the attention of the Board to the observations made by the Supreme Court at page 266 of its judgement in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others,* (quoted earlier in this judgement) to the effect that the determination of the Board of Review upon the appeal made by the Appellant in respect of his application made to the Commissioner in 1976 under Section 17A(1) was final, and no further applications under that section should have been entertained. Despite these submissions, the Board of Review by its order dated 14th February 2001 (A18) considered the equities in favour of the minor child Pascal so overwhelming that they could overcome any deficiencies in substantive or procedural power and the legal rights of a tenant of a surplus house to purchase the same.

It is trite law that the Sate is the upper guardian of all minors, and our courts have recognized this principle which has its roots in our Roman-Dutch Common law. *See*, *Perera* v. *Perera* 3 Browne's Report 150; *Mustapha Lebbe v Martinus* 6 NLR 364; *A.D. Weragoda v R. Weragoda* 66 NLR 83 at 86; *Madulawathie v Wilpus* 70 NLR 90; *L.C.N. Fernando v L.A.G Fernando* 72 NLR 174 at 175; *G.Pemawathie v Kudalugoda Aratchi* 75 NLR 398 at 403; *Karunawathie v Wijesuria and Another* [1980] 2 Sri LR 14 at 19. It would appear from decisions such as *AD and Another v DW and Others* [2008] 3 SA 183 that this protection will extend to a minor child in appropriate cases even if it is resident abroad. It appears from the Certificate of Registration of Birth outside Sri Lanka dated 22nd December 1978 marked 1R1 that the minor child Pascal was born to the Appellant and a Swiss national to whom he was presumably married at the relevant time in London, England on 1st June 1977. There is paucity of evidence as regards Pascal's citizenship status or his place of residence, but it is clear that in April 1999 at the time when the Commissioner notified the Respondent of his decision to vest the house in question for the benefit of Pascal, he had ceased to be a minor.

It is also in evidence that while he was still a minor, by the order dated 1st March 1979 (A9) the Commissioner has divested premises No. 43 2/1, Gregory's Road, Colombo 7, on account of Pascal under Section 11(3) of the Ceiling on Housing Property Law, although curiously, the order made by the Commissioner for this purpose had transformed itself into an order purported to be made under Section 17A(1) by the time it was published in the Gazette A10. The house so divested was admittedly sold by the Appellant soon after the divesting, but it was submitted by learned President's Counsel for the Appellant that this was done in compliance with the requirement that the divested house should be disposed of within a period of twelve months from the date on which the divesting order was published in the Gazette. However, neither Section 11(3) nor Section 17A(1) of the said Law require that a divested house should be disposed of within a year, and Section 17A(2) which does contain such a requirement, was not the provision under which the divesting was done. Furthermore, no evidence was placed before the Board of Review, the Court of Appeal or this Court by any of the parties to this appeal as to whether or not the proceeds of the sale of premises No. 43 2/1, Gregory's Road, Colombo 7 accrued to Pascal, nor is there material to show that he ever invoked the jurisdiction of any court in this country to redress any grievance he might have in regard to the manner in which the proceeds of sale

have been dealt with. In the circumstances, there is no basis to hold that the interests of Pascal had been adversely affected by the sale of the aforesaid premises during his minority.

In my view, the Board of Review has also failed to consider the equities in favor of the Respondent, who was at all relevant times the tenant of the Appellant of the house in question. It is in evidence that the Respondent had duly made his application under Section 9 of the Ceiling on Housing Property Law to purchase the house in question, and that in pursuance of such application, the Commissioner offered to sell the house to the Respondent at a price to be determined after the house was valued. Accordingly, an Agreement in the prescribed form dated 11th March 1977 (A5) was signed by the Respondent in the presence of witnesses at the office of the Commissioner for National Housing, which document, curiously, was not signed by the Commissioner. On the same day, the Respondent also signed a document headed "Confirmation of agreement to purchase house under Section 9/13 of the Ceiling on Housing Property Law" marked A6. It is also in evidence that pending the valuation of the house in question and the fixing of the price, the Commissioner called upon the Respondent to pay a monthly sum of Rs. 440 which he agreed to be set off against the price of the house to be eventually determined.

Learned President's Counsel for the Appellant has argued that the failure of the Commissioner for National Housing to sign the said Agreement is fatal, and that there was in law no binding agreement to sell. However, it is pertinent to note that this Court has adverted to the question of the agreement to sell in its judgment in *Gunawardene and Wijesooriya v. Minister of Local Government, Housing and Construction and Others* [1999] 2 Sri LR 263, and has observed at page 266 of the that the failure of the Commissioner to sign the Agreement is "his own fault" and not that of the present Respondent, and that latter "cannot be made to suffer for this omission". I am in respectful agreement with this observation.

It is noteworthy that as contemplated by the Agreement marked A5 and the Confirmation marked A6, certain payments have been made by the Respondent to the Commissioner for National Housing towards the purchase of the house in question. Learned President's Counsel for the Respondent invited the attention of Court to paragraph 8 of the affidavit dated 23rd March 2001 filed by the Respondent in the Court of Appeal, wherein he has averred that he has paid without default "the monthly amounts demanded by the Commissioner as payments towards the purchase price" from March 1977 "until the Commissioner purported to divest the said house and offered to refund all payments ….by his letter dated 18.02.1986 (A2)…." He has also produced with his affidavit marked A3 and A4 two receipts for Rs. 2640 each which add up to only Rs. 5280, but if the Respondent had regularly paid a monthly sum of Rs. 440 for the aforesaid period of approximately 9 years, the aggregate of such payments would be close to Rs. 47,520 – a tidy sum in the Nineteen Seventies and Eighties.

The Commissioner for National Housing in his affidavit dated 4th July 2001 has admitted the receipts marked A3 and A4 without expressly denying the claim that the said payments were regularly made during the period in question, and the Appellant in his affidavit dated 25th September 2001 has responded to the averments by admitting "the matter of record only", what ever he intended to mean by that phraseology. In the absence, therefore, of any express denial from the Appellant or the Commissioner of the matters set out in paragraph 8 of the Respondent's affidavit filed in the Court of Appeal, I am inclined to believe that the Respondent had in fact paid a substantial sum of money towards the purchase of the house

in question. In these circumstances, it is my opinion that the Respondent had a legitimate expectation, at the very least, that the house in question will be sold to him.

In my considered opinion, the equities favor the Respondent rather than the minor child Pascal, in whose favor house bearing premises No. 43 2/1, Gregory's Road, Colombo 7 had already been divested, although an attempt had been made to paint the picture that the said premises was divested in terms of Section 17(1) of the Ceiling on Housing Property Law to make out a case for another house to be divested on account of Pascal. It is unfortunate that the Commissioner for National Housing, and his Department, had wittingly or unwittingly helped the Appellant in this endeavor. To my mind, the "mistakes" made by the Commissioner for National Housing in this case are too many to be disregarded on the basis that they were made by sheer inadvertence.

I accordingly answer all the questions on which special leave has been granted by this Court in favor of the Respondent, and hold that-

(1) The Court of Appeal has duly, properly and correctly considered the law in relation to the facts arising from the application or applications of the Appellant for divesting of the house in question;

(2) The Commissioner for National Housing has by his order marked A9 decided to divest premises No. 43 2/1, Gregory's Road on account of the birth of the child Pascal born to the Appellant; and

(3) The order marked A11 was *ultra vires* the powers of the Commissioner insofar as it sought to divest premises No. 43 2/2, Gregory's Road, in respect of the birth of the same child Pascal.

I see no basis to interfere with the decision of the Court of Appeal dated 14th July 2003, which is hereby affirmed. The appeal is accordingly refused. I award the Petitioner-Respondent a sum of Rs. 35,000/- as costs of this appeal payable by the 1st Respondent-Appellant.

JUDGE OF THE SUPREME COURT

DR. SHIRANI A. BANDARANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

NIMAL GAMINI AMARATUNGA, 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. 22/2006
S.C. (H.C.) L.A. No. 28/2006
H.C. Civil No. 77/99(1)

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

Plaintiff-Petitioner-Appellant

Vs.

Yashodha Holdings (Pvt.) Ltd.,
No. 455, Galle Road,
Colombo 03.

Presently at No. 142A, 2nd Floor, S. de S. Jayasinghe Mawatha, Nugegoda.

Defendant-Respondent-Respondent

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Saleem Marsoof, J.

COUNSEL : S. A. Parathalingam, PC, with Kushan de Alwis, Hiran Jayasuriya and Nishkan Parathalingam for Plaintiff-Petitioner-Appellant

Manohara de Silva, PC, with Yasa Jayasekera and Nimal Hippola for Defendant-Respondent-Respondent

ARGUED ON: 25.09.2008

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Petitioner-Appellant : 10.12.2008
Defendant-Respondent-Respondent : 31.03.2009

DECIDED ON: 25.06.2009

Shirani A. Bandaranayake, J.

This is an appeal from the order of the Commercial High Court dated 16.02.2006 (X16). By that order, the learned Judge of the Commercial High Court dismissed the application of the plaintiff-petitioner-appellant (hereinafter referred to as the appellant) for execution of Decree pending appeal. The appellant came before this Court by way of leave to appeal on which this Court had granted leave to appeal on the following grounds:

a) after having applied for, receiving and utilizing the loan facility referred to in the Plaint, is the respondent estopped from asserting that:-

i. the borrowing and/or receiving the said loan facility from the appellant bank is *ultra vires* of its memorandum and Articles of Association of the respondent?

ii. the respondent was not empowered to borrow and/or receive the said loan facility from the appellant bank?

iii. The respondent was not authorized to receive any such loan or advance from the appellant bank?

b) in terms of the laws of Sri Lanka is the respondent not entitled to deny and/or refute liability to pay the appellant on the ground that the respondent was not authorised to receive from the appellant?

c) in any event, does English Law apply to banking transactions such as the transactions between the appellant and the respondent morefully set out in the Plaint marked X1?

d) whether there are no substantial questions of law raised and/or disclosed by the respondent which warrants the dismissal of the application of the appellant for execution of Decree pending appeal?

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

The appellant filed an action against the defendant-respondent-respondent (hereinafter referred to as the respondent) on 27.07.1999 seeking, *inter alia*, judgment and Decree in a sum of Rs. 328,474,520/55 together with interest at 26% per annum on a principal sum of Rs. 210,000,000/- from 01.01.1998 until the date of Decree and thereafter legal interest on the aggregate amount of the Decree until payment in full (X1 and X2).

The respondent filed Answer dated 26.11.1999 and thereafter the matter proceeded to Trial (X3).

The Admissions and Issues of the respective parties were tendered in writing and thereafter settled in Court. On 18.02.2002, the appellant commenced leading evidence in the aforementioned actions (X4(a) and X4(b)).
The evidence of W.D. Dayananda, Senior Manager of the appellant Bank was led on behalf of the appellant together with documents marked P1 to P25.

The respondent had not led any evidence and closed its case (X5). On 27.02.2004, learned Judge of the Commercial High Court delivered judgment in favour of the appellant Bank (X6).

The respondents, thereafter filed petition of appeal dated 08.04.2004 in the Supreme Court against the said judgment dated 27.02.2004 (X7). Consequently the appellant Bank filed an application for execution of Decree pending appeal dated 19.07.2004 in terms of Section 763 of the Civil Procedure Code, as amended (X8).

The respondent filed its statement of objections together with the affidavit of Y. Kasthuriarachchi, Managing Director of the respondent, resisting the appellant's application for execution of Decree pending appeal on the sole basis that there are questions of law to be adjudicated upon at the hearing of the appeal and not on grounds of substantial loss (X9 and X10).

Thereafter the matter was fixed for inquiry and at the said inquiry, Group Advisor of the respondent had given evidence by way of oral testimony and by way of an affidavit (X11).

Upon the objection raised by the appellant, the documents marked as V9, V10 and V11, which were annexed to the affidavit of the Group Advisor of the respondent, were rejected by Court. The inquiry into the application for execution of Decree pending appeal made by the appellant was concluded and Court had directed the parties to file their written submissions (X12 and X13). In H.C. (Civil) No. 75/99(1), the parties had agreed to abide by the order in application H.C. (Civil) No. 77/99(1).
On 16.02.2006, learned Judge of the Commercial High Court had delivered order dismissing the application of the appellant for execution of Decree pending appeal.

By his order dated 16.02.2006, learned Judge of the Commercial High Court refused the application filed by the appellant, on the ground that there is a substantial question of law to be determined at the final appeal of the main action. Accordingly learned Judge of the Commercial High Court had stated in his order that a substantial question on the basis that whether the appellant and respondent are bound by the terms and conditions of the contract and/or agreement between the parties in a situation, where the appellant had lent and advanced monies and the respondent had borrowed money for purposes other than for the purposes set out in the Memorandum and Articles

of Association of the respondent and therefore the transaction is *ultra vires* and if so, whether the laws of Sri Lanka provides for such a situation.

Learned President's Counsel for the appellant strenuously contended that he had brought to the notice of the learned Judge of the Commercial High Court, the applicability of the English Law to the issue in question and had referred to several authorities to illustrate that although the Companies Act, No. 17 of 1982 did not contain any provisions as to *ultra vires* transactions, in terms of Section 3 of the Civil Law Ordinance, the English Law is applicable to the question in issue and according to English Law the transaction in question is not *ultra vires* and that the Commercial High Court was in error in concluding that there were substantial questions of law.

Learned President's Counsel for the respondent contented that although the learned President's Counsel for the appellant relied on the applicability of Section 3 of the Civil Law Ordinance on the basis that the corresponding English Law would be applicable on the issue in question, that this position is not correct as the subsequent laws enacted by the British Parliament cannot have any application in Sri Lanka. Learned President's Counsel for the respondent relying on the decision in **Colletts** v **Bank of Ceylon** ([1982] 2 Sri L.R. 514) contended that the High Court was not in error, when it decided that there is a substantial question of law to be determined in the final appeal.

Having stated the main submissions made by both learned President's Counsel, let me now turn to examine the questions in issue.

It was common ground that considering all the circumstances, that this appeal could be heard on the basis of the following questions:

1. whether English Law would be applicable to the matters in issue in this appeal, morefully set out in the Plaint (X1), in terms of Section 3 of the Civil Law Ordinance; and

2. whether the learned Judge of the Commercial High Court had erred when it was decided that there is a substantial question of law based on the doctrine of *ultra vires* to be determined in the final appeal.

1. Whether English Law would be applicable to the matters in issue in this appeal morefully, set out in the Plaint (X1) in terms of Section 3 of the Civil Law Ordinance.

It is not disputed that the Companies Act, No. 17 of 1982 was the statute in force in Sri Lanka at the time, when this matter was considered before the learned Judge of the Commercial High Court. It is also not disputed that the Companies Act, No. 17 of 1982 did not contain any provisions regarding the transactions, which are *ultra vires*. In such circumstances, when there is a lacuna in the said Companies Act with regard to *ultra vires* transactions, a question would arise as to the applicable law regarding such transactions.

Considering the legal system of Sri Lanka, Statutes are the primary source of law, which could be either based on English Law or enacted as referred to by Dr. L.J.M. Cooray (An Introduction to the Legal System of Sri Lanka, Stamford Lake Publication, 2003, pg. 11) on a consideration of the local need and circumstances or be a restatement of customary or religious law. It is also to be noted that English Law had been legislatively incorporated in Sri Lanka and according to Dr. L.J.M. Cooray (supra, pg. 31), this had been effected in six (6) ways. These six (6) methods were as follows:

> "1. a statute passed by the Parliament of the United Kingdom was copied and enacted as law by the local legislature;
>
> 2. the principles underlying the decisions of the English Courts were codified and adopted by the local legislature;
>
> 3. the English Law on a particular subject was extended by the local legislature to the Island, without further elaboration of

the substance of the law in the enabling enactment, or in other words, English Law was incorporated by reference;

4. provision was made for the application of English Law where a statute in (1) or (2) above was silent;

5. the extension before 1948 of Acts of the United Kingdom Parliament to the Island as a consequence of its colonial status;

6. English Law became applicable as a consequence of the assumption of British sovereignty."

Learned President's Counsel for the respondent contended that the Companies Act, No. 17 of 1982 does not have a *casus omissus* clause and therefore English Law would not be applicable to Company Law in Sri Lanka.

Admittedly, unlike Section 100 of the Evidence Ordinance or Section 2 of the Trusts Ordinance, the Companies Act, No. 17 of 1982 does not contain a clause which provides for the application of English Law in the event of a *casus omissus* in the local statute. Accordingly there is no possibility of applying English Law on the basis that there is no provision in the Companies Act, No. 17 of 1982. However, it is to be noted that, as clearly pointed out by Dr. L.J.M. Cooray (supra), English Law could also be incorporated to our legal system by reference. Accordingly, the Civil Law Ordinance, also known as the Laws of England Ordinance, is referred to by Dr. L.J.M. Cooray (supra) as an enactment in point, where English Law has been incorporated by reference.

Along with the British occupation of the Maritime Provinces by the Proclamation of September 23, 1799, Roman Dutch Law was applied as the Common Law of the country. When the Courts were constituted, although there had been instances that the English judges had followed English precedents merely due to the reason that they were not familiar with the language to follow the writings of the Roman-Dutch jurists, it is also clearly evident that the British judges during the early

19th century had applied Roman-Dutch Law in commercial disputes. For instance in **Boyd** v **Staples** ((1820 – 33) Ramanathan Reports, 21), in considering a matter, it was stated that,

> "The English statutory limitation is not the law of this Island, the Roman-Dutch law and the regulations of the Government are guided in the administration of justice."

However, later decisions reveal that the dictum in **Boyd** v **Staples** (supra) did not continue for very long. The English judges, as stated earlier were not familiar with the Roman-Dutch law as they were trained in the traditions of Anglo-Saxon jurisprudence and gradually they had sought to follow English precedents in considering matters concerned with Commercial Law. For instance in **Sivapooniam** ((1820 - 33) Ramanathan Report 78), it was clearly stated that Roman-Dutch law is applicable subject to useful alterations, which are actually necessary. Accordingly it was stated that,

> "It has always been understood that this Court has always acted on the understanding that the basis of law in this Island is the Roman-Dutch law in the period of conquest in 1796, with such deviations, expedients and useful alterations as shall be either actually necessary and unavoidable or evidentially beneficial and desirable."

This process created uncertainly as there were instances, where the Court had been in doubt whether to apply Roman-Dutch law principles or the concepts of English Law in dealing with matters related to Commercial Law. The decision by Carr, C.J., in **Gerard and Brown** v **Fulton** ((1843 – 55) Ramanathan Report pg. 124), clearly indicates the difficulties the judges had encountered in this regard. The kind of confusion, which prevailed during that time was vividly described by H. W. Tambiah (Principles of Ceylon Law, H.W. Cave and Company, 1972, pg. 529, which reads as follows:

> "Attempts to equate the principles of English law and Roman-Dutch law on commercial matters by the judges brought about chaos and obscurity in Commercial Law, resulting in great dissatisfaction among

> the powerful English commercial circles in Ceylon. As a result of persistent agitation by this powerful community, the English law on commercial matters was introduced by legislation. In **Gerard and Brown** v **Fulton,** Carr C.J. was not sure whether Roman-Dutch law or English law applied in considering the days of grace permitted for the acceptance or payment of a bill of exchange. The English law allowed days of grace while the Roman-Dutch law did not recognise them. It was this decision which made the mercantile community to agitate for law reform."

The resulting position of this decision was the interest taken by the British administration to take steps in introducing the Civil Law Ordinance in 1852, which came into effect from 01.07.1853.

The Civil Law Ordinance was enacted for the purpose of introducing into the then Ceylon, the law of England in certain cases and to restrict the operation of the Kandyan Law.

Section 3 of the Civil Law Ordinance refers to the fact that law of England to be observed in all commercial matters and states as follows:

> "In all questions or issues which may hereafter arise or which may have to be decided in Ceylon with respect to the law of partnerships, corporations and banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as 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 or hereafter to be enacted."

When considering Section 3 of the Civil Law Ordinance, it is clear that, subject to any changes made by the legislature, the English Law on Banking at the time being in force, would apply in Sri Lanka.

This position was considered by H.W. Tambiah (supra pg. 533), where reference was made to Section 3 of the Civil Law Ordinance and it was stated tht,

> "It is clear that by this provision, subject to any changes made by legislature, the English law on banking at the time being in force (both the common law as well as the statutory law) would apply in Ceylon."

Learned President's Counsel for the respondent contended that the Civil Law Ordinance was enacted in 1852, at a time this country was under colonial rule. The contention was that although at that time the British Parliament had the authority to enact laws for this island, since the country became a Republic after 1972 there was total severance from the British Government. Moreover as the English Companies Act had come into effect after 1978, learned President's Counsel for the respondent submitted that laws enacted by the British Parliament after 1972 cannot be applicable in this country as the sole authority to enact laws is in the Parliament of Sri Lanka.

It is to be borne in mind that there cannot be any dispute that the legislative power of the people shall be exercised by Parliament. The legislature has the authority to make law and the 'legislation which emanates from the supreme legislative authority should take precedence over all other forms of law'. The Parliament shall have power to make laws, including laws having retrospective effect and repealing or amending any provision of the Constitution or adding any provision to the Constitution, provided that Parliament shall not make any law suspending the operation of the Constitution or any part thereof or repealing the Constitution as a whole, unless such law also enacts a new Constitution to replace it. Article 76 of the Constitution refers to delegation of legislative power and Article 76(1) states that Parliament shall not abdicate or in any manner alienate its legislative power and shall not set up any authority with any legislative power. However, it is to be noted that sub-Articles to Article 76 of the Constitution, states that it shall not be in contravention of the provisions of Article 76(1) for the President to make emergency regulations and the Parliament to make any law relating to public security according to such law.

However, the decisions in **The Mahakande Housing Company Ltd**. v **Duhilamomal and others** ([1981] 2 Sri L.R. 232) and **Wright and Three others** v **People's Bank** ([1985] 2 Sri L.R. 292), clearly show that English Law had been applied to the questions, which arose in those matters through the operation of the Civil Law Ordinance.

In **The Mahakande Housing Company Ltd.** (supra) considering the question concerning a partnership, Soza, J. held that although there is a Partnership Ordinance in Sri Lanka, that is mainly concerned with providing that certain classes of persons should not be regarded as partners and therefore it does not affect the English Law of Partnership being applicable in terms of the provisions of Section 3 of the civil Law Ordinance.

In **Wright and Three others** (supra) the question, which came up for consideration was based on the Agent's authority to bind his Principal. Examining the issue at hand, G.P.S. de Silva, J. (as he then was), stated that,

> "The law relating to principal and agent governs the question whether the defendants had the authority to pledge goods of their clients. The provisions of the Civil Law Ordinance (Chap. 79) would therefore be very relevant . . . .
>
> Having regard to the wide language used, namely 'the law to be administered shall be the same as would be administered in England in the like case, in the corresponding period, if such question or issue had arisen or had to be decided in England', it is not only the English Common Law, but also the statute law of England that is made applicable."

Referring to the decision in **Usman** v **Rahim** ((1930) 32 N.L.R. 259), G.P.S. de Silva, J. (as he then was) further held that in terms of the provisions of the Civil Law Ordinance, what is applicable is not only the English Law in force at the time of the enactment, but also any subsequent statute.

It is to be noted that in **The Mahakande Housing Company Ltd.** (supra) and **Wright and Three others** (supra) were decided well after the 1972 and 1978 Constitutions came into effect.

As clearly stated in, **In re Amand** ((No. 2) 1942 1 K.B. 445) any law could be enforced in this country only by the legislative authority of our Parliament. By the introduction of the Civil Law Ordinance in 1952, provision was made for the application of the English Law governing bills of exchange, promissory notes and banking etc.

The laws passed by the Parliament, which is the supreme legislative authority, subject to constitutional safeguards, will repeal all existing legal rules, which are in conflict with any of the relevant provisions, as stated by Dr. L.J.M. Corray (supra pg. 155) whether found in prior statutes, delegated legislation, custom, religion, case law or the Roman-Dutch law. Dr. L.J.M. Corray (supra) had further stated that,

> "It must be noticed that such repeal could be partial-abrogating particular branches of law and leaving other sections untouched, or it could be complete."

Along with the introduction of the Companies Act, No. 17 of 1982, the applicability of the Civil Law Ordinance regarding matters pertaining to several areas dealing with Commercial Law became limited to such areas, where there was a lacuna in the statutory provisions. In the circumstances, it would not be correct to state that the applicability of English Law 'in the like case at the corresponding period' would be an abdication of the legislative authority given to the Parliament of Sri Lanka. If provision is made in the Companies Act, for such areas, where there is a lacuna in the law, then there cannot be a need to apply English Law prevailing at the corresponding period.
It is thus clear that in a situation where there are no provisions in the Companies Act, No. 17 of 1982 regarding banking transactions, which are categorised as *ultra vires*, that it would be necessary to refer to English Law, which is in force 'at the corresponding period', as Section 3 of the Civil Law Ordinance had stated that in such an instance 'the law to be administered shall be the same as would be administered in the like case, at the corresponding period'.

Learned President's Counsel for the appellant referred to the decision in **The Shantha Rohan** ([1994] 3 Sri L.R. 54) to emphasis his contention that the words 'for the time being in force' means the time, when the question or dispute arose or when proceedings commence or when an action is instituted. In **Shantha Rohan** (supra) reference was made to the House of Lords decision by Lord Cross in **Attorney-General** v **Howard Reformed Church, Bedford** ([1975] 2 All E.R. 337), where the words 'for the time being' under Section 55(1) of the Town and Country Planning Act, 1971 was defined, which referred to the time at which an offence was committed under Section 55(1) by the execution of works for the demolition or alternation of the building.

Accordingly it is apparent that the relevant period under Section 3 of the civil Law Ordinance, as correctly contended by the learned President's Counsel for the appellant, would be a date after the institution of the action and/or a date after the answer of the respondent, where he had raised the defence of *ultra vires*.

It is common ground that the action was instituted by the appellant on 26.07.1999 and the respondent had filed answer on 12.11.1999.

The *ultra vires* transactions in Companies were governed by Section 35 of the Companies Act of 1989, which was amended in 1991 and this would be the applicable Law in England at the corresponding time. Learned President's Counsel for the appellant correctly referred to Paget's Law of Banking (12th Edition, Butterworth pg. 147), where reference is made to the *ultra vires* transactions and the applicability of Section 35 of the English Companies Act (as amended), which reads as follows:

> "An *ultra vires* transaction is one which it is beyond the capacity of a company to enter into. It is to be distinguished from an unauthorized transaction, i.e. a transaction which, although within the capacity of the company, is carried out otherwise then through the proper exercise by the company's agents of their powers . . . .

> The law in this area was transformed by the substitution of a new Section 35 in the Companies Act 1985, which applies to any act done by a company on or after 4 February 1991. The new Section provides that the validity of an act done by a company (as defined in Section 735) shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum (Section 35(1)) . . . . **The effect of the new Section 35 is that a third party dealing with a company need not concern himself with the company's capacity to enter into the transaction. It is expressly provided in Section 35B that a party to a transaction with a company is not bound to enquire as to whether it is permitted by the company's memorandum**" (emphasis added).

It is therefore apparent that the English Companies Act of 1985 (as amended), clearly provides for a situation, where a Company had borrowed money for purposes out side the objects in its Memorandum and Articles of association.

Considering all the aforementioned circumstances, it is apparent that English Law would be applicable to the matters in issue in this appeal in terms of Section 3 of the civil Law Ordinance.

2. Whether the learned Judge of the Commercial High Court had erred when it was decided that there is a substantial question of law based on the doctrine of *ultra vires* to be determined in the final appeal.

Learned President's Counsel for the respondent submitted that although the learned High Court Judge had expressed the view that this question is well settled in England, it is not so in Sri Lanka under the Companies Act, No. 17 of 1982, which was the Act in operation at the time this action was decided. Accordingly his position was that since there is an Act 'to amend and consolidate the law relating to Companies', Section 3 of the Civil Law Ordinance would not be applicable in the instant matter.

Learned President's Counsel for the appellant strenuously contended that English Law applies under Section 3 of the Civil Law Ordinance as stated under the first question of law and even the learned Judge of the High Court had appreciated this position. Accordingly learned President's Counsel for the appellant contended that learned Judge of the High Court could not have come to the conclusion that the defence of *ultra vires* raised by the respondent amounts to a substantial question of law.

As stated earlier, it was common ground that Companies Act, No. 17 of 1982 was the Act in operation at the time the question at issue was considered by the High Court. It was also not disputed that there were no provisions stipulated under the said Act of 1982 to deal with '*ultra vires'* transactions as referred to by the respondent in the High Court. In such circumstances, as stated earlier, Dr. L.J.M. Cooray had referred to the instances in which English Law had been incorporated by reference.

Although under the Companies Act, No. 17 of 1982, steps were taken 'to amend and consolidate the law relating to Companies', it is not disputed that there was no provision, which deals with the '*ultra vires* transactions'. In such circumstances, as described earlier, the law that has to be administered shall be the English Law at the corresponding period in England in terms of Section 3 of the Civil Law Ordinance of 1852. This situation cannot be considered as an instance, where the inalienable sovereignty of this country under Article 3 of the Constitution had been affected. In fact, quite contrary to the aforesaid contention, Section 3 of the Civil Law Ordinance, clearly indicated **that the said incorporation of English Law by reference is a limited process, as steps could be taken to introduce legislative provision, either by a new enactment or by the introduction of an amendment**. Section 3 of the Civil Law Ordinance has clearly stated that the law to be administered, when a question or issue arises on the subjects described in that Section should be the same as would be in the like case at the corresponding period if such question or issue had arisen or led to be decided in England '**unless in any case other provisions is or shall be made by any enactment now in force in Sri Lanka or hereinafter to be enacted**'.

Section 35A and 35B of the Companies Act of 1985 of England, which were incorporated by the Companies Act of 1989 that came into effect on 04.02.1991 clearly deal with the validity of acts,

which are within a Company's corporate capacity or which cannot be called into question on the ground of lack of capacity.

In such circumstances, the question arises as to whether there was a substantial question of law that had to be decided by the Supreme Court?

What constitutes a substantial question of law was discussed by this Court in **Collettes Ltd.** v **Bank of Ceylon** ([1982] 2 Sri L.R. 514). Considering the question at issue, Sharvananda, J. (as he then was) referred to the decision in **Chunilal Mehta** v **Century Shipping and Manufacturing Co. Ltd.** ((1962) A.I.R. S.C. 1314), which had quoted with approval the view expressed by the Madras High Court in **Subbarao** v **Veeraju** ((1951) A.I.R. Madras 969). In **Subbarao** (supra) the Court had framed a test that could be applied in identifying a substantial question of law, which was in the following terms:

> "When a question of law is fairly arguable, where there is room for difference of opinion on it or where the Courts below thought it necessary to deal with the question at some length and discuss alternative views, then the question would be a substantial question of law. On the other hand if the question was practically covered by the decisions of the Highest Court or **if the general principles to be applied in determining the question are well settled and the only question was of applying those principles to the particular facts of the case, it would not be a substantial question of law**" (emphasis added).

On a consideration of the submissions of both learned President's Counsel and the applicable legal principles stated earlier, it is quite evident that the general principles that had to be applied to the question before the High Court were well settled. Admittedly, there was no provision for the question in issue in terms of our Companies Act of 1982 and Section 3 of the Civil Law Ordinance therefore had to be applied in that instance. In terms of the provisions contained in Sections 35A and 35B of the English Companies Act, the respondent could not have succeeded in the defence of '*ultra vires*'.

In fact it appears that the learned High Court judge had appreciated the position, that in England the Companies Act had been amended to incorporate the authority to exercise the Company's corporate capacity.

> "bx.%Sis kS;sfhys fï nj meyeos,sj i|yka lrñka wruqKqj,g mrsndysr lghq;= ïïnkaOfhka jk .súiqï j,skao iud.ula neoS isák njg kS;sh ixfYdaOkh ù we;. oekg fhdacs; iud.ï mkf;ao, ta wdldrfha kS;suh ;;a;ajhla we;=<;a lsrSug meyeos<s W;aidyhla f.k we;."

In the aforesaid circumstances, it is evident that the High Court had erred when it decided that there was a substantial question of law based on the doctrine of *ultra vires* to be determined in the final appeal.

For the reasons aforementioned, both the questions on which this appeal was heard are answered in the affirmative. This appeal is accordingly allowed and the order of the High Court of Colombo (Commercial) dated 16.02.2006 is set aside. Learned Judge of the High Court of Colombo (Commercial) is directed to make order for the execution of the Decree pending appeal and issue writ accordingly.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, 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. 51/2006
S.C.L.A. Application No. 57/2005
H.C. (Civil) No. 8/2003(3)

Stassen Exports Ltd.,
No. 833, Sirimavo Bandaranaike Mawatha,
Colombo 14.

Plaintiff-Appellant

Vs.

1. Lipton Ltd.,
   No. 1, Kingscote Street,
   London EC4 YOAE,
   United Kingdom.

2. Director-General of Intellectual Property,
   (Formerly called and known as the Director of Intellectual Property),
   Samagam Medura,
   No. 400, D.R. Wijewardene Mawatha,
   Colombo 10.

Defendants-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
Saleem Marsoof, J. &
Jagath Balapatabendi, J.

COUNSEL : S.L. Gunasekera with Priyantha Jayawardane for Plaintiff-Appellant

K. Kanag-Iswaran, PC, with Dinal Phillips, Ranil Premathilake, Lakshman Jayakumar and Shivan Kanag-Iswaran for 1st Defendant-Respondent

ARGUED ON : 13.11.2008 and 27.11.2008

WRITTEN SUBMISSIONS
TENDERED ON : Plaintiff-Appellant - 22.01.2009
1st Defendant-Respondent - 22.06.2009

DECIDED ON : 19.11.2009

Dr. Shirani A. Bandaranayake, J.

This is an appeal from the judgment of the High Court of the Western Province, holden in Colombo and exercising civil jurisdiction dated 20.07.2005. By that judgment learned Judge of the High Court affirmed the order of the Assistant Director of Intellectual Property for and on behalf of the Director of Intellectual Property (hereinafter referred to as the 2nd respondent) and dismissed the appeal of the plaintiff-appellant (hereinafter referred to as the appellant). The appellant filed an application for leave to appeal before this Court on which leave to appeal was granted on the following questions.

1. Should the Director-General have taken into consideration the judgment of the District Court in D.C. Colombo Case No. 2765/Spl. and of the Court of Appeal in the appeal therefrom in determining whether the propounded mark should be registered or not?
2. Were the said judgments binding on the Director-General?
3. Were the said judgments final as between the parties on the question whether the use of the propounded mark was an act of unfair competition? If so, does the failure of the Director-General to consider the said judgments vitiate the order?
4. Was the Director-General entitled in law to independently arrive at the conclusion whether the propounded mark should be registered or not in terms of the applicable law without reference to the said judgments?

The first three (3) questions were raised by the learned Counsel for the appellant, whereas question No. 4 was raised by learned President's Counsel for the 1st defendant-respondent (hereinafter referred to as the 1st respondent).

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

The appellant is a Company of limited liability duly incorporated in Sri Lanka and is engaged in the business of blending, packeting, selling, exporting and distributing manufactured tea in and from Sri Lanka and is one of the leading Sri Lankan Tea exporters. The 1st respondent is a Company of limited liability duly incorporated in the United Kingdom, which is also engaged in the business of blending, packeting, selling and distributing manufactured Tea, which business is transacted for the 1st respondent by the 1st respondent's wholly owned subsidiary in Sri Lanka, viz., Lipton (Ceylon) Limited.

On 15.08.1985 the appellant had made an application to the 2nd respondent for the registration of its Trade Mark, SEL STASSEN – PURE CEYLON TEA – packeted in Sri Lanka. The said application was accepted by the 2nd respondent, which was numbered as 49819 and advertised in the Government Gazette No. 536 dated 09.12.1988 (A_1). Thereafter certain errors in the said advertisement were corrected by a notification in the Government Gazette No. 605 dated 06.04.1990 (A_1A). For several years prior to making the said application, the appellant had successfully exported, marketed, distributed and sold substantial quantities of 'Ceylon Tea' in packets and in boxes using the propounded Mark.

The 1st respondent had filed a Notice of Opposition to the said application on 06.06.1989 (A_2). The said opposition was in terms of Section 99(1)(f) and/or Section 100(1)(a) and /or Section 100(1)(e) and/or Section 142 of the now repealed Code of Intellectual Property Act. The opposition of the 1st respondent was based on the similarity between the propounded Trade Mark numbered as 49819 of the appellant and the 1st respondent's registered Trade Mark No. 41620 and the unregistered Trade Mark No. 43958 the application for the registration of which is pending.

The appellant filed its observations on the 1st respondent's opposition on 15.01.1991 (A_4).

In the meantime the 1st respondent had instituted action in the District Court of Colombo on 24.07.1987 seeking *inter alia*, injunctive relief restraining the appellant from using the

propounded Trade Mark or any colourable imitation of the 1st respondent's registered Trade Mark No. 41620 and of its unregistered Trade Mark No. 43958 (A_5). On 20.01.1988, the appellant filed Answer praying *inter alia* for the dismissal of the said action (A_6). After the trial, learned District Judge delivered the judgment on 31.03.1992, dismissing the 1st respondent's action (A_7).

The 1st respondent filed an application by way of an appeal to the Court of Appeal and by its judgment dated 08.10.1996, the Court of Appeal had dismissed the said appeal (A8).
The appellant during the pendency of the aforementioned matters, filed an affidavit of its Managing Director dated 29.09.1994 and a further affidavit on 10.03.1997 before the 2nd respondent. Along with these two affidavits the appellant had filed copies of the aforementioned judgments of the District Court (A_7) and the Court of Appeal (A_8). Accordingly the said judgments of the District Court and the Court of Appeal were before the 2nd respondent prior to the conclusion of the inquiry into the appellant's application for the registration of its Trade Mark. The 1st respondent had also filed an affidavit of one Harshana Jayanetti, a Director of Lipton Ceylon Limited (A_{11}).

The 2nd respondent had made order thereafter on 12.11.2001, upholding the objections of the 1st respondent to the registration of the propounded Trade Mark and refusing the appellant's aforesaid application (A_{12}).

Having been aggrieved by the said order of the 2nd respondent, the appellant filed an appeal against the said order in terms of Section 182 of the Code of Intellectual Property Act to the High Court of the Western Province holden in Colombo.

Learned Judge of the High Court delivered his order on 20.07.2005 (A_{21}) refusing to grant relief to the appellant and affirming the order of the 2nd respondent (A_{12}). Thereafter the appellant had come before the Supreme Court by way of Leave to Appeal.

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.

On a careful consideration of the four (4) questions on which leave to appeal had been granted by this Court and the submissions made by both learned Counsel in Court at the hearing it is apparent that the question that has to be considered by this Court would be whether the 2nd respondent should have considered the judgments of the District Court and the Court of Appeal in determining whether the propounded Mark should be registered or not. It is also to be examined as to whether the decisions of the District Court and the Court of Appeal were binding on the 2nd respondent and whether he could independently arrive at the conclusion as to whether the propounded Mark should be registered or not in terms of the applicable law without reference to the aforesaid two judgments.

Learned President's Counsel for the 1st respondent contended that when a Mark is propounded by an applicant for registration, the Director-General is mandated to consider whether the Mark is inadmissible on objective grounds and/or by reason of third party rights. He further contended that, in arriving at such a decision, the Director-General is guided purely by the provisions of the law and there is no necessity in determining the question *inter partes* as a Court would do in an action before Court. It was further submitted that the Director-General after hearing, would determine the issue on evidence placed before him and for that purpose he is guided by the relevant provisions of the Code and is free to follow judgments, whether local or foreign which would assist him in carrying out his statutory duties. The contention accordingly was that, the Director-General is not bound by the decision of a Court in the manner an inferior Court is bound by the decision of a Superior Court under the doctrine of *stare decisis* nor will he be estopped by reason of the doctrine of *res judicata*. The submission therefore was that the Director-General is an independent statutory authority and although an appellate Court is subsequently authorized on appeal to review this decision, it would not change the role he was mandated to perform under the Code of Intellectual Property Act.

In substantiating his contention, learned President's Counsel for the 1st respondent, in his written submissions, referring to the statutory obligation of the 2nd respondent had clearly stated that,

> ". . . in the performance of the statutorily mandated role of the Registrar in applying the provisions of the Code with regard to

> the admissibility of Marks as tested against the objective grounds and third party rights, the Registrar **was free to apply accepted principles of interpretation** evidenced by case law, both local and foreign, and **was free to choose the decision** which the Registrar in her understanding of the law thought best . . . **to determine the issues of fact and law** involved in a particular case and on a case by case basis."

It was also stated by the learned President's Counsel for the 1st respondent that,

> ". . . *stare decisis* has no application to the Registrar as she is not an inferior court and the Registrar was free to ignore any decision which she thought was **palpably erroneous**" (emphasis added).

Accordingly the contention of the learned President's Counsel for the 1st respondent was that, irrespective of the fact that there were decisions taken by the District Court and the Court of Appeal on the same issue, which was before the 2nd respondent, the said Assistant Director was correct in ignoring the said decisions as '**in her view** the decisions of the District Court and the Court of Appeal were **palpably erroneous'**. Further, it also appears that the reason for ignoring the decisions of the District Court and the Court of Appeal had been due to the fact that the Assistant Director was of the view that those decisions were **palpably erroneous**.

As referred to at the outset, after the appellant had made its initial application to the 2nd respondent for the registration of its Trade Mark 'SEL STASSEN – PURE CEYLON TEA packed in Sri Lanka', the 1st respondent had filed a Notice of Opposition and had instituted action in the District Court of Colombo in July 1987, seeking *inter alia*, injunctive relief restraining the appellant from using the propounded Mark or any colourable imitation of the 1st respondent's registered Trade Mark No. 41620 and of its unregistered Trade Mark No. 43958 (A_5).

In the plaint filed by the 1st respondent in the District Court he had stated that the packet or carton used by the appellant for the purpose of exporting tea to the Middle-East closely resembled his registered Trade Mark, calculatedly used to deceive or cause confusion and likely to mislead the purchasing public and the trade and thereby the appellant was infringing the 1st respondent's Trade Mark (paragraphs 16, 17, 18 of the plaint filed in the District Court of Colombo by the 1st respondent).

On an examination of the plaint filed in the District Court, it is evident that the action before the District Court was to secure declaratory and injunctive relief and the application before the 2nd respondent was to secure the registration of the appellant's propounded Mark No. 49819. However, in both matters the issue was whether the appellant's Trade Mark No. 49819 resembles the 1st respondent's registration Trade Mark No. 41620 and its unregistered Trade Mark No. 43958 and therefore whether the appellant was entitled to obtain the registration.

Considering the documents filed and the submissions made before the District Court, learned District Judge had stated in his judgment that the question that he had to decide was as to whether it is likely that an ordinary person looking for a packet of tea of the 1st respondent in a market shelf would be misled in buying a packet of tea of the appellant. There had been a long and protracted trial before the District Court, where witnesses had given evidence orally and were cross-examined.

After considering applicable provisions in the Code of Intellectual Property Act and the decided cases, the learned District Judge had determined that there was no likelihood of the public being misled by the use of the appellant's Trade Mark No. 49819. When the matter was taken up before the Court of Appeal, on an appeal instituted by the 1st respondent, it was contended on behalf of the 1st respondent that the learned District Judge had erred in law in determining that there was no infringement of the appellant's Trade Mark. Having considered the questions at issue at length learned Judges of the Court of Appeal had affirmed the judgment of the District Court and dismissed the appeal with costs. In its judgment, the Court of Appeal had held, *inter alia*, that there is no striking similarity between the shield devices in the respective Marks and the overall impression of the

appellant's product could not confuse the ordinary purchaser or of user or a likelihood of confusion. As submitted by both learned Counsel for the appellant and the 1st respondent there was no appeal from the judgment of the Court of Appeal to the Supreme Court. It is thus apparent that the 1st respondent had accepted the decision of the District Court, which was affirmed by the Court of Appeal, and thereby the judgment of the Court of Appeal became the final decision on the issue regarding the registration of appellant's Trade Mark No. 49819.

Learned Judge of the High Court had considered the judgments of the District Court and the Court of Appeal on the basis of *res judicata* and the doctrine of judicial precedent and had come to the conclusion that as the 2nd respondent was not a party to the dispute before the District Court and the Court of Appeal, the appellant cannot raise *res judicata* against the 2nd respondent. With regard to the applicability of the doctrine of judicial precedent, learned Judge of the High Court had stated that the 2nd respondent was bound and obliged to follow the judgments of the Supreme Court with regard to the determination of the issue before him in preference to the judgments of the Court of Appeal on the same matter.'

Accordingly, learned Judge of the High Court had held that,

> ". . . judicial precedent binds an inferior court or tribunal or any other person, where as *res judicata* binds only the parties to the case with regard to the law that is applicable in relation to a particular issue. In the circumstances, it would be seen that the Director-General of Intellectual Property, was bound to follow the judgments of the Supreme Court with regard to the determination of the issues before him in preference to the judgments of the Court of Appeal, on the same matter."

It is therefore quite clear that the learned Judge of the High Court had taken the position that, since the 2nd respondent was not a party to the matter before the District Court and the Court of Appeal, that the doctrine of *res judicata* would not be applicable and that the 2nd respondent was free to follow the decisions of the Supreme Court.

It would also be pertinent to refer to the contention of the learned President's Counsel for the 1st respondent at this juncture since he too had supported the view taken by the High Court and had contended that r*es judicata* is applicable and would be raised only in legal proceedings in a Court of law, as it is based upon the maxim *interest rei publicae sit finis litium* and the proceedings before the 2nd respondent under the Code of Intellectual Property Act cannot be treated as litigation.

Since all the said arguments were based on the doctrine of *res judicata* and thereby the applicability of the decision in the District Court and the Court of Appeal, let me now turn to consider the said doctrine of *res judicata* and its applicability to this appeal.

The doctrine of *res judicata*, as commonly known, means that the final judgment of a competent Court may not be disputed by the parties or their successors or any third parties in any subsequent legal proceeding (R.W.M. Dias, Jurisprudence, 5th edition, pg. 126).

The doctrine of *res judicata* dates back to the decision taken in 1776, where it was considered in the **Duchess of Kingston's** case ((1776) 2 Smith L.C. 13th edition, 644). The doctrine was later discussed in several other decisions and the rule was clearly stated in **Hoystead V Commissioner of Taxation** ([1926] A.C. 155), by Lord Shaw, with reference to the statement made by Wigram V-C in **Henderson V Henderson** ((1843) 3 Hare, 114), which was in the following terms:

> "I believe I state the rule of the Court correctly when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident, omitted part of their case. **The plea of *res***

> ***judicata applies*, . . . not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time**" (emphasis added).

Considering the views expressed on the doctrine of *res judicata*, it is apparent that where a final judicial decision has been pronounced by a Court which had jurisdiction over the issue before it, any party to such litigation as against the other party would be estopped in any subsequent litigation from disputing such decision on the merits whether it be used as the foundation of an action or as a bar to any claim (**Carl Zeiss** (No. 2) 1967 (1) A.C. 853, The Doctrine of *Res Judicata*, supra pg. 4). The purpose of the doctrine is thus clear that it enables to dispose finally and conclusively of the matters in controversy (**Badar Bee V Habib Mericen Noordin** [1909] A.C. 615, **R V Middlesex Justices, ex. P. Bond** [1933] 2 K.B. 1) and **other than on appeal** that particular subject matter cannot be re-litigated between the same parties.

The doctrine therefore has found justification in two fundamental principles. The first principle, which is public in nature, is based on the maxim *interest reipublicae ut sit finis litium* (in the interest of the state that there be an end to litigation) and secondly on the footing of a maxim, private in nature, namely, *nemo debet bis vexari pro una et eadem causa* (that no person should be proceeded against twice for the same cause).

Accordingly the theory pronounced on the basis of the doctrine of *res judicata* is that if an action is being brought and the merits of the matter had been decided by a Court with a final judgment being delivered, such a question cannot be canvassed by the same parties in another action.

The doctrine of *res judicata*, had been accepted and applied in Sri Lanka, as far back as in 1847 by Stark, J. in **Mendis V Himmappooa** (Ramanathan Reports (1843-1855) 88) well before the Civil Procedure Code came into existence. Since then the doctrine had been

considered in many judgments (**Cassim V Maricar** (1909) 12 N.L.R. 184), **Palaniappa Chetty V Gomes** (4 Balasingham Reports, 21), **Herath V The Attorney-General** (1958) 60 N.L.R. 193), which was later amplified and statutorily recognized in terms of the Civil Procedure Code.

The constituent elements of *res judicata* estoppel is clearly described by Spencer Bower (The Doctrine of *Res Judicata*, supra, pg. 10), where he has stated thus:

> "A party setting up *res judicata* by way of estoppel as a bar to his opponent's claim, or as the foundation of his own, must establish the constituent elements, namely:
>
> i. the decision was judicial in the relevant sense;
> ii. it was in fact pronounced;
> iii. the tribunal had jurisdiction over the parties and the subject matter;
> iv. the decision was –
> a) final and
> b) on the merits;
> v. it determined the same question as that raised in the later litigation; and
> vi. **the parties to the later litigation were either parties to the earlier litigation or their privies** or the earlier decision was in rem" (emphasis added).

This would clearly emphasis the fact that the purpose of the doctrine of *res judicata* is to confer the finality of a final determination of a dispute and considering the facts and circumstances of the present appeal it is evident that the judgment of the Court of Appeal dated 08.10.1996 had decided the matter in question that there is **no such confusing similarity finally between the parties**.

The description given by Spencer Bower (Supra) regarding the constituent elements of *res judicata* estoppel also clearly indicates that if the parties to later litigation were either

parties to the earlier litigation or their privies, the question as to whether the earlier decision was *in rem* would not arise.

The order of the Assistant Director of Intellectual Property for and on behalf of the 2nd respondent was given on 12.11.2001 refusing the registration of the propounded Trade Mark of the appellant. At the time the said order was given, it was not disputed that both the District Court and the Court of Appeal had delivered their judgments. In such circumstances considering the doctrine of *res judicata* it would not be possible for the 2nd respondent to ignore the fact that there had been two decisions that had considered substantially the same point which had come before the 2nd respondent by way of an application for the purpose of registration.

Learned Counsel for the appellant cited several decisions in support of his contention that the judgments of the District Court and the Court of Appeal, were binding on the 2nd respondent.

In **K.R. Chinnakrishna Setty and others V Sri Ambal and Co., Madras** (A.I.R. 1973 Mysore 74), the question arose as to whether a decision given in an earlier proceeding between the same parties with regard to the registration of a Trade Mark, operates *as res judicata* in a proceeding in terms of Section 105 of the Trade and Merchandise Marks Act, 1958. Considering the fact that earlier the parties had taken up the matter before the Supreme Court in appeal, the Court had decided that,

> ". . . . if a decision is given in an earlier proceeding between the same parties there is little reason for holding that the said decision would not operate as *res judicata* in a proceeding . . . in which the same question arises for consideration."

A similar view was taken in, **In the matter of an Application by the Massachusetts Saw Works to register a Trade Mark** ((1918) 35 R.P.C. 137).

On a consideration of the facts of this appeal it is apparent that the former application of the parties had been heard by the District Court and the Court of appeal which are admittedly competent Courts to hear and determine an application regarding an application of a Trade Mark. In **Raj Lakshmi Dasi V Banamali Sen** (A.I.R. 1953 S.C. 33), the Supreme Court of India, having considered the conditions regarding the competency of a former Court to try the subsequent suit had clearly stated that,

> "When a plea of *res judicata* is founded on general principles of law, all that is necessary to establish is that **the Court that heard and decided the former case was a Court of competent jurisdiction**" (emphasis added).

Considering the facts and circumstances of this application it is extremely clear that the earlier decision of the Court of Appeal, which affirmed the decision of the District Court would act as a bar against the respondents in claiming that the 2nd respondent had the authority to hear and determine the matter that had been already decided by a higher Court.

The applicability of the provisions of the Indian Code of Civil Procedure dealing with *res judicata* in matters coming under the Trade Marks Act was also considered by the Indian Supreme Court in **Chinnakrishna Setty and others V Sri Ambal and Co.,** (supra). Referring to the Supreme Court decision in **Raj Lakshmi Dasi V Banamali Sen** (supra) it was stated in **Chinnakrishna Setty and others** (supra) that,

> ". . . if a decision is given in an earlier proceeding between the same parties there is little reason for holding that the said decision would not operate as *res judicata* in a proceeding . . . in which the same question arises for consideration . . . . If the case can be brought within the scope of the general rule of *res judicata*, the decision in the earlier proceeding can still be used as a bar in a subsequent proceeding notwithstanding the fact that the earlier decision does not satisfy all the requirements of Section 11 of the Civil Procedure Code."

There is another aspect that strengthens the contention put forward by the learned Counsel for the appellant. It is not a disputed fact that the doctrine of *stare decisis* (keep to what has been decided previously) is a maxim of practically universal application (Rupert Cross, Precedent in English Law, 3rd edition pg. 4). Considering the present day developments, Professor Cross was of the view that the doctrine of precedent is to some extent in a state of flux, but there are three important features which still loom large (Rupert Cross, supra). They are as follows:

1. the respect paid to a single decision of a Superior Court,

2. the fact that a decision of such a Court is a persuasive precedent even so far as Courts above that from which it emanates are concerned, and

3. the fact that a single decision is always binding precedent as regards Courts below that from which it emanates.

Learned President's Counsel for the 1st respondent contended that the decision of the Court of Appeal was not binding on the 2nd respondent under the doctrine of judicial precedent as he is not an 'inferior Court'. Further it was submitted that he was 'free to follow any one or more of the applicable and relevant judicial decisions in his decision making process and an appellate Court called upon to review his decision will only address its mind to the question whether he has properly advised himself in the background of the applicable law'.

It is however to be borne in mind that, there is a vital factor which the 2nd respondent had not taken into consideration at the time he made the decision in refusing the registration of the propounded Mark of the appellant, viz., that previously the District Court as well as the Court of Appeal had considered the question of the alleged similarity between the Trade Marks of the appellant and the 1st respondent and both Courts had been of the view that there had been no such similarity of the Trade Marks in question. As stated earlier, it is common ground that the dispute had arisen between the appellant and the 1st respondent. Considering the decisions of the District Court, which was affirmed by the Court of Appeal refusing the application made by the 1st respondent, what the 2nd respondent by his order

dated 12.11.2001 had done was to reverse the decisions of the District Court and the Court of Appeal. Would it be possible for an authority such as the 2nd respondent to reverse a decision given by a District Court or the Court of Appeal? I do not think that there is even a necessity to explain why the 2nd respondent, which is only a statutory body, has no authority to reverse such decisions. Learned President's counsel contended that the doctrine of *stare decisis* has no application to the Registrar as she is not an inferior Court. Does this mean that irrespective of the fact that a decision has been already given by two Courts, the 2nd respondent could ignore all what had been decided by two Courts including the Court of Appeal due to the mere fact that he is not functioning as a judicial officer? It is surprising to note that although the decisions of Superior Courts are binding upon all Courts, that the 2nd respondent had thought and decided that he could simply ignore the whole concept of judicial precedent. Referring to this position learned Counsel for the appellant had rightly referred to the dictum of H.N.G. Fernando, C.J. in **Municipal Council of Colombo V Munasinghe** ((1968) 71N.L.R. 223), where it had been stated that,

> "I hold 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."

Therefore it is clear that the 2nd respondent could not have ignored the two decisions given in favour of the appellant by the District Court and the Court of Appeal.

A careful study of the doctrine of *res judicata* clearly indicates that, if the parties are allowed to re-agitate a question, which has been settled before a higher Court finally, again before a quasi judicial tribunal to make order affecting the rights of parties, then the purpose of the doctrine of *res judicata* would become meaningless and there would never be any finality in any dispute. Considering such practical difficulties, P. Narayanan (Law of Trade Marks and Passing off, 5th Edition, 2000, pg. 709) had stated that,

> "The words 'court' and 'suit' have been given a wide interpretation and the application of the rule of *res judicata*

has been extended to proceedings before tribunals other than courts."

Accordingly judicial precedent, which is part of the law of this country, is to be applied not only to Courts, but also to other Tribunals and authorities, which have the power to make orders affecting the rights of other parties. A decision of the 2nd respondent would be binding on parties only until a decision is taken by a Court of law and the doctrine of *res judicata*, which enables to ensure that there would be a finality in a final determination in a dispute before Court by prohibiting the re-agitation of such disputes would become meaningless and having no force, if the identical matter, which had earlier been considered by the District Court and the Court of Appeal is to be reviewed once again by the Director-General of Intellectual Property.

There is one other matter that I wish to examine before I part with this judgment.
Learned Judge of the High Court having considered the fact that, prior to the consideration of the registration of the Trade Mark in question by the 2nd respondent, the question of the alleged similarity between the Trade Marks of the appellant and the 1st respondent had been examined by the District Court and the Court of Appeal, had gone on the basis that since the 2nd respondent was not a party to the applications before the District Court and the Court of Appeal, that he is not bound by these decisions.

The plea of *res judicata* by way of estoppel was raised not by any other person, but by the appellant. In such a situation, as stated by Spencer Bower (supra), which was referred to earlier, the appellant would have to show that, the parties to the latter litigation were parties to the earlier litigation (supra). In the words of Lord Guest in **Carl-Zeiss ((No. 2)** (supra), referring to Spencer Bower (Res Judicata, Supra pg. 3), 'any party to such litigation as against any other party is estopped in any subsequent litigation from disputing or questioning such decision on the merits. In **New Brunswick Railway Co. V British and French Trust Corporation Ltd.** ([1939] A.C. 1), Maugham, L.C., referring to the applicability of *res judicata* estoppel had stated that,

> "The doctrine of estoppel is one founded on considerations of **justice and good sense**. If an issue has been distinctly raised and decided in an action, in which **both parties** are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them" (emphasis added).

It is common ground that the appellant and the 1st respondent had been disputing before the District Court, Court of Appeal and even **before the** 2nd respondent. In such circumstances, it would not be correct to say that the doctrine of *res judicata* is not applicable just because the 2nd respondent was not a party before the District Court and the Court of Appeal. It is to be borne in mind clearly that the dispute was between the appellant and the 1st respondent and the said dispute had been reviewed and decided in two actions, where both appellant and 1st respondent were parties to such action. A plea of *res judicata* estoppel was taken up by the appellant before the 2nd respondent and it was the duty of the 2nd respondent to have given due consideration to the applicability of the said doctrine. As stated in **Carl Zeiss** (supra) and in **The Sennar** ([1985] 2 All E.R. 104), the conditions for the application of the doctrine has been stated as being that,

a) the same question was decided in both proceedings;

b) the judicial decision said to create the estoppel was final; and

c) the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

It is abundantly clear that the facts of this appeal has clearly shown that all the aforementioned conditions have been fulfilled as the dispute between the appellant and the 1st respondent was fully decided before the Court of Appeal on the identical questions, which later came up before the 2nd respondent. Therefore the 2nd respondent was bound by the decision given by the District Court and the Court of Appeal and there was no possibility or a necessity for the 2nd respondent to have been a party before the District Court or the Court of Appeal.

For the reasons aforesaid, I answer the questions on which Leave to Appeal was granted as follows:

1. Yes. The Director-General should have taken into consideration the judgment of the District Court in D.C. Colombo Case No. 2765/Spl. and of the Court of Appeal in the appeal therefrom in determining whether the propounded Mark should be registered or not.

2. Yes. The said judgments were binding on the Director-General.

3. Yes. The said judgments were final as between the parties on the question whether the use of the propounded Mark was an act of unfair competition. The failure of the Director-General to consider the said judgments vitiates the order.

4. No. The Director-General was not entitled in law to independently arrive at the conclusion whether the propounded Mark should be registered or not in terms of the applicable law without reference to the said judgments.

Accordingly this appeal is allowed and the judgment of the High Court dated 20.07.2005 and the order made by the Assistant Director of Intellectual Property on behalf of the 2nd respondent dated 12.11.2001 (A_{12}) are set aside. The appellant is entitled to proceed with its application to register Trade Mark No. 49819. The 2nd respondent is directed to consider the appellant's application to register his Trade Mark No. 49819 in terms of the applicable law having in mind the plea of *res judicata* raised by the appellant on the basis of the judgments of the District Court dated 31.03.1992 and the Court of Appeal dated 08.10.1996.

On a consideration of all the circumstances of this appeal, 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. CHC (Appeal) No. 21/2006
S.C. (H.C.) L.A. No. 27/2006
H.C. Civil No. 75/99 (1)

People's Bank
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

PLAINTIFF-PETITIONER-APPELLANT

Vs.

Yashodha Holdings (Pvt.) Ltd.,
No. 455, Galle Road,
Colombo 03.

Presently at No. 142A, 2nd Floor,
S. de S. Jayasinghe Mawatha,
Nugegoda.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE : Shirani A. Bandaranayake, J.,
N. G. Amaratunga, J., &
Saleem Marsoof, J.

COUNSEL : S. A. Parathalingam, P. C. with Kushan de Alwis, Hiran Jayasuriya and Nishkan Parathalingam for Plaintiff-Petitioner-Appellant

Manohara de Silva, P.C., with Jasa Jayasekera and Nimal Hippola for Defendant-Respondent-Respondent

ARGUED ON : 25.09.2008

WRITTEN SUBMISSIONS TENDERED ON :

Plaintiff-Petitioner-Appellant	:	10.12.2008
Defendant-Respondent-Respondent	:	31.03.2009

DECIDED ON : 25.06.2009

MARSOOF, J.

I have had the advantage of perusing the judgment prepared by my sister Bandaranayake, J., in draft, and I agree that for the reasons to be set out hereinafter, the appeal should be allowed, the order of the Commercial High Court dated 16th February 2006 set aside, and the said High Court directed to make order for the execution of the decree pending appeal.

One of the questions that was argued with great vigor before the Commercial High Court as well as before this Court was whether at the relevant time, Section 35(1) of the English Companies Act of 1989 applied in Sri Lanka. This appeal arises from an action instituted by the Plaintiff-Petitioner-Appellant (hereinafter referred to as the "Appellant") in the Commercial High Court in July 1999 to recover from the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") money advanced as a short term loan with interest due thereon to finance the import of 14,907 metric tons of cement worth US $ 1,007,392.70 presumably for trading. It appears from the Memorandum of Association of the Respondent (X2) that the main object of the Company was to carry on the business of a holding company. The Memorandum disclosed only three primary objects, none of which included the business of trading in cement, and there were no "other" objects as contemplated by Section 4(3) of the Companies Act No. 17 of 1982, which admittedly applies to the transaction that constitutes the subject matter of this appeal. It is therefore clear that the loan had been granted for an object which was *ultra vires* the Respondent.

It was in order to overcome the defense of *ultra vires* raised by the Respondent that the learned Counsel for the Appellant has relied on Section 3 of the Civil Law Ordinance to invoke the benefit of Section 35 (1) of the English Companies Act of 1989 which provides that-

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The above-quoted provision was intended to mitigate the harshness of the doctrine of *ultra vires,* which had originated from the English law but had found its way to almost all jurisdictions in the world. The doctrine was originally conceived of as an important principle of stakeholder protection, but it caused so much unhappiness to those who imprudently transacted business with companies acting beyond their objects that it later had few advocates, and in most countries legislation has been enacted to bring about its demise. However, as Prof. Kent Greenfield observes in his enlightening article entitled 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality' published in (2001) 87 Virginia Law Review 1279 at page 1284, "notwithstanding the many strong reasons for the downfall of the *ultra vires* doctrine, the doctrine did not erode to nothingness." It is noteworthy that Section 35(2) of the English Act enables a member of a company to bring proceedings to restrain any act of the company which would, but for subsection 35 (1) of the Act, be *ultra vires,* but the effect of Section 35 (1) is that this would not affect the rights of any person who has transacted business with a company.

There are similar provisions in the current Sri Lanka Companies Act No. 7 of 2007 which has taken away the requirement that a company should have a memorandum of association, but permits an objects clause to be included in the articles of association of a company. Section 17 of the Sri Lankan Act provides that-

"(1) Where the articles of a company sets-out the objects of the company, there shall be deemed to be a restriction placed by the articles in carrying on any business or activity that is not within those objects, unless the articles expressly provide otherwise.

(2) Where the articles of a company provide for any restriction on the business or activities in which the company may engage—

(a) the capacity and powers of the company shall not be affected by such restriction; and

(b) no act of the company, no contract or other obligation entered into by the company and no transfer of property by or to the company, shall be invalid by reason only of the fact that it was done in contravention of such restriction."

The effect of Section 35 (1) of the English Act of 1989 and Section 17 (2) of the Sri Lankan Act of 2007 is to confine the doctrine of *ultra vires* to internal management but saving the actions and contracts of companies from invalidity. Learned Counsel for the Respondent has strenuously contended that while Section 17(2) of the Companies Act of 2007 has no application to this case as the law that has to be applied is the law that was in force at the time of the institution of the action in July 1999, the provisions of the English Companies Act of 1989 were never part of our law.

Learned President's Counsel for the Appellant has argued, with great force, that even if the salutary provisions of Section 17(2) of the Sri Lankan Companies Act of 2007 could not have applied in favor of his client, the People's Bank, Section 35(1) of the English Companies Act of 1989 has become part of the law of Sri Lanka by virtue of Section 3 of the Civil Law Ordinance No. 5 of 1852 (Cap. 79, Legislative Enactments of Ceylon, 1956). This section provides that-

"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as 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 Sri Lanka or hereafter to be enacted*."(*emphasis added*)

He has submitted that the said provision could have entered into our law through two gateways, namely, "corporations" and "banks and banking" both found in the above quoted section. For this proposition, he has relied very heavily on the decision of the Court of Appeal in *Wright and Three Others v People's Bank* [1985] 2 Sri LR 292 and three decisions of the Supreme Court, namely *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, and *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22. In all but the last of these cases, principles of English law including statutory law were held to be applicable in Sri Lanka having being incorporated by reference as provided in the Civil Law Ordinance, and in *Amarasekere v Mitsui and Company Ltd. and Others* too, as we shall see later, there is a reference to the Civil Law Ordinance.

The last of these cases, *Wright and Three Others v People's Bank,* had nothing to do with company law, and the question that arose was whether certain brokers had the authority to pledge the "Ceylon produce" which belonged to their clients for the purpose of obtaining the loan, the proceeds of which were sought to be recovered by the Bank. In answering the question in the affirmative, the learned District Judge had relied on the provisions of Section 2(1) of the English Factors Act of 1889, which provided that a mercantile agent had authority to pledge goods of the clients who were the owners of the goods. The Court of Appeal had no difficulty in affirming the decision of the learned District Judge since in terms of Section 3 of the Civil Law Ordinance the law applicable in Sri Lanka with respect to any questions or issues which may arise with respect to the law of principals and agents would be "the same as 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." It is noteworthy that G.P.S de Silva, J (as he then was) noted at page 300 of his judgment that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." It is also instructive to note that responding to a submission that the only authority the brokers had was the authority conferred on them by the licence issued under the Auctioneers and Brokers Ordinance (Cap. 109, Legislative Enactments of Ceylon, 1956), G.P.S de Silva J observed at page 303 that-

> "…..on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute…"

Learned President's Counsel for the Appellant also relied on *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, for the proposition that Section 3 of the Civil Law Ordinance had the effect of making Section 35(1) of the English Companies Act of 1989 applicable to the determination of the appeal at hand. In this case, it was held by the Supreme Court that despite the existence of the Partnership Ordinance No. 21 of 1866, the provisions of the English Partnership Act of 1890 regulate the rights and liabilities of partners in this country by virtue of Section 3 of the Civil Law Ordinance. I cannot see how this decision can assist the Appellant as the Partnership Ordinance consists of only seven sections and is by no means an exhaustive legislation regulating the rights and duties of partners which could have the effect of precluding the application of Section 3 of the Civil Law Ordinance. By contrast, the Companies Act No. 17 of 1982, which was the applicable company legislation at the time the action from which this appeal arises was instituted, is described in its preamble as "an act to amend and consolidate the law relating to companies" and contains elaborate provisions for the registration and administration of companies in Sri Lanka and also deals specifically with the rights of shareholders.

The right of a shareholder to file a derivative action was considered by this Court in *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22, in the context of an appeal against the order of the Court of Appeal (reported in [1992] 1 Sri LR 29) granting leave to appeal against the interim-injunction issued by the District Court of Colombo at the instance of a shareholder who did not have the requisite voting strength to initiate proceedings in terms of 210 to 211 of the Companies Act of 1982. All that the Supreme Court had to decide was whether the Court of Appeal was right in thinking that the shareholder had a *prima facie* case and reasonable prospect of success to obtain the interim-injunction, and at page 29 of the judgment Amerasinghe J. referred to

Section 3 of the Civil Law Ordinance only because the Court of Appeal had invoked it to bring in the English law which had been developed in *Wallersteiner v Moir (No.2)* so as to permit a derivative action. The Supreme Court, however, was careful not to call in aid Section 3 of the Civil Law Ordinance, and treating the question as one of standing, reasoned that if in the context of the allegation that company funds were being siphoned off and sent abroad a shareholder is unable to convince the company to take effective action to protect its own interests, the shareholder has every right as a representative of the company to obtain an injunction. At page 36 of the Supreme Court judgment, Amarasinghe J explained the dilemma the original court was faced with in the following words:

> "I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.*"

It is universally acknowledged that the decision in *Wallersteiner v Moir (No.2)* was an exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461. The essence of the rule is that, where the company suffers harm, the company itself is the true and proper claimant, to the exclusion of shareholders. The rule and the exceptions have been developed in the context of English and local statutory provisions which are substantially similar, and if, notwithstanding the comprehensive nature of the Companies Act of 1982, English decisions have been considered by our courts as did Amarasinghe J in the Colombo Hilton Case, it is clearly because of the persuasive value of those decisions, and not by reason of anything contained in Section 3 of the Civil Law Ordinance. However, in seeking enlightenment from foreign decisions, it is necessary as was stressed by Amarasinghe J in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at 351, to "proceed with caution" as the constitutional or statutory provisions on which such decisions were made may be substantially different from our own. It is also remarkable that a twentieth century parallel to the nineteenth century rule of standing enunciated in *Foss v Harbottle* is the decision in *Durayappah v Fernando and Others* 69 NLR 265, in which the Privy Council held that when a Municipal Council is dissolved, the Mayor of the Council had no right to complain independently of the Council. Rules of standing such as this have been relaxed by the courts from time to time, and in almost all jurisdictions, and in doing so, the courts have not lost sight of the particular statute in the context of which the question of standing has arisen.

There is no doubt that in terms of Section 3 of the Civil Law Ordinance, Acts of the Parliament of England as well of principles of English common law could have been legitimately applied in Sri Lanka had there been no elaborate legislative provision such as was found in the Companies Act of 1982 dealing with all aspects of company law. However, it is noteworthy that towards the end of the nineteenth century, in the absence of any comprehensive company legislation in this county, several ordinances fashioned on the then prevailing English legislation on joint stock companies, such as the Joint Stock Companies Ordinance No. 4 of 1861, No. 6 of 1888, No. 3 of 1883 and No. 2 of 1897 were enacted, but they did not deal with all aspects of company law. It was in this scenario that De Sampayo J observed in *The Ceylonese Union Co. v Vyramuttan* 19 NLR 250 at 252, that "….until some

comprehensive law relating to companies is passed locally, we must, when any question is not covered by any provision in our Ordinance, decide the same as far as possible by reference to the English law." This was how basic principles of English company law, including the rule in *Foss v Harbottle* [1843] 2 Hare 461 and the doctrine of *ultra vires* enunciated in the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* [1875] LR 7 HL 653*,* initially came to be introduced into our legal fabric.

The first comprehensive peace of legislation enacted in Sri Lanka with respect of companies was the Companies Ordinance No. 51 of 1938 (Cap. 145, Legislative Enactments of Ceylon, 1956). It is important to note that despite the absence in the aforesaid Joint Stock Companies Ordinances and the Companies Ordinance of 1938 of any provision expressly incorporating the doctrine of *ultra vires,* our courts have considered the concept as part of our law. In *Jupiter Cigarette & Tobacco Co. Ltd. v. Soysa* 72 NLR 12 (SC) 74 NLR 241 (PC), the Privy Council not only recognized the doctrine within the framework of the Companies Ordinance of 1938, but also applied the exception to it that was evolved in *Royal British Bank v Turquand* [1856] 6 E&B 327 (the well known 'Turquand rule'). The question for decision in the *Jupiter Cigarette* case was whether a mortgage bond purported to have been executed by a company was binding on the company notwithstanding that the number of directors who signed the bond happens to be less than the number required by the articles of the company. In answering the question in the affirmative, Lord Wilberforce, at page 245 of the judgement observed that-

> "In considering questions such as this, which are of common occurrence, particularly in relation to private companies, the Courts have evolved principles, basically of common sense, which, while respecting the separate corporate entity of the company concerned, enables it to, bind itself, as against third parties, in the absence of technicality or the formalities of internal procedure."

Even after the enactment of the Companies Act of 1982, our courts have in innumerable decisions applied the doctrine of *ultra vires*, which has been recognized as a fundamental principle of not only our company law but also of our administrative law. Thus, in *Patrick Lowe & Sons and Others v Commercial Bank of Ceylon* Ltd [2001] 1 Sri LR 280, at page 284, S.N. Silva CJ observed that-

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* and *Attorney General v The Great Eastern Railway*)**.**"

The fact that our courts have shown great reverence to decisions of English courts in the realm of company law does not necessarily mean that the entire body of English company law has been imported into our country. It is true that by Section 3 of the Civil Law Ordinance the entire body of English law relating to "corporations" was introduced into our legal system, but that was subject to the qualification contained in the said section that the law of England will not have application in any case if other provision is made by any local enactment. Thus, the comprehensive nature of the provisions of the Companies Act of 1982, and the absence therein of a '*casus omissus'* provision which enables the reception of principles of English law to deal with matters, if any, not specifically provided for in the Act, effectively prevented the application of English law except as persuasive authority for the

purpose of interpreting provisions which were identical or substantively similar to the provisions in force in England.

Another important factor that would militate against the application of any provision of English law seeking to modify the doctrine of *ultra vires* into our law in the absence of amending legislation, is that our Companies Act of 1982 is an exhaustive enactment which contains a provision that may be regarded as expressly embodying the doctrine of *ultra vires*. Section 4 of the Companies Act of 1982, distinguishes between primary and "other" objects, and provides in Section 4(1) that "the memorandum of every company shall, in stating the objects of the company, set out specifically, the primary objects of the company, that is to say, the objects which the subscribers or promoters intend that the company should carry out during the period of five years from the date of the commencement of business by the company." Section 4(2) provides for the incorporation in the memorandum of association, of "ancillary powers", and Section 4(3) enacts that-

> "(3) Nothing in the provisions of subsection (1) or subsection (2) shall be deemed or construed to preclude the memorandum from containing a separate statement of objects, not being primary objects, or of powers (whether general or special), in addition to those specifically set out under the provisions of subsections (1) and (2):
>
> Provided, however, that *no such object or power may be carried out or exercised by the company except with the prior sanction of a special resolution of the company*."(*emphasis added*)

It is clear from the above-quoted provision that a company is prohibited from entering into any transaction outside its primary objects and ancillary powers, even if it be for an "other" object within the meaning of Section 4(3) of the Act, unless it is sanctioned by a special resolution of company. It therefore goes without saying that any transaction which falls neither within the primary objects nor the "other" objects of a company, cannot be validly entered into by a company unless it is one that has been sanctioned as contemplated by Section 4(3) of the Act. Such a transaction is therefore *ultra vires* and not binding on the company. In view of these clear provisions of the local enactment, I am firmly of the opinion that Section 35 of the English Companies Act of 1989 could never have entered into the Sri Lankan legal fabric through the "corporations" gateway.

There remains the question whether the English law provision could have entered through the "banks and banking" gateway also found in Section 3 of the Civil Law Ordinance. For this argument, learned President's Counsel for the Appellant has relied heavily on the decision of the Supreme Court in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457. He has contended that in the said case, "a five judge bench of the Supreme Court consisting of Their Lordships H.N.G. Fernando CJ, Sirimanne J, Alles J, Weeramantry J and Wijayatilake J, unanimously held that *inter alia* that the English Law of Conversion under the common law of England applies to Sri Lanka through the operation of the Civil Law Ordinance."(*Vide* - paragraph 13.1 of the Written Submissions of the Appellant dated 17th November 2008). Without going into details, I am constrained to observe that while a closer examination of the separate judgments delivered in this case by the five judges reveals considerable differences of opinion in regard to the basis of applying principles of English law to the facts of that case, the decision is not very helpful to the determination of the present appeal for two reasons. Firstly, it is noteworthy that the Bills of Exchange Ordinance, unlike the Companies Act of 1982, contains a *casus omissus* provision in Section 98(2), which seeks to make the rules of the common law of England applicable in Sri Lanka "save insofar as they are

inconsistent with the express provisions of this Ordinance, or any other enactment". Secondly, even though one of the parties to this case is a Bank, the question that looms large in this case is one of *ultra vires*, and not any issue relating to banks and banking.

While for the above reasons, I am of the opinion that the learned Judge of the Commercial High Court cannot be faulted for entertaining serious doubts about the relevance of Section 35(2) of the English Companies Act of 1989 for deciding this case, this does not dispose of this appeal. This Court cannot show a Nelsonian eye to the fact that the Respondent will be unjustly enriched if the Appellant cannot recover the money advanced by it to the Respondent on a straightforward short term loan. If the transaction on the basis of which money was advanced to the Respondent is a nullity, then at least the money so advanced should be capable of being recovered. It is true that in *Sinclair v Brougham* [1914] AC 398, due to insistence of an imputed or fictional contract, the English House of Lords missed an opportunity of developing a general restitutionary remedy to redress unjust enrichment, but we cannot forget the ancient authority of *Moses v Macferlan* [1760] 2 Burr. 1055 in which Lord Mansfield observed at page 1012 that '' if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu"*) as the Roman law expresses it)." This reasoning has been followed in England (*Re Coltman; Coltman v. Coltman* [1881], 19 Ch.D. 64), Australia (*In re K.L. Tractors Ltd.,* ([1961], 106 C.L.R. 318) and Canada (*Breckenridge Speedway Ltd. et al. v. R.,* [1970] S.C.R. 175) to found an action for money had and received, and perhaps prompted Vicount Haldane to observe in *Dodwell & Co v John* 20 NLR 206 at page 211, that "under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund." Weeramantry J, in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, after making an exhaustive examination of all relevant authorities, set out his conclusions at page 544 of the judgment as follows:-

> "For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment. I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts."

There is however, one limitation that arises in the application of the general principle of unjust enrichment to the facts of this case, namely that what the Appellant has claimed from the Respondent in the action filed by it is the full amount due on the loan transaction, rather than a mere refund of the amount advanced. The restitutionary remedy cannot be availed of to obtain such broad relief.

In the circumstances, it is necessary to look at the other question on which leave to appeal has been granted by this Court, namely, whether the Respondent is estopped from asserting that "the borrowing and / or receiving the said loan facility from the Appellant is *ultra vires* of its Memorandum and Articles of Association". It is in evidence that the Respondent

applied for the loan in question from the Appellant Bank by a loan application dated 9th November 1995 (X18) which contained several stipulations including a promise to repay the amount of the loan with interest thereon within ninety days. In the context of the issue of estoppel that arises in this case, it is necessary to note paragraphs 5, 6 and 7 of the loan application which provided as follows:-

> "5. All representations and statements made to you us, our Agents, employees or Officers whether in writing or otherwise on our behalf or purporting to be on our behalf are hereby warranted true and correct and intended to be acted upon and shall form the basis of the contract or obligation intended to result from or arise upon your acting upon the request hereby made for an advance.
>
> 6. As Borrowers we shall jointly and severally be liable to repay the advance and interest due to you.
>
> 7. We hereby irrevocably authorize People's Bank without any notice to us to debit our current account maintained with People's Bank to settle People's Bank with all monies due from us by way of Capital interest and other charges in respect of this transaction, and authorize to set off any sum or sums of money due to us from People's Bank for the recovery of the sum or sums of money advance/to be advanced."

It is evident from the testimony of W.D. Dayananda, Senior Manager of the Appellant Bank that the said bank had previously granted several loan facilities to one Yasasiri Kasturiarachchi, and that the Respondent company was later floated by him and that the Bank had acted in good faith in granting the said loan to the newly formed company to enable it to clear a quantity of cement which had been imported from China. It is also evident from the said loan application and the receipt dated 9th November 1995 (X19) issued acknowledging the acceptance of the money advanced, both signed by the said Yasasiri Kasturiarachchi and one other Director of the Respondent company, that the loan facility was granted on the very day the application was made, and that in doing so, the Appellant had acted on the basis of the representation made by the Respondent that it was competent to enter into the loan transaction in question and as borrower it was liable to repay the loan and interest due thereon.

Spencer Bower, in *The Law relating to Estoppel by Representation*, (4th Edition), paragraph I.2.2, explains the concept of estoppel by representation of fact in the following terms:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment*, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (*emphasis added*)

It is clear from the evidence in this case that the Respondent has represented to the Appellant that it was competent to enter into the loan transaction in question and it is bound in law to honor its promise to repay the amount of the loan with interest, and that the Appellant had

been lead to believe that the said representation was true and had acted thereon to its prejudice. The courts in England have shown some restraint in using the concept of estoppel to hold companies liable on *ultra vires* transactions, and in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 1 All E.R. 630, the English Court of Appeal specifically held that "no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself." However, the concept of estoppel has successfully been deployed in the United States from the nineteenth century to overcome the plea of *ultra vires*, as it appears from decisions such as *Whitney Arms Co. v Barlow* 63 New York 62 [1875]. In that case, a New York Court noted at page 70 that "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract." The principle enunciated in this decision was approved by the United States Supreme Court in *Eastern Building & Loan Association of Syracuse v Williamson* 189 US 122 [1903]. As Seymour D. Thompson observed in 'The Doctrine of Ultra Vires in Relation to Private Corporations', 28 American Law Rev. 376, 387 (1894) -

> "The judicial and professional conscience . . . could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

I see no reason why the concept of estoppel cannot be employed in Sri Lanka to defeat such a plea in appropriate circumstances. I am therefore of the opinion that the Respondent is estopped from taking up the defence of *ultra vires* in the circumstances of this case.

Accordingly, for the reasons stated above, I agree with the conclusion reached by Bandaranayake, J., in her judgment that the appeal should be allowed, the order of the High Court of Colombo (Commercial) dated 16th February 2006 should be set aside and the said High Court should be directed to make order for the execution of the decree pending appeal. I make no 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

S.C. CHC (Appeal) No. 22/2006
S.C. (H.C.) L.A. No. 28/2006
H.C. Civil No. 77/99 (1)

People's Bank
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

PLAINTIFF-PETITIONER-APPELLANT

Vs.

Yashodha Holdings (Pvt.) Ltd.,
No. 455, Galle Road,
Colombo 03.

Presently at No. 142A, 2nd Floor,
S. de S. Jayasinghe Mawatha,
Nugegoda.

DEFENDANT-RESPONDENT-RESPONDENT

BEFORE : Shirani A. Bandaranayake, J.,
N. G. Amaratunga, J., &
Saleem Marsoof, J.

COUNSEL : S. A. Parathalingam, P. C. with Kushan de Alwis, Hiran Jayasuriya and Nishkan Parathalingam for Plaintiff-Petitioner-Appellant

Manohara de Silva, P.C., with Jasa Jayasekera and Nimal Hippola for Defendant-Respondent-Respondent

ARGUED ON : 25.09.2008

WRITTEN SUBMISSIONS TENDERED ON :

Plaintiff-Petitioner-Appellant	:	10.12.2008
Defendant-Respondent-Respondent	:	31.03.2009

DECIDED ON : 25.06.2009

MARSOOF, J.

I have had the advantage of perusing the judgment prepared by my sister Bandaranayake J in draft, and I agree that for the reasons to be set out hereinafter, the appeal should be allowed, the order of the Commercial High Court dated 16th February 2006 set aside, and the said High Court directed to make order for the execution of the decree pending appeal.

One of the questions that was argued with great vigor before the Commercial High Court as well as before this Court was whether at the relevant time, Section 35(1) of the English Companies Act of 1989 applied in Sri Lanka. This appeal arises from an action instituted by the Plaintiff-Petitioner-Appellant (hereinafter referred to as the "Appellant") in the Commercial High Court in July 1999 to recover from the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") money advanced as a short term loan with interest due thereon to finance the import of 10,186.10 metric tons of sugar worth US $ 4,104,489 presumably for trading. It appears from the Memorandum of Association of the Respondent (X2) that the main object of the Company was to carry on the business of a holding company. The Memorandum disclosed only three primary objects, none of which included the business of trading in sugar, and there were no "other" objects as contemplated by Section 4(3) of the Companies Act No. 17 of 1982, which admittedly applies to the transaction that constitutes the subject matter of this appeal. It is therefore clear that the loan had been granted for an object which was *ultra vires* the Respondent.

It was in order to overcome the defense of *ultra vires* raised by the Respondent that the learned Counsel for the Appellant has relied on Section 3 of the Civil Law Ordinance to invoke the benefit of Section 35 (1) of the English Companies Act of 1989 which provides that-

> "(1) The validity of an act done by a company shall not be called into question on the ground of lack of capacity by reason of anything in the company's memorandum."

The above-quoted provision was intended to mitigate the harshness of the doctrine of *ultra vires,* which had originated from the English law but had found its way to almost all jurisdictions in the world. The doctrine was originally conceived of as an important principle of stakeholder protection, but it caused so much unhappiness to those who imprudently transacted business with companies acting beyond their objects that it later had few advocates, and in most countries legislation has been enacted to bring about its demise. However, as Prof. Kent Greenfield observes in his enlightening article entitled 'Ultra Vires Lives! A Stakeholder Analysis of Corporate Illegality' published in (2001) 87 Virginia Law Review 1279 at page 1284, "notwithstanding the many strong reasons for the downfall of the *ultra vires* doctrine, the doctrine did not erode to nothingness." It is noteworthy that Section 35(2) of the English Act enables a member of a company to bring proceedings to restrain any act of the company which would, but for subsection 35 (1) of the Act, be *ultra vires,* but the effect of Section 35 (1) is that this would not affect the rights of any person who has transacted business with a company.

There are similar provisions in the current Sri Lanka Companies Act No. 7 of 2007 which has taken away the requirement that a company should have a memorandum of association, but permits an objects clause to be included in the articles of association of a company. Section 17 of the Sri Lankan Act provides that-

" (1) Where the articles of a company sets-out the objects of the company, there shall be deemed to be a restriction placed by the articles in carrying on any business or activity that is not within those objects, unless the articles expressly provide otherwise.

(2) Where the articles of a company provide for any restriction on the business or activities in which the company may engage—

(a) the capacity and powers of the company shall not be affected by such restriction; and

(b) no act of the company, no contract or other obligation entered into by the company and no transfer of property by or to the company, shall be invalid by reason only of the fact that it was done in contravention of such restriction."

The effect of Section 35 (1) of the English Act of 1989 and Section 17 (2) of the Sri Lankan Act of 2007 is to confine the doctrine of *ultra vires* to internal management but saving the actions and contracts of companies from invalidity. Learned Counsel for the Respondent has strenuously contended that while Section 17(2) of the Companies Act of 2007 has no application to this case as the law that has to be applied is the law that was in force at the time of the institution of the action in July 1999, the provisions of the English Companies Act of 1989 were never part of our law.

Learned President's Counsel for the Appellant has argued, with great force, that even if the salutary provisions of Section 17(2) of the Sri Lankan Companies Act of 2007 could not have applied in favor of his client, the People's Bank, Section 35(1) of the English Companies Act of 1989 has become part of the law of Sri Lanka by virtue of Section 3 of the Civil Law Ordinance No. 5 of 1852 (Cap. 79, Legislative Enactments of Ceylon, 1956). This section provides that-

"In all questions or issues which may hereafter arise or which may have to be decided in Sri Lanka with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by land, life and fire insurance, the law to be administered shall be the same as 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 Sri Lanka or hereafter to be enacted*."(*emphasis added*)

He has submitted that the said provision could have entered into our law through two gateways, namely, "corporations" and "banks and banking" both found in the above quoted section. For this proposition, he has relied very heavily on the decision of the Court of Appeal in *Wright and Three Others v People's Bank* [1985] 2 Sri LR 292 and three decisions of the Supreme Court, namely *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, and *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22. In all but the last of these cases, principles of English law including statutory law were held to be applicable in Sri Lanka having being incorporated by reference as provided in the Civil Law Ordinance, and in *Amarasekere v Mitsui and Company Ltd. and Others* too, as we shall see later, there is a reference to the Civil Law Ordinance.

The last of these cases, *Wright and Three Others v People's Bank,* had nothing to do with company law, and the question that arose was whether certain brokers had the authority to pledge the "Ceylon produce" which belonged to their clients for the purpose of obtaining the loan, the proceeds of which were sought to be recovered by the Bank. In answering the question in the affirmative, the learned District Judge had relied on the provisions of Section 2(1) of the English Factors Act of 1889, which provided that a mercantile agent had authority to pledge goods of the clients who were the owners of the goods. The Court of Appeal had no difficulty in affirming the decision of the learned District Judge since in terms of Section 3 of the Civil Law Ordinance the law applicable in Sri Lanka with respect to any questions or issues which may arise with respect to the law of principals and agents would be "the same as 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." It is noteworthy that G.P.S de Silva J (as he then was) noted at page 300 of his judgment that "what is applicable is not only the English law in force at the time of the enactment but also any subsequent statute." It is also instructive to note that responding to a submission that the only authority the brokers had was the authority conferred on them by the licence issued under the Auctioneers and Brokers Ordinance (Cap. 109, Legislative Enactments of Ceylon, 1956), G.P.S de Silva J observed at page 303 that-

> "…..on a reading of that Ordinance it would appear that it does not seek to regulate the rights and duties of a broker. It is rather a statute which makes provision to license the practice of the trade or business of a broker. There is nothing in the Ordinance which prohibits the pledging of goods if such power exists under another statute. The Ordinance is certainly not exhaustive of the rights of a broker and appears to be more in the nature of a revenue statute…"

Learned President's Counsel for the Appellant also relied on *Duhilanomal and Others v Mahakande Housing Co. Ltd.,* [1982] 2 Sri LR 504, for the proposition that Section 3 of the Civil Law Ordinance had the effect of making Section 35(1) of the English Companies Act of 1989 applicable to the determination of the appeal at hand. In this case, it was held by the Supreme Court that despite the existence of the Partnership Ordinance No. 21 of 1866, the provisions of the English Partnership Act of 1890 regulate the rights and liabilities of partners in this country by virtue of Section 3 of the Civil Law Ordinance. I cannot see how this decision can assist the Appellant as the Partnership Ordinance consists of only seven sections and is by no means an exhaustive legislation regulating the rights and duties of partners which could have the effect of precluding the application of Section 3 of the Civil Law Ordinance. By contrast, the Companies Act No. 17 of 1982, which was the applicable company legislation at the time the action from which this appeal arises was instituted, is described in its preamble as "an act to amend and consolidate the law relating to companies" and contains elaborate provisions for the registration and administration of companies in Sri Lanka and also deals specifically with the rights of shareholders.

The right of a shareholder to file a derivative action was considered by this Court in *Amarasekere v Mitsui and Company Ltd. and Others* (The Colombo Hilton Case) [1993] 1 Sri LR 22, in the context of an appeal against the order of the Court of Appeal (reported in [1992] 1 Sri LR 29) granting leave to appeal against the interim-injunction issued by the District Court of Colombo at the instance of a shareholder who did not have the requisite voting strength to initiate proceedings in terms of 210 to 211 of the Companies Act of 1982. All that the Supreme Court had to decide was whether the Court of Appeal was right in thinking that the shareholder had a *prima facie* case and reasonable prospect of success to obtain the interim-injunction, and at page 29 of the judgment Amerasinghe J. referred to

Section 3 of the Civil Law Ordinance only because the Court of Appeal had invoked it to bring in the English law which had been developed in *Wallersteiner v Moir (No.2)* so as to permit a derivative action. The Supreme Court, however, was careful not to call in aid Section 3 of the Civil Law Ordinance, and treating the question as one of standing, reasoned that if in the context of the allegation that company funds were being siphoned off and sent abroad a shareholder is unable to convince the company to take effective action to protect its own interests, the shareholder has every right as a representative of the company to obtain an injunction. At page 36 of the Supreme Court judgment, Amarasinghe J explained the dilemma the original court was faced with in the following words:

> "I do appreciate the dilemma that emerges when a court is confronted with an application for an injunction by a plaintiff who brings the application in a derivative capacity. On the one hand, if the plaintiff can require the court to assume as a fact every allegation in the plaint as proved, the purpose of the rule in *Foss v Harbottle* would be easily outmanoeuvred by the mere allegation of fraud and control. If, on the other hand, the interim injunction is to be refused until the issue of fraud or control is decided, the injunction would serve very little or no purpose. The interests of justice, I think, are served in the circumstances by requiring the plaintiff to establish a *prima facie* case that (1) the company is entitled to the relief claimed, and (2) that the action falls within the proper boundaries of the exceptions to the rule in *Foss v Harbottle.*"

It is universally acknowledged that the decision in *Wallersteiner v Moir (No.2)* was an exception to the rule in *Foss v Harbottle* [1843] 2 Hare 461. The essence of the rule is that, where the company suffers harm, the company itself is the true and proper claimant, to the exclusion of shareholders. The rule and the exceptions have been developed in the context of English and local statutory provisions which are substantially similar, and if, notwithstanding the comprehensive nature of the Companies Act of 1982, English decisions have been considered by our courts as did Amarasinghe J in the Colombo Hilton Case, it is clearly because of the persuasive value of those decisions, and not by reason of anything contained in Section 3 of the Civil Law Ordinance. However, in seeking enlightenment from foreign decisions, it is necessary as was stressed by Amarasinghe J in *Sunila Abeysekera v Ariya Rubasinghe, Competent Authority and Others* [2000] 1 Sri LR 314 at 351, to "proceed with caution" as the constitutional or statutory provisions on which such decisions were made may be substantially different from our own. It is also remarkable that a twentieth century parallel to the nineteenth century rule of standing enunciated in *Foss v Harbottle* is the decision in *Durayappah v Fernando and Others* 69 NLR 265, in which the Privy Council held that when a Municipal Council is dissolved, the Mayor of the Council had no right to complain independently of the Council. Rules of standing such as this have been relaxed by the courts from time to time, and in almost all jurisdictions, and in doing so, the courts have not lost sight of the particular statute in the context of which the question of standing has arisen.

There is no doubt that in terms of Section 3 of the Civil Law Ordinance, Acts of the Parliament of England as well of principles of English common law could have been legitimately applied in Sri Lanka had there been no elaborate legislative provision such as was found in the Companies Act of 1982 dealing with all aspects of company law. However, it is noteworthy that towards the end of the nineteenth century, in the absence of any comprehensive company legislation in this county, several ordinances fashioned on the then prevailing English legislation on joint stock companies, such as the Joint Stock Companies Ordinance No. 4 of 1861, No. 6 of 1888, No. 3 of 1883 and No. 2 of 1897 were enacted, but they did not deal with all aspects of company law. It was in this scenario that De Sampayo J observed in *The Ceylonese Union Co. v Vyramuttan* 19 NLR 250 at 252, that "….until some

comprehensive law relating to companies is passed locally, we must, when any question is not covered by any provision in our Ordinance, decide the same as far as possible by reference to the English law." This was how basic principles of English company law, including the rule in *Foss v Harbottle* [1843] 2 Hare 461 and the doctrine of *ultra vires* enunciated in the decision of the House of Lords in *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* [1875] LR 7 HL 653*,* initially came to be introduced into our legal fabric.

The first comprehensive peace of legislation enacted in Sri Lanka with respect of companies was the Companies Ordinance No. 51 of 1938 (Cap. 145, Legislative Enactments of Ceylon, 1956). It is important to note that despite the absence in the aforesaid Joint Stock Companies Ordinances and the Companies Ordinance of 1938 of any provision expressly incorporating the doctrine of *ultra vires,* our courts have considered the concept as part of our law. In *Jupiter Cigarette & Tobacco Co. Ltd. v. Soysa* 72 NLR 12 (SC) 74 NLR 241 (PC), the Privy Council not only recognized the doctrine within the framework of the Companies Ordinance of 1938, but also applied the exception to it that was evolved in *Royal British Bank v Turquand* [1856] 6 E&B 327 (the well known 'Turquand rule'). The question for decision in the *Jupiter Cigarette* case was whether a mortgage bond purported to have been executed by a company was binding on the company notwithstanding that the number of directors who signed the bond happens to be less than the number required by the articles of the company. In answering the question in the affirmative, Lord Wilberforce, at page 245 of the judgement observed that-

> "In considering questions such as this, which are of common occurrence, particularly in relation to private companies, the Courts have evolved principles, basically of common sense, which, while respecting the separate corporate entity of the company concerned, enables it to, bind itself, as against third parties, in the absence of technicality or the formalities of internal procedure."

Even after the enactment of the Companies Act of 1982, our courts have in innumerable decisions applied the doctrine of *ultra vires*, which has been recognized as a fundamental principle of not only our company law but also of our administrative law. Thus, in *Patrick Lowe & Sons and Others v Commercial Bank of Ceylon* Ltd [2001] 1 Sri LR 280, at page 284, S.N. Silva CJ observed that-

> "It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The *ultra vires* doctrine, now recognized universally, evolved in England on this premise (vide *Ashbury Railway Carriage and Iron Company Ltd. v. Riche* and *Attorney General v The Great Eastern Railway*)**.**"

The fact that our courts have shown great reverence to decisions of English courts in the realm of company law does not necessarily mean that the entire body of English company law has been imported into our country. It is true that by Section 3 of the Civil Law Ordinance the entire body of English law relating to "corporations" was introduced into our legal system, but that was subject to the qualification contained in the said section that the law of England will not have application in any case if other provision is made by any local enactment. Thus, the comprehensive nature of the provisions of the Companies Act of 1982, and the absence therein of a '*casus omissus'* provision which enables the reception of principles of English law to deal with matters, if any, not specifically provided for in the Act, effectively prevented the application of English law except as persuasive authority for the

purpose of interpreting provisions which were identical or substantively similar to the provisions in force in England.

Another important factor that would militate against the application of any provision of English law seeking to modify the doctrine of *ultra vires* into our law in the absence of amending legislation, is that our Companies Act of 1982 is an exhaustive enactment which contains a provision that may be regarded as expressly embodying the doctrine of *ultra vires*. Section 4 of the Companies Act of 1982, distinguishes between primary and "other" objects, and provides in Section 4(1) that "the memorandum of every company shall, in stating the objects of the company, set out specifically, the primary objects of the company, that is to say, the objects which the subscribers or promoters intend that the company should carry out during the period of five years from the date of the commencement of business by the company." Section 4(2) provides for the incorporation in the memorandum of association, of "ancillary powers", and Section 4(3) enacts that-

> "(3) Nothing in the provisions of subsection (1) or subsection (2) shall be deemed or construed to preclude the memorandum from containing a separate statement of objects, not being primary objects, or of powers (whether general or special), in addition to those specifically set out under the provisions of subsections (1) and (2):
>
> Provided, however, that *no such object or power may be carried out or exercised by the company except with the prior sanction of a special resolution of the company*."(*emphasis added*)

It is clear from the above-quoted provision that a company is prohibited from entering into any transaction outside its primary objects and ancillary powers, even if it be for an "other" object within the meaning of Section 4(3) of the Act, unless it is sanctioned by a special resolution of company. It therefore goes without saying that any transaction which falls neither within the primary objects nor the "other" objects of a company, cannot be validly entered into by a company unless it is one that has been sanctioned as contemplated by Section 4(3) of the Act. Such a transaction is therefore *ultra vires* and not binding on the company. In view of these clear provisions of the local enactment, I am firmly of the opinion that Section 35 of the English Companies Act of 1989 could never have entered into the Sri Lankan legal fabric through the "corporations" gateway.

There remains the question whether the English law provision could have entered through the "banks and banking" gateway also found in Section 3 of the Civil Law Ordinance. For this argument, learned President's Counsel for the Appellant has relied heavily on the decision of the Supreme Court in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457. He has contended that in the said case, "a five judge bench of the Supreme Court consisting of Their Lordships H.N.G. Fernando CJ, Sirimanne J, Alles J, Weeramantry J and Wijayatilake J, unanimously held that *inter alia* that the English Law of Conversion under the common law of England applies to Sri Lanka through the operation of the Civil Law Ordinance."(*Vide* - paragraph 13.1 of the Written Submissions of the Appellant dated 17th November 2008). Without going into details, I am constrained to observe that while a closer examination of the separate judgments delivered in this case by the five judges reveals considerable differences of opinion in regard to the basis of applying principles of English law to the facts of that case, the decision is not very helpful to the determination of the present appeal for two reasons. Firstly, it is noteworthy that the Bills of Exchange Ordinance, unlike the Companies Act of 1982, contains a *casus omissus* provision in Section 98(2), which seeks to make the rules of the common law of England applicable in Sri Lanka "save insofar as they are

inconsistent with the express provisions of this Ordinance, or any other enactment". Secondly, even though one of the parties to this case is a Bank, the question that looms large in this case is one of *ultra vires*, and not any issue relating to banks and banking.

While for the above reasons, I am of the opinion that the learned Judge of the Commercial High Court cannot be faulted for entertaining serious doubts about the relevance of Section 35(2) of the English Companies Act of 1989 for deciding this case, this does not dispose of this appeal. This Court cannot show a Nelsonian eye to the fact that the Respondent will be unjustly enriched if the Appellant cannot recover the money advanced by it to the Respondent on a straightforward short term loan. If the transaction on the basis of which money was advanced to the Respondent is a nullity, then at least the money so advanced should be capable of being recovered. It is true that in *Sinclair v Brougham* [1914] AC 398, due to insistence of an imputed or fictional contract, the English House of Lords missed an opportunity of developing a general restitutionary remedy to redress unjust enrichment, but we cannot forget the ancient authority of *Moses v Macferlan* [1760] 2 Burr. 1055 in which Lord Mansfield observed at page 1012 that '' if the defendant be under an obligation, from the ties of natural justice, to refund, the law implies a debt, and gives this action (sc. *indebitatus assumpsit)* founded in the equity of the plaintiff's case, as it were, upon a contract (" *quasi ex contractu"*) as the Roman law expresses it)." This reasoning has been followed in England (*Re Coltman; Coltman v. Coltman* [1881], 19 Ch.D. 64), Australia (*In re K.L. Tractors Ltd.,* ([1961], 106 C.L.R. 318) and Canada (*Breckenridge Speedway Ltd. et al. v. R.,* [1970] S.C.R. 175) to found an action for money had and received, and perhaps prompted Vicount Haldane to observe in *Dodwell & Co v John* 20 NLR 206 at page 211, that "under principles which have always obtained in Ceylon, law and equity have been administered by the same Courts as aspects of a single system, and it could never have been difficult to treat an action analogous to that for money had and received as maintainable in all cases where the defendant has received money which *ex aequo et bono* he ought to refund." Weeramantry, J., in *Mrs. Lily M. de Costa v Bank of Ceylon* 72 NLR 457, after making an exhaustive examination of all relevant authorities, set out his conclusions at page 544 of the judgment as follows:-

> "For all these reasons I strongly incline then to the view that there is available in our law a general principle of liability based on enrichment. I do believe moreover that any other view runs counter to the spirit and the essence of the Roman-Dutch law and that a compartmentalised method of approaching the question cuts across the grain and tradition of that eminently liberal system. There is, beneath the particular actions, a broader principle at once necessitous of and amenable to development; and of this principle the specific actions are no more than particular illustrations. Where possible, progress towards that general principle rather than regress towards the particular actions, is the obligation of the courts."

There is however, one limitation that arises in the application of the general principle of unjust enrichment to the facts of this case, namely that what the Appellant has claimed from the Respondent in the action filed by it is the full amount due on the loan transaction, rather than a mere refund of the amount advanced. The restitutionary remedy cannot be availed of to obtain such broad relief.

In the circumstances, it is necessary to look at the other question on which leave to appeal has been granted by this Court, namely, whether the Respondent is estopped from asserting that "the borrowing and / or receiving the said loan facility from the Appellant is *ultra vires* of its Memorandum and Articles of Association". It is in evidence that the Respondent

applied for the loan in question from the Appellant Bank by a loan application dated 9th November 1995 (X16) which contained several stipulations including a promise to repay the amount of the loan with interest thereon within ninety days. In the context of the issue of estoppel that arises in this case, it is necessary to note paragraphs 5, 6 and 7 of the loan application which provided as follows:-

> "5. All representations and statements made to you us, our Agents, employees or Officers whether in writing or otherwise on our behalf or purporting to be on our behalf are hereby warranted true and correct and intended to be acted upon and shall form the basis of the contract or obligation intended to result from or arise upon your acting upon the request hereby made for an advance.
>
> 6. As Borrowers we shall jointly and severally be liable to repay the advance and interest due to you.
>
> 7. We hereby irrevocably authorize People's Bank without any notice to us to debit our current account maintained with People's Bank to settle People's Bank with all monies due from us by way of Capital interest and other charges in respect of this transaction, and authorize to set off any sum or sums of money due to us from People's Bank for the recovery of the sum or sums of money advance/to be advanced."

It is evident from the testimony of W.D. Dayananda, Senior Manager of the Appellant Bank that the said bank had previously granted several loan facilities to one Yasasiri Kasturiarachchi, and that the Respondent company was later floated by him and that the Bank had acted in good faith in granting the said loan to the newly formed company to enable it to clear a quantity of sugar which had been imported from Brazil. It is also evident from the said loan application and the receipt dated 9th November 1995 (X17) issued acknowledging the acceptance of the money advanced, both signed by the said Yasasiri Kasturiarachchi and one other Director of the Respondent company, that the loan facility was granted on the very day the application was made, and that in doing so, the Appellant had acted on the basis of the representation made by the Respondent that it was competent to enter into the loan transaction in question and as borrower it was liable to repay the loan and interest due thereon.

Spencer Bower, in *The Law relating to Estoppel by Representation*, (4th Edition), paragraph I.2.2, explains the concept of estoppel by representation of fact in the following terms:

> "Where one person ('the representor') has made a representation of fact to another person ('the representee') in words or by acts or conduct, or (being under a duty to the representee to speak or act) by silence or inaction, *with the intention (actual or presumptive) and with the result of inducing the representee on the faith of such representation to alter his position to his detriment*, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in proper manner, objects thereto." (*emphasis added*)

It is clear from the evidence in this case that the Respondent has represented to the Appellant that it was competent to enter into the loan transaction in question and it is bound in law to honor its promise to repay the amount of the loan with interest, and that the Appellant had

been lead to believe that the said representation was true and had acted thereon to its prejudice. The courts in England have shown some restraint in using the concept of estoppel to hold companies liable on *ultra vires* transactions, and in *Freeman and Lockyer v. Buckhurst Park Properties (Mangal) Limited* [1964] 1 All E.R. 630, the English Court of Appeal specifically held that "no representation can operate to estop the corporation from denying the authority of the agent to do on behalf of the corporation an act which the corporation is not permitted by its constitution to do itself." However, the concept of estoppel has successfully been deployed in the United States from the nineteenth century to overcome the plea of *ultra vires*, as it appears from decisions such as *Whitney Arms Co. v Barlow* 63 New York 62 [1875]. In that case, a New York Court noted at page 70 that "It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of the performance of the contract." The principle enunciated in this decision was approved by the United States Supreme Court in *Eastern Building & Loan Association of Syracuse v Williamson* 189 US 122 [1903]. As Seymour D. Thompson observed in 'The Doctrine of Ultra Vires in Relation to Private Corporations', 28 American Law Rev. 376, 387 [1894] -

> "The judicial and professional conscience . . . could not forever endure a rule of law which enabled one party to a contract, perfectly innocent when made between natural persons, to keep the fruits of it and repudiate it because it had been made with an artificial person having no power to make it."

I see no reason why the concept of estoppel cannot be employed in Sri Lanka to defeat such a plea in appropriate circumstances. I am therefore of the opinion that the Respondent is estopped from taking up the defence of *ultra vires* in the circumstances of this case.

Accordingly, for the reasons stated above, I agree with the conclusion reached by Bandaranayake J in her judgment that the appeal should be allowed, the order of the High Court of Colombo (Commercial) dated 16th February 2006 should be set aside and the said High Court should be directed to make order for the execution of the decree pending appeal. I make no 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

S.C. (FR) Application
No. 56/2008

1. M. Deepthi Kumara Gunaratne,
   9/5, R.S. Fernando Mawatha,
   Panadura.

2. W.M.N.B. Wijesooriya,
   197/7, Hiressagala Road,
   Kandy.

3. T.A.C. Fernando,
   104/1, Pirivena Road,
   Sirimal Uyana,
   Ratmalana.

Petitioners

Vs.

1. Dayananda Dissanayake,
   Commissioner of Elections,
   Election Secretariat,
   Sarana Road,
   Rajagiriya.

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

Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Saleem Marsoof, J.

COUNSEL : J.C. Weliamuna with M. Rathnayake for Petitioners

Ms. Viveka Siriwardena De Silva, SSC, for Respondents

ARGUED ON: 11.11.2008

WRITTEN SUBMISSIONS
TENDERED ON: Petitioners : 27.11.2008
Respondents : 23.12.2008

DECIDED ON: 19.03.2009

Shirani A. Bandaranayake, J.

The petitioners, being the founder, the General Secretary and an office bearer of the *Sri Lanka Peratugami Pakshaya* (hereinafter referred to as the Party) complained that the refusal and/or failure on the part of the 1st respondent Commissioner to recognize and register the aforementioned Party and the refusal and/or failure to thereby grant the said Party the status of a recognized political party had infringed their fundamental rights guaranteed in terms of Articles 12(1), 12(2), 14(1)a) and 14(1)(c) of the Constitution for which this Court had granted leave to proceed.

The facts of the petitioners' case, as submitted by them, *albeit* brief are as follows:

The petitioners had formed the Party with an objective in entering the main political stream and gaining political power in order to achieve the following:

a) to promote political education and political, social, economic and cultural morality of the public;
b) to defend the people's sovereignty and the fundamental human rights;
c) to promote social, economic and cultural equality and equal opportunities.

In or about 1997, a new political party called 'X Group' was formed by a group of politically active young men and women from different segments of the society, who were sharing a common political ideology. The petitioners, in particular the 1st petitioner, being the founder, had played a significant role in the function of the Party known as 'X Group'. The Party X

Group as an ideological movement, had been a critique of the existing institutions and the individual, and concerned with bringing about changes through political reforms.

In September 1997, the Party X Group had taken over the 'Mathota' monthly magazine in which the political ideology of the Party X Group was discussed in the context of a variety of social issues. The 'Mathota' magazine continued until June 2000 and a total of 36 issues had been published (P2). In January 2001, the Party X Group started a new magazine called 'London', a bi-monthly publication. This continued until October 2004 (P3). Furthermore, the Party X Group had as part of their political activities, published several books (P4) and had conducted hundreds of public meetings on different social and political issues (P5).

Around December 2004 some members of the Party X Group broke away as a result of ideological differences. The said break away group however continued to use the original name of the Party X Group. This break away group however, is presently defunct. Accordingly in or around early 2005, the name of the Party was changed to 'X Party' and it continued its political activities on the lines of the core objectives of the original Party X Group.

The X Party had published two books and had conducted several public meetings and seminars as part of their political propaganda (P6 and P7).

In January 2006, at a Special General Meeting of the X Party it was unanimously decided to change the name of the Party to *Sri Lanka Peratugami Pakshaya* (The Sri Lanka Vanguard Party).

The Party is organized in a way that it is run by a core group of the Party members and currently the Party has a large number of followers at different levels. There are 304 card holding members of the Party and the Party had received a number of applications for membership. It has over 10,000 followers and is growing. The Party has an active cultural movement known as '*Peradiga Sulang* ' and several publications, which have been well received by different segments of the society including university students, academics, professionals and the rural youth.

The Party fund consists of income from four main sources; viz., proceeds from the sale of publications of the Party, proceeds from the sale of Bookmarks (under the Bookmark campaign) membership fee (Rs. 300/- per year) and donations from well-wishers (P12a and P12b – Audited accounts dated 31.03.2006 – 31.03.2007).

As the membership of the Party grew and its activities expanded, the Party had felt the necessity to contest elections in the future with a view to secure representation at representative institutions at all levels including Local Authorities, Provincial Councils and Parliament. It was also observed that a recognized political party enjoys certain privileges under the Parliamentary Elections Act (as amended), Local Government Elections Act (as amended), Provincial Councils Elections Act (as amended), Presidential Election Act (as amended), the Police Ordinance (as amended) and the Regulations made under the Public Security Ordinance. It was also observed that a recognized political party facilitates a political party's day to day political activities and its interaction with public institutions. As a result of their continuous presence in Sri Lankan politics since 1997, the Party is fully organized to contest any election under the election laws of the country and the Party has all the attributes of a political party.

In January 2008, the Party had made an application to the 1st respondent Commissioner seeking registration of the Party as a recognized political party. By letter dated 07.01.2008 the petitioners were called on behalf of the Party for an inquiry to be held on 17.01.2008 regarding the Party's application for registration (P14). On 17.01.2008, the petitioners had represented the Party at the inquiry held by the 1st respondent Commissioner. At the inquiry, the 1st respondent had questioned about the Party structure, financial details including financial management, membership recruitment criteria, political activities, Office Bearers and publications of the Party. The petitioners were also questioned on the Party's political ideology, which specific reference to the ethnic issue. The petitioners had given all the relevant information pertaining to the aforementioned inquiry.

By letter dated 21.01.2008, the 1st respondent Commissioner had rejected the application made by the Party for registration (P16). Consequent to the said rejection of their application for registration, the Party had written to the 1st respondent Commissioner asking for reasons for the purported rejection (P17). The petitioners submitted that in January 2008, at or about

the time the petitioners had made their application on behalf of the Party, the 1st respondent Commissioner had accepted and had registered five (5) new political parties, namely,

1. *Okkoma Wasiyo Okkoma Rajawaru Sanvidanaya;*
2. *Thamil Makkal Viduthialai Pulikal;*
3. *Nawa Sihala Urumaya;*
4. *Pathmanabha Eelam Revolutionary Liberation Front;*
5. *Muslim Liberation Front (P18).*

The aforesaid parties, according to the petitioners, had never existed as political parties prior to the registration and had never been actively engaged in political activities and the political vision and the leadership of the aforesaid five (5) parties were not known to the public. By contrast the petitioners' Party had been in active politics as a political movement and a Party for nearly 11 years.

The petitioners therefore specifically stated that by denying the Party the status of a recognized political party while accepting and registering five (5) new political parties is unfair, arbitrary and discriminatory and in frustration of the legitimate expectation of the Party to acquire the status of a recognized political party.

Since the right to engage in political activities includes forming of political parties in Sri Lanka, the formation of political parties and contesting elections is a necessary corollary for a working democracy guaranteed under Articles 3 and 4 of the Constitution of Sri Lanka. Accordingly the petitioners claim that the refusal and/or failure on the part of the 1st respondent Commissioner to recognize and register the Party, thereby granting the Party the status of a recognized political party is unreasonable, irrational, arbitrary, illegal and constitutes an infringement of Articles 12(1), 12(2), 14(1)a and 14(1)c of the Constitution for the reasons that,

1. the 1st respondent had acted contrary to the provisions of the Parliamentary Elections Act (as amended) and the purported decision of the 1st respondent has no legal basis;
2. the 1st respondent had failed to give reasons for his purported decision and there do not exist any valid reasons for the purported decision;

3. there are no disclosed criteria for the purpose of recognizing political parties;
4. the 1st respondent appears to have been influenced by extraneous factors;
5. the decision of the 1st respondent is in frustration of the petitioners' legitimate expectations;
6. the purported decision of the 1st respondent is discriminatory, and
7. the purported decision of the 1st respondent is obnoxious to the concept of franchise as judicially interpreted.

The respondents' contention in support of the rejection of the petitioners' application was mainly two fold;

a) the application of the petitioners' party 'Sri Lanka *Peratugami Pakshaya* is void *ab initio*; and
b) 'Sri Lanka *Peratugami Pakshaya*' did not meet the criteria to be eligible to be treated as a recognized political party.

The respondents in support of their 1st contention, referred to section 7 of the Parliamentary Elections Act, No. 1 of 1981, which stated that in terms of section 7(4)(b) of the Act, the Secretary of a political party should, at the time an application is made, furnish to the Commissioner a copy of the Constitution of such party and a list of office bearers of such party. Since the word 'shall' is used in section 7(4)(b) of the Parliamentary Elections Act, the respondents contended that the requirement stated in section 7(4)(b) is mandatory and not discretionary.

Learned Senior State Counsel for the respondents submitted that the petitioners had failed to comply with the said mandatory requirement as they had not tendered the Constitution of the Party at the time of making the application.

The contention of the learned Senior State Counsel for the respondents is that the Secretary of the Party had tendered only a 'proposed Constitution' and this had been stated in the covering letter sent along with the application (R1). The said document had stated that,

"එසේම යෝජිත පක්ෂ ව්‍යවස්ථාවේ පිටපත් තුනක්දල පක්ෂයේ නිළධාරී මණ්ඩලයේ ලැයිස්තුවක්ද, පක්ෂයේ මහා සභා සම්මේලන දෙකක වාර්තාද, මේ සමඟ ඉදිරිපත් කර ඇත."

Learned Senior State Counsel for the respondents took up the position that what was submitted was a 'proposed Constitution' of the Party as the word 'fhdacs;' amply demonstrates that it refers to a proposed Constitution and furnishing a proposed Constitution is not sufficient to fulfill the mandatory requirements specified in section 7(4)(b) of the Parliamentary Elections Act.

Also it was contended that since the letter of the petitioners dated 01.01.2008 (R1) refers to a 'proposed Constitution' that the party did not possess a Constitution and accordingly that the application of the party to be treated as a recognized political party is void *ab initio*.

Secondly, learned Senior State Counsel for the respondents contended that the eligibility criteria to be treated as a recognized political party are set out in section 7(5) of the Parliament Elections Act and in terms of the said provision, for a party to be entitled to be treated as a recognized political party it should satisfy that the said party is a political party and is organized to contest any election under the Act.

The contention of the learned Senior State Counsel for the respondents was that considering the material presented at the inquiry by the Commissioner of Elections in its totality, he had been of the opinion that the petitioners' Party did not satisfy the two attributes referred to in section 7(5) of the Parliamentary Elections Act and therefore the said Party was not eligible to be treated as a recognized political party.

Learned Senior State Counsel did not dispute the fact that in his letter dated 21.01.2008, the Commissioner of elections had not given any reasons for the rejection of the application preferred by the petitioners. Learned Senior State Counsel referring to the decisions in **Samalanka Ltd**. v **Weerakoon**, **Commissioner of Labour et al** ([1994] 1 Sri L.R. 405), **Karunadasa** v **Unique Gem Stones Ltd. et al** ([1997] 1 Sri L.R. 256) and **Yaseen Omar** v **Pakistan International Airlines Corporation and others** ([1999] 2 Sri L.R. 375), stated that the failure to

give reasons by the Commissioner is not a fatal error and cannot be concluded to mean that there is no valid reason for the said rejection as claimed by the petitioners.

Accordingly learned Senior State Counsel for the respondents contended that in the circumstances there had not been any violation of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

Having stated the submissions by both parties, let me now turn to examine the issues raised by them.

The main contention of the respondents as stated earlier was based on the fact that the petitioners had not furnished the Constitution of the Party in terms of section 7(4)(b) of the Parliamentary Elections Act.

Section 7 deals with recognized political parties for the purpose of elections and section 7(4)(b) of the Act reads as follows:

> "The Secretary of a political party shall, at the time an application is made under paragraph (a), furnish to the Commissioner a copy of the Constitution of such party and a list of office bearers of such party."

A plain reading of the aforementioned section, quite clearly stipulates that as correctly contended by the learned Senior State Counsel for the respondents that the requirement referred to in section 7(4)b is mandatory and the Secretary must submit the Constitution of the Party, along with the application to the Commissioner of Elections.

The 1st petitioner being the founder and the General Secretary of the Party in question had made an application to the Commissioner of Elections by his letter dated 01.01.2008 in which he had stated that,

> ". . . .
>
> **<u>දේශපාලන පක්ෂයක් ලියා පදිංචි කිරීම සඳහා වන ඉල්ලීමයි</u>**

පිළිගත් දේශපාලන පක්ෂයක් වශයෙන් ලියා පදිංචි කරනු ලැබීම සඳහා 1988 අංක 29 දරණ පනතින් සංශෝධිත 1981 අංක 01 දරණ පාර්ලිමේන්තු මැතිවරණ පනතෙහි 7(4) වගන්තිය ප්‍රකාරව මෙම ඉල්ලුම් පත ඔබ වෙත ඉදිරිපත් කරනු ලැබේ.

ලියා පදිංචි කරනු ලැබීම සඳහා අපේක්ෂා කරණ පක්ෂයේ නම ශ්‍රී ලංකා පෙරටුගාමී පක්ෂය වන අතර ඉහත කී 7(4) වගන්තිය මගින් නියම කර ඇති ලේඛණද ඇතුළත්ව පක්ෂය ලියාපදිංචි කිරීම සඳහා අවශ්‍ය වන මූලික ලේඛණ මේ සමග ඉදිරිපත් කරමි.

පක්ෂයේ ලකුණ ලෙස දැකැත්ත සහ මිටිය යොදාගැනීමට අපේක්ෂා කරන අතර එම සංකේතයෙහි අනුරුවක් මේ සමග අමුණා ඇතග පක්ෂයේ වර්ණය රෝස පාට වේ.

එසේම යෝජිත පක්ෂ ව්‍යවස්ථාවේ පිටපත් තුනක්ද පක්ෂයේ නිළධාරී මණ්ඩලයේ ලැයිස්තුවක් ද පක්ෂයේ මහා සම්මේලන දෙකක වාර්ථා ද මේ සමග ඉදිරිපත් කර ඇත.

මෙම අයදුම්පත සහ අමුනා ඇති ලේඛණ සළකා බලා අප පක්ෂය ලියා පදිංචි කිරීම සඳහා අවශ්‍ය පියවර ගන්නා ලෙස කාරුණිකව ඉල්ලා සිටිමි.

ස්තුතියි

මෙයටල

විශ්වාසී,

. . . . . .

ප්‍රධාන ලේකම්,

දීප්ති කුමාර ගුණරත්න.”

This clearly indicates that the petitioners had tendered the party Constitution along with the other relevant documents attached to their application form. In fact petitioners had tendered a copy of the party Constitution marked P1, along with the petition and affidavit to this Court.

Learned Senior State Counsel strenuously contended that the petitioners had failed to comply with the mandatory requirement stipulated in section 7(4)b of the Parliamentary Elections Act as they had not submitted the Constitution of the Party at the time of making their application. Her position was that the petitioners had submitted only a proposed Constitution and in support of her contention she relied on the letter forwarded by the petitioners on 01.01.2008, which was referred to earlier, where it was stated as follows:

> "**එසේම යෝජිත පක්ෂ ව්‍යවස්ථාවේ පිටපත් තුනක්ද පක්ෂයේ නිළධාරී මණ්ඩලයේ ලැයිස්තුවක් ද පක්ෂයේ මහා සම්මේලන දෙකක වාර්ථා ද මේ සමග ඉදිරිපත් කර ඇත.**"

The contention of the learned Senior State Counsel was that the usage of the word fhdaPs; mlaI jHjia:dj means that the document attached to the application is only a proposed Constitution and therefore the petitioners had not complied with the mandatory requirement, clearly specified under the Parliamentary Elections Act.

It is however interesting to note that, although the learned Senior State Counsel for the respondents took up the position that the petitioners had not complied with the mandatory requirement under the Parliamentary Elections Act by not furnishing the Constitution of the Party and that such non compliance had been the reason for the rejection of the application made by the petitioners, the 1st respondent in his affidavit dated 13.06.2008 had not made any reference to the non availability of the Party Constitution or petitioners submitting only a proposed Constitution. In fact the 1st respondent had averred that after considering the material presented to him by the petitioners, he was not convinced that the petitioners Party was a political party and that it was not organized to contest any election. In paragraph 14 of his affidavit, the 1st respondent had further averred that,

> "a. that an application was made in January 2008 seeking registration of a party by the name of 'Sri Lanka Peratugami Pakshaya' as a recognized political party;
>
> b. that by letter dated 07.01.2008 the petitioners' party was requested to come for an inquiry to be held on

17.01.2008 regarding the said application along with the relevant documentation in support of the application including membership registers, audit reports etc., if any;

c. that an inquiry was conducted by him on 17.01.2008 to consider the eligibility of the said party to be recognized as a political party under the Parliamentary Elections Act, No. 1 of 1981;

d. that he was not satisfied that the said party was eligible to be recognized as a political party for the reason that it was not a political party and not organized to contest any election;

e. that the said party appeared to be a party based on records on paper than being an actual political party and it seemed that the party was engaged in other activities rather than political activities;

f. that the petitioners' party was unable to demonstrate that they had a practical programme of work to confirm that they are a political party and that it is organized to carry out any election;

g. that the organizational structure of the petitioners' party appeared to be confined to paper and no proof was adduced to demonstrate that persons were in fact mobilized as per the organizational structure to organize the political activities of the party or that there are party organizers at the divisional, district or provincial levels engaged in political activities on behalf of the party;

h. that the petitioners' party had not put forward any nominations to contest any election to date and not mobilized support for any candidate at any election to date;

i. that by letter dated 21.01.2008 the petitioner was informed that the application for registration made by the said party was rejected."

The aforesaid affidavit indicates the reasons for the 1st respondent's decision and it is abundantly clear that the 1st respondent had not referred to the non submission of a valid party Constitution by the petitioners as contended by the learned Senior State Counsel for the respondents. Moreover and more importantly, the letter referred to by the 1st respondent in his affidavit dated 21.01.2008, which was sent to the petitioners informing that their application for registration had been rejected, does not refer to any of the reasons given by the 1st respondent in his affidavit dated 13.06.2008. The said letter (P16) is as follows:

". . .

දේශපාලන පක්ෂයක් වශයෙන් පිළිගනු ලැබීම සඳහා වූ ඉල්ලීම 1988 අංක 29 දරන පනතින් සංශෝධිත 1981 අංක 1 දරන පාර්ලිමේන්තු මැතිවරණ පනත

ඔබගේ 2008.01.01 දිනැති ඉල්ලීම හා ඉන් අනතුරුව 2008.01. 17 වන දින මගේ කාර්යාලයේදී පැවැත්වූ පරීක්ෂණයට ඔබගේ අවධානය යොමු කරනු කැමැත්තෙමි.

02 **ඔබගේ ඉල්ලුම් පත ප්‍රතික්ෂේප කරන ලද බව කණගාටුවෙන් දන්වමි.**

. . . ."

It was common ground that at the inquiry held by the 1st respondent on 17.01.2008, the 1st respondent had not given an indication as to whether the petitioners had satisfied the criteria required in terms of the Parliamentary Elections Act for the party to be recognized as a political party.

Accordingly it is not disputed that varying reasons have been given to this Court for the decision of the 1st respondent in rejecting the petitioners' application to be recognized as a political party. It is also to be noted that no reasons whatsoever were given by the 1st respondent in his communiqué dated 21.01.2008 addressed to the 1st petitioner.

As stated earlier, the main contention of the learned Counsel for the petitioners at the hearing was that no reasons were given by the 1st respondent for his decision. In the light of the aforementioned, it is apparent that it would be necessary to examine whether the failure to give reasons to petitioners by the 1st respondent had infringed the fundamental rights of the petitioners guaranteed in terms of Article 12(1) of the Constitution.

As stated earlier, learned Senior State Counsel strenuously contended that not giving reasons for the rejection of the petitioners' application is not a fatal error and the learned Counsel for the petitioners contended that such failure has amounted to a violation of the petitioners' fundamental rights and relied on the decisions of this Court in **Wijepala** v **Jayawardena** (S.C. (Application) No. 89/95 – S.C. Minutes of 30.06.1995), **Karunadasa** v **Unique Gem Stones Ltd**. ([1997] 1 Sri L.R. 256) and **Lal Wimalasena** v **Asoka Silva, General Manager, Peoples' Bank** (S.C. (Application) No. 473/2003 – S.C. Minutes of 04.08.2005).

The contention of the respondents regarding the question for the need to give reasons is that the failure to give reasons by the Commissioner is not a fatal error and cannot be construed to mean that there is no valid reason for the rejection of the petitioners' application as claimed by the petitioners. Further it was submitted that the failure to give reasons does not take away from the fact that the Commissioner formed his opinion after a proper inquiry and further the failure to give reasons by the Commissioner in his letter is not fatal as the reasons have been adequately explained to this Court by way of the 1st respondent's affidavit.

An examination of the decisions relied on by the respondents in support of their contention clearly shows that those decisions have spelt out the general position regarding the necessity to give reasons for a decision. For instance in **Samalanka Ltd.** v **Weerakoon, Commissioner of Labour and others** (supra) this Court had held that in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to adduce reasons, provided that the decision is made after holding a fair inquiry. The decision in **Yaseen Omar** (supra) also had been on the same line, where it was held that neither the Common Law nor principles of natural justice requires as a general rule that administrative tribunals or authorities should give reasons for their decisions that are subject to judicial review. Considering the question that arose in that appeal it was held that there is no statutory requirement imposed on the Commissioner to give reasons for his decision.

The decision in **Karunadasa** v **Unique Gem Stones Ltd. and others** (supra) had taken the view that natural justice also means that a party is entitled to a reasoned consideration of his case.

Therefore it would be apparent that none of the decisions referred to earlier, which were relied on by the respondents supports the contention that not giving reasons for a decision by an administrative authority is not a fatal error.

In such circumstances, it would be pertinent to examine the legal position pertaining to the need to give reasons.

For a long period of time, as stated by Bandaranayake, J., in **N.S.A.M. Nanayakkara** v **Peoples Bank and others** (S.C. (Application) No. 525/2002 – S.C. Minutes of 20.06.2007) the commonly accepted norm in English Law had been that there is no general rule or a duty to state reasons for judicial or administrative decisions (**Pure Spring Co. Ltd.** v **Minister of National Revenue** ([1947] 1 D.L.R. 501, Statements of Reasons for Judicial and Administrative Decisions, Michael Akehurst, M.L.R. Vol. 33, 1970, pg. 154). As pointed out by Michael Akehurst, a statement of reasons is not required by the rules of natural justice and therefore there is no duty to state reasons for the decisions of Courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals (Michael Akehurst (supra)). This position was again considered in **Marta Stefan** v **General Medical Council** ([1999] 1 W.L.R. 1293) by the Privy Council, where

it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987. Referring to right to reasons, S.A. de Smith (De Smith's Judicial Review, 6th Edition, 2007, pg 411) had clearly stated that,

> "On this view, a decision – maker is not normally required to consider whether fairness or procedural fairness demands that reasons should be provided to an individual affected by a decision because the giving of reasons has not been considered to be a requirement of the rules of procedural propriety."

This position is well compatible with the theory that there is no general common law duty to give reasons for decisions (**Minister of National Revenue** v **Wrights' Canadian Ropes Ltd.** ([1947] A.C. 109), **R** v **Gaming Board for Great Britain, Ex.p. Benaim and Khaida** ([1970] 2 Q.B. 417), **Mc Innes** v **Onslow – Fane** ([1978] 1 W.L.R. 1520), **R** v **Civil Service Appeal Board Ex.p. Cunningham** ([1991] 4 All E.R. 310).

However, this position has changed dramatically and as pointed out by de Smith (supra, pg. 413),

> ". . . . it is certainly now the case that a decision – maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given. Indeed, so fast is the case law on the duty to give reasons developing, that it can now be added that fairness or procedural fairness usually will require a decision – maker to give reasons for its decision. **Overall the trend of the law has been towards an increased recognition of the duty to give reasons . . . .**" (emphasis added).

Thus it appears that although the common law had failed to develop any general duty regarding the need to give reasons, there are several exceptions to this general principle.

One clear method, as pointed out in **N.S.A.M. Nanayakkara** v **People's Bank** (supra) was through statutory intervention, which came into being by the recommendations of the Report of the Committee on Administrative Tribunals and Enquiries, commonly known as Franks Committee (Cmnd. 218 (1957)). The Franks Committee recommended the need to give reasons ((supra), para 98, 351), that came into being through the Tribunals and Inquiries Act, 1958, which was replaced by the Tribunals and Inquiries Act, 1992.

The Franks Committee Report of 1957 ((supra) at para 98), in fact highlighted the issue as to why reasons should be given, referring to ministerial decisions taken, after the holding of an inquiry.

> "It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. **Where no reasons are given the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the minister's decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions, a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more truly to have been properly thought out**" (emphasis added).

In addition to the above there are several other instances in which the common law had imposed a duty to give reasons for its decisions. One such method was developed on the basis that the absence of reasons would render any right of appeal or review nugatory. Thus in **Minister of National Revenue** v **Wrights Canadian Ropes Ltd.** (supra), which considered an appeal from an income tax assessment, the Privy Counsel stated that,

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons

> for taking action . . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal . . . . The Court is . . . always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are . . . insufficient in law to support it, the determination cannot stand . . . ."

A number of other decisions had taken a similar approach. For instance, in **R** v **Civil Service Appeal Board, *Ex parte* Cunningham** (supra), Lord Donaldson MR and McCowan and Leggatt, LJJ., had held that although there was no general rule that required administrative tribunals to give reasons, that such an obligation could arise as an incident of procedural fairness in appropriate circumstances.

This approach had been followed in other cases. In **R** v **Secretary of State for the Home Department *Ex parte* Doody** ([1994] 1 A.C. 531), which considered whether the Secretary of State is required to inform the prisoner the reasons as to why he was deciding on a certain period of time for imprisonment, Lord Mustill expressed the view that, although there was no general duty to provide reasons, there was a duty to give reasons in that instance, as it would facilitate any judicial review challenged by the prisoner. Lord Mustill had clearly stated in **Doody** (supra) that,

> ". . . I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon, 'transparency', in the making of administrative decisions."

Another method and one which was extremely important from the practical point of view, indirectly imposed a requirement that reasons be stated and if not had decided that the result reached in the absence of reasoning is arbitrary. Thus in the well known decision in **Padfield** v **Minister of Agriculture Fisheries and Food** ([1968] A.C. 997), the House of Lords decisively rejected the notion that the absence of a duty to state reasons, precluded the Court from reviewing the reasons for the decision. It was therefore stated by Lord Pearce in **Padfield** (supra) that,

> "If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

Accordingly an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement.

Referring to reasons, fair treatment and procedural fairness, Galigan (Due Process and Fair Procedures, Clarendon Press, Oxford, pg. 437) stated that,

> "If the new approach succeeds, so that generally a statement of reasons for an administrative decision will be regarded as an element of procedural fairness, then various devices invented in the past in order to allow the consequences of a refusal of reasons to be taken into account will gradually lose their significance."

The necessity to give reasons was considered by this Court, as referred to in Bandaranayake, J.'s judgments in **Lal Wimalasena** v **Asoka Silva and others** (S.C. (Application) No. 473/2003 - S.C. Minutes of 04.08.2005) and in **N.S.A.M. Nanayakkara** v **People's Bank** (supra), in **Wijepala**

v **Jayawardene** (S.C. (Application) No. 89/95 - S.C. Minutes of 30.06.1995, **Manage** v **Kotakadeniya** ([1997] 3 Sri L.R. 264), **Suranganie Marapana** v **The Bank of Ceylon and others** ([1997] 3 Sri L.R. 156) and in **Karunadasa** v **Unique Gemstones** ([1997] 1 Sri L.R. 256).

In **Wijepala** v **Jayawardene** (supra) considering the necessity to give reasons, at least to this Court, Mark Fernando, J., was of the view that,

> "The petitioner insisted, throughout that established practice unquestionably entitled him at least to his first extension and that there was no relevant reason for the refusal of an extension . . .
>
> Although openness in administration makes it desirable that reasons be given for decisions of this kind, in this case I do not have to decide whether the failure to do so vitiated the decision. **However, when this Court is requested to review such a decision, if the petitioner succeeds in making out a prima facie case, then the failure to give reasons becomes crucial. If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons – and so also, if reasons are suggested, they were in fact not the reasons, which actually influenced the decision in the first place**" (emphasis added).

In **Manage** v **Kotakadeniya and others** (supra), where an application of a Post Master for his extension of service, upon reaching the age of 55 years was refused, Amerasinghe, J., was of the view that,

> "the refusal to extend the service of the petitioner was not based on adequate grounds."

The order of retirement was thus quashed on the basis that the petitioner in that case was treated unequally and that there had been discriminatory conduct against the petitioner.

In **Suranganie Marapana** v **The Bank of Ceylon and others** (supra) it was held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension, which was recommended by the corporate management and therefore it was held that the refusal to grant the extension of service sought was arbitrary, capricious, unreasonable and unfair. Considering the question in issue the Court had stated that,

> "Even though Public Administration Circular No. 27/96 dated 30.08.96 (P8), which was an amendment to Chapter 5 of the Establishments Code, does not have any direct application to the matter before us, it clearly sets out the attitude of the State in regard to the question of extension of service of public sector employees, when it states that where extensions of service of State Employees are refused **there should be sufficient reasons to support such decision beyond doubt**" (emphasis added).

It is also noteworthy to refer to the views expressed by Mark Fernando, J., in **Karunadasa** v **Unique Gem Stones** (supra) with reference to the need to give reasons to a decision, where it was stated that,

> ". . . whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable'; certainly the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion."

On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Moreover in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily, in coming to their conclusion. These aspects have been stated quite succinctly in the following

passage, where Prof. Wade had expressed the view that, (Administrative Law, 9th Edition, pg. 522),

> "Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others"** (emphasis added).

And more importantly,

> "**Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully**" (emphasis added).

The importance of giving reasons, irrespective of the fact that there are no express or implied obligation to do so, had been clearly shown in many decisions and it would be pertinent to mention the views expressed in **Osmond** v **Public Service Board of New South Wales and Another** ([1985] L.R.C. (Const.) 1041) and **Marta Stefan** v **General Medical Council** (supra).

In **Osmond** (supra), the appellant was employed in the New South Wales Public Service. In 1982 he applied for promotion to the vacant post of Chairman of the Local Lands Board. He was not recommended for this appointment and appealed to the Public Service Board under section 116 of the Public Service Act 1979. Soon after his appeal was heard by the Board he was informed orally that it had been dismissed, although no written notice of the decision was ever given to him and requests for a written decision with reasons were refused on the ground that it was not the Board's practice to give reasons.

It was held that natural justice required that the appellant should be given the reasons for the decision of the Board in his appeal and Kirby, J. had stated that,

> "The duty of public officials, in making discretionary decisions affecting others in the exercise of statutory powers, is to act justly and fairly; this will normally impose an obligation to state the reasons for their decisions. Such an obligation will exist where the absence of reasons would render nugatory a facility provided to appeal against the decision or would diminish a facility to test the decision by judicial review and ensure that it complies with the law and that relevant matters only have been taken into account."

In **Marta Stefan** (supra), the question related to a doctor, who was subjected to suspension of her registration for varying periods following decisions of the Health Committee of the General Medical Council that her fitness to practice was impaired. In February 1998 her case came before the Health Committee again and the Committee concluded that her registration should be suspended indefinitely. The only reason given for the decision was that the Committee have carefully considered all the information presented to them and continue to be deeply concerned about her medical condition and that the Committee have again judged her fitness to practice to be seriously impaired and have directed that her registration be suspended indefinitely.

Allowing the appeal by the Doctor, it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987, but that in the light of its judicial character, the framework in which it operated and the provision of a right of appeal against its decisions there was a common law obligation to give at least a short statement of the reasons for its decision, that the extent and substance of the reasons would depend upon the circumstances and they did not need to be elaborate or lengthy, but they should be such as to tell the parties in broad terms, why the decision was reached. It was also decided that the doctor's case would be remitted to a freshly constituted Health Committee for rehearing with reasons to be given for its decision.

The petitioners had complained of the infringement of their fundamental right guaranteed in terms of Article 12(1) of the Constitution. Article 12(1) of the Constitution deals with the right to equality and reads as follows:

> "All persons are equal before the law and are entitled to the equal protection of the law."

Equality, which could be introduced as a dynamic concept, forbids inequalities, arbitrariness and, unfair decisions. As pointed out by Bhagwati, J. (as he then was) in **E.P. Royappa** v **State of Tamil Nadu** (A.I.R. (1974) S.C. 555),

> "From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch."

In such circumstances to deprive a person of knowing the reasons for a decision, which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law.

As pointed out by Craig (Administrative Law, 4th Edition, 1999 pg. 430) referring to Rabin (Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement (44 U. Chi. L.R. 60)) the very essence of arbitrariness is to have one's status redefined by the State without an adequate explanation of its reasons for doing so.

It is therefore apparent that as pointed out by Prof. Wade (Administrative Law, supra pg. 527), the time has now come for the Court to acknowledge that there is a general rule that reasons should be given for decisions based on the principle of fairness. Prof. Wade (supra) had further stated that,

> "Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but

the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them,"

It is to be noted that there have been instances where Courts had quashed the decisions when only vague reasons had been given (**Re Poyser and Mills' Arbitration** ([1964] 2 Q.B. 467) or in circumstances where ambiguous reasons were provided (**R** v **Industrial Injuries Commissioner, *Ex parte* Howarth** ((1968) 4 K.I.R. 621).

It is not disputed that in the instant application, although the 1st respondent had informed this Court his reasons for the refusal of petitioners' application for the recognition of the Party in question, that in his communiqué to the petitioners on 21.01.2008 (P16) referred to above, no reasons whatsoever were given, which in my view means a denial of justice, an error of law and more importantly in connection to this matter, the said decision to withhold the reasons is arbitrary, unfair and unreasonable within the framework of Section 12(1) of the Constitution.

It is also to be noted, as referred to earlier in detail, that the reasons given by the 1st respondent are contradictory to that of the submission made by the learned Senior State Counsel for the respondents, especially with regard to the availability of an approved Party Constitution.

In such circumstances for the reasons aforementioned I hold that the decision reflected in the document dated 21.01.2008 (P16) is null and void and therefore the 1st respondent had violated the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioners' application is accordingly allowed. I direct the 1st respondent to re-consider the application submitted by the petitioners and to give reasons for his decision following such re-consideration.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, 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. 67/2008

1. Sirimasiri Hapuarachchi,
   Leader of the Party and General Secretary of the party called 'Eksath Janatha Peramuna',
   306/C, Batagama North,
   Ja-Ela.

2. H.D. Keerthi Sampath,
   Executive Member of the Party called 'Eksath Janatha Peramuna',
   306/C, Batagama North,
   Ja-ela.

3. Anil Chandrasekera,
   Chief Treasurer of the Party called 'Eksath Janatha Peramuna',
   306/C, Batagama North,
   Ja-ela.

Petitioners

Vs.

1. Dayananda Dissanayake,
   Commissioner of Elections,
   Department of Elections,
   Elections Secretariat,
   P.O. Box 2,
   Rajagiriya 10107.

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

Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Saleem Marsoof, J.

COUNSEL : K. Deekiriwewa with L.M. Deekiriwewa and Manel Herath for Petitioners

Viraj Dayaratne, SSC, for Respondents

ARGUED ON: 11.11.2008

WRITTEN SUBMISSIONS
TENDERED ON: Petitioners : 19.12.2008
Respondents : 23.12.2008

DECIDED ON: 19.03.2009

Shirani A. Bandaranayake, J.

The petitioners, who had formed a political party known as '*Eksath Janatha Peramuna*' (hereinafter referred to as the Party), complained that the refusal of the 1st respondent commissioner to recognize the aforementioned Party and the refusal to thereby grant the said Party the status of a recognized political party had infringed their fundamental rights guaranteed in terms of Articles 12(1), 12(2) and 14(1)(c) of the Constitution for which this Court had granted leave to proceed.

The facts of the petitioners' case, as submitted by them, *albeit* brief, are as follows:

The petitioners had formed the said political party in 1999 and had formulated and adopted the party Constitution in the year 2000 at their 2nd annual national meeting (X2). The main objective of the said Party was to nominate candidates from the said Party to stand for General, Provincial and Local Elections as and when such elections are held. At the time of the filing of this application the Party had over 2200 members.

On 31.10.2007 the 1st petitioner, being the General Secretary had made an application to the 1st respondent Commissioner seeking registration of the Party as a recognized political party. That application had been returned as the 1st respondent Commissioner could not consider the said application in terms of Parliamentary Elections Act, No. 1 of 1981 (X4). Thereafter by letter dated 14.12.2007, the petitioners had again made an application to the

1st respondent, seeking registration of the Party as a recognized political party (X5). By letter dated 07.01.2008 the petitioners were called on behalf of the Party for an inquiry to be held on 16.01.2008 regarding the Party's application for registration (X6). On 16.01.2008, the petitioners had represented the Party at the inquiry held by the 1st respondent Commissioner.

By letter dated 21.01.2008, the 1st respondent Commissioner had rejected the application made by the Party for registration, without assigning any reasons for his decision (X7).

The petitioners submitted that in January 2008, at or about the time the petitioners had made their application on behalf of the Party, the 1st respondent Commissioner had accepted and registered five new political parties, namely,

1. *Okkoma Rajawaru Okkoma Wasiyo*
2. *Muslim Vimukthi Peramuna*
3. *Nawa Sihala Urumaya*
4. *Padmanada Eelam Janatha Viplavakari Vipulanari*
5. *T.M.V.P.*

The aforesaid parties, according to the petitioners, had not been actively engaged in political activities and the petitioners' Party had been in active politics since 1999.

The petitioners therefore claim the decision of the 1st respondent to reject their application without assigning any reasons is unreasonable, unfair and arbitrary and thereby had violated their fundamental rights guaranteed in terms of Articles 12(1), 12(2) and 14(1)(c) of the Constitution.

Learned Senior State Counsel for the respondents did not dispute the fact that in his letter dated 21.01.2008, the Commissioner of Elections had not given any reasons for the rejection of the application preferred by the petitioners. Learned Senior State Counsel referring to the decisions in **Samalanka Ltd.** v **Weerakoon, Commissioner of Labour *et al*** ([1994] 1 Sri L.R. 405), **Karunadasa** v **Unique Gem Stones Ltd, *et al*** ([1997] 1 Sri L.R. 256) and **Yaseen Omar** v **Pakistan International Airlines Corporation and others** ([1999] 2 Sri L.R.

375), stated that the failure to give reasons by the Commissioner is not a fatal error and cannot be concluded to mean that there is no valid reason for the said rejection as claimed by the petitioners.

Accordingly learned Senior State Counsel for the respondents contended that in the circumstances, there had not been any violation of the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

It is not disputed that in his letter dated 21.01.2008, sent to the petitioners informing that their application for registration had been rejected, the 1st respondent Commissioner does not refer to any reasons for his decision. The said letter (X7) is as follows:

" 2008.01.21

ලේකම්,
එක්සත් ජනතා පෙරමුණ,
306/සී, උතුරු බටගම,
ජාඇල.

මහත්මයාණෙනි,

දේශපාලන පක්ෂයක් වශයෙන් පිළිගනු ලැබීම සඳහා වූ ඉල්ලීම 1988 අංක 29 දරන පනතින් සංශෝධිත 1981 අංක 1 දරන පාර්ලිමේන්තු මැතිවරණ පනත

ඔබගේ 2007.12.14 දිනැති ඉල්ලීම හා ඉන් අනතුරුව 2008.01. 16 වන දින මගේ කාර්යාලයේදී පැවැත්වූ පරීක්ෂණයට ඔබගේ අවධානය යොමු කරවනු කැමැත්තෙමි.

02 **ඔබගේ ඉල්ලුම් පත ප්‍රතික්ෂේප කරන ලද බව කණගාටුවෙන් දන්වමි.**

. . . ."

As stated earlier, the main contention of the learned Counsel for the petitioners at the hearing was that no reasons were given by the 1st respondent for his decision. In the light of the aforementioned, it is apparent that it would be necessary to examine whether the failure to give reasons to petitioners by the 1st respondent had infringed the fundamental rights of the petitioners guaranteed in terms of Article 12(1) of the Constitution.

As stated earlier, learned Senior State Counsel strenuously contended that not giving reasons for the rejection of the petitioners' application is not a fatal error and the learned Counsel for the petitioners contended that such failure has amounted to a violation of the petitioners' fundamental rights and relied on the decision of this Court in **Karunadasa** v **Unique Gem Stones Ltd**. ([1997] 1 Sri L.R. 256).

The contention of the respondents regarding the question for the need to give reasons is that the failure to give reasons by the Commissioner is not a fatal error and cannot be construed to mean that there is no valid reason for the rejection of the petitioners' application as claimed by the petitioners. Further it was submitted that the failure to give reasons does not take away from the fact that the Commissioner formed his opinion after a proper inquiry and further the failure to give reasons by the Commissioner in his letter is not fatal as the reasons have been adequately explained to this Court by way of the 1st respondent's affidavit.

An examination of the decisions relied on by the respondents in support of their contention clearly shows that those decisions have spelt out the general position regarding the necessity to give reasons for a decision. For instance in **Samalanka Ltd.** v **Weerakoon, Commissioner of Labour and others** (supra) this Court had held that in the absence of a statutory requirement, there is no general principle of administrative law that natural justice requires the authority making the decision to adduce reasons, provided that the decision is made after holding a fair inquiry. The decision in **Yaseen Omar** (supra) also had been on the same line, where it was held that neither the Common Law nor principles of natural justice requires as a general rule that administrative tribunals or authorities should give reasons for their decisions that are subject to judicial review. Considering the question that arose in that appeal it was held that there is no statutory requirement imposed on the Commissioner to give reasons for his decision.

The decision in **Karunadasa** v **Unique Gem Stones Ltd. and others** (supra) had taken the view that natural justice also means that a party is entitled to a reasoned consideration of his case.

Therefore it would be apparent that none of the decisions referred to earlier, which were relied on by the respondents supports the contention that not giving reasons for a decision by an administrative authority is not a fatal error.

In such circumstances, it would be pertinent to examine the legal position pertaining to the need to give reasons.

For a long period of time, as stated by Bandaranayake, J., in **N.S.A.M. Nanayakkara** v **Peoples Bank and others** (S.C. (Application) No. 525/2002 – S.C. Minutes of 20.06.2007) the commonly accepted norm in English Law had been that there is no general rule or a duty to state reasons for judicial or administrative decisions (**Pure Spring Co. Ltd.** v **Minister of National Revenue** ([1947] 1 D.L.R. 501, Statements of Reasons for Judicial and Administrative Decisions, Michael Akehurst, M.L.R. Vol. 33, 1970, pg. 154). As pointed out by Michael Akehurst, a statement of reasons is not required by the rules of natural justice and therefore there is no duty to state reasons for the decisions of Courts, juries, licensing justices, administrative bodies and tribunals or domestic tribunals (Michael Akehurst (supra)). This position was again considered in **Marta Stefan** v **General Medical Council** ([1999] 1 W.L.R. 1293) by the Privy Council, where it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987. Referring to right to reasons, S.A. de Smith (De Smith's Judicial Review, 6th Edition, 2007, pg 411) had clearly stated that,

> "On this view, a decision – maker is not normally required to consider whether fairness or procedural fairness demands that reasons should be provided to an individual affected by a decision because the giving of reasons has not been considered to be a requirement of the rules of procedural propriety."

This position is well compatible with the theory that there is no general common law duty to give reasons for decisions (**Minister of National Revenue** v **Wrights' Canadian Ropes Ltd.** ([1947] A.C. 109), **R** v **Gaming Board for Great Britain, Ex.p. Benaim and Khaida** ([1970] 2 Q.B. 417), **Mc Innes** v **Onslow – Fane** ([1978] 1 W.L.R. 1520), **R** v **Civil Service Appeal Board Ex.p. Cunningham** ([1991] 4 All E.R. 310).

However, this position has changed dramatically and as pointed out by de Smith (supra, pg. 413),

> ". . . . it is certainly now the case that a decision – maker subject to the requirements of fairness should consider carefully whether, in the particular circumstances of the case, reasons should be given. Indeed, so fast is the case law on the duty to give reasons developing, that it can now be added that fairness or procedural fairness usually will require a decision – maker to give reasons for its decision. **Overall the trend of the law has been towards an increased recognition of the duty to give reasons . . . .**" (emphasis added).

Thus it appears that although the common law had failed to develop any general duty regarding the need to give reasons, there are several exceptions to this general principle.

One clear method, as pointed out in **N.S.A.M. Nanayakkara** v **People's Bank** (supra) was through statutory intervention, which came into being by the recommendations of the Report of the Committee on Administrative Tribunals and Enquiries, commonly known as Franks Committee (Cmnd. 218 (1957)). The Franks Committee recommended the need to give reasons ((supra), para 98, 351), that came into being through the Tribunals and Inquiries Act, 1958, which was replaced by the Tribunals and Inquiries Act, 1992.

The Franks Committee Report of 1957 ((supra) at para 98), in fact highlighted the issue as to why reasons should be given, referring to ministerial decisions taken, after the holding of an inquiry.

> "It is a fundamental requirement of fair play that the parties concerned in one of these procedures should know at the end of the day why the particular decision has been taken. **Where no reasons are given the individual may be forgiven for concluding that he has been the victim of arbitrary decision. The giving of full reasons is also important to enable those concerned to satisfy themselves that the prescribed procedure has been followed and to decide whether they wish to challenge the minister's decision in the courts or elsewhere. Moreover as we have already said in relation to tribunal decisions, a decision is apt to be better if the reasons for it have to be set out in writing because the reasons are then more truly to have been properly thought out**" (emphasis added).

In addition to the above there are several other instances in which the common law had imposed a duty to give reasons for its decisions. One such method was developed on the basis that the absence of reasons would render any right of appeal or review nugatory. Thus in **Minister of National Revenue** v **Wrights Canadian Ropes Ltd.** (supra), which considered an appeal from an income tax assessment, the Privy Counsel stated that,

> "Their Lordships find nothing in the language of the Act or in the general law which would compel the Minister to state his reasons for taking action . . . . But this does not mean that the Minister by keeping silent can defeat the tax payer's appeal . . . . The Court is . . . always entitled to examine the facts which are shown by evidence to have been before the Minister when he made his determination. If those facts are . . . insufficient in law to support it, the determination cannot stand . . . ."

A number of other decisions had taken a similar approach. For instance, in **R** v **Civil Service Appeal Board, *Ex parte* Cunningham** (supra), Lord Donaldson MR and McCowan and Leggatt, LJJ., had held that although there was no general rule that required administrative

tribunals to give reasons, that such an obligation could arise as an incident of procedural fairness in appropriate circumstances.

This approach had been followed in other cases. In **R** v **Secretary of State for the Home Department *Ex parte* Doody** ([1994] 1 A.C. 531), which considered whether the Secretary of State is required to inform the prisoner the reasons as to why he was deciding on a certain period of time for imprisonment, Lord Mustill expressed the view that, although there was no general duty to provide reasons, there was a duty to give reasons in that instance, as it would facilitate any judicial review challenged by the prisoner. Lord Mustill had clearly stated in **Doody** (supra) that,

> ". . . I find in the more recent cases on judicial review a perceptible trend towards an insistence on greater openness, or if one prefers the contemporary jargon, 'transparency', in the making of administrative decisions."

Another method and one which was extremely important from the practical point of view, indirectly imposed a requirement that reasons be stated and if not had decided that the result reached in the absence of reasoning is arbitrary. Thus in the well known decision in **Padfield** v **Minister of Agriculture Fisheries and Food** ([1968] A.C. 997), the House of Lords decisively rejected the notion that the absence of a duty to state reasons, precluded the Court from reviewing the reasons for the decision. It was therefore stated by Lord Pearce in **Padfield** (supra) that,

> "If all the *prima facie* reasons seem to point in favour of his taking a certain course to carry out the intentions of Parliament in respect of a power which it has given him in that regard, and he gives no reason whatever for taking a contrary course, the Court may infer that he has no good reason and that he is not using the power given by Parliament to carry out its intentions."

Accordingly an analysis of the attitude of the Courts since the beginning of the 20th century clearly indicates that despite the fact that there is no general duty to give reasons for administrative decisions, the Courts have regarded the issue in question as a matter affecting the concept of procedural fairness. Reasons for an administrative decision are essential to correct any errors and thereby to ensure that a person, who had suffered due to an unfair decision, is treated according to the standard of fairness. In such a situation without a statement from the person, who gave the impugned decision or the order, the decision process would be flawed and the decision would create doubts in the minds of the aggrieved person as well of the others, who would try to assess the validity of the decision. Considering the present process in procedural fairness vis-à-vis, rights of the people, there is no doubt that a statement of reasons for an administrative decision is a necessary requirement.

Referring to reasons, fair treatment and procedural fairness, Galigan (Due Process and Fair Procedures, Clarendon Press, Oxford, pg. 437) stated that,

> "If the new approach succeeds, so that generally a statement of reasons for an administrative decision will be regarded as an element of procedural fairness, then various devices invented in the past in order to allow the consequences of a refusal of reasons to be taken into account will gradually lose their significance."

The necessity to give reasons was considered by this Court, as referred to in Bandaranayake, J.'s judgments in **Lal Wimalasena** v **Asoka Silva and others** (S.C. (Application) No. 473/2003 - S.C. Minutes of 04.08.2005) and in **N.S.A.M. Nanayakkara** v **People's Bank** (supra), in **Wijepala** v **Jayawardene** (S.C. (Application) No. 89/95 - S.C. Minutes of 30.06.1995, **Manage** v **Kotakadeniya** ([1997] 3 Sri L.R. 264), **Suranganie Marapana** v **The Bank of Ceylon and others** ([1997] 3 Sri L.R. 156) and in **Karunadasa** v **Unique Gemstones** ([1997] 1 Sri L.R. 256).

In **Wijepala** v **Jayawardene** (supra) considering the necessity to give reasons, at least to this Court, Mark Fernando, J., was of the view that,

> "The petitioner insisted, throughout that established practice unquestionably entitled him at least to his first extension and that there was no relevant reason for the refusal of an extension . . . .
>
> Although openness in administration makes it desirable that reasons be given for decisions of this kind, in this case I do not have to decide whether the failure to do so vitiated the decision. **However, when this Court is requested to review such a decision, if the petitioner succeeds in making out a prima facie case, then the failure to give reasons becomes crucial. If reasons are not disclosed, the inference may have to be drawn that this is because in fact there were no reasons – and so also, if reasons are suggested, they were in fact not the reasons, which actually influenced the decision in the first place**" (emphasis added).

In **Manage** v **Kotakadeniya and others** (supra), where an application of a Post Master for his extension of service, upon reaching the age of 55 years was refused, Amerasinghe, J., was of the view that,

> "the refusal to extend the service of the petitioner was not based on adequate grounds."

The order of retirement was thus quashed on the basis that the petitioner in that case was treated unequally and that there had been discriminatory conduct against the petitioner.

In **Suranganie Marapana** v **The Bank of Ceylon and others** (supra) it was held that the Board failed to show the Court that valid reasons did exist for the refusal to grant the extension, which was recommended by the corporate management and therefore it was held that the refusal to grant the extension of service sought was arbitrary, capricious, unreasonable and unfair. Considering the question in issue the Court had stated that,

> "Even though Public Administration Circular No. 27/96 dated 30.08.96 (P8), which was an amendment to Chapter 5 of the Establishments Code, does not have any direct application to the matter before us, it clearly sets out the attitude of the State in regard to the question of extension of service of public sector employees, when it states that where extensions of service of State Employees are refused **there should be sufficient reasons to support such decision beyond doubt**" (emphasis added).

It is also noteworthy to refer to the views expressed by Mark Fernando, J., in **Karunadasa** v **Unique Gem Stones** (supra) with reference to the need to give reasons to a decision, where it was stated that,

> ". . . whether or not the parties are also entitled to be told the reasons for the decision, if they are withheld, once judicial review commences, the decision 'may be condemned as arbitrary and unreasonable'; certainly the Court cannot be asked to presume that they were valid reasons, for that would be to surrender its discretion."

On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today's context, which cannot be lightly disregarded. Moreover in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily, in coming to their conclusion. These aspects have been stated quite succinctly in the following passage, where Prof. Wade had expressed the view that, (Administrative Law, 9th Edition, pg. 522),

> "Unless the citizen can discover the reasoning behind the decision, he may be unable to tell whether it is reviewable or not, and so he may be deprived of the protection of the law. **A right to reasons is therefore an indispensable part of a sound**

> **system of judicial review. Natural justice may provide the best rubric for it, since the giving of reasons is required by the ordinary man's sense of justice. It is also a healthy discipline for all who exercise power over others"** (emphasis added).

And more importantly,

> "**Notwithstanding that there is no general rule requiring the giving of reasons, it is increasingly clear that there are many circumstances in which an administrative authority which fails to give reasons will be found to have acted unlawfully**" (emphasis added).

The importance of giving reasons, irrespective of the fact that there are no express or implied obligation to do so, had been clearly shown in many decisions and it would be pertinent to mention the views expressed in **Osmond** v **Public Service Board of New South Wales and Another** ([1985] L.R.C. (Const.) 1041) and **Marta Stefan** v **General Medical Council** (supra).

In **Osmond** (supra), the appellant was employed in the New South Wales Public Service. In 1982 he applied for promotion to the vacant post of Chairman of the Local Lands Board. He was not recommended for this appointment and appealed to the Public Service Board under section 116 of the Public Service Act 1979. Soon after his appeal was heard by the Board he was informed orally that it had been dismissed, although no written notice of the decision was ever given to him and requests for a written decision with reasons were refused on the ground that it was not the Board's practice to give reasons.

It was held that natural justice required that the appellant should be given the reasons for the decision of the Board in his appeal and Kirby, J. had stated that,

> "The duty of public officials, in making discretionary decisions affecting others in the exercise of statutory powers, is to act

> justly and fairly; this will normally impose an obligation to state the reasons for their decisions. Such an obligation will exist where the absence of reasons would render nugatory a facility provided to appeal against the decision or would diminish a facility to test the decision by judicial review and ensure that it complies with the law and that relevant matters only have been taken into account."

In **Marta Stefan** (supra), the question related to a doctor, who was subjected to suspension of her registration for varying periods following decisions of the Health Committee of the General Medical Council that her fitness to practice was impaired. In February 1998 her case came before the Health Committee again and the Committee concluded that her registration should be suspended indefinitely. The only reason given for the decision was that the Committee have carefully considered all the information presented to them and continue to be deeply concerned about her medical condition and that the Committee have again judged her fitness to practice to be seriously impaired and have directed that her registration be suspended indefinitely.

Allowing the appeal by the Doctor, it was held that there was no express or implied obligation on the Health Committee to give reasons for its decision within either the Medical Act 1983 or the General Medical Council Health Committee (Procedure) Rules Order of Council 1987, but that in the light of its judicial character, the framework in which it operated and the provision of a right of appeal against its decisions there was a common law obligation to give at least a short statement of the reasons for its decision, that the extent and substance of the reasons would depend upon the circumstances and they did not need to be elaborate or lengthy, but they should be such as to tell the parties in broad terms, why the decision was reached. It was also decided that the doctor's case would be remitted to a freshly constituted Health Committee for rehearing with reasons to be given for its decision.

The petitioners had complained of the infringement of their fundamental right guaranteed in terms of Article 12(1) of the Constitution. Article 12(1) of the Constitution deals with the right to equality and reads as follows:

> "All persons are equal before the law and are entitled to the equal protection of the law."

Equality, which could be introduced as a dynamic concept, forbids inequalities, arbitrariness and, unfair decisions. As pointed out by Bhagwati, J. (as he then was) in **E.P. Royappa** v **State of Tamil Nadu** (A.I.R. (1974) S.C. 555),

> "From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies, one belongs to the rule of law in a Republic while the other, to the whim and caprice of an absolute monarch."

In such circumstances to deprive a person of knowing the reasons for a decision, which affects him would not only be arbitrary, but also a violation of his right to equal protection of the law.

As pointed out by Craig (Administrative Law, 4th Edition, 1999 pg. 430) referring to Rabin (Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement (44 U. Chi. L.R. 60)) the very essence of arbitrariness is to have one's status redefined by the State without an adequate explanation of its reasons for doing so.

It is therefore apparent that as pointed out by Prof. Wade (Administrative Law, supra pg. 527), the time has now come for the Court to acknowledge that there is a general rule that reasons should be given for decisions based on the principle of fairness. Prof. Wade (supra) had further stated that,

> "Such a rule should not be unduly onerous, since reasons need never be more elaborate than the nature of the case admits, but the presumption should be in favour of giving reasons, rather than, as at present, in favour of withholding them,"

It is to be noted that there have been instances where Courts had quashed the decisions when only vague reasons had been given (**Re Poyser and Mills' Arbitration** ([1964] 2 Q.B. 467) or in circumstances where ambiguous reasons were provided (**R** v **Industrial Injuries Commissioner, *Ex parte* Howarth** ((1968) 4 K.I.R. 621).

It is not disputed that in the instant application, although the 1st respondent had informed this Court his reasons for the refusal of petitioners' application for the recognition of the Party in question, that in his communiqué to the petitioners on 21.01.2008 (X7) referred to above, no reasons whatsoever were given, which in my view means a denial of justice, an error of law and more importantly in connection to this matter, the said decision to withhold the reasons is arbitrary, unfair and unreasonable within the framework of Section 12(1) of the Constitution.

In such circumstances for the reasons aforementioned I hold that the decision reflected in the document dated 21.01.2008 (X7) is null and void and therefore the 1st respondent had violated the petitioners' fundamental rights guaranteed in terms of Article 12(1) of the Constitution. The petitioners' application is accordingly allowed. I direct the 1st respondent to re-consider the application submitted by the petitioners and to give reasons for his decision following such re-consideration.

I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

Saleem Marsoof, 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. 107/2007

Bandula Samarasekera,
No. 5, River View,
Tennekumbura,
Kandy.

Petitioner

Vs.

1. Vijitha Alwis,
   Officer-in-Charge,
   Ginigathhena Police Station,
   Ginigathheha.

2. Chief Inspector Dehigama,
   Officer-in-Charge,
   Kandy Police Station,
   Kandy.

3. Sub Inspector Dharmasena,
   Officer-in-Charge,
   Divisional Crime Prevention Unit,
   Kandy Police Station,
   Kandy.

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

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
Chandra Ekanayake, J. &
S.I. Imam, J.

COUNSEL : J.C. Weliamuna with Maduranga Ratnayake and Pasindu Silva for Petitioner

W.D. Weeraratne for 1st to 3rd Respondents

K.A.P. Ranasinghe, SSC, for 4th Respondent

ARGUED ON: 30.03.2009

WRITTEN SUBMISSIONS
TENDERED ON: Petitioner : 04.05.2009
1st to 3rd Respondents: 08.07.2009
4th Respondent : 04.05.2009

DECIDED ON: 14.09.2009

Dr. Shirani A. Bandaranayake, J.

The petitioner had filed this application in this Court alleging that his fundamental rights guaranteed in terms of Articles 11, 12(1), 13(1) and 13(2) of the Constitution were violated by the 1st and/or 2nd respondents. This Court had granted leave to proceed for the alleged infringement of Articles 11, 13(1) and 13(2) of the Constitution.

The facts of this application, as submitted by the petitioner, are as follows:

The petitioner had been an employee at Brown and Company from 1979 – 1996 and thereafter was engaged in facilitating sales of vehicles. His wife is a retired teacher in English who was the Head of the English Division of the Advanced Technical Institute, Kandy. Their son Sahan, was 24 years of age at the time of this incident and was engaged in a mobile phone shop in Kandy.

In 2005, the petitioner and his wife had learnt that Sahan was having an affair with a married woman. In the best interest of their son, the petitioner and his wife had advised Sahan not to

continue with the said affair, which Sahan had ignored. Both of them had made several attempts through their friends and relatives to advise Sahan against the said affair to no avail.

On 02.12.2006, Sahan had left the petitioner's residence stating that he would be thereafter living on his own and later the petitioner had become aware that Sahan was living with the said married woman in a rented house at Ampitiya.

At that point, the petitioner and his wife in a desperate attempt to change Sahan's mind had decided to retain the services of a local exorcist (*kattadiya*). Accordingly the petitioner had obtained the services of one P.G. Premaratne of Katugastota, a retired Grama Niladhari, who was said to be skillful in exorcism. The said exorcist had informed the petitioner that the exorcizing rituals must be performed at the petitioner's residence and thereafter charmed mustard must be scattered on the compound of the house, where Sahan was living. The exorcist had also told the petitioner to bring incense, camphor, flowers of five (5) kinds, beetle, coconut oil, an egg, frankincense, mustard and clay lamps for the exorcism. Thereafter on 28.02.2007, around 7.00 in the evening the exorcist had commenced the exorcizing rituals at the petitioner's residence. After that performance, around 10.00 p.m., the petitioner, a friend of Sahan and the exorcist had set off in the jeep bearing No. 31 Sri 9734 to Sahan's house. After scattering charmed mustard on the compound of Sahan's house, the petitioner along with the others had proceeded back home around 10.45 p.m.

Soon after within matters of 5-10 minutes drive from Sahan's house another vehicle had approached from the opposite direction and the lane had been too narrow at that point for the two vehicles to move forward. The petitioner had stopped his jeep and then the driver of the other vehicle had alighted from his vehicle and had asked the petitioner if he could reverse the jeep. By that time the petitioner had also got off from the jeep and whilst trying to get into his jeep he had said that he would reverse the jeep. Just as the petitioner was getting into his jeep, the 1st respondent, who was seated in the front passenger seat of that vehicle got off and came close to the petitioner stating that,

> **"මම ගිනිගත්හේන පොලීසියේ ඕ.අයි.සී. විජිත අල්විස්. අපේ ගමේ අපට කරන්න බැරි දෙයක් නැහැ. අපේ ගමට ඇවිත් අපට පාට් දාන්න දෙන්න බැහැ."**

Thereafter, the 1st respondent had snatched the ignition key of the jeep. The petitioner at that stage had stated that he was going to reverse the jeep and therefore there was no need to create any difficulty. No sooner the petitioner had stated the above, the 1st respondent had jumped forward and dealt several severe blows on the petitioner's face and had assaulted him. Thereafter having seen in the jeep the remaining items used for the rituals such as incense, camphor etc., the 1st respondent had started shouting stating that,

"මුන් නිදන් හොරු, කට්ටඩියකුත් ඉන්නවා."

Having stated that, the 1st respondent had assaulted the exorcist and Sahan's friend, who were in the jeep. The 1st respondent, according to the petitioner was smelling of liquor and the vehicle he came was driven by a member of a Pradeshiya Sabha, whom he could not identify.

Thereafter the 1st respondent had got into the driver's seat of the jeep, threatened the petitioner and the two others that they would be killed if they shout and had driven them to the Kandy Police Station. The petitioner, due to the brutal assault, was bleeding from his nose and his face and his right eye was swollen. He had also realized that his gold bracelet and the chain were missing. He had however managed to call his wife on his mobile phone and had told her briefly that he was arrested and being taken to the Kandy Police Station. When they reached the Kandy Police Station, the 1st respondent had told the petitioner and the two others to follow him and had made certain entries in a book at the Police Station. After stating that, "uqka ksoka fydre, uqka rsudkaâ lrkjd," he had left the Police Station. The officers of the Kandy Police Station had remanded the petitioner and the two others.

Soon after the petitioner's wife and the daughter had arrived at the Kandy Police Station with an Attorney-at-Law (P_1, P_2 and P_3). Around 2.00 a.m. the officers of the Kandy Police Station had taken the petitioner and the other two persons to the Judicial Medical Officer. However his injuries were not attended to by the said Medical Officer. On 01.03.2007 around 9.00 a.m. a Police Officer had obtained statements from the petitioner and the other two persons and thereafter around 12.00 noon they were taken to Dr. A.B. Seneviratne, who was a Judicial Medical Officer. The said Judicial Medical Officer had referred them to the E.N.T. clinic of the Kandy Hospital and thereafter necessary X-rays had been taken by them (P_4).

Around 5 p.m. on 01.03.2007, all three were produced before the Magistrate's residence and were released on surety of Rs. 100,000/- for each of them.

The petitioner had made a complaint to the Human Rights Commission of Sri Lanka and to the National Police Commission regarding the aforesaid incident (P_6 and P_7). His position was that he had to undergo continues treatment for the injury caused to his eye and the said incident had caused him severe pain of mind.

When this matter came up on 27.07.2007, an application had been made by the learned Counsel for the 2nd respondent to discharge the 2nd respondent from these proceedings. Learned Counsel for the petitioner on that date had submitted that the petitioner had not claimed any relief against the 2nd respondent. In the circumstances, this Court had discharged the 2nd respondent from these proceedings.

The 1st respondent in his affidavit had averred that he had received a message on 24.02.2007 for him to attend the Magistrate's Court, Kandy on 28.02.2007 to lead evidence in M.C. Case No. 61908 ($1R_1$). On 28.02.2007, after attending the duties in Court, he had returned to his residence in his private vehicle at 190/4, Pallegama, Ampitiya around 10.30 p.m. As he was around 100 metres away from his house he had noticed a commotion and there was a gathering of a big crowd near a jeep, where some were shouting. Referring to the said incident the 1st respondent had averred in his affidavit that,

> "I noticed those three people were been man handled by the crowd. I shouted at them to disperse the mob and asked the crowd to hand them over to me. The people then brought the petitioner and two others to me and informed that they were suspected as treasure hunters."

Thereafter he had handed over the suspects to the Police Sergeant Padmasiri attached to Kandy Police Station to take necessary action. His contention was that he had not assaulted any body and that he had noticed that the petitioner had sustained some marks on his left eye.

In support of his contention, the 1st respondent had annexed a certified copy of the notes entered by him in the Police Station, Kandy ($1R_2$). The contention of the 1st respondent was that the petitioner with two others had been at that particular place on the night of 28.02.2007 for the purpose of treasure hunting and in support of his contention he had referred to the items in the petitioner's possession at the time of his arrest.

The petitioner's position, as stated earlier, had been that his arrest and detention had been unlawful and that he was assaulted by the 1st respondent at the time of his arrest.

The 1st respondent's version was that the civilians of the area had surrounded the petitioner and the two others and thereafter the 1st respondent had arrested the petitioner and had brought him to the Kandy Police Station. In support of this position he had filed a copy of his entry made at the Kandy Police Station at 11.50 p.m. on 28.02.2007 ($1R_2$) and an affidavit filed by one Jegan Navaratne Raja ($1R_9$), a resident of No. 35A, Wewathenna Road, Ampitiya, Kandy. The said Navaratne Raja's position was that he had been returning from the construction site of his house situated at Pallegama around 10.30 p.m. on 28.02.2007 and he had witnessed the incident related by the 1st respondent.

Articles 13(1) and 13(2) of the Constitution refer to freedom from arbitrary arrest and detention and read as follows:

> "13(1)- No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest.
>
> 13(2)- 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 procedure established by law."

It is to be borne in mind that the 1st respondent had contended that the petitioner and the three others were arrested by the villagers and thereafter they were handed over to him. The procedure for the arrest of any person by private person is dealt with in Section 35 of the Code of Criminal Procedure Act, No. 15 of 1979. According to the said Section 35, that,

> "Any private person may arrest any person who in his presence commits a cognizable offence or who has been proclaimed as an offender, or who is running away and whom he reasonably suspects of having committed a cognizable offence, and shall without unnecessary delay make over the person so arrested to the nearest peace officer or in the absence of a peace officer take such person to the nearest police station. If there is reason to believe that such person comes under the provisions of Section 32 a peace officer shall re-arrest him . . . . If there is no reason to believe that he has committed any offence he shall be at once discharged."

The situation which prevailed at the time the 1st respondent had arrested the petitioner was vividly described by him in his affidavit, where he had averred that,

> ". . . as I was approaching around one hundred metres close to my house where there is a small bridge I heard a big noise from a crowd; some were shouting and some were screaming centering a pajero with three people. I noticed that those three people were being man handled by the crowd. I shouted at them to disperse the mob and asked the crowd to hand them over to me. The people then brought the petitioner and two others to me and informed that they were suspected as treasure hunters."

According to his affidavit, the 1st respondent had arrested the petitioner as he was suspected as a treasure hunter. However, in his own entry entered at 11.50 p.m. at the Kandy Police Station

it had been stated that the 1st respondent had arrested the petitioner not for any other reason, but for the petitioner's own safety.

> "පැය 23.10 ට සැකකරු හා දේපල **ආරක්ෂාව සඳහා අත් අඩංගුවට ගෙන** වැඩිදුර පරීක්ෂණ සඳහා පොලිස් ස්ථානයට රැගෙන විත් උප සේවයේ යෙදී සිටි පො. සැ. පත්මසිරි වෙත භාර දෙමි" (emphasis added) ($1R_2$).

When one considers the averment of the 1st respondent in his affidavit tendered to this Court and the entry entered by him on 28.02.2007 at 11.50 p.m., it is quite clear that there is clear contradiction in the two versions given by the 1st respondent.

Learned Counsel for the 1st respondent contended that the petitioner was a treasure hunter and therefore the 1st respondent had to arrest him as the petitioner had got caught to the people of that area. However, no material was produced before this Court to indicate that the area in question had any places of archaeological value. A police officer of the Kandy Police Station had investigated into the incident in question and according to his report about 200 metres away from the place, where the petitioner was arrested on the night of 28.02.2007 there had been a place with a stone stairway leading to a house and the said stairway, which consisted of 27 stone steps had a historical value. It was further stated in the police officer's Report that during the period of King Rajasinghe, in one of his visits, the King had rested for a while in the house near the said stone stairway. However, this place is about 200 metres away from the place of the incident in question ($1R_7$) and the owner of the house to which the stone stairway leads to had categorically stated that no one had visited their house on the night of the incident. Further the said owner had not referred to any archaeological importance being attributed to the said stone stairway. More importantly, the Deputy Director (Movable and Immovable Property) of the Archaeological Department by his letter dated 25.04.2007 had informed the Head Quarters Inspector of the Police Station, Kandy that on an examination of the place in question, it is ascertained that the particular place has no archaeological value.

On the basis of the letter of the Deputy Director of Archaeological Department the Officer-in-Charge of the Police Station, Kandy had submitted to the Magistrate's Court, Kandy that as

there is no material against the petitioner and the other two suspects, that they be discharged from the proceedings.

As referred to earlier, Section 32(1)b of the Code of Criminal Procedure Act, had clearly stipulated that an arrest could be made not on vague reasons, but only on a reasonable suspicion that the person in question has been concerned in any cognizable offence.

In **Kushan Indika** v **Ranjan Wijesekera**, **Officer-in-Charge, Police Station, Pitigala** (S.C. (Application) No. 129/2007 – S.C. Minutes of 31.08.2009), the question of arresting a person according to the procedure established by law in terms of Article 13(1) and Section 32 of the Code of Criminal Procedure Act, was examined in detail. Considering the rationale in decisions of **Pelawattage (A.A.L.) for Piyasena** v **O.I.C. Wadduwa and others** (S.C. (Application) 433/93 – S.C. Minutes of 31.08.1994), **Gamlath** v **Neville Silva and others** ([1991] 2 Sri L.R. 267) **Muttusamy** v **Kannangara** ((1951) 52 N.L.R. 324) and **Veeradas** v **Controller of Immigration and Emigration and others** ([1989] 2 Sri L.R. 205), it was clearly stated that,

> "It is therefore abundantly clear that although a person could be arrested without a warrant in terms of section 32(1)b of the Code of Criminal Procedure Act, for such action to be taken it is necessary that there **should be a reasonable suspicion that such person had committed the offence in issue**" (emphasis added).

Accordingly, the question which arises at this juncture is whether there was a reasonable suspicion against the petitioner at the time he was arrested by the 1st respondent.

As referred to earlier, the contention of the 1st respondent was that he had suspected him to be a treasure hunter. However, as has been already described, the Assistant Director of the Archaeological Department in his letter had categorically stated that according to the report issued on the basis of the examination of the site in issue, that the area in question is not a place with any archaeological value. Furthermore the owner of the house, where the stone stairway was located had stated that no person had come near their house in that night. In

those circumstances it is apparent that the petitioner could not have committed the alleged offence.

Accordingly I hold that the petitioner's fundamental rights guaranteed in terms of Article 13(1) of the Constitution had been violated by the 1st respondent.

The petitioner had complained that his fundamental rights guaranteed in terms of Article 13(2) had been violated by the 1st respondent.

The 3rd respondent, who was the Officer-in-Charge of the Divisional Crime Prevention Unit, Police Station, Kandy had averred that at the time the petitioner was brought to the Kandy Police Station on 28.02.2007, he was not in the Police Station as he had left the Police Station around 4.00 p.m. on 28.02.2007 and reported for duty only on 01.03.2007 at 2.00 p.m. and had attended to duties until 10.00 p.m. in the mobile duty car ($3R_2$).

The B report dated 01.03.2007 had been prepared by the police officer, who was on duty at the time and not by the 3rd respondent.

The B report clearly stated that the petitioner was brought to the Kandy Police Station and a complaint was made by the 1st respondent. The petitioner was brought to the Police Station around 11.00 p.m. on 28.02.2007 and he had been produced before the learned Magistrate at his residence around 4.00 p.m. on 01.03.2007, where he was released on surety bail of Rs. 100,000/- (P_5). It is interesting to note that the learned Magistrate after a perusal of the material placed before him had recorded that 'no offence appears to have been committed'.

An arrest takes place when a person is either taken into custody or placed under restraint. In **Holgate-Mohammed** v **Duke** ([1984] 1 All E.R. 1056) Lord Diplock was of the view that when a person is detained or restrained by a police officer and that he is aware that he is being detained or restrained, that would amount to an arrest of the person although no formal words of arrest were spoken by the officer.

Considering the circumstances of this application, a question arises as to whether there was a need for the 1st respondent to have brought the petitioner to the Kandy Police Station. In his

statement recorded at the Kandy Police Station he had stated that the petitioner was arrested for the protection of the petitioner and if that had been the reason for his arrest there would not have been any need to have detained the petitioner until 4.00 p.m. on 01.03.2007.

It is not disputed that the petitioner was arrested around 10.00 p.m. on 28.02.2007 and produced before the learned Magistrate around 4.00 p.m. on 01.03.2007. In effect he had been in police custody for over 18 hours.

Section 37 of the Code of Criminal Procedure Act refers to the procedure that should be adopted when a person is arrested by a peace officer without a warrant. According to Section 37,

> "Any peace officer shall not detain in custody or otherwise confine a person arrested without a warrant for a longer period then under all the circumstances of the case is reasonable, and such period shall not exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate."

Section 35 of the Code of Criminal Procedure Act states that when a person, who has been arrested by a private person is produced before a peace officer and there is no reason to believe that he has committed any offence that he shall be at once discharged. The peace officer could arrest such a person only if there is reason to believe that he is a person, who has acted in the circumstances set out in Section 32 of the Code of Criminal Procedure Act.

Considering the circumstances of the present application it is apparent that there were no reasons for the petitioner to have been arrested and also there was no necessity for him to have been kept in custody without been produced before the Magistrate for over 18 hours. Although Section 37 of the Criminal Procedure Code refers to a period of 24 hours as the period a person taken without a warrant could be kept in custody without producing him before the Magistrate, this does not mean that a person could be kept for the maximum period of time under arrest without taking necessary steps to produce him before the learned Magistrate.

What Section 37 of the Code of Criminal Procedure Act had contemplated is that, a person who has been taken into custody without a warrant should be produced before the learned Magistrate as early as possible and without any unnecessary delay. The time taken for such production should be considered on the circumstances of each case.

On a consideration of the totality of the circumstances it is clear that the petitioner was taken into custody for his own protection and for the protection of his property and therefore there was no necessity for any unnecessary delay. I accordingly hold that the petitioner's fundamental rights guaranteed in terms of Article 13(2) of the constitution had been violated.

The petitioner had complained that his fundamental rights guaranteed in terms of Article 11 had been violated by the 1st respondent as he was brutally assaulted by him. The petitioner had complained that as a result of the said brutal assault by the 1st respondent, he was bleeding from his nose, his face and his right eye was swollen and reddened and the left ear drum too had got injured. Article 11 of the Constitution, which deals with the right pertaining to freedom from torture, reads as follows:

> "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

Torture or cruel, inhuman or degrading treatment or punishment could take many forms and even the nature of the physical harm may differ from case to case. When there is a complaint against a police officer alleging that the complainant had been assaulted, a mere allegation would not be sufficient to prove that there had been a violation of Article 11 of the Constitution. As stated in **Ansalin Fernando** v **Sarath Perera and others** ([1992] 1 Sri L.R. 411), an allegation against the police cannot be rejected merely because the police deny such allegation or due to the fact that the aggrieved party cannot produce any medical evidence of the injuries. Whether any allegation is in violation of Article 11 of the Constitution would depend on the facts of each case.

However, in order to establish the alleged allegation of torture it would be necessary for an aggrieved party to corroborate his averments against the respondents and for such corroboration it would be necessary to produce evidence including medical evidence.

In **Namasivayam** v **Gunawardena** ([1989] 1 Sri L.R. 394) referring to the need for corroborating the averments of alleged torture, Sharvananda, C.J., had stated that,

> "On the question whether the petitioner was subject to cruel treatment or torture, petitioner's averments stands uncorroborated by any medical evidence and has been denied by the respondents. The evidence is not sufficient for us to hold that there had been any violation of Article 11 of the Constitution."

On many instances, this Court therefore had directed aggrieved persons to be examined by a Judicial Medical Officer, in order to obtain a Medico-Legal Report. In this instance, however, after the petitioner was arrested and taken to the Police Station, a police officer had taken the petitioner to the Judicial Medical Officer, Dr. A.B. Seneviratne of the General Hospital, Kandy around 12.00 noon on 01.03.2007.

The consultant Judicial Medical Officer, Dr. A.B. Seneviratne, who was attached to the General Hospital, Kandy had tendered the Medico-Legal Report pertaining to the petitioner to this Court. The relevant parts of the Judicial Medical Report are re-produced below to indicate the kind of injuries the petitioner had sustained on the night of 28.02.2007.

> "Injuries
>
> 1. Sub conjunctival haemorrhage in left eye,
>
> 2. Traumatic perforation of the ear drum in the left ear
> No evidence of nerve damage.
>
> 3. Pain and swelling in the nose with fracture of the nasal bone,

4. Multiple small abrasions over the malar prominence of the left cheek

5. Abrasion 4.0 x 2.0 cm. over upper third front right side of the chest.

Non-grievous injuries – (1), (3), (4)

Grievous injuries	Limb under Section 311 of Penal Code	Explanatory remarks if any
(2)	C	Permanent privation or impairment of the hearing of either ear
(3)	G	Cut or fracture of bone cartilage or tooth dislocation or subluxation of bone, joint or tooth

Injuries caused by – blunt weapon."

An examination of the Medico-Legal Report clearly indicates that the petitioner had suffered several grievous and non-grievous injuries. The question that arises at this juncture is as to who had been responsible for such injuries. As stated earlier the petitioner's contention was that the 1st respondent, in his anger that the petitioner's vehicle had obstructed his vehicle from moving, had assaulted him and the 1st respondent had taken up the position that since the petitioner and his friends were treasure hunters, the villagers had assaulted him.

Although the 1st respondent had stated that since the petitioner was a treasure hunter the villagers had assaulted him, he had not tendered any evidence in support of this contention. Moreover as pointed out earlier, the place where the incident took place or the surrounding area had not been either declared or known as an area, where there is any archaeological value. In such circumstances the contention of the 1st respondent fails and on a careful examination of the two versions and the findings of the consultant Judicial Medical Officer

referred to in the Medico-Legal Report, it is apparent that the contention of the petitioner is more probable and has to be accepted.

I accordingly hold that the 1st respondent had violated the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

The petitioner had clearly stated that the 1st respondent had become annoyed with the petitioner since the 1st respondent could not move his vehicle as the petitioner's vehicle had come from the opposite direction, at a place where the road was too narrow for two vehicles to pass.

Although the 1st respondent had contended that the petitioner had been on that road on an expedition in search of treasure, it is apparent that the petitioner's contention is more probable and that the 1st respondent had been simply displaying his authority as the Officer-in-Charge of the Police Station, Ginigathhena.

It is the duty of a police officer to use his best endeavour and ability to prevent all crimes, offences and public nuisances and more importantly to preserve the peace. In order to carry out his duties efficiently and effectively, it would be necessary to have the trust and respect of the public. It is not easy to command that from the public and in order to earn such trust and respect, the police officers must possess a higher standard of moral and ethical values than that is expected from an average person.

The facts and circumstances of this application clearly demonstrate the lack of such higher standards of ethical and moral value that is expected from a police officer. As stated by Atukorale, J. In **Amal Sudath Silva** v **Kodituwakku** ([1987] 2 Sri L.R. 119),

> "Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects helpless suspect in his charge to depraved and barbarous methods of treatment .... **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" (emphasis added)"

For the reasons aforesaid I hold that the petitioner's fundamental rights guaranteed in terms of Articles 11, 13(1) and 13(2) of the Constitution had been violated and the 1st respondent is responsible for the said violation of Articles 11 and 13(1) of the Constitution. I accordingly direct the 1st respondent to pay personally to the petitioner a sum of Rs. 50,000/- as compensation and costs. Since the violation of Article 13(2) had occurred whilst the petitioner was in the custody of the Police Station, Kandy and no particular officer was responsible for such violation I hold that the said violation would be the responsibility of the State and therefore I direct that a sum of Rs. 15,000/- to be paid to the petitioner by the State as compensation and costs. Altogether the petitioner would be entitled to a sum of Rs. 65,000/-. These amounts to be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector-General of Police.

Judge of the Supreme Court

Chandra Ekanayake, 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. (FR) Application
No. 129/2007

K.H.G. Kushan Indika,
"Dhammika",
Dombagahawatta,
Niyagama,
Talgaswela.

Petitioner

Vs.

1. Christy Leonard Ranjan Wijesekera,
   Officer-in-Charge,
   Police Station,
   Pitigala.

2. J.M. Karunaratne,
   Superintendent of Police,
   Office of the Superintendent of Police,
   Elpitiya.

3. Victor Perera,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

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

Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Chandra Ekanayake, J.

COUNSEL : Sagara Kariyawasam for Petitioner

Upul Kumarapperuma for 1st Respondent

Riyaz Hamza, SSC, for 2nd – 4th Respondents

ARGUED ON: 10.12.2008

WRITTEN SUBMISSIONS

TENDERED ON:	Petitioner	:	25.06.2009
	1st Respondent	:	22.01.2009
	2nd to 4th Respondents	:	29.07.2009

DECIDED ON: 31.08.2009

Shirani A. Bandaranayake, J.

The petitioner, who was a Driver attached to the Sri Lanka State Plantation Corporation, had complained that his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution were violated by the 1st respondent for which this Court had granted leave to proceed.

The petitioner's complaint, as submitted by him, *albeit* brief, is as follows:

The petitioner had to report for work usually at the Head Office of the Sri Lanka Plantation Corporation situated at Vauxhall Street, Colombo 02 and as he was from Niyagama, Talgaswatta, for his convenience he had been staying with a family known to him at Park Avenue in Colombo 08.

On 30.03.2007 after his work the petitioner had gone to Niyagama as the following Monday was also a holiday and on 02.04.2007, he had left his home at Niyagama to proceed to Colombo on 02.04.2007. He had come to the bus halt at Gallinda Junction around 5.00 p.m. to proceed to Elpitiya from where he could wait for a bus plying to Colombo.

While the petitioner was waiting at the bus stand at Gallinda Junction around 5.10 p.m. a police jeep had arrived at the said bus stand with 4 police officers in civilian clothes with another person, whom the petitioner had subsequently had got to know to be a person taken into police custody, named Wasantha. The 1st respondent had been seated in the front passenger seat of the said police jeep.

At that time the petitioner had been the only male waiting for a bus to proceed to Elpitiya and there had been a few females on the other side of the road waiting for a bus travelling towards the opposite direction. There had been a motorbike stopped near the bus stand, where the petitioner was standing.

The said police jeep had stopped near the petitioner and the 1st respondent had alighted from the jeep and had questioned the petitioner on his identification. When the petitioner gave his driving licence to the 1st respondent, the 1st respondent had given a heavy slap on to his face without accepting his driving licence. The petitioner had realised that the 1st respondent had been under the influence of liquor at that time, as he smelt of liquor.

When the 1st respondent had slapped the petitioner, he had told the 1st respondent that the petitioner had not committed any offence; that he had been waiting there for a bus and was on his way to his work place, the 1st respondent while stating that there cannot be any kind of work at that time, had again slapped the petitioner several times.

Thereafter the 1st respondent had made inquiries from the petitioner as to the motorbike, which was parked near the bus stand to which the petitioner had stated that it does not belong to him and that he had no knowledge about the said motorbike. The 1st respondent had then stopped an open truck, which was proceeding in the direction of Pitigala Police Station and the 1st respondent had ordered the petitioner to load the motorbike into that truck. Since the said motorbike was too heavy for the petitioner to have moved, he had told the 1st respondent that he could not load the motorbike alone into that truck and that he needs the assistance from another person.

At that stage, the 1st respondent had taken out a club from the jeep and had assaulted the petitioner with that club for over four times. Thereafter the 1st respondent had ordered the

other person, who was in the jeep to assist the petitioner to load the said motorbike into the truck and the petitioner had loaded the said motorbike with that persons' assistance.

The 1st respondent thereafter had ordered the petitioner to get into the jeep and the petitioner was taken to Pitigala Police Station. Even on his way to the Police Station, the petitioner had attempted to explain to the 1st respondent that he was waiting for a bus to go for work to which the 1st respondent had stated that, "f;da fmd,sishg hux ug f;daj jevg hjkak". The other police officers, who were inside the jeep had told the petitioner not to talk and if he talks he would get into trouble as the 1st respondent was in a bad mood.

When they arrived at the Police Station, the 1st respondent ordered the petitioner to unload the motorbike, which the petitioner did with the assistance of the other persons who were in the jeep. Thereafter the petitioner was put inside the cell around 5.40 p.m. on 02.04.2007.

Around 6.30 p.m. the petitioner was taken out of the cell and produced before the 1st respondent, where the 1st respondent has released the petitioner after scolding and threatening him not to get caught to him again.

The petitioner stated that no statement was recorded from him and he was never informed of the reason for his arrest. The only reason given by the other officers had been that the 1st respondent was in a bad mood.

The petitioner submitted that as a result of the said incident, he could not come to Colombo as planned on 02.04.2007 to report for work on 03.04.2007. Later he had learnt that the motorbike he had to load into a truck and which was brought to the Police Station was claimed by its owner on the same day itself. The petitioner had gone to the office of the Superintendent of Police, Elpitiya on 03.04.2007, to lodge a complaint, but he was unable to do so since the 2nd respondent was not available. Accordingly the petitioner had made a complaint on 07.04.2007 at the Superintendent's office at Elpitiya. Thereafter, the petitioner had learnt that the other person, who was in the police custody at the time the petitioner was assaulted by the name Wasantha, was summoned by the 2nd respondent, where he had made a statement confirming the incident narrated by the petitioner.

The petitioner had accordingly complained of the alleged infringement of his fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution.

An examination of the petitioner's submissions clearly indicates that the petitioner's allegations are only against the 1st respondent and the only relief he had sought from the 2nd respondent was to direct the 2nd respondent to tender the proceedings of the complaint made by him on 07.04.2007, which the 2nd respondent had carried out without any delay.

The 1st respondent had denied the allegations levelled against him by the petitioner and had submitted that he had not assaulted the petitioner and that he had not asked the petitioner to load a motorbike to his jeep. He had averred in his affidavit of 14.08.2008 that on 02.04.2007 he was on routine mobile patrol service in the Thalgaswela area with two other police officers attached to the Pitigala Police Station, namely Sergeant Piyal Shantha and Sergeant Thilak Jayasumana. He had noticed that the petitioner and several other persons were talking at Niyagama/Gallinda Junction. According to the 1st respondent the said junction was well known for robberies and various other illegal and anti-social activities. The 1st respondent had proceeded to the said place with other officers with the intention of questioning the said persons. At that moment except for the petitioner, the others in the said group had started running. The 1st respondent had questioned about the petitioner's identification and the petitioner had failed to produce any document to prove his identity. The 1st respondent had asked the petitioner about the other persons, who had fled when he reached that place and the petitioner had failed to divulge any information. Since the 1st respondent had a serious doubt about the petitioner, he had brought him to the Police Station for further investigations after explaining the reasons for bringing him to the Police Station.

Soon after the petitioner was brought to the Police Station, one Padmasiri Block, who was a member of the Nagoda Predesheeya Sabha came to meet the 1st respondent and had informed that the petitioner was a strong supporter of one Ananda Padmasiri Kariyawasam, who was a politician in the area and had requested the 1st respondent to release the petitioner without taking further action. The said Padmasiri Block had further informed the 1st respondent that the petitioner is his cousin and a person of good character.

The 1st respondent had then informed the said Padmasiri Block that the petitioner was brought to the Police Station to question about his suspicious behaviour as there had been complaints from the Manager of the Bank of Ceylon, to the effect that female employees of the Bank had been subjected to various humiliations by a group of people, who had been usually loitering in the said area and that an armed robbery had also taken place at the said area and that a case on that matter was pending before Court.

The 1st respondent had further averred that, after accepting the said Padmasiri Block's recommendation regarding the petitioner, he had released the petitioner after advising him not to behave in a suspicious manner.

The 1st respondent in support of his contention had tendered an affidavit from the Manager, Bank of Ceylon, Thalgaswela (1R-3C) dated 10.02.2007 that there were persons loitering near Gallinda Junction, who have been passing remarks to lady officers of the Bank when they were on their way either for work or returning home after work.

It is not disputed that the 1st respondent had arrested the petitioner near the Niyagama/Gallinda Junction. The 1st respondent's contention was that since the area in question had a reputation as a place where unlawful activities had taken place, and the petitioner had not been able to prove his identity and had failed to give information about the other persons, who had fled at the time the 1st respondent had stopped near the Niyagama/Gallinda Junction, the petitioner was arrested. The petitioner on the other hand submitted that he had been waiting for a bus to proceed to Colombo and when the 1st respondent had inquired about his identity the petitioner had taken out his Driving Licence, which was not accepted by the 1st respondent.

Admittedly the petitioner was an employee of the Sri Lanka State Plantation Corporation and had been working as a driver. The arrest took place on 02.04.2007 around 5.00 p.m., which was a holiday on account of Full Moon Poya Day. The petitioner's version was that since he had to report for duty on the next morning, viz., on 03.04.2007, that he left his home on the evening of 02.04.2007 to proceed to Colombo.

The 1st respondent had admitted that he had arrested the petitioner and had taken him to the Police Station, Pitigala. He had also averred in his affidavit that such arrest had been on suspicion. However, it is not disputed that the 1st respondent had not recorded a statement from the petitioner. Further, the petitioner had complained that the 1st respondent had assaulted him. The 1st respondent had not produced the petitioner before the Judicial Medical Officer and therefore no medico-legal Report was available regarding his injuries.

The relevant IB extract of 02.04.2007 stated that several people, who were loitering at the Niyagama Junction were dispersed and two persons, who were taken to the Police Station were released due to the intervention of a member of the Pradesheeya Sabha.

> **"නියාගම, මානම්පිට, බඹරවාන, පෝද්දිවෙල, යන ප්‍රදේශ සංචාරය කලා. නියාගම හන්දියේදී නිකරුනේ ගැවසුනු පුද්ගලයන් කීපදෙනෙක් විසුරුවා හරින ලදී. මෙම අවස්ථාවේදී ප්‍රාදේශීය සභා මන්ත්‍රී බිලොක් මන්ත්‍රීතුමා ස්ථානයට පැමින කරුණු දැන්වීමෙන් අනතුරුව මෙම රැගෙන ආ දෙදෙනකු අවවාද කර පිටත්කර හරින ලදී"** (R1).

However, it is to be noted that although, the 1st respondent had filed the two affidavits (R2 and R3) from the two officers who had accompanied him on 02.04.2007 in support of his version, both affidavits refer to the fact that the petitioner had been waiting at the bus halt at Niyagama/Gallinda Junction. Moreover, these two affidavits support the version given by the petitioner that there was no one near the bus halt at that time. For instance, in his affidavit Sergeant H.H. Tilak Jayasumana had averred that,

> "On 02.04.2007, while engaged in mobile police patrol, a person, who was loitering suspiciously at the Gallinda bus halt attracted our attention and on being suspicious of his behaviour, on the instructions of the first respondent, we took him into custody and took him to the police station."

The aforementioned averments clearly indicate that the contention of the 1st respondent was that the petitioner was arrested due to his suspicious behaviour whilst he was waiting at the bus halt near Niyagama/Gallinda Junction.

The petitioner had alleged that no reason was given by the 1st respondent for his arrest and that he was arrested without following the procedure established by law and therefore had violated his fundamental right guaranteed in terms of Article 13(1) of the Constitution.

Article 13(1) of the Constitution, which deals with freedom from arbitrary arrest states that,

> "No person shall be arrested except according to procedure established by law. Any person shall be informed of the reason for his arrest."

The provisions of Article 13(1) thus clearly indicate that the said Article contains two important limbs, viz., the arrest according to procedure established by law and giving reason for arrest. Since the petitioner had complained of both limbs under Article 13(1) of the Constitution, let me now turn to consider them separately.

It is not disputed that the 1st respondent had arrested the petitioner around 5.00 p.m. on 02.04.2007 near Niyagama/Gallinda Junction. Therefore the question, which arises at this point is whether the petitioner was arrested according to the procedure established by law, as Article 13(1) of the Constitution clearly provides that "No person shall be arrested except according to procedure established by law".

The petitioner was arrested admittedly by the 1st respondent and the arrest was carried out without a warrant. Section 32 of the Code of Criminal Procedure Act, No. 15 of 1979 deals with arrest without a warrant and Section 32(1) b refers to a situation, where a person is arrested on suspicion. The said Section 32(1) b reads as follows:

> "32(1) Any peace officer may without an order from a Magistrate and without a warrant arrest any person –
>
> a. . . . .
>
> b. who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been

> received or a reasonable suspicion exists of his having been so concerned,"

The contention of the 1st respondent was that he had arrested the petitioner on suspicion at a time he was standing at a bus halt near Niyagama/Gallinda Junction. Section 32(1)b of the Criminal Procedure Code Act, no doubt provides for a peace officer to arrest a person on the basis of suspicion, but the said Section quite clearly states that there should be the existence of a 'reasonable suspicion'. Considering the circumstances of this application, the question that arises would be as to whether there was a reasonable suspicion on the behaviour of the petitioner at the time he was waiting for a bus at Niyagama/Gallinda Junction, on 02.04.2007.

In **Pelawattage (AAL) for Piyasena** v **OIC Wadduwa and others** (S.C. (Application) 433/93 – S.C. Minutes of 31.08.1994), the petitioner was arrested near a hotel in Kurunegala as he was unable to explain his presence at that place. He had been a person, who was 'wanted' in connection with offences committed previously. Kulatunga, J., whilst holding that such an arrest was violative of Article 13(1) of the Constitution, had stated that,

> "If Piyasena was a wanted man in respect of offences committed in 1990 and 1992, and the 2nd respondent had information that Piyasena was at Kurunegala, there was nothing to prevent the 2nd respondent obtaining a warrant for his arrest. To permit extra-judicial arrests would be detrimental to liberty. Interested parties can get involved in such exercises. It would also encourage torture in the secrecy of illegal detention. We cannot encourage illegality to help the police to apprehend criminals. The end does not justify the means."

In **Gamlath** v **Neville Silva and others** ([1991] 2 Sri L.R. 267) the petitioner was arrested on suspicion of a theft of a water pump from an estate. The estate was owned by the wife of a Superintendent of Police. The watcher of the said estate could not name a suspect and a Police Sergeant, who was known to the owner, named one Dharmadasa as a suspect as he was working in this estate and had been arrested by the police previously for theft of similar articles. On this material Dharmadasa was arrested. Within 15 minutes from his arrest he

was said to have confessed to the offence and the disposal of the water pump. He had also referred to one Kirthipala, who had assisted him to sell the water pump. On this statement Kirthipala was arrested who had confessed within 10 minutes of his arrest of the involvement of the petitioner. On this statement, the petitioner was arrested, but the stolen article was not recovered.

On a complaint by the petitioner with regard to the violation of his fundamental right guaranteed in terms of Article 13(1) of the Constitution, Kulatunga, J., held that the said right had been violated. It was further stated that,

> ". . . there is no credible information giving rise to a reasonable suspicion that the petitioner is concerned in the offence of dishonestly receiving stolen property. It was an arbitrary arrest particularly having regard to the background to the case, viz., the water pump which was lost belongs to the wife of a senior Police Officer and the initial information which led to the petitioner's arrest was given by a subordinate Police Officer. The information, even if it has any value, does not touch the petitioner."

It is therefore apparent that although provision had been made under the Code of Criminal Procedure Act for a peace officer to arrest a person, such a peace officer is not entitled to arrest a person on mere suspicion, except on grounds, which justify the entertainment of a reasonable suspicion.

In **Muttusamy** v **Kannangara** ((1951) 52 N.L.R. 324), referring to the entertainment of a reasonable suspicion by a Police Officer, Gratiaen, J., citing the decision in **McArdle** v **Egan** ((1933) 30 Cox G.C. 67) stated that,

> "A suspicion is proved to be reasonable if the facts disclose that it was 'founded on matters within the police officer's own knowledge or on statements by other persons in a way which justify him in giving them credit'."

A similar view was taken in **Veeradas** v **Controller of Immigration and Emigration and others** ([1989] 2 Sri L.R. 205), where it was clearly stated that for a peace officer to make an arrest of a person in terms of Section 32(1)(b) of the Code of Criminal Procedure Act, it is necessary for there to be a reasonable suspicion of such person committing the offence in question.

It is therefore abundantly clear that although a person could be arrested without a warrant in terms of Section 32(1)(b) of the Code of Criminal Procedure Act, for such action to be taken it is necessary that there should be a reasonable suspicion that such person had committed the offence in issue.

Accordingly, the question which arises at this juncture is whether there was a reasonable suspicion of the petitioner at the time he was arrested by the 1st respondent.

The contention of the 1st respondent was that he had received complaints from the Manager of the Bank of Ceylon, Thalgaswela Branch that some of the female employees of the Bank had been harassed. The said complaint was made in February 2007 and the incident pertaining to this application took place in April 2007. According to the 1st respondent, while he was on mobile duty he had seen several people near Niyagama/Gallinda Junction who had started running when the vehicle he was travelling approached the said junction. The 1st respondent had averred in his affidavit that all the persons in the said group except for the petitioner, had started running from the scene. Thereafter the 1st respondent had inquired from the petitioner about the other persons, who had fled from that place to which the petitioner had not been able to divulge any information. The 1st respondent had further stated that the petitioner had been unable to produce any document to prove his identity.

The petitioner's version is quite different to the aforementioned. According to him he was the only person, who had been at the bus halt at the time in question. The two affidavits filed by the two sergeants on the other hand is supportive of the version given by the petitioner and both of them had averred that only the petitioner had been at the bus halt near Niyagama/Gallinda Junction. Learned Counsel for the 1st respondent submitted that the petitioner had not been able to produce any identification. However, when the 1st respondent had asked for his identification, the petitioner had immediately handed over his

Driving Licence. The question that arises at this juncture therefore, is as to whether it is mandatory to produce the National Identity Card as the only means of identification.

There is no doubt that the best method of identification of a person would be to produce the National Identity Card issued by the Commissioner for the Registration of Persons. As correctly pointed out by the learned Senior State Counsel for the 2nd to 4th respondents that there are no provisions in the Registration of Persons Act, No. 32 of 1968 requiring or stipulating that the National Identity Card of a person is the only method by which a person has to prove his identity. Section 15(1) of the Act, which deals with the production of an identity card states thus:

> "The holder of an identity card shall, on a request made by the Commissioner or any other prescribed officer, produce that card at such time and place as shall be specified in such request and permit it to be inspected."

The proviso to the aforementioned Section clearly states that no person shall be deemed to have contravened provision contained in Section 15(1), if his identity card had at the time of alleged contravention been lost and he has complied with the provisions of Section 16(1) of the Act.

Section 16(1) of the Act deals with the issue of a duplicate identity card in case of loss of the original.

It is therefore quite evident that the National Identity Card of a person is not the only method by which a person could prove his identity.

On a consideration of all the aforementioned facts and circumstances it is thus apparent that the 1st respondent could not have reasonably suspected the petitioner of having been concerned with an offence.

The 1st respondent had also contended that he brought the petitioner to the Police Station as he had a 'serious doubt' about the petitioner. However, he had not described as to the kind

of suspicion, which had made him to arrest the petitioner. The petitioner had submitted that he was not informed of any reason for his arrest.

In terms of Article 13(1) of the Constitution a person arrested should be informed of the reason for his arrest and this is a salutary requirement.

In **Muttusamy** v **Kannangara** (supra) Gratiaen J. had emphasised the need to inform the suspect of the nature of the charge upon which he is arrested and had stated that,

> "A *fortiori* whenever a police officer arrests a person on suspicion without a warrant 'common justice and commonsense' require that he should inform the suspect of the nature of the charge upon which he is arrested. This principle has been laid down in no uncertain terms by the House of Lords in **Christie** v **Leachinsky** and it is indeed very much to be desired that the following general propositions enunciated by Lord Chancellor Simon should be borne in mind by all police officers in this country:-
>
> 1) If a police officer arrests without warrant upon reasonable suspicion, he must in ordinary circumstances inform the person arrested of the true ground of arrest. He is not entitled to keep the reason to himself, or to give a reason which is not the true reason. In other words, a citizen is entitled to know on what charge or on suspicion of what crime he is seized;
>
> 2) If a citizen is not so informed, but is nevertheless seized, the police man, apart from certain exceptions, is liable for false imprisonment."

Although the 1st respondent had stated that he had informed the reason of his arrest to the petitioner, there is no material to substantiate this position. It is also to be borne in mind that

the 1st respondent had not taken steps to record a statement from the petitioner. Moreover, the petitioner was released within a period of 2 hours from the time of his arrest.

It is my considered view, that a mere statement by a Police Officer that the reasons were informed would not be sufficient to satisfy the provisions in Article 13(1) of the Constitution. A citizen has the right to know the reasons for his arrest and it is the duty of a Police Officer in ordinary circumstances to inform the person the true reason for his arrest.

Considering the totality of the aforementioned facts and circumstances it is quite apparent that the petitioner had not committed any offence. It is also clearly evident that the petitioner was not arrested according to the procedure established by law, that he was not informed of the reason for his arrest and therefore the decision to arrest the petitioner was arbitrary.

Accordingly I hold that the petitioner's fundamental rights guaranteed in terms of Article 13(1) of the Constitution had been violated by the 1st respondent.

The petitioner alleged that the 1st respondent had slapped him near the Niyagama/Gallinda Junction. He has also stated that at that time in addition to the 1st respondent there had been the two sergeants, who had accompanied the 1st respondent and one Wasantha inside the jeep. However, except for the version given by the petitioner in his petition and affidavit he had not tendered any affidavits and/or documents in support of his version.

The petitioner had however referred to the inquiry proceedings of the complaint made by him to the 2nd respondent on 07.04.2007. In that report it is stated that on the basis of the complaint made by the petitioner, he had been examined by the District Medical Officer of the Elpitiya hospital and the observations had been recorded. The relevant portion of the 2nd respondent's report reads as follows:

> "මා විසින් මෙම පැමිණිලිකරු කුෂාන් ඉන්දික ඇල්පිටිය රජයේ රෝහලේ රෝහල් පත් අංක 145/07, යටතේ ඇල්පිටිය රෝහලේ දිස්ත්‍රික් වෛද්‍ය නිළධාරී ඒදිරිසිංහ මහතා වෙත 2007.04.07 වන දින ඉදිරිපත් කළෙමි. එහි අපවර්ථන, මොට්ට, බරපතල නොවන, බීමත්ව නැති

බවට සඳහන් කර ඇත. එය මෙහි පිටු අංක 08 ලෙස යා කර ඉදිරිපත් කරමි. ඉහත වෛද්‍ය වාර්ථාව අනුව පැමිණිලිකරු කුෂාන් ඉන්දික යන අයට පහර දීමක් වී ඇති බවට සඳහන් කර ඇත. එම අයගේ ප්‍රකාශය හා වසන්තගේ ප්‍රකාශය අනුව ස්ථානාධිපති පහර දුන් බව කියා සිටියි. ආනන්ද පත්මසිරි මහතාගේ ප්‍රකාශය අනුව ඉන්දික පොලිසියට ගෙන ගොස් ඇත. පොලිසියට රැගෙන ගිය මොහුගේ ප්‍රකාශයක් ද ගෙන නැත. මොහුට පහර දුන්නේ නම් ස්ථානයට ඉදිරිපත් කර අධිකරණ වෛද්‍ය වාර්ථාවක් මගින් වෛද්‍ය වරයෙකුට ඉදිරිපත් කර වෛද්‍ය වාර්ථාවක් ලබා ගැනීමට තිබුනි. එසේ කර නැත. ස්ථානාධිපති සමග ගිය පොලිස් සැරයන් වරයා සටහන් ද යොදා නැත. ස්ථානාධිපති වරයකු වශයෙන් මීට වඩා වගකීමකින් යුතුව වැඩ කල යුතුය. (2 ව 11)"

In response to this report the Senior Superintendent of Police Elpitiya had forwarded his observations to the Deputy Inspector-General of Police, Southern Division, where he had clearly stated that disciplinary action should be taken on the officer on the following charges:

"1. කේ. එච්. පී. කුෂාන් ඉන්දික යන අයට අතින් හා පොල්ලකින් පහර දීම;

2. චෝදනාවක් නොමැතිව අත් අඩංගුවට ගෙන පොලිස් ස්ථානයට ඉදිරිපත් නොකොට කූඩුවේ රඳවා තබා ගැනීම;

3. 2007.04.02 දින කේ. එච්. පී. ඉන්දික හා කේ. ටී. වසන්ත යන දෙදෙනා අත් අඩංගුවට ගැනීම හා පොලිස් ස්ථානයට රැගෙන එම පිළිබඳව කිසිඳු සටහනක් නොයෙදීම (2 ව 12).

In response to the observations and recommendations of the Senior Superintendent of Police, Elpitiya the Deputy Inspector–General of the Southern Division by his letter dated 05.06.2007 (2 j 13), had decided to severely warn the 1st respondent, instead of holding a disciplinary inquiry after issuing a charge sheet.

Article 11 of the Constitution provides that 'no person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment'. A long line of cases of this Court had decided that Article 11 of the Constitution, which is an absolute fundamental right, is a constitutional safeguard to prohibit persons being subjected to torture or to cruel, inhuman or degrading treatment.

Considering the contents of Article 11, in **W.D.K. de Silva** v **Ceylon Fertilizer Corporation** ([1989] 2 Sri L.R. 393), Jameel, J., was of the view that, ill- treatment, *per se*, whether physical or mental was not enough as a very high degree of mal-treatment was required for in infringement of Article 11 of the Constitution. However, it is noteworthy to refer to the decision by Amerasinghe, J., in **W.D.K. de Silva**, (supra), where it was stated, referring to inhuman treatment, that,

> "I am of the opinion that the torture or cruel, inhuman or degrading treatment or punishment contemplated in Article 11 of our Constitution is not confined to the realm of physical violence. It would embrace the sphere of the soul or mind as well . . . .
>
> Article 11 of the Constitution prohibits any act by which severe pain or suffering, whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as 'the victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office . . . ."

Considering the circumstances of this application, although the injuries inflicted on the petitioner may belong to the category of 'non-grievous', nonetheless, it is to be noted that, the petitioner was assaulted, he was taken to the Police Station in the police jeep, kept him in the Police Station for over 1 ½ hours for no apparent reason and thereafter had released him even without recording his statement. All these actions of the 1st respondent lead to one simple question as to the reasons for the decision of the 1st respondent to have brought the

petitioner to the Pitigala Police Station. By the said action of the 1st respondent, it is also to be noted that the petitioner was deprived of reporting for duty on the next morning in Colombo.

Accordingly the physical assault combined with the actions of the 1st respondent, when taken together were capable of humiliating the petitioner for no fault of his and I therefore hold that the 1st respondent had violated the petitioner's fundamental right guaranteed under Article 11 of the Constitution by the subjection of the petitioner to degrading treatment.

For the reasons aforementioned I hold that the 1st respondent had violated the petitioner's fundamental rights guaranteed in terms of Articles 11 and 13(1) of the Constitution. The 1st respondent is directed to pay personally to the petitioner a sum of Rs. 50,000/- as compensation and costs. This amount to be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this Judgment to the Inspector-General of Police.

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

S.C. (FR) Application
No. 258/2007

Uduwa Athukoralage Chandrasena,
Kelinkanda Janapadaya,
Niluketiya,
Kelinkanda,
Agalawatte.

Petitioner

Vs.

1. Sub-Inspector Buddhika,
   Officer-in-Charge – Crimes,
   Police Station,
   Baduraliya.

2. Officer-in-Charge,
   Police Station,
   Baduraliya.

3. The Inspector General of Police,
   Police Headquarters,
   Colombo 01.

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

Respondents

BEFORE : Shirani A. Bandaranayake, J.
Jagath Balapatabendi, J. &
K. Sripavan, J.

COUNSEL : Sharmaine Gunaratne for Petitioner

P. Munasinghe, SC, for Respondents

ARGUED ON: 23.10.2008

WRITTEN SUBMISSIONS
TENDERED ON: Petitioner : 16.12.2008
1st & 2nd Respondents : 19.01.2009

DECIDED ON: 13.05.2009

Shirani A. Bandaranayake, J.

The petitioner complained that he was arrested on 27.06.2007 around 11.30 a.m. while he was on his way to attend a funeral in the Neluketiya area and that at the time he was arrested the 1st respondent had assaulted him. The petitioner accordingly alleged that due to the aforementioned action his fundamental rights guaranteed in terms of Articles 11, 13(1) and 13(2) of the Constitution had been infringed for which this Court had granted leave to proceed.

Although leave to proceed was granted on Articles 11, 13(1) and 13(2) of the Constitution, learned Counsel for the petitioner confined her submissions to the infringement of petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution. Accordingly both parties were heard only on the alleged infringement of Article 11 of the Constitution.

The petitioner's case, as submitted by him, *albeit* brief, is as follows:

The petitioner, a labourer by profession, had no family and was staying at a relative's house. On 27.06.2007, while he approached the volleyball court of the village on his way to Neluketiya, he had seen two villagers, namely Martin and Sarath, being accompanied by four (4) unknown persons. Later the petitioner had become aware that the 1st respondent had led the said team.

The said persons had inquired from the petitioner for *kasippu* (illicit liquor) to which the petitioner had replied that he has no involvement in any such brewery. However the 1st respondent and the others, who had claimed to be from the 'Police', took the petitioner near the volleyball court and made him to hold a post therein and the 1st respondent had assaulted the petitioner with a club. When the petitioner inquired as to what offence he had committed, the 1st respondent had stated that they were from the Police and had asked for *kasippu* once again, while the 1st respondent and another, whose name is not known to the petitioner, assaulted him continuously.

The said Police officers had assaulted the petitioner on his arms, particularly the right arm, shoulders, legs, thighs and head. The petitioner felt dizzy, faintish and developed a headache.

The petitioner had requested the 1st respondent and the others to take him to a hospital, where the said officers had told him to go to a hospital on his own, but not to mention that he was assaulted by Police and in the event they become aware that he had mentioned about the said assault, that he would be sent to jail by introducing *ganja* and heroin.

Later the petitioner was brought to the main road along with Martin and Sarath. There was a three wheeler parked at the side of the road. Two officers of the group, set off stating that they were going to Premadasa's house. At that moment a bus arrived and Premadasa was among the people, who alighted from the bus. The Police officers stopped Premadasa and one officer stepped into the bus along with the petitioner, Martin and Sarath and brought them to Baduraliya Police Station around 1.30 p.m. and were immediately put into the cell. Later they had brought Premadasa, who was also put into that cell. The petitioner was in pain and he had seen that Sarath, who was also assaulted by the said Police officers, had injuries on his buttocks, but the Police did not offer any food, water or medicine to them.

The petitioner and the others were released on police bail around 9 p.m. Although the petitioner was feeling sick he was in fear to get himself admitted to a hospital due to the threats of the police.

On 29.06.2007, the petitioner appeared before the Magistrate's Court, Matugama. His Attorney had informed him that he had been charged with possession of '*goda*' and since he had not committed any offence he had pleaded not guilty. He had informed the learned Magistrate that he had been arrested on false grounds and was assaulted by Police. Learned Magistrate had inquired from him whether he had any injuries and he had shown his right upper arm. The petitioner was released on a Rs. 20,000/- personal bond. Along with the petitioner, Premadasa also had pleaded not guilty, but Sarath and Martin had pleaded guilty and paid the fine.

Since the petitioner was in severe pain and as there was no improvement in his condition he went to a private medical practitioner and later due to the continuous body pain and nausea he was admitted to the Kalutara-North Hospital on 04.07.2007, where he was warded until 07.07.2007. During that period, the petitioner was examined by the Consultant Judicial Medical Officer of the Karapitiya Teaching Hospital.

Having stated the facts of this application, let me now turn to consider the submissions made on behalf of the petitioner and the respondents.

The 2nd respondent being the Officer-in-Charge of the Baduraliya Police station, in his affidavit dated 16.08.2008 had averred that on the day the petitioner was arrested, viz. 27.06.2007, he was on leave and therefore he was not present at the Police Station. He had tendered the out entry and the in entry as an annexure to his affidavit in support of his contention.

The said out entry (2R3) dated 24.06.2007 stated that he had obtained leave for three (3) days with effect from 25.06.2007 and during his absence the 1st respondent would be functioning as the acting Officer-in-Charge of the Station. The in entry (2R4) stated that the 2nd respondent had reported for duty at 7.05 a.m. on 28.06.2007.

It is common ground that the petitioner was taken into custody on 27.06.2007 around 11.30 a.m. On a consideration of the affidavit and the supporting documents tendered by the 2nd

respondent, it is evident that the 2nd respondent had not been in the Police Station during the said period and that there was no involvement on his part with regard to the arrest of the petitioner. Furthermore, it is to be noted that, the petitioner's allegation is that, he was assaulted at the time he was arrested on 27.06.2007. Based on the submissions on behalf of the 2nd respondent and the supporting documents he had tendered to this Court, it is apparent that the 2nd respondent was not involved either in the arrest or the alleged assault on the petitioner and therefore I hold that the 2nd respondent cannot be held responsible for the violation of the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

The 1st respondent had taken up the position that he had not accompanied the team of Police officers, who had participated in the aforementioned raid for illicit liquor and had arrested the petitioner and three others on 27.06.2007, as he was engaged in duties at the Police Station on that day. In support of his contention, the 1st respondent had tendered extracts from daily reports of the Baduraliya Police Station (1R2), MOIB information book (1R3) and an affidavit given by one Kodippili Arachchige Ajith Prasanna (1R4). The extracts of the MOIB information book of the Baduraliya Police Station indicates that around 10.00 a.m., the 1st respondent had been investigating into a road dispute between two parties.

The MOIB information book indicates that on 27.06.2007 around 9.45 a.m., five officers had left the Police Station in a three wheeler to investigate into the information received on the sale of illicit liquor within the area. The officers had returned later with Sarath, Martin, Chandrasena and Premadasa as they were in possession of illicit liquor.

On a consideration of the submissions made on behalf of the 1st respondent and on an examination of the aforementioned documents, it is apparent that the 1st respondent had been involved in other duties at the Police Station by 10.00 a.m., on 27.06.2007. The 1st respondent had not denied the fact that there had been a raid on the brewing of illicit liquor. His position was that on 27.06.2007, on information received, a team of Police officers attached to the Baduraliya Police Station headed by Sergeant Gunaratne had conducted a raid on the brewing

of illicit liquor. The petitioner's allegation was that he was assaulted by the Police officers at 11.30 a.m. near the volleyball court of the village.

It is also to be noted that in all the relevant extracts of the MOIB Information Book, there is no reference to the participation of the 1st respondent in the raid on 27.06.2007.

Except for the version given by the petitioner, there is no material to substantiate his position that the 1st respondent was among the group of Police officers, who had arrested the petitioner and the others at 11.30 a.m. on 27.06.2007. Learned State Counsel for the 1st respondent strenuously contended that the 1st respondent had been at the Station at 10.00 a.m. on the day in question. The petitioner's position was that he was arrested at 11.30 a.m. on 27.06.2007. Considering the position as to whether the 1st respondent could have been at the place in question by 11.30 a.m. on 27.06.2007, it was not disputed by the learned Counsel for the petitioner at the hearing, that the road leading to the volleyball court and the surrounding area are in a dilapidated condition, which would take a considerable amount of time to arrive at the said volleyball court from the Police Station.

The question of proof in fundamental rights applications was considered by this Court in **Kapugeekiyana** v **Hettiarachchi** ([1984] 2 Sri L.R. 153), where Wimalaratne, J. had stated that,

> "In deciding whether any particular fundamental right has been infringed I would apply the test laid down in **Velmurugu** that the civil, and not the criminal standard of persuasion applies, with this observation: that the nature and gravity of an issue must necessarily determine the manner of attaining reasonable satisfaction of the truth of that issue."

This question was considered in depth by Wanasundera, J. in **Velmurugu** v **A.G. and others** (Fundamental Rights – Vol. I 196) and referred to Lord Stowell's Judgment, in **Loveden** v **Loveden** ((1810) 2 Hagg. Con. 1.3), where Lord Stowell had stated that,

> "The only general rule that can be laid down upon the subject is that the circumstances must be such as would lead the guarded discretion of a reasonable and just man to the conclusion."

It is to be noted that in his petition, the petitioner had stated that Martin and Sarath were accompanied by four (4) unknown persons. Having stated that the four (4) officers to be unknown, he had continued to state that later he had become aware of the name and designation of the 1st respondent. It appears that the petitioner had attempted to identify the officers, who had arrested him on 27.06.2007 subsequently, by making inquiries. However, it is apparent that the petitioner had not been able to substantiate his position by independent evidence that the 1st respondent had led the team of police officers, who had arrested him.

On a consideration of the submissions made by the learned Counsel for the petitioner and the learned State Counsel for the respondents and on the basis of the aforementioned general tests, I am of the view that the petitioner had not satisfied this Court that the 1st respondent had been present at the time the petitioner was arrested by the Police officers near the volleyball court on 27.06.2007. I accordingly hold that the 1st respondent had not participated in the arrest of the petitioner on 27.06.2007.

Having decided on the participation of the 1st respondent, let me now turn to examine whether there had been a violation of petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution.

Article 11 of the Constitution deals with freedom from torture and reads as follows:

> "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."

The petitioner complained that he was assaulted by the Police officers at the time of his arrest. His complaint was that he was assaulted on his right arm, shoulder, legs, thighs and the head and that the said assault had been with the aid of a club. Except for the affidavit given by

Premadasa (P1), who was also taken into custody along with the petitioner, there is no other affidavit to substantiate the petitioner's version that he was assaulted by the Police officers at the time of his arrest.

The respondents were of the view that the petitioner was never assaulted, and had recorded that at the time of arrest that there were no visible injuries (**මතු පිටින් පෙනීමට කිසිදු තුවාල නැත** - 1R3).

Notwithstanding the position taken by the respondents, learned Counsel for the petitioner strenuously contended that, the petitioner was assaulted by the police officers and that he had taken treatment from the General Hospital, Kalutara. This Court had in fact called for the said Medical Report from the Government Hospital, Kalutara.

When considering allegations based on torture, in terms of Article 11 of the Constitution, this Court had considered medical evidence as sufficient to prove that the acts complained of in fact had taken place. Referring to this position Dr. A.R.B. Amerasinghe (Our Fundamental Rights of Personal Security and Physical Liberty, 1995, pg. 47), had stated that,

> "As will be seen from the Sri Lankan cases, . . . a total denial supported by a conspiracy of silence, the medical evidence is very often sufficient to prove that the acts complained of did take place."

As stated earlier, it is to be noted that at the time of the arrest, the petitioner did not have any injuries and this had been recorded by the Police officers at the Police Station (1R3). In such circumstances, when a person alleges that he had been assaulted, the inference is that the injuries were caused while he was in custody. In such an instance, the burden of adducing evidence, to show that the person having custody of the complainant was not responsible for such injuries shifts to him. This position was clearly stated by Kulatunga, J. in **Pita Kandalage**

Gamini Jayasinghe v **P.C. Samarawickrama and others** (S.C. (FR) No. 157/91 – S.C. Minutes of 12.01.1994), where it was stated that,

> "It is to be noted that at the time the petitioner was handed over to that Police, he had no injuries and was in perfect health. But when he was admitted to the hospital . . . he was a physical wreck and almost comatose. I therefore hold that the allegation of torture has been established."

A similar view had been taken earlier by Atukorale, J. in **Amal Sudath Silva** v **Kodituwakku** ([1987] 2 Sri L.R. 119) and it was held that where the injuries were caused while the petitioner was in the custody of State officers, that 'the only reasonable inference' was that they were caused by such officers.

In the above backdrop, let me now turn to refer to the Medico-Legal Report submitted by the Medico-Legal Specialist of the Teaching Hospital Karapitiya, who had examined the petitioner on 11.07.2007 at 10.00 a.m. I accordingly reproduce below the relevant parts of the said Medico-Legal Report:

> ". . .
>
> **Short history given by the patient**
>
> The victim was confronted by four police officers attached to the Baduraliya Police Station on 27th June 2007 on his way to a funeral. Two of them assaulted him with elongated wooden sticks. He was threatened by the same policemen not to seek medical treatment after the incident. Later he had taken

treatment from a general practitioner due to severe pain felt in limbs and the chest region.

. . . .

Injuries

1. A scalp haematoma measuring 2cm x 3cm placed on the vertex of the head just right to the midline.
2. A broad elongated contusion was placed obliquely over the full length of the inner aspect of the right upper arm. The maximum breadth of the contusion was 10cm observed towards proximal end of the upper arm.
3. A diffuse contused area measuring 8cm x 10cm located on the lateral aspect of the middle third of the right thigh.
4. The victim felt pain on examination over a diffuse area of the anterior chest more towards right side measuring 15cm x 10cm.

. . . .

Timing of injuries

The contused areas of the body appear macroscopically in a spectrum of purple to green colours. Two patchy areas of greenish yellow discoloration were seen in the diffuse contusion over the right thigh.

Conclusion

- The features of injuries observed on the scalp, right upper arm and the right thigh are consistent with contusions.
- The injury pattern is consistent with repeated assault by an elongated blunt weapon/s.
- The history given by the victim is in keeping with the examination findings."

In the short history given by the petitioner to the Medico-Legal Specialist at the time of examination, he had clearly referred to the incident that took place at the time of his arrest. The petitioner therefore had been consistent of how he had sustained his injuries. The Medico-Legal report clearly stated that history given by the petitioner is in keeping with the examination findings.

Considering all the circumstances of this matter, I find that the medical evidence substantiates the petitioner's allegation and therefore I declare that the petitioner's fundamental right guaranteed by Article 11 of the Constitution had been violated.

As stated earlier it is apparent that the 1st and 2nd respondents had not been involved in the arrest of the petitioner and therefore cannot be held responsible for the alleged assault. On the other hand, the Medico-Legal Report supports the version given by the petitioner that he had been assaulted at the time of his arrest. It is to be noted that although the 1st respondent had been in charge of the Baduraliya Police Station, in the absence of the 2nd respondent, who was the Officer-in-Charge, he had not indicated to the Court as to the officers, who were involved in the act.

Accordingly the petitioner had not amended the caption to add any officer as a respondent. Learned Counsel for the petitioner contented that the 1st and 2nd respondents had taken up the position to exclude themselves from liability, but had failed to look into the complaint made by the petitioner.

As stated earlier, at the time the petitioner was taken into custody it had been recorded that there were no injuries. Later however, the petitioner had been complaining that the Police officers had assaulted him at the time of his arrest. In such circumstances, it would be the duty of the Police officers, who are in charge of Police Stations, either to indicate as to what had caused the injuries complained of by the petitioner or in the event that there is a difficulty in identifying the officers, who had been involved in such a situation, to take steps to hold a proper inquiry into the complaint. Such an inquiry, probably with an identification parade in terms of the provisions of the Code of Criminal Procedure Act, No. 15 of 1979 would assist Court to obtain reliable identification of the persons, who would have been involved in alleged assaults.

However, even if the identity of the Police officers have not been sufficiently proved, the liability of the State cannot be ignored or treated lightly as such a violation of the petitioner's fundamental rights would be by executive and/or administrative action of State officers acting under the colour of their office. This position was considered in **Ratnasiri and another** v **Devasurendran, Inspector of Police, Slave Island and others** ([1994] 3 Sri L.R. 127), where reference was made by Kulatunga, J., to the identity of officers and it was stated that,

> "The weakness of their case against individual officers is probably due to the fact that they have attempted to identify these officers subsequently by making inquiries from others and that in the process they based their case on hearsay evidence. In these circumstances, the rejection of their testimony against individual respondents would not necessarily render their testimony as regards the assault on them incredible especially because the allegation of assault is corroborated by independent evidence including the medical evidence."

Considering all the aforementioned circumstances, for the infringement of the petitioner's fundamental rights guaranteed in terms of Article 11 of the Constitution the liability would lie with the State.

I accordingly hold that the petitioner's fundamental right guaranteed in terms of Article 11 of the Constitution had been infringed by executive and/or administrative action and I direct the State to pay a sum of Rs. 75,000/- as compensation and costs. This amount to be paid within three (3) months from today.

The Registrar of the Supreme Court is directed to send a copy of this judgment to the Inspector-General of Police.

Judge of the Supreme Court

Jagath Balapatabendi, 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

Vasudeva Nanayakkara,
Attorney at Law,
Advisor to HE the President,
Secretary, Democratic Left Front,
No. 491/1, Vinayalankara Mawatha,
Colombo 10.

PETITIONER

S.C. Application No. 209/07 **VS**

1. K. N. Choksy, P.C., M.P.,
Former Minister of Finance,
No. 23/3, Sir Ernest de Silva Mawatha,
Colombo 7.

2. Karu Jayasuriya, M.P.,
Former Minister of Power & Energy,
No. 2, Amarasekera Mawatha,
Colombo 5.

3. Ranil Wickremasinghe, M.P.,
Former Prime Minister,
No. 115, 5th Lane,
Colombo 3.

And 28 others

RESPONDENTS

AND NOW BETWEEN

Dr. P. B. Jayasundera
No.761/C, Pannipitiya Road,
Pelawatte,
Battaramulla.

8TH RESPONDENT PETITIONER

S.C. Application No. 209/07 **VS.**

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

31ST RESPONDENT-RESPONDENT

BEFORE	:	Hon. J. A. N. de Silva	Chief Justice
		Hon. Dr. S. A. Bandaranayake	Judge of the Supreme Court
		Hon. S. Tilakawardane	Judge of the Supreme Court
		Hon. S. Marsoof, P.C.	Judge of the Supreme Court
		Hon. D. J. De S. Balapatabendi	Judge of the Supreme Court
		Hon. K. Sripavan	Judge of the Supreme Court
		Hon. P. A. Ratnayake, P.C.	Judge of the Supreme Court

COUNSEL : Faiz Musthapha, P.C., with Anura Meddegoda and Lakdini Perera for the 8th Respondent–Petitioner

M. A. Sumanthiran with Viran Corea for the Petitioner-Respondent

Nihal Sri Amarasekera for 22nd Respondent-Respondent appearing in person

Mohan Pieris, P.C. for the Attorney General with J. Wijetilleke, A.S.G., Sanjaya Rajaratnam D.S.G., and Nerin Pulle, S.S.C. as amicus

ARGUED ON : 24.09.2009

DECIDED ON: 13.10.2009

MARSOOF, J.

I have had the advantage of perusing the draft judgement of His Lordship the Chief Justice, with which I respectfully agree. However, I wish to make a few additional observations.

The 8th Respondent-Petitioner (hereinafter referred to as the Petitioner) has prayed in his amended petition dated 31st July 2009 for the vacation of the order of this Court dated 8th October 2008 by which he was required to file an affidavit containing "a firm statement that he would not hold any office in any governmental institution either directly or indirectly or purport to exercise in any manner executive or administrative functions" (prayer (a)) and additionally for an order relieving the Petitioner of the undertaking contained in paragraph 13 of his affidavit dated 16th October 2008 whereby such a firm statement was made by him (prayer (b)). The Petitioner has also moved for any other and further relief that this Court may consider fit and meet (prayer (c)).

Mr. M.A. Sumanthiran, Senior Counsel for the Petitioner-Respondent, has made extensive submissions as to why in his view this Court should not vacate its order dated 8th October 2008 or permit the Petitioner to withdraw his undertaking given to

Court in his affidavit dated 16th October 2008. In particular, he has submitted that the judgement of this Court dated 21st July 2008 delivered by his Lordship Hon. Sarath N. Silva, C.J., (with Hon. Amaratunga, J. and Hon. Balapatabandi, J. concurring) contained serious findings against the Petitioner, which led to the determination that the Petitioner was primarily responsible for certain violations of fundamental rights by the executive and administrative action of the State. Mr. Sumanthiran pointed out that the Petitioner was directed to pay a sum of Rs. 500,000/- as compensation to the State, and submitted that it is clear from the tenor of the said judgement that the Petitioner was not a fit person to hold public office.

Mr. Sumanthiran also relied on *inter alia* the decision of this Court in *Jeyaraj Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70 to submit that the Supreme Court has no statutory jurisdiction to re-hear, reconsider, revise, review, vary or set aside its own orders. He also stressed that accordingly, neither the judgement of this Court dated 21st July 2008 nor the order of this Court dated 8th October 2008 can lawfully be revised or varied by this Court. This submission was independent of the preliminary objection taken by him in regard to the power of the Chief Justice to constitute a Bench comprising five or more judges to hear, in terms of Article 132(3) of the Constitution, the matter arising from the amended petition of the Petitioner dated 31st July 2009, which was disposed of unanimously by this Court earlier in the proceedings.

Mr. Faiz Mustapha, P.C. submitted on behalf of the Petitioner that the only sanction imposed against the Petitioner in the said judgement was the aforesaid order for compensation, and stressed that the said judgement contained no finding that the Petitioner was not a fit person to hold public office. He also emphasized that the main judgement in this case fell short of either removing the Petitioner from the substantive office he then held as the Secretary to the Ministry of Finance or barring him from holding public office in future. He further submitted that the Court, upon delivering the judgement dated 21st July 2008, became *functus*, and could not have lawfully made the order dated 8th October 2008 which required the Petitioner to file the affidavit in question.

In my view, the jurisdiction conferred on the Supreme Court by Article 126 of the Constitution to redress alleged infringements or imminent infringements of fundamental and language rights is unique in that it is an original jurisdiction vested in the apex court of the country without any provision for review through appellate or other proceedings. While our hierarchy of courts is built on an assumption of fallibility, with one, two or sometimes even three rights of appeal, as well as the oft used remedy of revision, being available to correct errors that may occur in the process of judicial decision making, in the absence of such a review mechanism, the remedy provided by Article 126 is fraught with the danger of becoming an "unruly horse", and for this reason has to be exercised with great caution. This Court has generally displayed objectivity, independence and utmost diligence in making its decisions and determinations, conscious that it is fallible though final. The decision of this Court in the *Fernandopulle* case stressed the need for finality, and very clearly laid down that this Court is not competent to reconsider, revise, review, vary or set aside its own judgement or order (in the context of a fundamental rights application) *except*

under its inherent power to remedy a serious miscarriage of justice, as for instance, where the previous judgement or order was made through manifest error *(per incuriam).*

Although the Petitioner has adverted to the doctrine of *per incuriam* as a basis for relief in his amended petition dated 31st July 2009, his Senior Counsel Mr. Mustapha submitted that he does not propose to rely on this doctrine, the parameters of which have been succinctly explained by his Lordship Hon. Amarasinghe, J., in the course of his judgement in the *Fernandopulle* case. Accordingly, in the absence of any contention that the judgement of this Court dated 21st July 2008 was pronounced or the order of this Court dated 8th October 2008 was made *per incuriam*, I agree with his Lordship the Chief Justice that the relief prayed for by prayer (a) of the amended petition filed by the Petitioner should be refused.

This does not, however, conclude the matter, as it is submitted that in the peculiar circumstances of this case, this Court should in the exercise of its inherent powers, consider granting relief to the Petitioner as prayed for in prayers (b) and /or (c) of his amended petition. Mr. Faiz Mustapha, P.C., in the course of his submissions, stressed that the former Chief Justice Hon. Sarath N. Silva was actuated by malice towards his client and stressed the element of coercion which he alleged vitiated the affidavit dated 16th October 2008 filed by the Petitioner in these proceedings. He submitted that on 8th October 2008, the Petitioner was directed by this Court contrary to all norms of natural justice, to file the said affidavit giving a "firm" undertaking not to hold public office in future, and that he had a reasonable apprehension that if he failed to comply with the order of Court he would have been held in contempt of court. It is in this context that the question arises as to whether in the peculiar circumstances of this case, the Petitioner may be permitted to withdraw the undertaking contained in the affidavit filed by him.

As his Lordship Sharvananda, A.C.J., observed in *Kumarasinghe v Ratnakumara and Others* [1983] 2 Sri LR 393 at page 395, "an affidavit is a declaration as to facts made in writing and sworn before a person having authority to administer an oath", and there can be no doubt that "facts" would include a state of mind or belief. Indeed, in my view, a person may even choose to give a binding undertaking by way of affidavit, to do or not to do something. The most important characteristic of an affidavit is its voluntary nature, and there can be no doubt that no court will act on an affidavit that has been extracted using duress or coercion. The onus would be on the person asserting duress or coercion to show that the threat of harm was so immediate and proximate that it deprived the affidavit of its voluntary character. It is, however, unnecessary to embark on an inquiry into the degree of immediacy or proximity of the alleged coercion or duress, as in my opinion this matter can be resolved on other grounds which render such an inquiry futile.

As strenuously contended by Mr. Mustapha, P.C., neither the judgement of this Court dated 21st July 2008 nor the order of this Court dated 8th October 2009 debarred the Petitioner from holding public office, and the omission to do so was perhaps due to the Court being mindful of the Petitioner's fundamental right guaranteed by Article 14(1)(g) of the Constitution to engage in any "lawful occupation, profession, trade, business or enterprise" which cannot be taken away except in according with law

following due process. He submitted that the phraseology of Article 14(1)(g) clearly applies to the holding of public office, and that the relevant disciplinary authority who had the power of dismissal with respect to the Petitioner while he held office as the Secretary to the Ministry of Finance was the President of the Republic, who in terms of Article 52 of the Constitution was the appointing authority to Secretaries of Ministries. He also submitted further that since this Court has not made any "final order" after the Petitioner filed his affidavit dated 16th October 2008, the Court may consider permitting the Petitioner to withdraw the said affidavit in its entirety, or at least consider relieving the Petitioner of the undertaking contained in paragraph 13 of the said affidavit not to hold public office, as prayed for in paragraph (b) of the prayer to his amended petition.

I am of the considered opinion that there is merit in the submissions made by Mr. Mustapha, P.C. In particular I find that the judgement of this Court dated 21st July 2008 did not hold that the Petitioner is a person unfit to hold public office and remove him from the post he held or debar him from holding public office in the future. In my opinion, the remedy enshrined in Article 126 of the Constitution is ill-equipped to determine the suitability of persons to hold office, whether of a public or private nature. The procedure applicable to deal with applications relating to violations of fundamental rights and language rights is found in Part IV of the Supreme Court Rules, 1990, formulated under Article 136 of the Constitution, and adopting this procedure, the Court arrives at its findings after examining the affidavits and documents that are filed by the parties with their pleadings. While the said procedure is appropriate to determine the question whether there has been an infringement or imminent infringement of any fundamental right or language right, in my opinion, it is not at all appropriate to determine the suitability of any person to hold or continue to hold public office.

Unless contrary provision is made by legislation or in the letter of appointment, the provisions of the Establishments Code (Vol. II) apply with respect to disciplinary proceedings against public officers, which could result in various punishments being imposed including dismissal from service of an officer who is found to be unfit to hold public office. The said procedure is characterized by a preliminary investigation, a charge sheet, and the testimony of witnesses under oath or affirmation subject to the right of cross-examination, which are all safeguards provided by the law to such public officers. As Wigmore observes at § 1367 of his treatise titled *Evidence* (J. Chadboum rev. 1974), cross-examination "is the greatest legal engine ever invented for the discovery of truth." It is an important safeguard provided by the law to a person who is subjected to any legal process, whether a criminal trial or disciplinary inquiry, which might ultimately result in the deprivation of his life, liberty or means of livelihood. Such safeguards are unavailable to a public officer who is cited as a respondent to a fundamental rights application. The Disciplinary Authority with respect to Secretaries of Ministries appointed by the President under Article 52 of the Constitution is the President himself, and disciplinary proceedings relating to such Secretaries are governed by the Minute on Secretaries 1979, as subsequently amended, which also contains some important safeguards. It is in view of the absence of such safeguards in fundamental rights proceedings that the Supreme Court has developed the practice of forwarding a copy of any judgement containing adverse

findings against a public officer to the relevant disciplinary authority for it to consider appropriate disciplinary action, without making any findings of its own in regard to the suitability of such public officer to hold public office.

For the purpose of considering the application made by the Petitioner in his amended petition, it is important to advert to the process followed by this Court that led to the impugned order of this Court dated 8th October 2008. When this case was mentioned in Court on 8th September 2008, before a Bench comprising his Lordship Hon. Sarath N. Silva, C.J., Hon. Tilakawardane, J. and Hon. Amaratunga, J. on a motion seeking certain incidental orders to give effect to the judgement of this Court dated 21st July 2008 and which had no bearing to the propriety of the Petitioner holding office, it was submitted by Mr. Sumanthiran that the Petitioner is "yet continuing to hold public office notwithstanding the fact that the finding of this Court is that this officer has violated the provisions of the Constitution and thereby breached the oath taken in terms of Article 53 of the Constitution" and was therefore disqualified from holding public office. The Court observed that there is merit in this submission, but very rightly directed that "the matter should be referred to the bench which heard the case for further orders." Accordingly, Court expressly directed that the case be mentioned "on 29th September 2008 *before the same Bench that heard the main case*", namely his Lordship Hon. Sarath N. Silva, C.J., Hon. Amaratunga, J. and Hon. Balapatabandi, J.

However, for reasons that do not appear from the docket, on 29th September 2008 the case did not come up before the aforesaid Bench that heard the main case, but was once again taken up before a Bench comprising his Lordship Hon. Sarath N. Silva, C.J., Hon. Tilakawardane, J. and Hon. Amaratunga, J. Unfortunately, the Bench before which this case was mentioned on that date, did not decline to hear the matter on the basis that the Bench was not properly constituted. On the contrary, the said Bench noted that despite the finding in the main judgement that the Petitioner has infringed certain fundamental rights, he was "continuing to hold public office", and directed that notice be issued on the Petitioner to be present in Court on the next date (8th October 2008) and "to reveal to Court –

(1) whether he continues to hold any office under the Republic, and if so, the nature of such office and the place at which he is functioning; and

(2) whether he is holding office in any establishment in which the Government of Sri Lanka has any interest, purporting to represent the interest of the Government of Sri Lanka, and if so, the nature of such office."

It is also significant that the Court expressly directed "this matter to be resumed before *the same Bench* on 08.10.2008."

It is therefore manifest that although the order of this Court dated 8th September 2008 clearly contemplated that the question of the propriety of the Petitioner holding public office should be considered by the very same Bench which pronounced the main judgement dated 21st July 2008, the subsequent order of Court dated 29th September 2008 resulted in the case being "resumed" before a differently constituted Bench on 8th October 2008. While in my considered opinion, the proceedings relating

to the Petitioner conducted on 8th October 2008 were null and void due to the improper constitution of the Bench, the said proceedings were also conducted in violation of the salutary *lex curiae* of this Court which was explained by his Lordship Hon. Amarasinghe J in *Jeyaraj Fernandopulle Premachandra de Silva and Others* [1996] 1 Sri LR 70 at page 87 as follows:

> "……law, practice and tradition require(s) that matters pertaining to a decided case should be referred to the Court composed of the Judges who had heard the case. The practice of the Court in this regard is the law of the Court *lex curiae* - and it must be given effect to in the same way in which a rule of Court must be given effect to."

The rationale and justification for this practice of Court is that it is only the Bench which pronounced a judgement or order that is in the best position to reconsider, revise, review, vary or set aside its judgement, weather on the basis of manifest error (*per incuriam*) or any other ground. Mr. Sumanthiran, who made extensive submissions regarding this salutary practice, nevertheless contended that there is no hard and fast rule that a case should be taken up before the same Bench which pronounced the main judgement for any "incidental order", and that any Bench of this Court could have dealt with the question of propriety of the Petitioner holding public office as it did on 8th October 2008.

While I agree with Mr. Sumanthiran that any Bench of this Court could make "incidental orders" to give effect to its judgements and decisions, insofar as this Court in its judgement pronounced on 21st July 2008 did not make any order having the effect of restraining the Petitioner from continuing to function as Secretary to the Ministry of Finance or in general seek to disqualify him from holding public office in the future, I am of the opinion that what the Court sought to do on 8th October 2008 was to reconsider and vary its judgement pronounced on 21st July 2008. This could only have been done by a Bench consisting of the same judges who heard the main case and pronounced judgement, and this Court was fully conscious of this requirement when it made order on 8th September 2008 that this issue should be dealt with by "*the same Bench that heard the main case*". Of course, as observed by his Lordship Hon. Amarasinghe J in *Jeyaraj Fernandopulle v Premachandra de Silva and Others* [1996] 1 Sri LR 70 at page 86, there could be circumstances in which it is not possible to constitute the same Bench for reviewing an earlier decision, as "for instance, one or more of the Judges who decided the first matter may not be available, due to absence abroad, or retirement or some such reason", in which circumstances the review could have been undertaken by a Bench consisting of as many of the judges of the Bench that made the decision sought to be reviewed. However, in the absence of any suggestion that any such circumstances existed on 8th October 2008 when the impugned order was made, it is unfortunate that the Bench of this Court that pronounced the main judgement was not constituted to deal with the question of suitability of the Petitioner to hold public office.

Apart from this, it is necessary to observe that even on 8th October 2008 this Court did not make any determination regarding the propriety of the Petitioner holding public office. After the Petitioner, through his Counsel Mr. Mustapha, intimated to Court

that he had tendered his resignation from the post of Secretary to the Ministry of Finance within four days from the date of pronouncement of the main judgement, and that he did not hold any office in any establishment in which the Government of Sri Lanka had any interest, Court only directed the Petitioner to file an affidavit giving a "firm" undertaking that he will not in the future hold public office.

In my considered opinion, on 8th October 2008 this Court could not have lawfully made a determination that the Petitioner was not fit to hold public office, since it had not afforded the Petitioner a proper opportunity of being heard on his fitness or otherwise to hold public office. Imposing a life-time bar on the Petitioner holding public office would not only have violated his fundamental right guaranteed by Article 14(1)(g) of the Constitution but would also have offended the rule of proportionality. Such a determination could also have impinged on the Petitioner's franchise in so far as it would have prevented him from seeking election to Parliament, the Provincial Council or even a local authority. The direction made by Court on 8th October 2008 spelling out the content of an affidavit to be filed by the Petitioner was an attempt to achieve indirectly what it could not have done directly, and additionally, had the sanction of contempt of court.

I am conscious of, and very much concerned about, the infirmities of the affidavit dated 16th October 2008 that was filed by the Petitioner pursuant to the order of this Court dated 8th October 2008. It is clear that the said affidavit seriously compromised the fundamental right of the Petitioner guaranteed by Article 14(1)(g) of the Constitution, giving rise to the question as to whether a person may lawfully waive a fundamental right guaranteed by the Constitution in this manner. In the United States, the Courts have consistently held that in general certain constitutional rights primarily granted for the benefit of the individual may be waived, but others enacted in the public interest or on grounds of public policy cannot be so waived. The said dichotomy did not find favour in the Supreme Court of India, where in *Basheshar Nath v. The Commissioner of Income Tax, Delhi and Rajasthan & Another* (1959) Vol. 46 AIR (SC) 149, the Court by majority decision held that none of the fundamental rights guaranteed by the Constitution of India could be waived. As Hon. Bhagwati, J., observed at page 160 of the said judgement–

> "… it is the sacred duty of the Supreme Court to safeguard the fundamental rights which have been for the first time enacted in Part III of our Constitution. The limitations on those rights have been enacted in the Constitution itself ……...But unless and until we find the limitations on such fundamental rights enacted in the very provisions of the Constitution, there is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the fundamental rights enshrined in Part III of our Constitution."

This decision has been followed consistently in India and was also cited with approval in *Herath Banda v. Sub Inspector of Police, Wasgiyawatta Police Station, and Others* [1993] 2 Sri LR 324, in which this Court refused an application to withdraw a fundamental rights application on the basis that the grievance has been settled. It is

significant to note that at page 325 of his judgement Hon. Amarasinghe, J., stressed that applications pertaining to fundamental rights are not ordinary private matters, and observed that he is "reluctant to accept any suggestion that the question of withdrawal (of a fundamental rights application) depends on the importance of the right violated." Following the reasoning in the *Basheshar Nath* case, his Lordship doubted that any useful purpose could be served "by attempting to arrange the rights on a hierarchical scale." I hold that none of the fundamental rights guaranteed by the Constitution may be compromised or waived by any person who is otherwise entitled to its protection. Accordingly, insofar as the Petitioner is not competent to compromise or waive his fundamental right guaranteed by Article 14(1)(g) of the Constitution, he is not bound by the undertaking given by him in paragraph 13 of his affidavit dated 16th October 2008.

Mr. Faiz Mustapha P.C. has urged this Bench, which has been specially constituted by his Lordship the Chief Justice, and consists of not only the honourable Judges who pronounced the judgement dated 21st July 2008 but also the honourable Judges who made the order dated 8th October 2008 (other than Hon. Justice Sarath N. Silva, C.J., who has since retired and Hon. Amaratunga, J., who has declined to sit), to consider granting the Petitioner relief, in the exercise of the inherent power of Court, by permitting him to withdraw the affidavit dated 16th October 2008 filed by him. He has further submitted that since no order has been made by this Court with reference to the said affidavit, the Petitioner is entitled to withdraw it. Alternatively, Mr. Mustapha has urged Court to relieve the Petitioner of the undertaking given by him in paragraph 13 of the affidavit not to hold any public office in future.

This Court, no doubt, has the inherent power to make such orders as may be necessary for the ends of justice. The inherent power of Court is exercised *ex debito justitiae* to do that real and substantial justice for the administration of which alone Courts exist. In the exercise of this power, the Court may rectify such injustice on the principle *actus neminem gravabit* (an act of the Court shall prejudice no person). This principle, which was described by Lord Cairns in *Rodger v. Comptoir D'Escompte de Paris* (1871) 3 PC 465 as "one of the first and highest duties of all Courts……to take care that the act of the Court does no injury to any of the suitors," has been applied by our courts as well as the courts in other jurisdictions such as the United Kingdom and Canada in situations in which there was a need to undo some harm caused by a serious miscarriage of justice. *See, Ittepana v Hemawathie* [1981] 1 Sri LR 476; *Amato v The Queen*, (1982) 69 CCC (2d) 31; *Gunasena v Bandaratillake* [2000] 1 Sri LR 292; *A and others v Home Secretary (No 2)* [2006] 2 AC 221. As Lord Nicholls of Birkenhead observed in *Regina v Loosely* [2001] 4 All ER 897 at 899 -

> "Every court has an inherent power and duty to prevent abuse of its process. This is a fundamental principle of the rule of law."

It is in this theoretical backdrop that the ultimate relief pressed for by Mr. Mustapha P.C should be viewed. In my considered opinion, even though as already noted, the order of this Court dated 8th October 2008 is devoid of validity, the Petitioner has chosen to abide by it, and it may not be proper to permit him to withdraw the affidavit filed by him pursuant to the said order, or any part thereof. Although for

this reason, I am inclined to hold that the application in prayer (b) to the amended petition of the Petitioner has to be refused, in view of the position that the said affidavit has been filed in proceedings tainted with illegality and in violation of the Petitioner's fundamental rights which this Court is bound to protect, I am of the opinion that it must be treated as a nullity having no force or avail in law.

In my opinion, it is the President of Sri Lanka, who as the Head of the Executive and the appointing and disciplinary authority with respect to Secretaries to Ministries, is vested with the power and responsibility to deal with disciplinary matters relating to such officers, and accordingly, the question of the propriety of the Petitioner holding public office, as Secretary to the Ministry of Finance, has to be considered by him. I therefore hold that in terms of the power vested in him by Article 52 of the Constitution, the President is free to consider appointing the Petitioner as Secretary to the Ministry of Finance notwithstanding the undertaking given by the Petitioner to Court in the aforesaid affidavit that he shall not hold public office in future.

I make no 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

S.C. (FR) Application
No. 252/2007

M. Azath S. Salley,
No. 122, Barnes Place,
Colombo 07.

Petitioner

Vs.

1. Colombo Municipal Council,
   Town Hall,
   Colombo 07.

2. Mayor of Colombo,
   Colombo Municipal Council,
   Town Hall,
   Colombo 07.

3. Jayantha Liyanage,
   Municipal Commissioner,
   Colombo Municipal Council,
   Town Hall,
   Colombo 07.

4. W.A. Leelananda,
   Chairman,
   Advertising Committee,
   Colombo Municipal Council,
   Town Hall,
   Colombo 07.

5. Vishaka Dias,
   Municipal engineer,
   Colombo Municipal Council,
   Town Hall,
   Colombo 07.

6. Nelu Fernando,

President,
Outdoor Advertising Association of Lanka,
No. 188, High Level Road,
Nugegoda.

7. Fareed Mohideen,
Secretary-General,
Outdoor Advertising Association of Lanka,
No. 188, High Level Road,
Nugegoda.

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

9. Auditor-General,
Auditor General's Department,
Independence Square,
Colombo 07.

Respondents

BEFORE : Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
Jagath Balapatabendi, J.

COUNSEL : J.C. Weliamuna with Maduranga Ratnayake for Petitioner

Uditha Egalahewa with Ranga Dayananda for 1st to 5th Respondents

M.M. Mohideen for 6th and 7th Respondents

ARGUED ON: 01.07.2008

WRITTEN SUBMISSIONS
TENDERED ON: Petitioner : 28.08.2008
1st to 5th Respondents: 23.09.2008
6th and 7th Respondents : 15.09.2008

DECIDED ON: 04.03.2009

Shirani A. Bandaranayake, J.

The petitioner, a former Deputy Mayor of the Colombo Municipal Council and a rate-payer to the Colombo Municipal Council (hereinafter referred to as the CMC) had made this application on his own behalf and in the public interest of the residents of the CMC area, that due to the failure of the respondents to remove a large number of unauthorized hoardings erected, granting of purported approval for the erection of hoardings and the display of advertisements, in violation of the By-laws and guidelines of the CMC, the 1st to 5th respondents have violated the fundamental rights of the petitioner and the residents of the Colombo Municipality area, guaranteed in terms of Article 12(1) of the Constitution, for which this Court had granted leave to proceed.

The petitioner's case, as submitted by him, *albeit* brief is as follows:

Displaying of Advertisements within the Colombo Municipality is regulated by the advertisement, Decoration and Posters by-law 1991 of the CMC. Section 2 of the said By-law, stated that,

> "No one shall display any advertisement or cause any advertisement to be displayed so as to be visible from any street, road, canal, lake, sea or the sky except under the authority of a license issued in that behalf."

Section 2 of the said by-law is subject to the exceptions set out in section 3 of the by-law, which deals with the non-commercial advertisements, notices, etc. In terms of the said by-laws the 3rd respondent was vested with powers to entertain and approve applications and to issue license for displaying of advertisements.

In 2005, the 2nd respondent's predecessor, the 3rd respondent and the petitioner in his capacity as the then Deputy Mayor had taken a decision to allow the Municipal Engineers to decide the locations for hoardings. It was also decided to remove all unauthorized hoardings and in fact 386 such hoardings were demolished in 2005.

During that period, as the CMC was in the process of identifying unauthorized hoardings for the purpose of removal, several cases were filed in the Court of Appeal and in one application, the matter was settled on the basis that the advertiser would be allowed to display the advertisements until 31.12.2005, provided any arrears of payment due to the CMC was paid (P3). Thereafter, several fundamental rights applications were filed in this Court challenging *inter alia*, the authority of the 1st respondent to remove hoardings. In the mean time CMC had introduced guidelines in respect of hoardings on which this Court had made order permitting CMC to remove hoardings, which were in violation of the said guidelines (P4 and P5). Moreover, when these applications were considered on 18.09.2006, learned Counsel for the petitioners in those applications had moved to withdraw them, considering the guidelines that have been formulated. It had also been submitted to Court on behalf of the respondents, in the aforementioned matters, that steps would be taken in respect of hoardings, which were not in conformity with the by-laws of the CMC and the guidelines, to be removed (P5a). Accordingly, the said applications were dismissed by this Court.

Irrespective of the aforementioned orders made by Court and the undertaking given by CMC, the petitioner alleged that the Municipality had failed to take effective steps whatsoever to remove unauthorized or illegal hoardings displayed in the Colombo Municipality area.

Accordingly the complaint of the petitioner is that the 3rd respondent had approved a large number of hoardings in violation of the said guidelines. He had referred to certain instances in which hoardings had been approved and permitted to be displayed in violation of the guidelines, which are set out below.

Table I

Guidelines – Clause 1	**The maximum size of a hoarding should be 20 feet x 10 feet.** There are several over-sized hoardings at the Maradana Junction and the Green Path Junction. Further the recently erected large hoarding opposite Elphinston Theatre seriously undermines the scenic value of the historical buildings at the Maradana Junction.
Guidelines – Clause 2	**Hoardings should only be erected on uni-poles (single poles).** The majority of the hoardings are erected on two or more poles.
Guidelines – Clause 3	**No hoarding should be erected within road reservations of Independent Mawatha, Bauddhaloka Mawatha, Ananda Coomaraswamy Mawatha and Galle Face Centre Road**. There are a large number of hoardings erected on the said roads.
Guidelines – Clause 4	**No hoarding should be erected at the Independent Square, frontage of Sports Ministry Grounds, alongside cemeteries and Viharamahadevi Park.** There are several hoardings alongside the Borella Public Cemetery.
Guidelines – Clause 6	**No hoarding should be erected on property frontage of religious places of worship, schools, universities, other educational institutions, buildings of national importance, places of visual quality and diplomatic missions.** There is a hoarding at Horton Place – Kynsey Road Junction outside Libyan Embassy. On Reid Avenue there are eight (8) hoardings alongside the property frontage of the University of Colombo. There are several hoardings alongside the property frontage of Devi Balika Vidyalaya, St. Bridget's Convent and Royal College. There are hoardings on the property frontage of the Church and the Mosque in

	Cinnamon Gardens.
Guidelines – Clause 7	**No hoarding should be erected alongside sites of monuments within 10 meters thereof obliterating such monuments.** There are hoardings in violation of the said Clause 7 on either side of the statue of Hon. Dharmasiri Senanayake at the Devi Balika Vidyalaya Junction and near the statute of Hon. Lalith Athulathmudali at the Royal College roundabout.
Guidelines – Clause 8	**No hoarding should be erected violating the rights of property owners to enjoy reasonable property frontage, ventilation and natural light.** Hoardings have been erected in violation of the said Clause 8.
Guidelines – Clause 9	**No hoarding should be erected on top of another hoarding.** Hoardings have been erected in violation of the said Clause 9.
Guidelines – Clause 10	**Only one hoarding should be allowed to display within 100 meters from the centre of an intersection with three arms and with traffic signals. Only three (3) hoardings shall be allowed to display within 100 meters from the centre of an intersection with more than three (3) arms with traffic signals. This regulation shall be applicable to roundabouts also. Such advertisements shall not be illuminated and shall not be backed by a front of a traffic signal head.** There are hoardings at almost all the roundabouts and traffic signal heads in the Colombo city.
Guidelines – Clause 11	**No hoardings should be erected within roundabouts, traffic diversion islands, public parks and centre median.**

	Hoardings have been erected at many places violating the said Clause 11.
Guideline - Clause 12	**No hoarding should be erected without displaying municipal reference number, contact telephone number of applicant of advertisement and the phrase *city complaints* *www.cmc.lk* on the right hand bottom corner of the front face of the advertisement. This information of the advertisement should be clearly visible and readable to the public. This information should be written on either side of the advertisement in case of double side display. Only reference number of the advertisement shall be written on a 3 feet x 2 feet directional signboard**. Almost all the hoardings are in violation of the said Clause 12.
Guideline – Clause 13	**No hoarding should be erected on a land or a property maintained by the council in the following manner –** **(a) parallel to a property frontage;** **(b) at an angle less than 45 degrees to property frontage;** **(c) with less than 2.5 meters ground clearance;** **(d) within three meters of vehicular access to premises;** **(e) overhanging a carriageway;** **(f) where the width of the foot path is less than or equal to 1.0 meter. Where the width of the foot path is more than 1 meter, any part or column of the structure shall not lie within the effective area of foot path;** **(g) on electricity posts and tele-communication posts.**

	Hoardings have been erected in violation of the said clause 13.
Guidelines – Clause 14	**A cluster of hoardings should not exceed three numbers. Gap between two hoardings in a cluster forming a row shall be one meter. Distance between two freestanding hoardings shall not be less than 10 meters. Distance between two clusters of hoardings shall not be less than 20 meters.** Hoardings have been erected in violation of the said Clause 14.
Guidelines – Clause 15	**Visuals displayed shall be approved by the Commissioner. No visual shall display material of disrespect to religious beliefs, depicting nudity, semi-nudity, cruelty of any nature including animals.** Hoardings have been erected in violation of the said Clause 15. (P6(a), P6(b), P6(c), P6(d), P6(e), P6(f) and P6(g)

Accordingly it was submitted that most of the new hoardings that have been approved do not display certification with regard to structure safety and suitability, thus violating Clause 16 of the said guidelines and as a result, when there was heavy rain in the city of Colombo recently, nearly 40 such hoardings collapsed causing damage to property. The petitioner alleged that some of the hoardings have been erected in structurally hazardous and unsafe manner and cited as an example the hoarding opposite the Elphinston Theatre at the Maradana Junction (P6(a)), which has not only been erected in violation of the said By-law and the guidelines, but also causing structural damage to the bridge and as for the purpose of the erection of the said hoarding the ground has been dug and a large number of steel poles have been fixed to the ground on concrete slabs.

It was also submitted that several newspapers have carried articles bringing to light the issue of hoardings being indiscriminately erected on roads and streets being a public nuisance and also impacting on the aesthetic impression of the city of Colombo (P7).

Several residents in the city of Colombo have made complaints to the Mayor of Colombo regarding the hoardings and the University of Colombo too has complained to the 3rd respondent with regard to such hoardings (P8(a), P8(b) and P8(c)).

The petitioner also alleged that aside from the arbitrary granting of approval of hoardings in violation of the law, as the 1st and/or 2nd and/or 3rd respondents have failed to evolve a transparent and an accountable mechanism of receiving revenue by advertisement hoardings, the CMC has lost an enormous amount of revenue. Such action has led to corrupt practices particularly in the process of approving hoardings as there is a greater demand for advertising at key locations in the city of Colombo. According to the petitioner if hoardings were auctioned, a single hoarding in the city of Colombo, being the commercial capital of the country, would have fetched an annual income of Rs. 500,000/- to Rs. 1,000,000/- whereas most of the hoardings have currently been licensed for an annual fee, which is an unrealistically low as Rs. 20,000/-. The petitioner cited the Road Development Authority, which had adopted a competitive bidding process by way of auction in awarding hoardings that had been able to collect as revenue the true market value of such hoardings (P9(a), P9(b), (P9(c), P9(d) and P9(e)).

The petitioner therefore claimed that the failure of the 1st to 5th respondents to remove a large number of unauthorized hoardings erected in the city of Colombo and their granting of purported approval for the erection of said hoardings is illegal, irrational, contrary to by-laws of the CMC, and Advertisement guidelines and constituted an infringement of the fundamental rights of the petitioner's and the residents' of the CMC area guaranteed in terms of Article 12(1) of the Constitution.

The petitioner had prayed from this Court to direct, *inter alia*, the respondents to remove all unauthorized hoardings, strictly enforce the said by-laws and guidelines and grant an interim stay order restraining the respondents from granting approval for new advertising hoardings.

Prior to this matter was taken up for support for interim relief as prayed for by the petitioner, the respondents had filed their objections. After considering the submissions by both parties,

this Court issued a limited interim order to the effect that the 1st respondent council to consider all the applications made for erection of hoardings for advertisements in terms of their guidelines (P4). Thereafter the said interim order was extended until the final hearing and determination of this application with the consent of the 1st to 5th respondents.

Learned Counsel for the 1st to 5th respondents took up the objection that the petitioner did not have *locus standi* to make this application as he had failed to reveal as to how his fundamental rights were violated.

Learned Counsel for the petitioner contented that the petitioner, a rate payer and a resident of the CMC area had filed this case in the 'public interest' seeking relief that the guidelines governing hoardings would be implemented while protecting the revenue of the Council.

The fundamental rights jurisdiction and its exercise is spelt out in Article 126 of the Constitution. Article 126(2) of the Constitution, which refers to the exercise of the fundamental rights, clearly states that a person, whose fundamental right has been infringed or is about to be infringed by executive or administrative action, he may himself or by an Attorney-at-Law on his behalf, should apply to the Supreme Court by way of a petition praying for relief. The said Article reads as follows:

> "**Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be 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 may be 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 . . . ." (emphasis added).

Thus as stated earlier, our Constitution had made provision only for the person, who has suffered injury by reason of the violation of his fundamental right or for an Attorney-at-Law, on

his behalf, to be entitled to seek redress from the Supreme Court in terms of the fundamental rights jurisdiction under Article 126(2) of the Constitution.

A strict interpretation of Article 126(2) of our Constitution would no doubt indicate that the judicial review of violations of fundamental rights by executive or administrative action is restricted, and that there is no *locus standi* for an outsider to obtain relief in terms of the said Article of the Constitution. Such a strict interpretation would undoubtedly restrict the applicability of the fundamental rights jurisdiction, and in my view, time is opportune to forge and adopt a liberal interpretation for the purpose of making fundamental rights more meaningful for the majority of the people. As rightly pointed out by Bhagwati, J. (as he then was), in **Bandhua Mukti Morcha** v **Union of India** (A.I.R. 1984 S.C. 802),

> "But if we want the fundamental rights to become a living reality and the Supreme Court to become a real sentinel on the *qui vive*, we must free ourselves from the shackles of outdated and out mode assumptions and bring to bear on the subject fresh outlook and original unconventional thinking."

This position was observed by the Supreme Court of India which had been broadening the applicability of the concept of *locus standi* and was clearly laid down in **Maharajah Singh** v **Uttara Pradesh** (A.I.R. 1976 S.C. 2602) which stated that,

> "Where a wrong against community interest is done, 'no *locus standi* ' will not always be a plea to non-suit an interested public body chasing the wrong doer in court . . . . *Locus standi* has a larger ambit in current legal semantics than the accepted individualistic jurisprudence of old."

A few years later in **S.P. Gupta** v **Union of India** (A.I.R. 1982 S.C. 149), the Indian Supreme Court had determined that any member of the public can maintain an application for an appropriate direction or order or writ and had stated that,

> "Where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any constitutional or legal right and such person or determinate class of persons is by reason of poverty, helplessness or disability or sociality or economically disadvantaged position, unable to approach the Court for relief, any member of the public can maintain an application for an appropriate direction or order or writ in the High Court under Article 226 or in case of breach of any fundamental right to this Court under Article 32."

An examination of the Indian Case Law clearly indicates that a petition in terms of Article 32 of the Indian Constitution can be filed only by a public spirited individual, who acts in a *bona fide* manner, without personal gain or profit or out of political motivation in cases, where there has been a breach of a public duty or breach of a constitutional provision causing injury to the general public.

A careful examination of the case law indicates that public interest litigation is a special 'juridical device' that could be used to settle disputes in contemporary society. It has been introduced by Justice Bhagwati (as he then was), as 'a strategic aim of the legal-aid movement, which was intended to bring justice within the reach of the poor masses' and its purpose is to promote and vindicate public interest, which demands that violations of constitutional or legal rights of large number of people should not go unnoticed and un redressed (**Peoples' Union for Democratic Rights** v **Union of India** (A.I.R. 1982 S.C. 1473).

It is not disputed that Article 126(2) of our Constitution cannot be compared with Article 32 and/or 226 of the Indian Constitution. However, it also cannot be disputed that the concept of *locus standi* had faced changes in the recent past as measures were taken to expand its applicability.

This broadening of the concept of *locus standi* could be even seen in the English Courts, where steps have been taken to relax the rules applicable to standing in recent years. The said 'change in legal policy' came into being in the well known case, popularly known as the Inland Revenue Commissioners Case (**R** v **Inland Revenue Commissioners' *ex-parte* National Federation of Self-Employment and Small Businesses Ltd.** ([1982] A.C. 617). Approving the concept that in suitable cases, a citizen's action, or *actio popularis*, must be allowed, Lord Diplock in the **Inland Revenue Commissioner's** case stated that,

> "It would, in my view be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of *locus standi* from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped."

Lord Diplock in **Inland Revenue Commissioners'** case (supra) also referred to the words of Lord Denning M.R. in **R** v **Greater London Council *ex-parte* Blackburn** ([1976] 1 W.L.R. 550), where he had stated that,

> "I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then any one of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced, and the courts in their discretion can grant whatever remedy is appropriate."

These decisions clearly enumerate the new concept adopted by English Courts on the test of standing. The attitude of those Courts has been to consider the merits of the application than the standing of the applicant. Considering these decisions, Professor Wade (Administrative

Law, 9th Edition, pp. 692-693) had succinctly spelt out the present trend of the English Courts in deciding the question of standing, which reads as follows:

> "The essence of standing, as a distinct concept, is that an applicant with a good case on the merits may have insufficient interest to be allowed to pursue it. The House of Lords' new criterion would seem virtually to abolish the requirement of standing in this sense. **However remote the applicant's interest, even if he is merely one taxpayer objecting to the assessment of another, he may still succeed if he shows a clear case of default or abuse. The law will now focus upon public policy rather than private interest**. (emphasis added)"

The English Courts had taken a similar view in deciding cases filed in the public interest. For instance in **R** v **Secretary of State for Foreign and Commonwealth Affairs Ex-parte Rees – Mogg** ([1994] Q.B. 552) it was held that a member of the House of Lords had standing to challenge the decision of the Secretary of State for Foreign and Commonwealth Affairs to proceed to the ratification of the *Treaty on European Union* 'because of his sincere concern for constitutional issues'.

The scope of Article 126(2) of our Constitution, on the basis of the question of *locus standi*, was examined by this Court in **Somawathie** v **Weerasinghe and others** ([1990] 2 Sri L.R. 121). In that matter the petitioner was complaining of the violation of her husband's fundamental rights and the alleged infringements including unlawful arrest, detention and assault, whilst he remained in police custody. In deciding that the petitioner had no *locus standi* to maintain the application, Amerasinghe, J. pronouncing the majority view, construed the provision contained in Article 126(2) of the Constitution. According to Amerasinghe, J.,

> "How should the word of this provision of the Constitution be construed? It should be construed according to the intent of the makers of the Constitution. Where, as in the Article before us, the words are in themselves precise and unambiguous, and there

> is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense."

However, Kulatunga, J., while dissenting with the majority opinion, expressed the view that in circumstances of grave stress or incapacity, particularly where torture resulting in personal injury has alleged to have been committed; next-of-kin such as a parent or the spouse should be able to apply to this Court and this Court could entertain such an application notwithstanding the failure to effect literal compliance with the requirements of Article 126(2) of the Constitution.

The question of standing again arose in **Bulankulama and others** v **Secretary, Ministry of Industrial Development and others** ([2000] 3 Sri L.R. 243). In that case the representative of the Government and Freeport Mac Moran of USA and its officiate Imco Agrico initiated the final drafts of the Mineral Investment Agreement and subsidiary documents in respect of a deposit of phosphate rock at Eppawela in the Anuradhapura District. The proposed agreement granted the Company the sole and exclusive right to search and explore the phosphate and other minerals in the exploration area, to conduct test or pilot operations at any location within the contract area and to develop and mine under Mining Licenses any phosphate deposits (including associate minerals) found in the exploration area.

The petitioners, being residents of Eppawela engaged in cultivation and owning lands there, one of whom was the Viharadhipathi of a temple, complained of infringement of their rights under Articles 12(1), 14(1)g and 14(1)h of the Constitution by reason of the proposed agreement. They relied on the analysis of several professional experts and reports of the National Academy of Science and the National Science Foundation, who were of the opinion that the proposed agreement will not only be an environmental disaster, but also an economic disaster. The Court held that there is an imminent infringement of the petitioners' fundamental rights guaranteed under Articles 12(1), 14(1)g and 14(1)h of the Constitution.

Several preliminary objections were taken at the hearing of that case and one of those were based on the question of public interest litigation, where the learned Counsel for the 5th and 7th respondents had submitted that the application should not be entertained under the provisions of the Constitution. Thus the question at issue had been whether the individual petitioners had standing to pursue their rights in terms of Articles 17 and 126(1) of the Constitution and whether they are qualified on the ground that it is public interest litigation. For this question Amerasinghe, J., had answered in the affirmative and had stated that,

> "Learned Counsel for the 5th and 7th respondents submitted that, being an alleged 'public interest litigation' matter, it should not be entertained under provisions of the Constitution and should be rejected. **I must confess surprise, for the question of 'public interest litigation' really involves questions of standing and not whether there is certain kind of recognized cause of action**. The Court is concerned in the instant case with the complaints of individual petitioners. On the question of standing, in my view, the petitioners as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court" (emphasis added).

The question of standing in regard to applications made under Article 11 of the Constitution was considered in the decisions (application for leave to proceed and the hearing) in **Sriyani Silva** v **Chanaka Iddamalgoda and others** ([2003] 1 Sri L.R. 14 and S.C. (Application) No. 471/2000 – S.C. Minutes of 08.08.2002). It was decided by this Court that Article 126(2) of the Constitution must be interpreted broadly in order to grant constitutional remedy expansively and that Article 17 recognizes that every person is entitled to make an application under Article 126 in respect of the infringement of a fundamental right.

As stated earlier, Article 126(2) of the Constitution refers to the infringement of a fundamental right of a 'person'. Article 126 of the Constitution must be read with Article 17 of the

Constitution, which is an entrenched provision and deals with the remedy for the infringement of fundamental rights by executive action. The Constitution of this Island Republic clearly stipulates that sovereignty includes fundamental rights and it is in the People, which is inalienable. Article 4 of the Constitution deals with the exercise of sovereignty and Article 4(d) clearly states that the fundamental rights, which are by the Constitution declared and recognized, shall be respected, secured and advanced by all the organs of government. This Article further stipulates that such fundamental rights 'shall not be abridged, restricted or denied' to the People.

Considering the provisions contained in the Constitution dealing with the fundamental rights jurisdiction and the applicability of Article 126(2) read with Articles 3, 4(d) and 17, it is apparent that Article 126(2) should be interpreted broadly and expansively. Where a person therefore complaints that there is transgressing the law or it is about to transgress, which would offend the petitioner and several others, such a petitioner should be allowed to bring the matter to the attention of this Court to vindicate the rule of law and to take measures to stop the said unlawful conduct. Such action would be for the betterment of the general public and the very reason for the institution of such action may be in the interest of the general public.

The petitioner as has been stated earlier is a rate payer to the CMC, and had made this application on his behalf as well as on behalf and of the residents of the Colombo Municipal area.

On a consideration of the totality of the aforementioned, I hold that Article 126(2) of the Constitution must be given a broad and expansive interpretation keeping in line with the developments that had taken place in the arena of Public Law and I accordingly overrule the objection raised on the basis of the standing of the petitioner.

Having considered the objection raised by the learned Counsel for the 1st to 5th respondents, let me now turn to examine the main issues raised in this application.

The contention of the learned Counsel for the petitioner was that 1st and/or 2nd and/or 3rd and/or 4th and/or 5th respondents had granted approval to erect hoardings in the CMC area in violation of the by-laws marked P2 and advertisement guideline marked P4.

Learned Counsel for the 1st to 5th respondents submitted that the petitioner had relied on the purported by-law contained in the document marked P2, but the said by-law is not the prevailing by-law, which regulate the displaying of banners, advertisements and hoardings within the CMC area as it was never approved by the 1st respondent Council. The contention of the learned Counsel for the 1st to 5th respondents was that the applicable by-laws are the ones, which came into operation in 1949 and which was gazetted in the Gazette Notification No. 541/17 dated 20.01.1989.

Learned Counsel for the 1st to 5th respondents further contented that the position taken up by the learned Counsel for the petitioner regarding the guidelines that they were given legal sanctity by the 1st respondent Council is not correct. His position was that the fundamental rights applications bearing Nos. S.C. (Application) 30–35/2006 were filed challenging, *inter alia*, the applicability of the proposed guidelines at that time and the contents of the said guidelines. The submission of the learned Counsel for the 1st to 5th respondents was that this Court had directed the 1st respondent Council to entertain the applications for the erection of hoardings, in terms of the applicable by-laws of CMC and not on the basis of the guidelines.

Since the said by-laws were outdated, this Court had permitted the said guidelines to be used to ascertain the hoardings that should be removed. Learned Counsel further submitted that, thereafter a set of new guidelines approved by the then Commissioner was filed in Court for approval and as the petitioners in the applications referred to earlier, sought to withdraw the said applications before the conclusion of the hearing, the said guidelines could not be properly considered by this Court.

The contention of the 1st to 5th respondents therefore was that the by-laws, which came into operation in 1949 and the by-laws gazetted in Government Gazette Notification No. 541/17 dated 20.01.1989 and adopted by the 1st respondent Council regulated the displaying of

banners, advertisements and hoardings within the Colombo Municipality area (R9 and R10) and the question as to whether the hoardings set up at various locations referred to in the petition were in violation of the guidelines does not arise as the operation of the guidelines in question had been suspended by the 3rd respondent.

Since the applicability of the guidelines has come up as the main issue in this application, I would now turn to examine the validity of the said guidelines in question.

Considering the submissions made by the learned Counsel for the 1st to 5th respondent and the affidavit of the 4th respondent on behalf of himself and 1st, 3rd and 5th respondents, it is apparent that initially erection of hoardings within the Colombo Municipal area were considered in terms of the by-laws, which regulated the displaying of banners, advertisements and hoardings. Admittedly the said by-laws had come into effect in 1949 and was gazetted in the Gazette Notification dated 20.01.1989.

Later a set of guidelines for the purpose of advertising in Colombo had come into being to be effected from January 2006. The said guidelines (P4) contained 18 clauses and stated that the said guidelines had to be followed in considering applications to obtain a license to display advertisements within the city of Colombo.

It is thus not disputed that a set of guidelines had been introduced by the 1st respondent Council and had come into being, with effect from January 2006. In fact the applicability of the said guidelines had been considered by this Court in February 2006, when the question of removal of hoardings had to be examined. In that matter, the 1st respondent Counsel had informed this Court that the 1st respondent would decide as to the hoardings that would have to be removed on the basis of the guidelines for advertisements of the 1st respondent Council (P5). It is to be noted that on the day the said order was made by this Court, the Chief Legal Officer of the 1st respondent Council was present in Court and the order made on 01.02.2006 had stated that,

"The applications, which have already been made by the petitioners, would be taken into consideration for the purpose of deciding to grant formal licenses to the petitioners in terms of the applicable by-laws.

Learned Counsel for the 1st and 3rd respondents informs Court that after perusing the applications made by the petitioners, the 1st respondent Council will decide as to the hoardings that will have to be removed **in terms of the guidelines**" (emphasis added).

The order thus had referred to the applicable by-laws as well as the guidelines, which were to be taken into account in deciding the validity of the already erected hoardings as well to consider the applications made for the purpose of erection of new hoardings.

Whilst this was the position by February 2006, it appears that the 3rd respondent had thereafter decided to suspend the guidelines and to draft a new set of by-laws. The 4th respondent in his affidavit referred to documents marked as R6 and R7 and had averred to the aforesaid intention of the 3rd respondent. These two documents are reproduced below since they are of importance to this application.

"Director Engineering (Projects)

Implementation of Guidelines for Hoardings in Colombo

As you are aware, several cases had been filed in the Supreme Court against the Council in respect of hoardings. When these cases were taken up in Supreme Court and having heard both petitioners and respondents, Supreme Court had noticed that certain amendments or modifications have to be made to the present guidelines for hoardings. Thereafter amendments and

modifications were made to the guidelines and the same was submitted to the Supreme Court, but unfortunately the petitioners concerned withdrew those cases on 18.09.2006.

Though we have reserved our rights to implement the present guidelines, still I see it needs further modifications and amendments.

Since this is substantial income to the Council and the interest of the Council as well as advertisers, it is high time for the Council to amend present advertising by laws incorporating the present guidelines with amendments and modifications to suit the present economic, cultural and social status of the city in particular and the country in general.

In view of the above, you are requested to draft a set of advertisement by laws incorporating the guidelines as aforesaid, in consultation with Legal Officer, Director (Traffic & Designs) and Director (Planning). The application of present guidelines is hereby suspended until such time the new by laws are framed and enacted.

Municipal Commissioner
26.09.2006 (R6)."

The Director Engineering (Projects) by his letter dated 03.10.2006 had informed the 3rd respondent, Municipal Commissioner that he would not take into consideration the guidelines either for the new applications or for the applications for the existing hoardings. He had further stated that he would prepare the by-laws 'leisurely in his spare times'. The said letter is as follows:

"Municipal Commissioner

Implementation of Guidelines for Hoardings in Colombo

This is in reference with your instructions dated 26.09.2006 regarding the above matter.

As instructed by you, present guidelines will not be taken into consideration. I hereby refrain from adopting guidelines for locations of new applications and requests for advertisements and also for existing advertisements.

Formulation of new by laws incorporating modified guidelines is a time consuming process as many aspects such as economic, cultural, social status of the city, identification of objectionable locations, aesthetic and scenic beauty requirements, impact on traffic etc. should be considered. On the other hand, I have to undertake these tasks in addition to my assigned duties as Director Engineering (Projects). Hence I am unable to give you any predicted period to finalize by laws and please allow me to draft these by laws **leisurely in my spare times** and I will appraise you of progress of draft by law from time to time when necessity arises. I also suggest and seek your approval to incorporate a new enhanced fee structure for advertisements together with the by laws.

Director Engineering (Projects)

03.10.2006" (emphasis added) (R7).

The 4th respondent in his affidavit therefore had averred that the question whether the hoardings set up at various locations and stated in paragraph 11 of the affidavit filed by the petitioner, that the said hoardings have been set up in violation of the guidelines does not arise since the operation of the aforesaid guidelines have been suspended by the 3rd respondent. The contents of paragraph 11 was reproduced in tabulated form and given in Table I at the commencement of the judgment.

On examination of the aforementioned two communications between the Municipal Commissioner and the Director Engineering (Projects) (R6 and R8) it is abundantly clear that at a time when this Court had recorded to the effect that,

> "the guidelines in question had been approved by the Chief Minister on the basis,
>
> 1. the specific locations would be identified where hoardings should be permitted;
>
> 2. within the specific locations where the guidelines would apply"
>
> (Journal Entry dated 28.04.2006 – P10),

and that the

> "respondents would take action that has been withheld pending these applications in respect of the hoardings that are not compliant with by laws and guidelines and also to recover the amounts that are due."
>
> (Journal Entry dated 18.09.2006 – P10),

the 3rd respondent, Municipal Commissioner had taken steps to suspend the application of present guidelines until new by-laws are framed and enacted, with a single stroke of his pen. It is quite apparent that no thoughts were given and no steps were taken for the period interim, for hoardings that were to be erected in the city of Colombo. Due to this position several parties suffered; the advertisers did not know on what basis they had to apply for the erection of hoardings; the residents and the general public within the city of Colombo had faced difficulties (P8a, P8b and P8c) and the 1st respondent Council had lost revenue as there was no clear fee structure. It is also to be noted that the 3rd respondent had refrained from tendering an affidavit to this Court and had got the 4th respondent to file an affidavit on his behalf as well as on behalf of 1st, 3rd and 5th respondents.

Considering the aforementioned affidavit of the 4th respondent filed on his behalf and on behalf of the 1st, 3rd and 5th respondents, the question which arises at this point is that, whether the suspension of the guidelines marked as P4 was lawful and whether the 1st to 5th respondents had acted in contravention to the doctrine of public trust.

Learned Counsel for the petitioner strongly contended that the failure of the 1st to 5th respondents to remove a large number of unauthorized hoardings erected within CMC area and granting of purported approval for the erection of hoardings is illegal, irrational and contrary to by-laws of the Council and its guidelines and therefore constitutes a grave abuse of power and is obnoxious to the doctrine of public trust.

As stated earlier, it was not disputed that the displaying of advertisements within the Colombo Municipality area was regulated by the by-laws, which came into operation in 1949 and the by-laws gazetted in Government Gazette Notification bearing No. 541/17 dated 20.01.1989 and adopted by the 1st respondent Council. The displaying of such advertisements within the Colombo Municipality area was also regulated, as stated earlier, by the guidelines prepared and approved by the Chief Minister of the Western Provincial Council. The aforementioned by-laws clearly stipulated that,

"No person shall cause any advertisement to be displayed so as to be visible from any street, road, canal or lake, except under the authority of licence issued in that behalf by the Commissioner."

The proviso to the above clause refers to the advertisements to which the aforesaid should not apply, provided that such advertisement is an illuminated advertisement or a sky sign. These types of advertisements were described as follows:

"a) an advertisement relating to any entertainment the net proceeds of which are to be used for the purpose of charity;

b) an advertisement relating to any entertainment to be held in the premises upon which such advertisement is displayed;

c) an advertisement displayed by the Government,

d) an advertisement relating to a religious, political or public meeting;

e) an advertisement in the window of any building;

f) a 'To Let' advertisement;

g) a 'For Sale' advertisement;

h) a domestic name plate;

i) a name plate not exceeding 09 square meters in area, used for professional purpose;

j) an advertisement on a vehicle used for trade purposes displaying the name and address of the owner of that vehicle;

k) an advertisement relating to the trade or business carried on in the premises upon which such advertisement is displayed.

Part II of the said set of by-laws, refers to the other relevant provisions pertaining to advertisements. The learned Counsel for the 1st to 5th respondents submitted that the by-laws referred to above are the currently applicable by-laws and the 4th respondent too had averred to this effect in his affidavit of 30.11.2007.

It is therefore abundantly clear that there was a set of valid by-laws in addition to the aforementioned guidelines pertaining to advertisements within the city limits of the 1st respondent Council area. The contention on behalf of the 1st to 5th respondents, as stated in the affidavit of the 4th respondent is that the question whether the hoardings set up at various locations referred to in the petition in violation of the guidelines does not arise since the operation of the said guidelines had been suspended by the 3rd respondent. Although the learned Counsel for the 1st to 5th respondents strenuously contended that the guidelines in question were not adequate for the purpose it was intended and that they had not obtained legal sanctity, there was no reference made to the applicability of the by-laws approved by the members of the Municipal Council and published in terms of the Municipal Councils Ordinance in the Gazette of 20.01.1989. Specific reference was however, made to the by-laws of 1948 (R9) being 'archaic and in need of drastic changes to suit socio economic environment at present'. The question however, arises at this juncture as to whether the 3rd respondent could have taken the decision to suspend the guidelines in question as stated earlier with just a stroke of a pen and totally ignore the by-laws enacted in terms of the provisions of the Municipal Councils Ordinance.

The law regarding the waiver, relaxation and repeal of by-laws of local authorities has no ambiguities as there is no possibility for a local authority to waive its by-laws unless there is specific provision contained in the by-law itself. Referring to this position, Charles A Cross (Principles of Local Government Law, 6th Edition, pg. 123) stated that,

> "An authority has no power to waive its by-laws or to relax them in any respect unless the by-laws themselves contain provisions enabling this to be done (it is highly improbable that by-laws

> containing a dispensing power would be confirmed) or else there is specific statutory provision for waiver or relaxation."

This position was considered as far back as in 1899 by Day, J. in **Yabbicom** v **King** ([1899] 1 Q.B. 444), where it was categorically stated that,

> ". . . . by-laws properly made have the effect of laws; a public body cannot any more than private persons dispense with laws that have to be administered; they have no dispensing power whatever."

When the 3rd respondent had decided to suspend the guidelines, he had not stated about the applicability of the by-laws. A careful examination of the letter from the 3rd respondent to the Director Engineering (Projects) however, reveals that there is no reference to the applicability of by-laws enacted and published in the Gazette Notification dated 20.01.1989. In these circumstances the question arises as to whether the 3rd respondent's decision to suspend the application of guidelines and by-laws without any authority from the 1st respondent Council could be regarded as lawful and not an arbitrary decision. The answer to the question is clearly in the negative for the reasons set forth in the following paragraphs.

The allegation of the petitioner is that the failure of the 1st to 5th respondent to remove a large number of unauthorized hoardings erected and further granting of purported approval for the erection of hoardings within the city limits of the 1st respondent Council area contrary to applicable by-laws and guidelines had infringed the fundamental rights of the petitioner's and of the residents' of the CMC area guaranteed in terms of Article 12(1) of the Constitution.

Article 12(1) of the Constitution deals with the right to equality and reads as follows:

> "All persons are equal before the law and are entitled to the equal protection of the law."

Equality, which is a dynamic concept, forbids unfairness and arbitrariness. The Concise Oxford Dictionary of Current English (7th Edition, pg. 44) refers to an arbitrary decision as,

> "Derived from mere opinion or random choice; capricious; unrestrained, despotic."

Referring to arbitrariness, in **E.P. Royappa** v **State of Tamil Nadu** (A.I.R. 1974 S.C. 555) it was stated that equality is antithetic to arbitrariness and equality and arbitrariness are sworn enemies. In the words of Justice Bhagwati (as he then was),

> In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary, it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Article 14 . . . ."

The summation of these concepts is that in terms of the Constitution everything must be carried out according to the rule of law. The concept of the rule of law has many meanings and out of which an important and relevant aspect is that the functions of the authorities should be conducted within a framework of recognized rules and principles, which would restrict discretionary power. Professor Wade refers to the picturesque language of Coke, where he had described this position as 'the golden and straight metwand' of law as opposed to 'the uncertain and crooked cord of discretion' (Administrative Law, supra pg. 20).

Although Dicey in his theory had explained that in classical constitutional law wide discretionary power was incompatible with the rule of law (A.V. Dicey, Law of the Constitution, 9th Edition, pg. 202), this concept does not hold good in today's context as in practical terms what is necessary would be not to eliminate the wide power of discretion, but the control of its exercise.

This general principle had remained unchanged for centuries and in Coke's words (Administrative Law, supra page.351),

> "For discretion is a science or understanding to discern between falsity and truth, between wrong and right, between shadows and substance, between equity and colourable glosses and pretences, and not to do according to their wills and private affections; for as one saith, *talis discretio discretionem confundit*."

It is interesting to note that the general principle which was evolved since the **Rooke's** case in 1598 (Administrative Law, supra) was followed continuously in related matters and the decision in **Westminster Corporation** v **London & North Western Railway** ([1905] A.C. 426), where Lord Macnaghten, stated with reference to a local authority's power to erect public conveniences that,

> "It is well settled that a public body invested with statutory powers such as those conferred upon the corporation must take care not to exceed or abuse its powers. It must keep within the limits of the authority committed to it. It must act in good faith. And it must act reasonably. The last proposition is involved in the second, if not in the first."

This position was further illustrated with approval by Lord Denning M.R. in **Breen** v **Amalgamated Engineering Union** ([1971] 2 Q.B. 175), referring to the land mark decision in **Padfield** v **Minister of Agriculture, Fisheries and Food** ([1968] A.C. 997), where it was stated that,

> "The discretion of a statutory body is never unfettered. It is a discretion which is to be exercised according to law. That means at least this: the statutory body must be guided by relevant

> considerations and not by irrelevant. If its decision is influenced by extraneous considerations which it ought not to have taken into account, then the decision cannot stand. No matter that the statutory body may have acted in good faith; nevertheless the decision will be set aside. That is established by **Padfield** v **Minister of Agriculture, Fisheries and Food**, which is a land mark in modern administrative law."

It is therefore apparent that a public authority has no absolute or unfettered discretion. Referring to this position, Professor Wade (supra pgs. 354 - 355) had stated that,

> "**Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely** – that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended" (emphasis added).

Learned Counsel for the petitioner contended that the manner in which the approval was granted for the hoardings and how they were allowed to be displayed constituted a grave abuse of power and violation of the doctrine of public trust and the 1st to 5th respondents were liable in terms of section 12(1) of the Constitution.

This Court in **Bulankulama and others** v **Secretary, Ministry of Industrial Development and others** (supra) had carefully considered the concept of public trust and had held that the 'organs of State are guardians to whom the people have committed the care and preservation of the resources of the people'. This position was referred to in the Supreme Court Determination on 'Land Ownership' (Decisions of the Supreme Court on Parliamentary Bills, 1991 – 2003, Vol. VII pg. 455), where it was stated that, 'from the time immemorial, land had been held in **trust** for the people in this island republic'.

The concept of public trust had been followed in several judgments of this Court and now it is an accepted doctrine that the resources of the country belong to the people; Sri Lanka's

sovereignty is in the people in terms of Article 3 of the Constitution and is inalienable and includes the powers of government, fundamental rights and the franchise; and the people have committed the care and preservation of their resources to the organs of the State, which are their guardians or trustees.

In such circumstances, the 1st to 5th respondents have a fundamental duty as specified in Article 28(d) 'to preserve and protect public property, and to combat misuse and waste of public property'. Furthermore the learned Counsel for the petitioner contended that the arbitrary methods of approving hoardings in a non-transparent manner had serious lapses of financial accountability. The 1st respondent Council, which has a history of over one hundred and twenty two years, is the largest and the oldest Municipal Council in the country. Revenue from an independent source, which is an essential commodity for any local authority, could have been enhanced, if the 1st respondent Council had utilized the applicable by-laws and the guidelines in granting approval for the hoardings.

Accordingly it is apparent that by the process, which was followed by the 1st to 5th respondents, the 1st respondent Council would have lost a substantial amount of income, which could have been put to good use for the upliftment, not only of the capital city, but also of its residents.

Learned Counsel for the 1st to 5th respondents contended that the guidelines, which were suspended did not provide for many important aspects of advertising. It had not made provision to prevent covering the public view, and no provision regarding the safety of the public. Furthermore, there was no provision for competitive transparent bidding procedure in awarding the bill boards and hoardings to advertisers. It was also contended that the existing by-laws were archaic and outdated and in need of drastic changes to suit the present socio-economic environment.

Learned Counsel for the 1st to 5th respondents had further contended that the 1st respondent Council received only the annual fee of Rs. 20,000/- per hoarding regardless of the location of the hoarding. It was conceded referring to the documents marked P9(a) to P9(e) that the

Roads Development Authority had fetched millions of rupees adopting the competitive bidding process.

There were five (5) documents submitted by the petitioner along with his petition marked P9(a) to P9(e). These documents refer to the charges levied by the Road Development Authority in the year 2007 for the erection and maintenance of hoardings, gantries, cantilevers and overhead bridges. The relevant portions of these documents are re-produced below, since they indicate the income that could be generated through this process.

> " . . . .
>
> **Permission for erection and maintenance of hoardings at Peliyagoda abundant bridge on Colombo-Kandy road.**
>
> This refers to the auction held at Ministry of Highways on 16.01.2007 on the above.
>
> You are required to do the following prior to the erection of hoarding.
>
> Make payment of Rupees **Seven Million Nine Hundred and Twelve Thousand and Five Hundred + 15% VAT (Rs. 7,912,500.00 + 15% VAT)** by a Bank draft . . . .
>
> 1. You are required to erect, maintain and removal of the above hoarding strictly in accordance with the conditions for erection, maintenance and removal of hoardings on National Highways . . . . (P9a)
>
> . . . .

Permission for erection and maintenance of gantries and cantilever on Cotta Road.

. . . .

Make payment of Rupees One Million Six Hundred Thousand + 15% VAT (Rs. 1,600,000.00 + 15% VAT by a Bank draft . . . . (P9b)

Permission for erection and maintenance of gantries, cantilevers and overhead bridges on Marine Drive.

. . . .

This is to inform you that you are the successful bidder at the above auction for installing and maintaining of **02 Nos. full gantries, 04 Nos. cantilevers and advertising space of 02 Nos. overhead bridges on Marine Drive.**

. . . .

Make payment of Rupees Two Million Eight Hundred Thousand + 15% VAT (Rs. 2,800,00.00 + 15% VAT) . . . . (P9c)

Permission for erection and maintenance of gantries and cantilevers on W.A. Silva Mawatha.

. . . .

This is to inform you that you are the successful bidder of the above auction for installing and maintaining **of 03 Nos. full gantries and 02 Nos. Cantilevers on W.A. Silva Mawatha.**

. . . .

Make payment of Rupees One Million Nine Hundred Thousand + 15% VAT (Rs. 1,900.000.00 + 15% VAT) . . . . (P9d)

Permission for erection and maintenance of hoarding on Baseline Road

. . . .

This is to inform you that you are the successful bidder at the above auction for installing and maintaining of **35 Nos. hoardings on Baseline Road**.

. . . .

Make payment of Rupees Six Million Six Hundred Thousand + 15% VAT (Rs. 6,600,000.00 + 15% VAT) . . . . (P9e)" (emphasis added).

It is common ground that the 1st respondent Council had charged only a maximum of Rs. 20,000/- per annum per hoarding. The aforementioned documents clearly illustrate the amount of revenue the 1st respondent Council could have earned through such hoardings. In fact guideline 18 of the document marked P4 refers to the fact that hoardings could be awarded to advertisers by calling for tenders. Even in the event that there were no proper

guidelines, the 1st respondent Council could have formulated relevant guidelines either to allow tenders or to conduct auctions. Irrespective of the method used, it is not disputed that, this would have paved the way for the 1st respondent Council to enhance its revenue from an independent source of income.

Learned Counsel for the petitioner submitted that it is common ground that even a newspaper advertisement of a full page in an insignificant page of a widely circulated newspaper would cost over Rs. 350,000/-. In such circumstances, it is surprising that the 1st respondent Council, presumably being aware of how advertising space was given by other organizations such as the Road Development Authority, took no steps at least on a temporary basis, until such time the guidelines were implemented, to levy a fee commensurate with the other comparable institutions.

Learned Counsel for the 1st to 5th respondents submitted that the 1st respondent Council had levied license fees in terms of Council Resolution No. 2061 (sanctioned on 28.06.1996) and that it is necessary to revise the present fees.

Accordingly learned Counsel for the 1st to 5th respondents contended that it was the sole responsibility of the members of the 1st respondent Council to impose appropriate license fees and to prepare a new set of by-laws to regulate the setting up of hoardings.

Whilst such was the situation, the 3rd respondent had taken steps to suspend the guidelines without making any arrangements as to the procedure that should be applicable regarding the erection of hoardings in the interim. At the time the guidelines were suspended no reference was made to the applicability of the prevailing by-laws. Accordingly it is not disputed that due to the said action of the 3rd respondent, several illegal hoardings had come up within the city limits of Colombo without any consideration for the safety of the general public or the scenic beauty of the capital city of the country.

Advertising, it is to be noted, has been used by the commercial enterprises and the business community for the purpose of promoting their products and has become a thriving industry in the commercial world. Considering its competitiveness in today's context, advertising, which is in its purest form is an art, alone has become a booming industry, which should not be stifled. It is also to be noted that the creativity and the variety of out door advertisements carried out in an organized manner could add colour, vividity and luster to a city centre.

However, it is to be admitted that there should be a policy, guidelines and by-laws to regulate the erection of hoardings, bill boards, gantries and any other mode used for the purpose of exhibiting advertisements. These regulations should have the requirement in issuing licenses for such hoardings etc. in public places as well as in private places. When public places are concerned, it is not disputed that the State or the local government institutions concerned has the authority to regulate them. As stated in **Saghir Ahmad** v **The State of Uttar Pradesh** ([1955] S.C.R. 707), referring to the decision in **C.S.S. Motor Service** v **State of Madras** ((1952) 2 M.L.J. 894),

> "The true position then is, that all public streets and roads vest in the State, but that the State holds them as trustees on behalf of the public. The members of the public are entitled as beneficiaries to use them as a matter of right . . . . The State as trustees on behalf of the public is entitled to impose all such limitations on the character and extent of the user as may be requisite for protecting the rights of the public generally; . . ."

However, this does not mean that the hoardings erected on private places should be excluded. As referred to in **Links Advertisers and Business Promoters** v **Commissioner, Corporation of the City of Bangalore** (A.I.R. 1977 S.C. 1646), what is necessary to be considered is whether the advertisement affixed is fronting the public street and is exposed to public view and if so the conditions applicable to hoardings situated in public property would be applicable to those as well.

On an examination of all the circumstances aforementioned, it is apparent that the manner in which hoardings had been allowed to be displayed without any regard to the scenic beauty and the historical value of the capital city of the country, without due regard to safety of the public and the non consideration for the financial accountability regarding the income that could have been generated by the 1st respondent Council, the said respondents should have taken steps to remove the unauthorized hoardings in terms of the applicable by-laws and guidelines. Such failure to remove the said unauthorized hoardings and granting approval without giving due consideration to the by-laws and guidelines, which were applicable at the time material had constituted an infringement of the fundamental rights of the petitioner and the residents of the CMC area by 'executive and administrative action' within the meaning of Article 126 of the Constitution and I hold that the 1st to 5th respondents are responsible for the said violation of the fundamental rights of the petitioner's and the residents' of the CMC area, guaranteed in terms of Article 12(1) of the Constitution.

I accordingly allow this application and direct the 1st respondent to take action forthwith on the following:

1. to strictly enforce the by-laws published in the Gazette Notification dated 20.01.1989 (R10) and the guidelines for advertising in Colombo which came into effect on 01.01.2006, (P4) until such time amended by-laws and guidelines are introduced;

2. to remove all unauthorized/illegal hoardings and hoardings erected in the Colombo Municipal Council area which were given approval in violation of the aforementioned by-laws and the guidelines for advertising in Colombo; and

3. to take immediate steps to revise the present guidelines, considering the globally accepted detailed policies on hoardings and out door advertising in keeping with the practice of other organizations such as the Road Development Authority in conducting auctions to enhance the financial viability in the process. Such revision of guidelines to be carried out as an urgent requirement by the 1st

respondent Council and to consider the proposals for this purpose that could be submitted by the 6th and 7th respondents, who are the President and the Secretary –General of the Outdoor Advertising Association of Sri Lanka, respectively. These guidelines to be prepared and finalized to come into being with effect from 01.01.2010.

If these directions are sincerely and expeditiously carried out, it would not only improve the revenue of the 1st respondent Council, but would also be an enhancement to the advertising industry and more importantly, would beautify the capital city of the pearl of the Indian Ocean.

In all the circumstances of this case, I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, 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

In the matter of an Application for Special Leave to Appeal made in terms of Article 154P of the of the Constitution of the Democratic Socialist Republic of Sri Lanka read with the provisions of Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 (as amended) and Industrial Disputes Act No. 43 of 1950 as amended by Act No. 32 of 1970.

Bank of Ceylon,
No. 4, Bank of Ceylon Mawatha,
Colombo 1.

Respondent-Appellant-Appellant

S.C. H.C.(C.A.) L.A. No: 183/2008
Civil High Court of Appeal
No: NCP/HCCA/LTA/10/2008

Vs.

H.S. Somaratne,
No. 740/1,
Millawa,
Kurunegala.

Applicant-Respondent-Respondent

Before : **R.A.N. Gamini Amaratunga, J.**

K. Sripavan, J.

Chandra Ekanayake, J.

Counsel : Sanjaya Rajaratnam, D.S.G. for Respondent-Appellant-Appellant.

Nimal Hapuarachchi for the Applicant-Respondent-Respondent.

Argued on : 11.03.2009

Written Submissions filed on : 28.04.2009

Decided on : 09.2009

SRIPAVAN, J.,

The Applicant-Respondent-Respondent (hereinafter referred to as the workman) joined the services of the Respondent-Appellant-Appellant Bank (hereinafter referred to as the employer) on 16th May 1997 as a junior clerk cum assistant cashier. The services of the workman were terminated by the employer with effect from 19th December 1997 following a disciplinary inquiry held against him. The workman instituted an application in the Labour Tribunal, Anuradhapura seeking relief for the termination of his services by the employer.

The employer filed answer stating that the workman was sent on compulsory leave and was interdicted by letter dated 19th December 1997 for acts of misconduct committed by him when he was serving in the Anuradhapura Bazaar Branch of the Bank; a Charge Sheet dated 21st January 1998 was served on the workman and after an inquiry he was found guilty of all the charges; consequently, his services were terminated by letter dated 9th December 1998 with effect from 19th December 1997.

The learned President of the Labour Tribunal, Anuradhapura after the conclusion of the inquiry made Order on 30th June 2006 directing the employer to pay a sum of Rs. 304,200/- as compensation to the workman computed on the basis of one and a half months salary for each year of service. The employer appealed to the Provincial High Court of the North Central Province holden in Anuradhapura.

The appeal was subsequently transferred to the Civil High Court of Appeal upon a direction dated 2nd June 2008 issued by the Secretary to the Judicial Services Commission.

Both the employer and the workman filed written submissions in the Provincial High Court. The workman in his written submissions took up a preliminary objection which the employer claimed that he had been deprived of an opportunity to counter the said preliminary objection. The preliminary objection taken on behalf of the workman was that the petition of appeal filed in the High Court did not bear a Certificate by an Attorney-at-Law to the effect that the matter of law to be argued was a fit question for adjudication by Court. The learned High Court Judge delivered his Order on 13th November 2008 upholding the preliminary objection raised on behalf of the workman and dismissed the appeal of the employer. The learned High Court Judge relying on the judgment of *Thavarayan and two Others* vs. *Balakrishnan* (1984) 1 S.L.R. 189, stated, inter alia :-

(a) that Section 31(D)(9) of the Industrial Disputes Act mandates that the hearing and disposal of an appeal shall be in compliance with Chapter XXVIII of the Code of Criminal Procedure Act;

(b) that the petition of appeal should comply with Section 322(2) of the Code of Criminal Procedure Act No. 15 of 1979;

(c) that accordingly, the petition of appeal must contain a Certificate by an Attorney-at-Law that such question of law is a fit question for adjudication by Court; and

(d) that no such Certificate has been annexed to the petition of appeal.

The employer sought leave to appeal to the Supreme Court against the Order made by the Civil High Court of Appeal. This Court granted leave to appeal on the following questions of law :-

(a) Did the learned High Court Judge of the Civil High Court of Appeal err in law when he came to the finding that it was mandatory to comply with Section 322 (2) of the Code of Criminal Procedure Act No. 15 of 1979, in an appeal made from an Order of the Labour Tribunal under Section 31(D)(9) of the Industrial Disputes Act No. 43 of 1950 as amended?

(b) Did the learned High Court Judge of the Civil High Court of Appeal err in law when he came to the finding that it was mandatory that the petition of appeal must contain a Certificate by an Attorney-at-Law to the effect that the matters referred to in the petition are questions of law fit and proper for adjudication by Court?

(c) Did the learned High Court Judge of the Civil High Court of Appeal err in law when he came to the finding that the petition of appeal filed by the Appellant (Employer) did not conform to the requirements of Section 31(D)(9) of the Industrial Disputes Act read with Section 322(3) of the Code of Criminal Procedure Act No. 15 of 1979?

(d) Did the learned High Court Judge err in law in failing to consider that there was substantial compliance with Section 322(2) of Act No. 15 of 1979 although there was no literal compliance with that Section?

Thavarayan and two Others v. *Balakrishnan* (1984) 1 S.L.R. 189 is a case based on Section 31D of the Industrial Disputes Act which relates to an identical matter that is under consideration in the present appeal. H.A.G. de Silva, J. with whom Abeywardena, J. agreed, followed the decision in *Thomas* vs. *Ceylon* ***Wharfage*** *Co. Ltd.* 49 N.L.R. 397 which was decided by a single Judge under the Workman's Compensation Ordinance and held that in terms of Section 322(2) of the Code of Criminal Procedure Act No. 15 of 1979 read with Sections 31D (2) and (5) of the Industrial Disputes Act, a question of law in an appeal from an Order of the

Labour Tribunal must be certified by an Attorney-at-Law as a question of law fit for adjudication by the Court of Appeal.

It is regretted to note that in *Thavarayan's* case, it was not brought to the attention of Court that *Thomas'* case which it followed had been over-ruled by a later decision in *Saranelis* vs. *Civilian Labour Administrative Officer,* 56 N.L.R. 366, by a Bench of Two Judges consisting of Pulle, J. & Weerasuriya, J. The Court may have come to a different conclusion had the decision in *Saranelis' case* been brought to the notice of the Court that decided *Thavarayan's case.*

It is observed that Section 31 D of the Industrial Disputes Act has been repealed by the amending Act No. 32 of 1990 as amended by Act No. 11 of 2003. The relevant Section, namely, Section 31D(6) reads as follows :-

> "Every petition of appeal to a High Court established under Article 154P shall bear uncancelled stamps to the value of five rupees and in every case where the applicant is required to furnish security, be accompanied by a certificate issued under the hand of the President of the Labour Tribunal to the effect that the appellant has furnished such security, in the High Court within a period of thirty days (including the day on which the order appealed from was made but excluding Sundays and Public Holidays) reckoned from the date of the order from which the appeal is preferred."
>
> This Section undoubtedly refers to the following relevant material that a petition of appeal should contain :
>
> (a) An uncancelled stamps to the value of five rupees ; and
> (b) Where the appellant is required to furnish cash security, a Certificate issued under the hand of the President, Labour Tribunal in proof of such payment.

The manner of drawing up of a petition of appeal or the form of appeal is not stated in Section 31D(6). In fact, the Act is silent regarding the form of petition. In the case of *Liyanage* vs. *Weeraman,* S.C. 235/72 – L.T. Case No. G/6967 – S.C. Minute of 31st January 1974, the then Supreme Court deciding a similar issue under the Industrial Disputes Act held (Rajaratnam, J. with Tittawella, J. agreeing) that a Certificate in compliance with Section 340 (2) of the Criminal Procedure Code [now Section 322(2) of Act No. 15 of 1979] need not be attached to the petition of appeal. The Court took the view that Section 31D(5) [now Section 31D(9)] refers to matters connected with the "hearing and disposal" of an appeal but is silent regarding the form of the petition of appeal.

The *Liyanage's case* followed the decision made by Sansoni, CJ., in *Walker Sons & Co, Ltd.* Vs. *Fry*, 68 N.L.R 73 at 89. His Lordship the Chief Justice made the following observations:

> "Nowhere does Section 31D require that the petition of appeal should state the question of law. Nor does the manner of drawing up a petition of appeal come within the expression "hearing and disposal of an appeal".

The observation made by His Lordship Sansoni, C.J., apply with equal force to the present appeal as Section 31D(9) of Act No. 32 of 1990 has recourse only to "hearing and disposal of an appeal" and not to the format of a petition of appeal. The primary rule of construction is to intend the legislature to have meant what they have actually expressed. The object of all interpretations is to discover the intention of the legislature and if the words properly construed admit only one meaning, the Court is entitled to give that meaning and not to travel outside on a voyage of discovery. The use of the words "hearing and disposal of an appeal" by necessary

implications shuts out the style or the manner in which a petition of appeal be drawn up.

It must therefore follow that the petition of appeal filed by the employer need not contain a certificate by an Attorney-at-Law to the effect that the matters referred to in the said petition are fit for adjudication by Court. For the reasons set out, I answer the questions of law referred to in paragraphs (a), (b) and (c) in the affirmative. In view of the conclusion reached, the necessity to answer the question of law in paragraph (d) does not arise.

The Order of the Civil High Court of Appeal holden in Anuradhapura dated 13.11.2008 is therefore set aside and the said Court is directed to hear and determine the appeal No. NCP/HCCA/LTA/10/2008 on its merit and to make an appropriate order as expeditiously as possible.

Judge of the Supreme Court

R.A.N. Gamini Amaratunga, J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court