SRI LANKA SUPREME COURT **Judgement Delivered (2011)**

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

S.C. (FR) Application
No. 391/2009

Walawe Durage Dulani,
No. 323, Olcott Mawatha,
Galle.

Petitioner

Vs.

1. Nimal Bandara,
   Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

2. H.A.K.R. Tissera,
   Additional Secretary,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

3. Susil Premjayanth,
   Minister of Education,
   Isurupaya,
   Battaramulla.

4. H.H.A. Amarabandu,
   No. 53, New City,
   Gonamulla.

5. H.N.D. Jayamaha,
   Teacher Educator,
   Siyanae National College of Education,
   Veyangoda.

6. U.G.N. Kumari,
   'Sampath', Udumalagala,
   Nakiyadeniya.

7. University Grants Commission,
   No. 20, Ward Place,
   Colombo 07.

8. Secretary,
   Public Service Commission,
   No. 356 B, Carlwil Place,
   Colombo 03.

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

10. C.R. Jayasundara,

11. J.D.T.U.K. Jayasinghe,

12. J. Peduruhewa,

13. C.P.K. Wijekoon,

14. P.S. Kumara,

15. M.P. Uduwage,

16. P.K. Chandramala,

17. A.J. Gamage,

18. P.D.G. Geethika,

19. A.M.A.B. Adikari,

20. D.D.R.P. Wanigasekera,

21. P.G.B. Kalpani,

22. M.H.C.S. Tissera,

23. H.M.T.K.D. Bandara,

24. R.M.K. Rajapaksa,

25. K.D. Anuradha,

26. D.D.S.P. Jayasinghe,

27. W.K.P.D. Gunaratne,

28. N.I. Kulasinghe,

29. W.A.K.P. Wickramasinghe,

30. M.V.T. Malinda,

31. S.J. Abeygunawardena,

32. I.M.N.K. Yatagammana,

33. G.P.O.V. Perera,

34. S.W.N. Samarasinghe,

35. A.C. Senanayake,

36. K. Galappaththi,

37. H.A.M. Priyangani,

38. M.H.M.M. de Silva,

39. J.N. Waduge,

40. P.P. Widanapathirana,

41. P.K. Premachandra.

Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
N.G. Amaratunga, J. &
K. Sripavan, J.

COUNSEL : Viran Corea with S. Gunaratne for Petitioner
S. Barrie, SC, for 1st - 3rd and 7th - 9th Respondents

ARGUED ON: 31.05.2010

WRITTEN SUBMISSIONS
TENDERED ON: Petitioner : 07.07.2010
Respondents : 11.10.2010

DECIDED ON: 31.01.2011

Dr. Shirani A. Bandaranayake, J.

The petitioner, who is a Teacher Educator serving at the Ruhunu National College of Education on secondment, had alleged that her fundamental rights guaranteed in terms of Articles 12(1) and/or 12(2) and/or 14(1)g of the Constitution had been violated due to her non-appointment as a Teacher Educator in Information Technology. This Court had granted leave to proceed for the alleged infringement of Articles 12(1) and 14(1)g of the Constitution.

The facts of this application, as submitted by the petitioner, *albeit* brief, are as follows:

The petitioner was appointed as a Teacher in English Language by the Uva Province Public Service Commission by letter dated 09.06.1992 (P1). At the time the petitioner filed this application she was in Grade 2-II in the Teachers Service. Whilst in the Teachers Service, the petitioner had followed various courses to improve her knowledge and qualifications. Accordingly the petitioner had successfully completed the Degree of Bachelor of Science at the Open University of Sri Lanka with a second class in the Lower Division (P3A and P3B) and had further followed a Postgraduate Diploma in Computer Technology at the University of Colombo in 2002 (P4A and P4B).

The Ministry of Education, by Gazette notification dated 09.09.2005 (P5), had called for applications for the post of 'Teacher Educator' in National Colleges of Education of the Sri Lanka Teacher Education Service (hereinafter referred to as SLTES). The petitioner, being eligible to

apply for the said post under the subject of Information Technology, had forwarded an application. Thereafter she had attended three interviews at which she had presented all the relevant documents and details pertaining to her experience, qualifications and commendations in service (P6A and P6B).

In the meantime, due to the delay in making permanent appointments to the National Colleges of Education and as the petitioner was eligible to be appointed as a Teacher Educator in terms of the criteria in the Gazette notification dated 09.09.2005 (P5), the petitioner was attached to the Ruhunu National College of Education as a Lecturer on secondment for the Teaching service. Her services were extended from time to time and the petitioner had continued to function as a Teacher Educator entertaining a legitimate expectation that her application for formal recruitment would be considered in terms of the criteria published in the Gazette notification dated 09.09.2005 (P5).

In or around October 2007 the petitioner was recalled to the school where she was serving previously and later at the request made by the President of the Ruhunu National College of Education and at the request of the petitioner herself, she was temporarily released from Teacher Service to the Ruhunu National College of Education to serve on secondment on the basis that her salary would be paid by the said National College of Education (P10).

In mid 2008 the petitioner had reliably learnt that she had been placed 7th in the rank after the interviews held for the recruitment for Teacher Educators to National Colleges of Education. By 01.04.2009, the petitioner learnt that the list of recruits for the subject of Information Technology was amended and there were 31 names above her. Later she had become aware that her name was not among the 35 persons, who were selected, but was placed as No. 38 in the list.

The petitioner had made several representations regarding her grievance. Letters had been sent to HE the President, the Minister of Education, Secretary to the Public Service Commission

and the Human Rights Commission stating her entitlement and/or eligibility to be appointed as a Teacher Educator to National Colleges of Education in Information Technology.

Having stated the facts of this application, let me now turn to consider the submissions of the learned Counsel for the petitioner and the respondents. It is also to be noted that although leave to proceed was granted in terms of Articles 12(1) and 14(1)g of the Constitution, submissions were made only on the basis of the alleged infringement of Article 12(1) of the Constitution.

Learned Counsel for the petitioner contended that the requirement under Clause 6.4.6 (i) had been wrongly interpreted by the respondents and the meaning given by the 1st respondent that Computer Science, Library and Information Technology being considered as 'a subject' is in clear violation of the Gazette notification.

The 1st respondent, being the Secretary to the Ministry of Education, had averred that by the Gazette notification dated 09.09.2005, (P5) applications were called for 'Teacher Educators' and the initial interview had been conducted in 2006. Thereafter the Public Service Commission had nullified the results of the said interview and consequent to the directions given by the Public Service Commission fresh interviews had been held in January, February and March 2007. Since there was a delay in appointing Teacher Educators, and as there were a shortage of teachers, a decision had been taken to temporarily attach teachers from the Sri Lanka Teachers Service to such Colleges of Education. Several lecturers, including the petitioner, were thus temporarily attached to Colleges of Education until the vacancies in 'Teacher Educators' were filled. At the time the said attachments were made it was clearly laid down that such temporary attachments would not give rise to any right in respect of a permanent appointment to the 'Teacher Educators' service.

In fact the letters issued to the petitioner extending her attachment had clearly laid down this position, where it was stated that (P8A),

"ඔබ විද්‍ය පීඨයේ සේවය කිරීම හුදෙක් තාවකාලික අනුයුක්ත කිරීමක් පමණක් වන අතර එය ස්ථිර තනතුරක් ලබා ගැනීම සඳහා අයිතිවාසිකමක් නොවේ. ස්ථිර වශයෙන් තනතුරු පිරවීමේදී ඔබ පෙර සිටි තනතුරට යා යුතු බව දන්වනු කැමැත්තෙමි."

Applications were called by Gazette notification dated 09.09.2005, to fill vacancies *inter alia* in Class III of the SLTES. Educational and other qualifications, which were necessary for Class III of SLTES, were given in Clauses 6.1 to 6.3 of the said Gazette notification. Clause 6.4 of the said Gazette notification had made provision for candidates with lesser qualifications to apply for the subject areas in English, Physical Education, Technological Education, Food Technology, Special Education, Information Technology and Western Music, when there are no candidates having the qualifications referred to in Clauses 6.1 to 6.3 of the Gazette notification. The said Clauses are as follows:

"6. **Educational and other qualifications**

6.1 Should have obtained a first or second class (upper) Degree on Education from a recognized University or a higher Degree on Education, or

6.2 Should have obtained a Degree relating to the subject area from a recognized University and a Post Graduate Diploma in Education with a Distinction or Merit pass; or

6.3 Should be a person not exceeding 40 years of age having a satisfactory period of not less than 3 years in teaching and holding a permanent post in Sri Lanka Teachers' Service or Sri Lanka Educational Administrative Service and having a Degree with a First or Second Class Pass (upper) in the relevant subject area issued from a recognized University

and Post Graduate Diploma in Education, or a Post Graduate Diploma in Education with a Degree on the relevant subject.

Note: The upper age limit shall not be applicable for the officers serving in the post of Lecturers on performing basis in the National Colleges of Education and in Teachers' Colleges."

It is common ground that the petitioner had made an application for the subject of Information Technology under the category given in Clause 6.4.6 of the Gazette notification. The said Clause is as follows:

"6.4.6. **Information Technology**

i) A Degree obtained from a recognized University with Computer Science, Library and Information Technology as subject; or

ii) A Degree obtained from a recognized University and a Post Graduate Diploma in Information Technology and teaching experience of not less than Five years; or

iii) A Diploma Certificate in the relevant subject conducted by the Department of Examination or National Diploma in Teaching with a Distinction/Merit pass; or

iv) A Diploma in Information Technology of not less than two years duration from a government recognized institute and Trained Teacher Certificate with teaching experience of not less than Ten years after teacher training."

It is not disputed that the petitioner had made her application under Clause 6.4.6 (ii) of the Gazette notification and as has been stated earlier, in terms of the 'Note' under the said Clause, vacancies had to be first filled by those who qualified under Clause 6.4.6 (i) and applications under Clause 6.4.6 (ii) could be considered only if any further vacancies existed.

The 1st respondent in his affidavit had averred that applications had been called to fill 35 vacancies in Class III of the service. The interview panel had recommended 34 applicants under category 6.4.6 (i) and therefore only one vacancy had remained to be filled under Clause 6.4.6 (ii). The person who had ranked No. 1 under category 6.4.6 (ii) was selected (35th in the overall list) and the petitioner was placed 4th (38 in the overall list) and therefore could not be appointed.

Learned Counsel for the petitioner contended that the respondents had given a wrong interpretation to Clause 6.4.6 (i) in clear violation of the published criteria in the Gazette notification. It was also contended that the 4th and 5th respondents possessed Degrees in Mathematics and have followed Information Technology only 'as a subject' and not 'as subject' as required by the Gazette notification (P3). It was further submitted that the University of Kelaniya offered a Degree in Bachelor of Arts in Library and Information Science conducted by the Department of Library and Information Science of the Faculty of Social Science of the University of Kelaniya.

Clause 6.4.6 (i) of the Gazette notification refers to a Degree **with** Computer Science, Library and Information Technology as subjects. Clause 6.4.6 (ii) on the other hand refers to **A Degree** and a Post Graduate Diploma in Information Technology.

With reference to Clause 6.4.6 (i) it is quite evident that what is required by an applicant is to possess a Degree which would have consisted of subjects including Computer Science, Library and Information Technology. There is no specific mention as to whether the Degree should be from the discipline of Science or Arts. The requisite qualification for the appointments in question was to possess a Degree consisting of subjects referred to in Clause 6.4.6 (ii). It is also

important to note that Clause 6.4.6 (i) does not call for a Degree **in** Computer Science, Library and Information Technology.

A careful scrutiny of the wording in Clause 6.4.6 (i) clearly indicates that it does not require a Degree in the discipline of Computer Science, Library and Information Technology. In fact the University Grants Commission, having referred to the academic years 1999/2000, 2000/2001, 2001/2002, 2002/2003 and 2003/2004 had stated that no Degree had been awarded by a Sri Lankan University in Computer Science, Library and Information Technology.

Furthermore, the University Grants Commission, on 28.06.2010 had informed the learned State Counsel for the 1st – 3rd and 7th – 9th respondents (hereinafter referred to as respondents) that,

> "As at today no degree has been awarded carrying the title B.Sc/BA in Computer Science, Library and Information Technology."

University Grants Commission, it is not disputed, is the apex body of the University system of Sri Lanka, established under the Universities Act, No. 16 of 1978. The said Commission plans and co-ordinates the University education in the country. It is also to be noted that the applications for the posts in Clause 3 of SLTES were called for in September 2005 and what is relevant to this application would be the courses conducted as at the time the Gazette notification was published, calling for such applications.

It is also relevant to note that the Degree referred to in Clause 6.4.6 (ii) is totally different to what is stated in Clause 6.4.6. (i). Clause 6.4.1 (ii) deals with candidates, who possess a Degree obtained from a recognized University and a Post Graduate Diploma **in** Information Technology and teaching experience of not less than five years. Accordingly to fall within the said Clause 6.4.1 (ii), the required Post Graduate Diploma should be **in** Information Technology.

As referred to earlier, the preferred qualifications for appointment to Class III of the SLTES are set out in sections 6.1 to 6.3 of the Gazette notification dated 09.09.2005 (P5). In the absence of applicants with qualifications referred to in Clauses 6.1 to 6.3, provision was made under Clause 6.4 to consider applicants with lesser qualifications. In such an event, the applicants had to be considered in order of priority under Clauses 6.4.1 to 6.4.7 of the Gazette notification dated 09.09.2005 (P5).

It is therefore apparent that in order to fill the vacancies in the subject area of 'Information Technology', consideration had first to be given to applicants qualified under Clause 6.4.6 (i) and the applicants under Clause 6.4.6 (ii) could only be considered only if any further vacancies existed.

Considering all the circumstances, it is apparent that in terms of Clause 6.4.6. (i) what is necessary is a not a Degree in Computer Science, Library and Information Technology, but a degree which consists of the aforementioned and other subjects.

The petitioner also complained of the selection of one P.K. Premachandra, who had been appointed as a Teacher Educator to the Ruwanpura National College of Education.

The respondents had admitted that the said P.K. Premachandra was selected as a Teacher Educator at the interview held for such selection. It was submitted on behalf of the respondents that the said P.K. Premachandra had scored the highest marks at the interview under the category referred to in Clause 6.4.6 (ii) of the Gazette notification. Learned State Counsel for the respondents further submitted that although the petitioner's post graduate qualification in Information Technology had been accepted by the interview panel to have fulfilled the requirements referred to in Clause 6.4.6 (ii) of the Gazette notification, she had obtained lesser marks than the said P.K. Premachandra, at the interview. Applications under the said Gazette notification had been called to fill 35 vacancies in Class III of SLTES. The interview panel had recommended 34 applicants under the category referred to in Clause 6.4.6 (i) and therefore there had been only one vacancy that could have been filled in terms of Clause

6.4.6 (ii) of the Gazette notification. The interview panel had selected the person who had ranked 1st in the category under Clause 6.4.6 (ii) and the said P.K. Premachandra had been so recommended. The petitioner who was placed 4th under the said category therefore had not been selected and was not appointed.

In such circumstances, it would not be correct to state that the petitioner's application for the post in question had not been duly assessed at the interview, as the Gazette notification had clearly laid down that candidates were to be selected in order of priority under Clause 6.4.6 of the Gazette notification.

Such differentiation cannot be said to be arbitrary or discriminatory and is in violation of Article 12(1) of the Constitution, as every differentiation is not discrimination. Article 12(1) of the Constitution, which speaks of the right to equality, has clearly laid down that,

> "All persons are equal before the law and are entitled to the equal protection of the law."

When all persons are treated as equals, there cannot be any discrimination between two persons. However, it is to be borne in mind that this concept is to be applicable to situations, where the two persons in question are similarly circumstanced. Thus, the concept of unequal treatment is based on the premise that equals cannot be treated unequally and that unequals cannot be treated equally. The underlying principle of this concept is that, if founded on an intelligible differentia, a classification could be good and valid and cannot be treated as arbitrary, discriminatory and in violation of Article 12(1) of the Constitution. This position was clearly laid down in the well known decision in **Ram Krishna Dalmia v Justice Tendolkar** (A.I.R. 1958 S.C. 538), where it was stated that, there are two conditions to be satisfied for a classification to come within the ambit of being reasonable. They are as follows:

1. that the classification must be founded on an intelligible differentia which distinguish persons that are grouped in from others who are left out of the group; and

2. that the differentia must bear a reasonable, or a rational relation to the objects and effects sought to be achieved.

In terms of the Gazette notification dated 09.09.2005 (P5) applicants had been categorized into several different categories according to their qualifications. Considering individual qualifications, it was necessary to have such classifications in order to fill the relevant vacancies. Therefore it is apparent that such classification had not been either irrational or arbitrary. The non selection of the petitioner had been due to the fact that there were others, who had scored higher marks under the relevant categories and therefore there was no violation of Article 12(1) of the Constitution.

For the reasons aforesaid I hold that the petitioner had not been successful in establishing that the respondents had violated her fundamental right guaranteed in terms of Article 12(1) of the Constitution. This application is accordingly dismissed. I make no order as to costs.

Judge of the Supreme Court

N.G. Amaratunga, J.

I agree.

Judge of the Supreme Court

K. Sripavan, J.

I agree.

Judge of the Supreme Court

PIN 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.

Perumpulli Hewage Piyasena,
Sagama Road,
Akkaraipattu-8.

Petitioner

SC Application Special
[Expulsion] No. 03/2010

Vs.

1. Ilankai Tamil Arasu Kadchi
   ITAK Office,
   16 (30), Martin Road,
   Jaffna.

2. Rajavarothayan Sampathan,
   Leader,
   Ilankai Tamil Arasu Kadchi
   ITAK Office,
   16 (30), Martin Road,
   Jaffna.

3. Mawai S. Senathirajah,
   General Secretary,
   Ilankai Tamil Arasu Kadchi
   ITAK Office,
   16 (30), Martin Road,
   Jaffna.

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

5. Dayananda Dissanayake,
   Commissioner of Elections,
   Elections Secretariat,
   Sarana Mawatha,
   Rajagiriya.

Respondents

APPLICATION under and in terms of Article 99(13)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978.

BEFORE	:	Hon. Saleem Marsoof, P.C., J., Hon. K. Sripavan, J., Hon. R. K. S. Suresh Chandra, J.
COUNSEL	:	D.S. Wijesinghe, P.C with N.M. Saheed, Shantha Jayawardena, Kaushalya Molligoda, Chamila Talagala and Isuru Somadasa for the Petitioner K. Kanag-Isvaran, P.C with Viran Corea, Lakshmanan Jayakumar, Niran Anketell and Juanita Arulanantham for the 3rd Respondent Shavindra Fernando, Deputy Solicitor General, with Nerin Pulle, State Counsel for the 4th and the 5th Respondents
Argued on	:	18.1.2011, 24.1.2011 and 25.1.2011
Written Submissions	:	31.1.2011 (Initial Written Submissions) 3.2.2011 (Responses)
Decided on	:	8.2.2011

SALEEM MARSOOF, J.

The Petitioner has filed this application in terms of the proviso to Article 99(13)(a) of the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, as subsequently amended, challenging his purported expulsion from the Ilankai Tamil Arasu Kadchi (ITAK), which is a recognized political party on whose nomination paper his name admittedly appeared at the time of his election as a Member of Parliament for the Digamadulla District at the April 2010 General Election. By his Petition dated 10th December 2010, the Petitioner has challenged on the various grounds set out therein, his purported expulsion from the said party as communicated to him by the letter dated 28th November 2010 'P12' under the hand of the General Secretary of the party, which reads as follows:-

இலங்கைத் தமிழரசுக் கட்சி

ILANKAI TAMIL ARASU KADCHI

இ.த.அ.க.அலுவலகம்:
16 (30) மார்டின் வீதி,
யாழ்ப்பாணம்இ இலங்கை

ITAK Office,
16 (30) Martin Road,
Jaffna, Sri Lanka.

Registered Post
P.H.Piyasena Esq.,
Sagama Road,
Akkaraipattu 8.

28th November 2010

Dear Mr. Piyasena,

Expulsion from the membership of the ITAK

This refers to the disciplinary proceedings initiated against you for acting against the party discipline.

The *Disciplinary Committee* of the ITAK that met today (28.11.2010) has *unanimously recommended* that you be expelled from the party membership forthwith.

Accordingly, *you are hereby expelled* from the membership of the political party, Ilankai Thamil Arasu Kadchi (ITAK).

Yours sincerely,
Sgd./ Mawai S. Senathirajah
General Secretary,
Ilankai Thamil Arasu Kadchi
(italics added by me for emphasis)

In his Petition, the Petitioner has prayed for a declaration that the said decision to expel him from the ITAK as communicated by 'P12' is invalid and of no force or avail in law and for a determination that the said expulsion was invalid. He has also prayed for an order declaring that the Petitioner has not ceased to be a Member of Parliament and that he continues to be and remains a Member of Parliament.

Preliminary Objection

A preliminary objection was taken at the outset to the maintainability of this application on the basis that the Petitioner was not entitled to the relief prayed for by him in view of the alleged suppressions and misrepresentations of material facts contained in the Petition filed by the Petitioner, and his alleged failure to discharge the duty of full disclosure of all material facts imposed by law on any person invoking the jurisdiction of court for the grant of injunctive and discretionary relief. As the said objection involved mixed questions of facts and law, and in view of the time constraints imposed by Article 99(13)(a) of the Constitution, after hearing submissions of all learned Counsel on this objection, the decision of court was deferred until after

all matters arising for determination are argued in full. It is therefore necessary to deal with the said preliminary objection at the very commencement of this determination.

Learned President's Counsel for the 3rd Respondent, the General Secretary of ITAK, prefaced his submissions on the preliminary objection with the observation that the effect of the lodging of an application in terms of the proviso to Article 99(13)(a) of the Constitution, is to postpone the date on which a Member of Parliament would cease to hold office as such, by a period not exceeding two months pending the determination of this Court on the validity of his expulsion. Learned President's Counsel submitted that whenever a litigant seeks a remedy which is discretionary in nature by reason of its injunctive effect, he has a duty to come to court with "clean hands", and that the Petitioner has breached the duty of *uberrima fides* or utmost good faith, which circumstance precludes him from any relief as a matter of law. He relied for this purpose on the *dicta* of Pathirana J. in *W. S. Alphonso Appuhamy v. L. Hettiarachchi*, (1973) 77 NLR 131 at 135 which emphasized the "necessity of a full and fair disclosure of all the material facts to be placed before the Court". Learned President's Counsel further submitted that the Petitioner has suppressed and misrepresented material facts and documents from this Court, which disentitled him to the grant of relief as prayed for, and which justified the dismissal of the application of the Petitioner *in limine*.

Four specific allegations of suppressions and misrepresentations were highlighted by learned President's Counsel for the 3rd Respondent in the course of his lengthy oral and written submissions before this Court. The alleged suppressions adverted to by the learned President's Counsel for the 3rd Respondent relate to the omission to disclose in his Petition filed by the Petitioner in this Court, the amendment to the Constitution of the ITAK which allegedly came into effect on 3rd August 2008 and a copy of which was produced by the 3rd Respondent marked 'R4A', and the alleged declaration of allegiance to the Parliamentary Group of the ITAK, a copy of which was produced by the said Respondent marked 'R7E'. The alleged misrepresentations adverted to by learned President's Counsel relate mainly to paragraph 11 of the Petition filed in this Court in which the Petitioner has stated that he opposed the decision taken at the meeting of the Parliamentary Group of ITAK held on 6th September 2010 to vote against the 18th Amendment to the Constitution and certain positions taken by the Petitioner in DC Jaffna case No. 38/2010 (Misc), in which he had sought albeit with no apparent success, certain enjoining orders and injunctions to restrain the disciplinary proceedings which ultimately resulted in the expulsion of the Petitioner from the ITAK.

Learned President's Counsel for the Petitioner has also made extensive submissions, both oral and written, with the object of showing that the Petitioner has not suppressed or misrepresented any facts or documents to this Court or to the District Court of Jaffna, and sought to explain in particular, that not being a member of the ITAK, the Petitioner did not attend the National Delegates Convention of the said party at which the said amendment appears to have been enacted, and that he was not in any event, privy to the fact of any amendment having ever been made to the Constitution of the party. He also submitted that the certified copies of the Tamil and

English versions of the ITAK Constitution which the Petitioner filed with his Petition marked respectively 'P1' and 'P1A', which admittedly did not include the provisions of the said amendment, were obtained by him from the 5th Respondent Commissioner of Elections, after the 3rd Respondent refused in writing to issue him with copies of the same, which position, of course, was denied by the 3rd Respondent.

In regard to the other allegation of suppression related to the alleged declaration of allegiance marked 'R7E', which the Petitioner had admittedly signed at the time his name was included in the nominations of the ITAK for the Digamadulla District, learned President's Counsel for the Petitioner submitted that at the same time when the Petitioner was required to sign 'R7E', the other candidates whose names were included in the said nominations were also required to sign similar declarations marked respectively 'R7A' to 'R7D', 'R7F' and 'R7G', and those of who signed same having read and understood the contents thereof, simply agreed to "faithfully abide by the discipline of the Parliamentary Group of the Ilankai Tamil Arasu Katchi" and in the event of being elected as a Member of Parliament, to "represent the Ilankai Tamil Arasu Katchi". However, it is significant to note that 'R7A' to 'R7G', also contain the following declaration:-

> I also state that, should there arise an instance where I speak, act or do any other act of commission or omission against the collective decision of the Parliamentary Group of Ilankai Tamil Arasu Katchi at any time, I will forthwith cease to be a member of Parliament and will communicate my resignation as an MP to the Secretary General of Parliament and to the General Secretary, Ilankai Tamil Arasu Katchi. I do hereby authorize the General Secretary of the Ilankai Tamil Arasu Katchi to use this document itself as my letter of resignation in the event of the Parliamentary Group determining that I have violated the collective decision of the Parliamentary Group as stipulated above.

The explanation of the learned President's Counsel for the Petitioner was that at the same time the Petitioner was required to sign 'R7E', he was also required along with the other candidates, to sign several blank papers, and that in any event, 'R7E' was in the English language, which he did not understand at all. Learned President's Counsel for the Petitioner stressed that the Petitioner was the only ITAK candidate for the relevant district who had signed the alleged declaration in Tamil, and that except for any official or legal correspondence, which were drafted by others including his lawyers, he usually communicated in the Tamil language, in which he was very fluent. He submitted that the Petitioner was not aware of the contents of, and even the very existence of, 'R7E' until a copy of the same was produced with the objections of the 3rd Respondent and the same was explained to him by his lawyers. He stressed that although it appears that 'R7E' had been signed before a Justice of the Peace, there is no attestation clause, and no indication that its contents in English were read over and / or explained to the Petitioner.

It was the contention of the learned President's Counsel for the Petitioner that there was no intention on the part of the Petitioner to suppress from Court, the documents marked 'R4A' and 'R7E', which were omitted from the Petition only by reason of the fact that the Petitioner was not aware of their existence, in the circumstances outlined

above. Similarly, in regard to the alleged misrepresentations adverted to by the learned President's Counsel for the 3rd Respondent, learned President's Counsel for the Petitioner was equally persuasive, and made detailed submissions to show that they involved contested facts and the Petitioner's conduct was *bona fide* and in accord with his obligations of *uberrima fides.*

It is, however, unnecessary to probe deep into the submissions and counter submissions of learned Counsel on these contentious matters, as in my considered opinion, the jurisdiction of this Court to determine the validity or otherwise of an expulsion in terms of the proviso to Article 99(13)(a) of the Constitution is neither injunctive nor discretionary, and does not necessitate any inquiry into the conduct of the person invoking the said jurisdiction. Indeed, the mechanism provided by the said Article to an expelled Member of Parliament, to effectively have the date of vacation of his seat postponed for a further period not exceeding two months pending the determination by this Court of its validity or invalidity, does not necessarily confer on it a discretionary character as contended by the learned President's Counsel for the 3rd Respondent, as that is an automatic stay of vacation of seat mandated by the Constitution, and is not dependent on the exercise of any discretion by Court. This stay of vacation of seat is not granted by Court, but is conferred by the Constitution itself.

The jurisdiction of this Court conferred by Article 99(13)(a) of the Constitution is *sui generis*, original and exclusive, and does not confer any discretion to this Court to dismiss *in limine* an application filed thereunder merely on the ground of suppression or misrepresentation of material facts, as in cases involving injunctive relief or applications for prerogative writs. As noted by Fernando, J. in *Gamini Dissanayake v. Kaleel and Others* [1993] 2 Sri LR 135 at 198, it is "not a form of judicial review, or even of appeal, but rather an original jurisdiction analogous to an action for a declaration, though it is clearly not a re-hearing." As Dheeraratne, J. observed in *Tilak Karunaratne v. Sirimavo Bandaranaike* [1993] 2 Sri LR 90 at 101-

> The nature of the jurisdiction conferred on the Supreme Court in terms of the proviso to Article 99(13)(a) is indeed unique in character; it calls for a determination that expulsion of a Member of Parliament from a recognized political party on whose nomination paper his name appeared at the time of his becoming such Member of Parliament, was valid or invalid. If the expulsion is determined to be valid, the seat of the Member of Parliament becomes vacant.

On the other hand, it is expressly provided in the proviso to Article 99(13)(a) that-

> ....in the case of the expulsion of a Member of Parliament *his seat shall not become vacant if* .....he applies to the Supreme Court by petition in writing, and *the Supreme Court upon such application determines that such expulsion was invalid.....(emphasis added).*

The only matter for determination by this Court in terms of the proviso to Article 99(13)(a) of the Constitution is the validity or otherwise of the expulsion of the applicant Member of Parliament, and his conduct subsequent to his expulsion is altogether irrelevant. Learned President's Counsel for the Petitioner has invited the

attention of Court to Section 63 of the Provincial Councils Act No. 2 of 1988, which contains provisions which are substantively similar to those of Article 99(13)(a) of the Constitution, subject to the variation that the court that is required to inquire into and determine the validity of the expulsion is the Court of Appeal, and the decision of that Court in *Gooneratne v. Premachandra* [1994] 2 Sri LR 137. The order of that Court, which was read by S.N. Silva, J (P/CA), as he then was, at page 160 dealt with the submissions of Counsel in regard to the conduct of the Petitioners in that case, in the following manner:-

> As observed earlier, the burden of satisfying this court that the expulsion of the petitioners was valid lay on the respondents. They sought to discharge this burden, mainly by *harping on the conduct of the petitioners after their expulsions*. *This court is concerned only with the validity of the expulsion as it stood on that date.* This necessarily means that the reasons that have to be considered by this court are those that have been adduced prior to the expulsion only." *(emphasis added).*

Although that was a decision of the Court of Appeal on a similar provision found in the Provincial Councils Act, it is of high persuasive value, and is fully in accord with the objective of the said legislation, which is the same as the objective of Article 99(13)(a) of the Constitution, namely, to provide the expelled member a meaningful and effective remedy against arbitrary removal.

I am therefore of the opinion that even in a case where there is cogent evidence to establish that an expelled Member of Parliament did not come to Court with clean hands, if this Court finds that the purported expulsion is invalid, "his seat shall not become vacant" and he will continue to hold office, and this Court does not have the discretion to make a contrary determination on the sole ground of suppression or misrepresentation of material facts, or dismiss the application *in limine*. I am of the opinion that it is therefore not necessary to make any findings with regard to the question of whether the Petitioner has suppressed or misrepresented any material facts in his Petition or in the course of the hearing, and accordingly, the preliminary objection raised by the 3rd Respondent has to be overruled.

Is the Petitioner amenable to the Disciplinary Control of ITAK?

This brings me to the consideration of the question whether the Petitioner was validly expelled from the membership of the ITAK through the process which culminated in the communication marked 'P12'. For this purpose, before considering the grounds set out in paragraph 29 of his Petition dated 10th December 2010 for challenging his expulsion, it is necessary to consider whether, in the first place, the Petitioner was amenable to the disciplinary control of ITAK. This is a matter of fundamental importance which involves another important question, namely, whether the Petitioner is or was a member of ITAK, because it is obvious that only a member of a political party that can be dealt with by that party for any breach of discipline. While, learned President's Counsel for the Petitioner strenuously contended that the Petitioner was not a *de jure* member of ITAK, and was therefore not amenable to its disciplinary control, learned President's Counsel for the 3rd Respondent has contended with equal force that he was.

Learned President's Counsel for the Petitioner has referred in the course of his submissions to several decisions of this Court including the decisions in *Ediriweera Premaratne v. Srimani Athulathmudali and Others* (SC Special 1/1996, SC Minutes of 27.2.1996), *Galappaththi v. Arya Bulegoda and Another* [1997] 1 Sri LR 393, *Basheer Segu Dawood v. Ferial Ashraff and Others* [2002] 1 Sri LR 26 and *Ameer Ali and Others v. Sri Lanka Muslim Congress and Others* [2006] 1 Sri LR 189 for the proposition that a recognised political party such as ITAK cannot lawfully expel a Member of Parliament if he was not a member of the party in question, and if it purports to do so, the fact that he was not a member of the party would not prevent him from invoking the jurisdiction of this Court under Article 99(13)(a) of the Constitution. In particular, learned President's Counsel relied on the following *dicta* of Amarasinghe, J. in *Basheer Segu Dawood*'s case at page 31 –

> Where there is a purported expulsion of a Member of Parliament such member is entitled, under Article 99(13)(a) of the Constitution, to invoke the jurisdiction of this Court to determine whether such expulsion was valid. In order to invoke the jurisdiction of this Court, *a petitioner is not required to establish that he was a member of a recognized political party on whose nomination paper his name appeared at the time of becoming such Member of Parliament*. Members of Parliament who are 'elected' are *candidates* whose names appear on the nomination papers of recognized political parties. *There is no requirement that such candidates shall also be members of such parties*. *(emphasis added).*

The Petitioner in the *Basheer Segu Dawood*'s case was a member of the Sri Lanka Muslim Congress (SLMC), which party together with another party, formed a political alliance called the 'National Unity Alliance' (NUA). The Petitioner's name appeared on the nomination paper of NUA, but since he did not secure sufficient number of preference votes to be declared elected as a Member of Parliament on the basis of the results of the election, he was eventually returned to Parliament on the National List of NUA. Sometime later NUA purported to expel him, and he invoked the jurisdiction of this Court under Article 99(13)(a) of the Constitution. In the course of his judgement Aramarasinghe, J. also made the following pertinent observation at pages 31 and 32 of the judgement -

> Of course, political parties and alliances of political parties may have members who can be expelled. In fact, the new Constitution of the NUA does provide for "Founder Members", namely, the SLMC and the SLPF and individuals. But, as far as the petitioner is concerned he was and remains a member of one political party, namely, the SLMC, and that party alone, although he was a candidate nominated by the NUA for election to Parliament in terms of Article 99A of the Constitution.…….*The Petitioner, not being a member of the NUA could not be expelled from it.* I therefore, hold that the purported expulsion of the petitioner, Mr. Basheer Segu Dawood, was invalid since it was null and void and of no force or avail in law; the purported expulsion by the first respondent is of no value or importance: It amounts to nothing and shall be treated as non-existent for the purposes of Article 99(13)(a) of the Constitution. *(emphasis added).*

In the light of the aforesaid decisions of this Court, it is vital to determine whether the Petitioner is, or at least was at the time his name was included in the ITAK nomination paper, a member of ITAK. He has in fact, asserted in no uncertain terms that he is a member of ITAK in paragraph 10 of the Petition filed by him in this Court and the corresponding paragraph 12 of his affidavit dated 10th December 2010. In the said affidavit, the Petitioner has averred as follows:-

> 12. I state that from *the inception of my political career as a member of ITAK*, I have been a staunch supporter of the programmes and policies of the said Party. I state that although my relationship with the party is relatively new, *having joined the party just over four and a half years ago*, I have always endeavoured to serve the Party with the utmost dedication, commitment and unreserved loyalty. *(emphasis added).*

However, in paragraphs 7 (d) and (e) of his counter affidavit dated 18th January 2011, the Petitioner has taken the somewhat inconsistent stand that he is only a *de facto* member of ITAK and not a *de jure* member thereof. He has averred that:-

> (d) I state that to the best of my knowledge I have not tendered an application for membership in the 1st Respondent Party, nor have I ever paid any membership fee nor taken a membership pledge in terms of the Constitution of the 1st Respondent Party [P1 and P 1A] – *and in the light of the revelation now made that I have only made a declaration pledging allegiance to the Parliamentary Group of the 1st Respondent party,* I am advised to state and do hereby state that I am only a *de facto* member of the 1st Respondent Party and not a *de jure* member, in terms of its Constitution and that I am accordingly not bound by the said Constitution.
>
> (e) I am also advised to state and do hereby state that in view of the fact that I am only a *de facto* member of the 1st Respondent party, and not bound by its Constitution, I could not have been expelled from the 1st Respondent party, and therefore, my purported expulsion from the 1st Respondent party is illegal and is of no force or avail in law. *(emphasis added)*.

Learned President's Counsel for the 3rd Respondent has vehemently objected to this change of stance on the basis that the Petitioner cannot be permitted to blow hot and cold at the same time. While I must confess that I am not entirely unimpressed by the ingenuity of the legal advisors of the Petitioner, it is not possible to overlook the fact that the Petitioner sought to invoke the jurisdiction of this Court clearly on the basis that he was a member of ITAK, which recognised political party he joined "just over four and a half years ago", which approximates with the time he would have joined ITAK which led to his name eventually being included as an ITAK candidate for the Alayadyvembu Pradeshiya Sabha in March 2006, as disclosed in paragraph 8 of the Petitioner's affidavit dated 10th December 2010. The position subsequently taken by the Petitioner, no doubt on the advice of his legal advisors, that he is not a *de jure* member of ITAK, is to my mind, altogether unconvincing as it seems to have been prompted by the fact that only the purported declaration marked 'R7E' was produced with the objections of the 3rd Respondent linking the Petitioner to ITAK, and the apparent dearth of other material to establish that the Petitioner was a member of ITAK.

However, it needs to be observed that since the Petitioner had come to Court on the basis that he was a member of ITAK and that certain provisions of the ITAK Constitution, which he himself produced marked 'P1' and 'P1A', have been violated by the Respondents, it was not incumbent upon the Respondents to produce any documents to substantiate the fact of his membership of the party, and the objections of the 3rd Respondent have been formulated on the assumption that he was a member of the party. This being the case, I am clearly of the opinion that the Petitioner cannot in these proceedings take up an inconsistent stand and assert that he is not a *de jure* member of ITAK and is therefore not bound by the provisions of its Constitution and the disciplinary procedure laid down in that Constitution.

In view of this finding, the decision in *Basheer Segu Dawood v. Ferial Ashraff and Others* [2002] 1 Sri LR 26, and other similar decisions adverted to by learned President's Counsel for the Petitioner, are altogether irrelevant to the determination that this Court is required to make in this case in terms of Article 99(13)(a) of the Constitution. I am therefore of the opinion that the application of the Petitioner has to be considered further on the basis that the Petitioner is a member of ITAK.

Validity of the Disciplinary Proceedings against the Petitioner

It is manifest from paragraph 29 of the Petition dated 10th December 2010 filed by the Petitioner to invoke the jurisdiction of this Court in terms of Article 99(13)(a) of the Constitution that he has challenged his purported expulsion from ITAK as being *ex-facie* illegal and contrary to the provisions of the Constitution of ITAK, as well as the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka, on the basis it is contrary to natural justice, unreasonable, capricious and vitiated by demonstrable *mala fides*. These grounds have been set out in greater detail in sub-paragraphs (a) to (h) of paragraph 29 of the Petition. The aspect of procedural impropriety stressed by learned President's Counsel for the Petitioner in the course of his submissions have been encapsulated into sub-paragraphs (a) and (b) which are quoted below for convenience:-

(a) The said purported decision to expel him from the party is *ex-facie* illegal in as much as it has been made by the 3rd Respondent based on a purported recommendation of the Disciplinary Committee of the ITAK and not by either the Central Committee or the General Working Committee of the Party, which are the only bodies vested in terms of the Constitution of the ITAK, with the power to take disciplinary action against members of ITAK;

(b) The purported disciplinary procedure which has culminated in such decision to expel him is *ex-facie* illegal and contrary to the provisions of the Constitution of the ITAK, in as much as such proceedings had been initiated by the 3rd Respondent-General Secretary [vide P3] and/or the Disciplinary Committee of the ITAK [vide P6, P7 and P9] and not by the bodies vested with such power by the Constitution of the ITAK- being the Central Committee or the General Working Committee of the party.

In this context, it has to be mentioned that the constituent bodies of ITAK are the General Working Committee, the Central Committee, District Committees, Party Branches and the National Conventions of the party constituted by the members thereof. The applicable disciplinary procedure applicable in the case of members of ITAK is generally laid down in Articles 8(c)(3), 8(d), 8(e), 8(f) and 8(g) of the ITAK Constitution, copies of which were produced by the Petitioner marked 'P1' and 'P1A', and the authenticity of which was not disputed by the Respondents, except that they relied on a subsequent amendment which will be adverted to later. These provisions are reproduced below for ease of reference, from the English version of the said Constitution marked 'P1A':-

ARTICLE 8

(c) The Central Committee has the power to put into action the objectives of the Party as directed by the National Convention and decided by the General Working Committee. It is accountable to the National Convention. It has the power to implement the decisions, programmes and policies formulated from time to time by the General Working Committee and the National Convention. Without prejudice to the general power enjoyed by the Central Committee, it has the following powers as well:-

1. ……..
2. ……..
3. Disciplinary action against and expulsion of members for irregularities, disobedience and lack of loyalty.
4. ……....
5. ……
6. …….

(d) Anyone aggrieved on account of the exercise of powers as mentioned above in sub-sections (c) 3 and 4 can submit a complaint of objection to the General Working Committee within one month of such decision. Such complaints shall be included in the agenda of the first next meeting of the General Working Committee. Until such time as the General Working Committee takes a decision on the matter, the decision of the Central Committee will be valid.

(e) The decision of the Central Committee is final and conclusive in matters of interpretation regarding the provisions of the party constitution or any sub-legislation.

(f) In order to be lawful, at least eleven members of the Central Committee must be present. A member who has failed to attend three consecutive meetings of the Central Committee without acceptable reason shall be deemed to have lost his membership. Accordingly he will be announced as having lost his membership by the General Secretary.

(g) Whenever the need arises, the Central Committee may appoint sub-committees, Committees of Inquiry etc. For those reasons it may grant specific powers to such committees.

It is important to note in regard to disciplinary action and expulsion of office bearers, the disciplinary authority as provided in Article 7(d) of the ITAK Constitution is the General Working Committee of ITAK, and with respect to members of ITAK the disciplinary authority is the Central Committee as provided in Article 8(c), which power is subject to review by the General Working Committee of ITAK in terms of Article 8(d) of the ITAK Constitution. There is no reference at all in the Constitution of ITAK produced by the Petitioner marked 'P1' and 'P1A', to any Disciplinary Committee, the only express reference being in Article 8(g) to sub-committees and committees of inquiry to which the Central Committee may grant specific powers.

In this backdrop, it is necessary to focus once again on the letter of expulsion dated 28th November 2010 ('P12'), which was quoted fully at the very commencement of this determination, by which the Petitioner was informed by the General Secretary of ITAK that the Disciplinary Committee of ITAK that met on the very same day, namely 28th November 2010, has "unanimously recommended" that the Petitioner be expelled from the party membership forthwith. The said letter thereafter proceeds to inform the Petitioner that he is "hereby expelled" from the membership of ITAK. It has been submitted by learned President's Counsel for the Petitioner that it is clear from the said letter that the ultimate decision to expel the Petitioner was not taken by the Central Committee of ITAK as it should have been, but what is embodied in 'P12' is the decision of the General Secretary of ITAK, who was not the authority empowered by the Constitution of ITAK to make such an important and serious decision.

It is however important to note that the 3rd Respondent has attempted to show that the said Constitution was amended with effect from 3rd August 2008 by 'R4', having been approved by the National Delegates Convention held in Jaffna on 10th January 2010 after it was allegedly passed by the General Working Committee of ITAK on 17th April 2008 in Jaffna and on 23rd August 2008 at Colombo and approved by the "General Council" on 9th January 2010 as set out in the 3rd Respondent's communication addressed to the Commissioner of Election marked 'R4B'. The Petitioner has expressly pleaded ignorance of the said amendment marked 'R4', and learned President's Counsel appearing for the Petitioner has, without conceding its authenticity or validity, submitted that even the procedure laid down in that so called "amendment" has not been complied with. The Tamil version of the new provision, of which much has been said in the course of submissions, provides as follows:-

> 8.(ஏ) மத்திய செயற்குழு ஆனது அரசியற் குழு, நாடாளுமன்ற உறுப்பினர் குழு, மாகாணசபை உறுப்பினர் குழு, உள்ளூராட்சி மன்ற உறுப்பினர் குழு, தேர்தல் வேட்பாளர் நியமனக்குழு, ஒழுக்காற்று நடவடிக்கைக்குழு என்பனவற்றை நியமனம் செய்வதுடன் அவற்றிற்கான வழிகாட்டு விதிகள் மற்றும் ஒழுக்காற்றுக்கோவை என்பனவற்றை வழங்குதலும் வேண்டும். ஆந்தந்த குழுக்களுக்கான அங்கத்தவர் எண்ணிக்கையை மத்திய செயற்குழு தீர்மானிக்கும்

When translated into English, the provision reads as follows:-

> 8(h) The Central Committee shall appoint a Political Committee, Parliamentary Membership Committee (Parliamentary Group), Provincial Council Membership Committee, Local Authorities Membership Committee, Nomination Committee and Disciplinary Committee, and provide the Guidelines and Disciplinary Code

for these Committees. The Central Committee shall also determine the number of members of each such Committee.

There are several difficulties in regard to this purported amendment which have to be noted. Firstly, learned President's Counsel for the 3rd Respondent could not refer us to any express provision in the original ITAK Constitution marked 'P1' and 'P1A', which laid down the procedure for amendments of the Constitution. Secondly, no explanation was provided as to how an amendment to a Party Constitution which according to 'R4B' was only approved by the National Delegates Convention on 10th January 2010 and intimated to the Commissioner of Elections on 12th January 2010, could have been in force from 3rd August 2008. Thirdly, it is uncertain as to whether even at the time of the purported expulsion of the Petitioner, the new provision which had allegedly been incorporated into the ITAK Constitution as Article 8(h) has been fully implemented by the party. There has been no material produced by any of the parties to show whether the number of members to serve in any of the Committees contemplated by the above-quoted provision had been determined by the Central Committee, or whether any such Committees had in fact been appointed. Nor is there any evidence in regard to whether the Guidelines and Disciplinary Code applicable to the Disciplinary Committee had been formulated as required by Article 8(h) of the purported amendment. It is also important to note that although the grounds for disciplinary action as set out in Article 8(c)(3) of 'P1' and 'P1A', which have not been added to or modified by the alleged amendment 'P4', are " irregularities, disobedience and lack of loyalty" none of these words are used in 'P12', which simply refers to disciplinary proceedings alleged to have been initiated against the Petitioner "for acting against the party discipline".

It is common ground that the Petitioner voted in favour of the 18th amendment to the Constitution on 8th September 2010, although the parties are at variance in regard to whether the Petitioner had opposed the decision of the Parliamentary Group of ITAK to vote against it. It is also common ground that on 17th October 2010 the Central Committee met at No. 32 A, Retreat Road, Bambalapitiya, presided over by Mr. R. Sampanthan, M.P. and passed a resolution generally to deal with the Petitioner for acting against party discipline. The Tamil version of the said resolution was produced marked 'R5A' with the objections of the 3rd Respondent, and reads as follows:-

பாரளுமன்ற உறுப்பினர் திரு. பியசேனாவுக்கு எதிரான ஒழுங்கு நடவடிக்கை பற்றி ஆராய்ந்த சபை ஈற்றில் திரு. கனகசபாபதி அவர்களால் பிரேரிக்கப்பட்டு திரு. வர்ணகுலநாதன் அவர்களால் ஆமோதிக்கப்பட்ட பின்வரும் பிரேரணையை ஒருமனதாக ஏற்றுக்கொள்ளப்பட்டது. பிரேரணை: "திரு P.H. பியசேனா பா.உ. அவர்கள் பாராளுமன்றக் குழுத் தீர்மானத்திற்கும் கட்சித் தீர்மானத்திற்கும் எதிராக அரசுக்கு ஆதரவாக 18வது அரசியலமைப்புத் திருத்தத்திற்கு ஆதரவாக வாக்களித்ததுடன், அரசாங்கத் தரப்பிற்கு மாறி அரசாங்கத்துடன் இணைந்துவிட்ட காரணத்தால் அவருக்கு எதிராக ஒழுக்காற்று நடவடிக்கை எடுக்க *வேண்டுமென்றும் அதற்குப் பொருத்தமான நடவடிக்கை எடுப்பதற்கு* பொதுச்செயலாளருக்கு கட்சியின் இம் மத்திய செயற்குழு அதிகாரமளிக்கிறதெனத் தீர்மானிக்கின்றது."

This may be translated into English as follows:-

In view of the fact that Mr. Piyasena, M.P. voted in favour of the 18th Amendment, crossed over and joined the Government in contravention of the Parliamentary Group decision and Party decision, the Central Committee hereby resolves this disciplinary

action be taken against him and authorizes the General Secretary to take such appropriate action in that regard.

It has to be observed that on a careful reading of the Minute Book maintain by ITAK from which the Tamil original of 'R5A' appears to have been extracted from page 29 thereof, the words that have been underlined in the above extracts as well as the English translation thereof had been interpolated in between the lines. While the learned President's Counsel for the Petitioner has vehemently objected to the reception in evidence of these Minutes on the basis that they have only been signed by an Administrative Secretary and have not been certified on the original of the Minute Book by the 3rd Respondent General Secretary, who is in terms of the ITAK Constitution vested with the responsibility of maintaining such minutes, it is also necessary to observe that even the fairly extensive interpolations made throughout in those minutes have not been countersigned or certified by any responsible office bearer or by even the Administrative Secretary.

In any event, it is my considered opinion that the extract produced as 'R5A' only shows that the Central Committee authorized the 3rd Respondent to take steps towards initiating disciplinary action against the Petitioner, and did not empower to take disciplinary action against the Petitioner functioning as the disciplinary authority. This becomes apparent from the fact that, a Disciplinary Committee consisting of 5 senior members of the party, namely, Messrs. R. M. Imam, Thurairatnasingham, Thurairajasingham, C.V.K. Sivagnanam and David Naganathan persons had been appointed to inquire into the matter. The fact of the appointment of the said Disciplinary Committee was brought to the notice of the Petitioner by the 3rd Respondent General Secretary himself by his letter dated 23rd October 2010 ('P7') paragraphs 5, 5(a) and 5(b) thereof are reproduced below:-

5. தங்கள் 10.10.2010 கடிதத்தின் 2ஆம் பந்தியில், தாங்கள் பாராளுமன்றத்தில் 08.10.2010 அன்று, தமிழரசுக்கட்சி / தமிழ் தேசியக்கூட்டமைப்புப் பாராளுமன்றக்குழுவின் தீர்மானத்திற்கு மாறாக 18ஆவது அரசியலமைப்புத்திருத்தத்திற்கு ஆதரவாக வாக்களித்திருந்தமையும், அது தொடர்பில் தங்கள் நடவடிக்கைகளையும் ஏற்றுக்கொண்டுள்ளீர்.

5(அ) எனவே தங்கள் மீது எம்மால் சுமத்தப்பட்டுள்ள குற்றங்களையும், தங்கள் பதிலையும் இ.த.அ.கட்சியின் ஒழுங்கு நடவடிக்கைக் குழுவுக்குப் பாரப்படுத்தியுள்ளேன்.

5(ஆ) 5(அ)வில் குறிப்பிட்டுள்ளவாறும், இ.தஅ.கட்சியின் மத்திய செயற்கு ழுத்தீர்மானித்தவாறும் கட்சியின் ஒழுங்கு நடவடிக்கைக்குழு தங்கள் மீது பொருத்தமான ஒழுக்காற்று நடவடிக்கையை எடுக்கும் என்பதைத் தெரிவித்துக் கொள்கின்றேன்.

The English rendering of the aforesaid has been provided by the Petitioner marked 'P7A' which is reproduced below:-

5. Second paragraph of your letter dated 10.10.2010 says that you have admitted that you have voted against the decision of Tamil Arasu Kadchi / TNA parliamentary committee at the parliament on 8.1.2010. You have also admitted my action on this regard.

5(a) Therefore, our allegations against you and your related response are forwarded to the Disciplinary Committee, Ilankai Tamil Arasu Kadchi.

5(b) As stated in 5(a), I wish to inform you that *the disciplinary committee will take appropriate action* as per the decision taken by the central action committee, Ilankai Tamil Arasu Kadchi. *(emphasis added).*

It is significant to note that it is clear from the aforesaid communication signed by the 3rd Respondent General Secretary of ITAK, that the intention was for the Disciplinary Committee to first inquire into the facts and circumstances relating to the charge against the Petitioner, which is presumably what was intended by the phrase "appropriate action" in the words highlighted in 'P7' and 'P7A'. What followed thereafter has also given rise to controversy, as it would appear that the findings of the Disciplinary Committee which are contained in the purported report of the said Committee which was originally produced with the objections of the 3rd Respondent marked 'R6', excluding page 4 thereof which was only made available to Court with a subsequent motion marked 'R6 Part' to which the learned President's Counsel for the Petitioner has taken objection.

To make things worse, the said report is signed only by four members of the Committee, and although it is stated in the subsequently produced page of the report that the member who omitted signing the document had been in communication with the other members by telephone, and had in fact concurred with the findings of the other members, no affidavit from the said member has been tendered to Court. In any event, it is also clear from the said report that the Disciplinary Committee has only made its recommendation, which presumably had to be confirmed by the disciplinary authority which is the Central Committee of ITAK with the possibility of review by the General Working Committee. The final part of the said report marked 'R6' is quoted below:-

எமது இந்த ஏகமனதான தீர்மானம் ஆவது:-
கௌரவ பொ. பியசேன அவர்கள் இலங்கைத் தமிழரசுக் கட்சியின் தீர்மானத்திற்கு எதிராக பாராளுமன்றத்தில்

1) உரையாற்றி
2) செயற்பட்டு - அதாவது, அரசாங்கக் கட்சிக்கு மாறிச் சென்று
3) வாக்களித்ததன் மூலம் இலங்கைத் தமிழரசுக் கட்சியின் அமைப்புவிதிகளின் - விதி 8 (இ) 3 இற்கு முரணாக செயற்பட்டதன் காரணத்தினால் அவரை உடனடியாக இலங்கை தமிழரசுக் கட்சியின் உறுப்புரிமையிலிருந்து நீக்கும்படியாகவும் அப்படியாக அவர் நீக்கப்படுவதை பாராளுமன்ற செயலாளர் நாயகத்திற்கும் தேர்தல்கள் ஆணையாளர் நாயகத்திற்கும் அறிவிக்கும்படி இக்குழு இத்தால் பரிந்துரைக்கின்றது.

The submission made by learned President's Counsel for the 3rd Respondent that the word "பரிந்துரைக்கின்றது" used in the above report is a direction and not a recommendation has not been entirely convincing, and this Court is of the view that it has to give preference to the rendering of the said Tamil word by the General Secretary of the Ilankai Tamil Arasu Kadchi himself in 'P12', which is fully in accord with the meaning of this word in ordinary parlance. We are therefore not persuaded by the submission of learned President's Counsel for the 3rd Respondent that the Central Committee had delegated its disciplinary authority to the General Secretary of ITAK. Accordingly, when the final paragraph of P6 is translated into English, it should read as follows:-

Our unanimous decision is as follows:
As Mr. Piyasena, acted contrary to the resolution of ITAK by
1 Speaking;
2 Acting – that is to say, crossing over to the Government; and
3 Voting,
thereby violating Article 8(c)(3) of the Constitution of ITAK, we *recommend* that he be expelled from party membership, and this be communicated to the Secretary General of Parliament.

It is the considered opinion of this Court that it is the Central Committee of the ITAK that has disciplinary authority over the Petitioner, and it is that Committee which had in fact initiated a disciplinary process by appointing a Disciplinary Committee. It is not possible for only four members of the Committee to arrive at findings, and the purported report of the Committee marked 'R6', which does not bear all the signatures of its members, is incomplete and cannot be acted upon. In any event, the final decision in regard to a disciplinary matter involving a member of ITAK has to be taken by the Central Committee, subject to review in appropriate cases by the General Working Committee. In the circumstances, I hold that the decision to expel the petitioner from the membership of ITAK on a purported decision of the Disciplinary Committee by the letter dated 28th November 2010 marked 'P12' is *ex-facie* illegal in as much as it has not been made by the appropriate disciplinary authority in terms of the ITAK Constitution. In these circumstances, it is not necessary to go into any of the other grounds urged in paragraph 29 of the Petition.

Conclusion

For all the aforesaid reasons, I determine that for the purposes of Article 99(13)(a) of the Constitution, the purported expulsion of the Petitioner Perumpulli Hewage Piyasena, was invalid. In all the circumstances of the case, I make no order as to costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN, J.
I agree.

JUDGE OF THE SUPREME COURT

SURESH CHANDRA, J.
I agree.

JUDGE OF THE SUPREME COURT

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

Jayasiri Edirisinghe,
E and S Land Sales and Property Developments,
No. 627, Maradana Road,
Colombo 10.

- Plaintiff-

S.C.(CHC) Appeal No. 34/08
S.C.H.C.L.A. 18/08
Commercial High Court
Case No. H.C. (Civil) 47/2006(01)

Vs.

City Properties (Pvt) Ltd..,
No. 111, Negombo Road,
Peliyagoda.

- Defendant -

And now between

City Properties (Pvt) Ltd..,
No. 111, Negombo Road,
Peliyagoda.

- Defendant Petitioner -

Vs.

Jayasiri Edirisinghe,
E and S Land Sales and Property Developments,
No. 627, Maradana Road,
Colombo 10.

- Plaintiff Respondent -

Before **Tilakawardene, J.,**
Sripavan, J.,
Imam, J.

Counsel : Harsha Amarasekera with Kanchana Pieris for Defendant-Petitioner

Kuvera de Zoysa for Plaintiff-Respondent

Argued on : 18.02.2010

Written Submissions
Filed on : 26.03.2010 – By the Defendant-Petitioner
30.03.2010 - By the Plaintiff-Respondent

Decided on : 02.06.2011

SRIPAVAN. J.

The Plaintiff-Respondent (hereinafter referred to as the Respondent) instituted an action in the District Court and against the Defendant-Petitioner (hereinafter referred to as the Petitioner) seeking to recover a sum of Rs. 12 Million as Commission/brokerage fees due to the Respondent in respect of a sale of a particular property. Upon an objection being raised by the Petitioner to the jurisdiction of the Court, the case was transferred to the High Court of the Western Province exercising civil jurisdiction. The Petitioner filed answer

and took up the position that the Respondent did not act as a broker and as such was not entitled to recover any monies from the Petitioner.

It is noted that the Respondent based his action on an oral agreement which he alleged to have been entered into with the Petitioner. When the matter was taken up for trial on 14-05-07, the Petitioner objected to issue No. 2 raised by the Respondent on the ground that the plaint did not disclose either the date of the oral agreement nor did it disclose the identity of the person with whom such agreement had been entered into. The Learned High Court Judge thereupon made the following Order marked A6 (translated into English).

> *"The Petitioner has objected to the Respondent's issue No. 2 on the basis that the Respondent has no right to raise such issue as he has not specified the date on which the oral agreement referred to in Paragraphs 4 and 5 of the plaint was entered into. Further, the Respondent has not disclosed the identity of the person of the Petitioner Company with whom the oral agreement was said to have been entered……*
>
> *Having considered the submissions, I feel it is necessary to specify the date or the approximate period during which the agreement was entered into. The Civil Procedure Code requires the Respondent to annex a copy of the written agreement to the plaint where the cause of action arises out of a written agreement. If this is not done, the Petitioner would not have*

sufficient opportunity to prepare his defence or establish his rights.

As the Petitioner is a Company, it is also necessary to specify with clarity the identity of the authorized representative of the petitioner with whom the oral agreement was entered into. Since this has not been disclosed, I reject the proposed issue No. 2.
I grant a date to the Respondent to consider this and take steps."

The respondent did not prefer an appeal against this Order marked A6. However, he sought to amend his plaint. Though the Petitioner, objected to the said amendment, it was allowed by Court after an inquiry. Neither the fundamental character of the suit nor its nature and scope was permitted by the amendment. Accordingly, the Respondent filed a motion dated 21-06-07 and chose to file an amended plaint. The Petitioner filed amended answer in response to the amended plaint and both parties thereafter filed their amended issues. The matter came up in Court on 13-05-2008 for consideration of issues and trial.

The Learned Counsel for the Petitioner objected to Issue No. 4 of the Respondent on the following basis:

(a) the name of the representative of the Petitioner Company with whom the proposed agreement was said to have been entered into had not been specified in the amended plaint,

(b) the said Issue must be rejected in view of the previous order marked "A6", and for the same reasons set out therein,

(c) the issue was not based on the pleadings contained in the plaint, and

(d) that the issue was vague.

The Learned High Court Judge again made an order marked A16, stating that it was the duty of the Court to frame issues and directed the Respondent to disclose the name of the employee with whom the Respondent entered into an oral agreement. The Petitioner sought leave to appeal against the said Order marked A16 and leave was granted by this Court on 4th July 2008.

It is observed that the Respondent was given an opportunity to consider the steps he wished to take in respect of the Order marked A6. Without appealing against the Order marked A6, the Respondent sought to amend his plaint. Thus, when the Respondent sought an amendment of the plaint, he was duty bound to file an amended plaint in terms of the Order marked "A6". It is of utmost importance to comply with the directions given by Court in order to ensure that administration of justice in a particular case or matter be protected in the interests of the society.

One of the requirements of A6 is the disclosure of the name of the Petitioner's purported representative with whom the Respondent claims to have entered into an oral agreement. The failure to disclose the name in the amended plaint amounts to a failure to comply with the Order of Court marked A6. A party who has failed to comply with the Order made by Court,

cannot seek the protection of law thereafter on the same cause of action. He has to face the consequences of such non-compliance. Thus, when the Respondent decided to amend the plaint and was not amended in accordance with the order made by Court, I am of the view that the Court was entitled to make an appropriate order for not complying with its order.

It is significant to note that at the time of filing the amended plaint, the Court did not exercise its discretion under Section 46(2)(J) of the Civil Procedure Code to refuse to entertain the same for not complying with its order. The provision contained in Section 93 of the Civil Procedure Code grants a wide discretion to Court to amend the pleadings. Its discretionary power must, however, be exercised subject to the limitations set out in Section 46(2) of the said Code that no amendment is to be made which has the effect of converting an action one character into an action of another or inconsistent character. A case must be tried upon the issues on which a right decision could be arrived at, raising the real question between the parties. The functions of pleadings enable the Court to clarify the issues so that the real issues between the parties may be tried at the trial.

The impugned order marked A16, directed the Respondent to disclose the date and the name of the employee with whom he entered into an oral agreement. The effect of the clarification sought by Court was merely to find out the real dispute between the correct parties which would facilitate the task of administering justice and will not cause any injustice to the petitioner. The appellate court would be hesitant to interfere with the exercise of such a discretion by the trial Judge. This discretion could be viewed from the

perspective of the flexibility and the choice granted to the trial judge based upon a consideration of all factors involved. This judicial discretion of the Court must be exercised so as to do justice in a case that is being tried with the ascertainment, declaration and enforcement of the rights and liabilities of the parties as they exist or are deemed to exist at the time the proceedings were instituted.

It must however, be emphasized that it is a prime duty of the Court to consider the issues already raised and to allow any fresh issues to be formulated based on the clarification sought by Court only if such a course appears to Court to be in the best interest of justice.

For the foregoing reasons, I hold that the appeal fails. Having regard to the facts and circumstances, I make no order as to costs. The Registrar is directed to forward the Case record to the High Court forthwith so that trial could be proceeded with as expeditiously as possible.

Judge of the Supreme Court.

Tilakawardena, J.

I agree.

Judge of the Supreme Court

Imam, J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application for Leave to Appeal under and in terms of Section 5C of the High Court of Provinces (Special Provisions) (Amendments) Act No. 54 of 2006 from the Order of the Provincial High Court of the Northern Province (Holden in Jaffna) dated 26th March 2009 read together with the Constitution of the Democratic Socialist Republic of Sri Lanka and the Rules of the Supreme Court.

1. Storer Duraisamy Yogendra,
   No. 21/1, Alfred House Gardens,
   Colombo 3, and
   No. 136, Hulftsdorp Street,
   Colombo 12.

2. Balasubramaniam Thavabalan,
   Nallur Cross Road,
   Nallur.

1ST & 2ND DEFENDANT-RESPONDENT-APPELLANTS

S. C. Appeal No. 87/09
S. C. (HCCA) L. A. No. 84/09
Provincial High Court of the Northern Province
- Civil Appeal No. 14/07
D. C. Jaffna Case No. 130/Misc.

-VS-

Velupillai Tharmaratnam
Sampanthar Kandy,
Karainagar.

PLAINTIFF-APPELLANT-RESPONDENT

Karthgesu Sivaharan,
Araly North, Vaddukkodai,
Presently of Bresinaweg 1,
59404, Soest Germany.

3RD DEFENDANT-RESPONDENT – RESPONDENT

BEFORE	:	Hon. Saleem Marsoof, P.C., J., Hon. P. A. Ratnayake, P.C., J., and Hon. S. I. Imam, J.
COUNSEL	:	S. A. Parathalingam, P.C., with P. Sivaloganathan, Jaliya Bodinagoda and Nishkan Parathalingam for the 1st and 2nd Defendant-Respondent-Appellants. 3rd Defendant-Respondent-Respondent absent and unrepresented. Plaintiff-Appellant-Respondent appearing in person.
ARGUED ON	:	18.11.2010
DECIDED ON	:	06.07.2011

SALEEM MARSOOF, J.

The only point argued in this appeal was whether the procedure for appealing from an order made by a District Court rejecting a plaint on the ground that it is barred by a positive rule of law, was the procedure set out in Section 754(1) of the Civil Procedure Code or that set out in Section 754(2) of the said Code. The question has arisen in the context of an action instituted in the District Court of Jaffna in May 2005 by the Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent), against the 1st and 2nd Defendant-Respondent-Appellants and one Karthigesu Sivaharan, who is the 3rd Defendant-Respondent-Respondent, to recover damages in a sum of Rs. 25 million for the loss of reputation and pain of mind alleged to have been suffered by him. The Respondent who is a highly qualified academic and former Professor of Mathematics attached to the University of Colombo and the University of Jaffna, had claimed in his plaint that his reputation and dignity had been injured by certain statements forming part of the pleadings in another action, namely, D.C. Jaffna case No. 130/Misc., which had been filed against him by the said Karthigesu Sivaharan, whose pleadings in the case were alleged to have been prepared by the said Appellants in their professional capacities as Attorneys-at-law.

It is common ground that the District Judge had, by his order dated 30th July 2007, rejected the plaint in terms of Section 46(2)(i) of the Civil Procedure Code, without trying the case on its merits. The gist of the order of the learned District Judge was that the action appeared from the statement in the plaint to be barred by a positive rule of law, namely, that Attorneys-at-law were entitled to immunity from suit with respect to the contents of the pleadings they file on the instructions of their clients who retain their services. In the final paragraph of the said order, the learned District Judge stated as follows:-

> "நான் விபரமாகக் கூறிய காரணங்களில் முக்கியமாக 1988ம் ஆண்டு அரசியல் அமைப்பின் (Constitution) 136ம் பிரிவின் பிரகாரம் இலங்கை உயர் நீதிமன்றம் 07.12.1988ம் திகதிய அதிவிசேட வர்த்தமானி (Gazette) மூலம் பிரகடனப்படுத்தப்பட்ட விதிகளில் காணப் படுகின்றவாறு, சட்டத்தரணி தமது கடமை செயற்பாடுகளில் பூரண சிறப்புரிமை கொண்டுள்ளார்கள் என்பதும், இது உரோம டச்சு சட்ட தத்துவங்களுக்கு முரணாக இருந்த

போதிலும் உயர்நீதிமன்ற விதிகள் மற்றும் ஆங்கில சட்டத்தைப் பின்பற்றி இந்திய சான்றுக் கட்டளைச் சட்டத்தை (Indian Evidence Ordinance) வழிகாட்டியாகக் கொண்டு இலங்கையில் உருவாக்கப்பட்ட சான்றுக் கட்டளைச் சட்டத்தின் பிரிவு 126 இன் பிரகாரமும், குடியியல் நடைமுறைச் (Civil Procedure) சட்டக் கோவையின் பிரிவு 46(2) (ஏ) இன் பிரகாரமும், தன்னுறுதிச் சட்ட விதிகளால் தடை செய்யப்பட்டுள்ள விபரமாக 1ம், 2ம் எதிராளிகள்-மனுதாரர்களின் சிறப்புரிமையை மீறுவதான பிராதாக அமைந்துள்ளதால் வழக்காளியின் பிராதை நிராகரித்து கட்டளை இடுகின்றேன். வழக்கு செலவு பற்றி ஒப்புரவான நீதியின் (Equity) அடையாளமாக எதுவித கட்டளையும் இடவில்லை.

It is clear from the above quoted passage that the District Judge was of the opinion that the action filed by the Respondent was barred by a positive rule of law, insofar as it concerned the 1st and 2nd Defendant-Respondent-Appellants, and that the plaint had to be rejected as provided in Section 46(2)(i) of the Civil Procedure Code. It is noteworthy that the reference in the above passage to "குடியியல் நடைமுறைச் சட்டக் கோவையின் பிரிவு 46(2) (ஏ)" was an obvious error for பிரிவு 46(2)(ஐ) of the Tamil version of the Civil Procedure Code which corresponds to Section 46(2)(i) of the Code. It is important to note that the learned Judge did not purport to dismiss the action, but simply made order rejecting the plaint against the said Appellants using the words "பிராதை நிராகரித்து கட்டளை இடுகின்றேன்".

Being aggrieved by the said decision of the District Court, the Respondent filed notice of appeal followed by a petition of appeal in terms of the procedure set out in Section 754(1) read with Sections 754(3) and 754(4) of the Civil Procedure Code against the said order. When the appeal lodged by the Respondent came up before the Provincial High Court of the Northern Province exercising civil appellate jurisdiction and holden in Jaffna (hereinafter referred to as the "Provincial High Court"), the Appellants took up a preliminary objection and contended that the appeal should be dismissed *in limine* as it was not properly constituted. It was submitted by learned Counsel for the Appellants that the Respondent was only entitled to seek leave to appeal in terms of Section 754(2) of the Civil Procedure Code, and that insofar as the order sought to be appealed against was not a "judgement", the purported appeal should be dismissed. On the other hand, the Respondent argued that that the order rejecting the plaint made by the District Judge was an "order having the effect of a final judgement" within the meaning of the definition of "judgement" found in Section 754(5) of the Civil Procedure Code, and that the procedure adopted by him is correct and appropriate.

After hearing the submissions on the preliminary objection, the Provincial High Court, by its order dated 26th March 2009, overruled the preliminary objection, and set down the appeal for hearing on its merits. The Appellants filed an application seeking leave to appeal from the said order of the Provincial High Court, and this Court has on 14th July 2009 granted leave to appeal on the questions set out in paragraph 25(a) and (b) of the petition of appeal, which are reproduced below:-

(a) Did the Civil High Court of the Northern Province err in law to duly consider whether the order dated 30.07.2007 was a 'final order' or an 'interlocutory order' within the meaning of Section 754(5) of the Civil Procedure Code?

(b) Did the Civil High Court of the Northern Province err in law to duly consider whether there was no right of Appeal under Section 754(1) of the Civil Procedure Code against the order dated 30.07.2007?

By the order of this Court dated 3rd August 2009, the proceedings in the Provincial High Court were also stayed pending the determination of this Court. The appeal was taken up for hearing in this Court on 15th December 2009, and while this matter was being argued before this Court, on 10th June 2010, a Divisional Bench of this Court consisting of five Judges, pronounced the judgement in *S. Rajendran Chettiar and Two Others v. S. Narayanan Chettiar* SC

Appeal No. 101A/2009 (SC Draft Minutes dated 10.6.2010). The judgement in this case, which was delivered by Hon. Dr. Shirani A. Bandaranayake, J. (as she then was) with Hon. J. A. N. de Silva, C.J., Hon. N. G. Amaratunga, J., Hon. P. A. Ratnayake, P.C., J. and I concurring, dealt with the very same issues which arise for decision in this appeal. The Bench of five Judges which heard the case had come to the conclusion that the correct procedure for appeal in a case where a plaint had been rejected in terms of Section 46(2) of the Civil Procedure Code, was the one set out in Section 754(1) of the Civil Procedure Code, for the reason that such an order is not one "having the effect of a final judgment".

The Respondent, who appeared in person, conceded that this Bench, as presently constituted, is bound by the decision of the Bench of 5 Judges of this Court in the *Rajendran Chettiar* case, but strenuously urged that this appeal be referred for consideration by a Bench which would be numerically superior to the Bench that made the *Rajendran Chettiar* decision, as otherwise, irreparable prejudice would be caused to him. However, learned President's Counsel for the Appellant submitted that the conflict between the decisions of numerically equal benches of the Supreme Court in *Siriwardene v. Air Ceylon* [1984] 1 Sri L.R. 286 and *Ranjit v. Kusumawathie and others* [1998] 3 Sri LR 232, which in turn reflected the difference in judicial opinion that prevails in England, had been finally resolved by the decision of a Bench of five Judges of this Court in the *Rajendran Chettiar* case in the context of an order to reject the plaint under Section 46(2) of the Civil Procedure Code, and that it was therefore not necessary to look into the question any further.

I have carefully considered the question as to whether it is appropriate, in the circumstances of this case to have this matter placed before the Hon. Chief Justice to consider referring the matter to a numerically superior Bench, for further consideration. The two substantive questions on which leave to appeal has been granted involve the interpretation of Section 754(5) of the Civil Procedure Code in the context of the question whether the decision of the District Court dated 30th July 2007 was a "final order" as opposed to an "interlocutory order" within the meaning of Section 754(5) of the Civil Procedure Code, although this provision, which is quoted below, does not in fact use the said the phraseology, which appear to be borrowed from English law, but instead use the word "judgement" and "order" to refer to the same dichotomy:-

> "Notwithstanding anything to the contrary in this Ordinance, for the purposes of this Chapter –
>
> > "judgment" means any judgment or order having the effect of a final judgment made by any civil court; and
> >
> > "order" means the final expression of any decision in any civil action, proceedings or matter which is not a judgment."

The distinction between a "final order" and an "interlocutory order", which the Respondent as well as the learned President's Counsel for the Appellants concede correspond to the dichotomy between "judgement" and "order" as used in our Civil Procedure Code, has been considered in a large number of judicial decisions in England. The polarization of judicial thought in that country can best be visualized by referring to the contrasting approaches of the courts in *Salaman v. Warner* [1891] 1 QB 734 and *Bozson v. Altrincham Urban District Council* [1903] 1 KB 547. In the first of these cases Lord Esher, M.R. observed at page 735–

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in

> dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. "

However, in *Bozson v. Altrincham Urban District Council*, Lord Alverstone, C.J. at pages 548 to 549 adopted a contrary approach and said –

> "It seems to me that the real test for determining this question ought to be this: Does the judgment or order, as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order; but if it does not it is then, in my opinion, an interlocutory order."

A similar conflict of judicial opinion existed in Sri Lanka as well, where in *Siriwardena v. Air Ceylon Ltd.* [1984] 1 Sri LR 286, Sharvananda, J. (as he then was) chose to follow the approach adopted by Lord Alverstone, C.J. in *Bozson v. Altrincham Urban District Council*, while in *Ranjit v. Kusumawathie* [1998] 3 Sri LR 232, Dheerarathne, J. preferred the opinion of Lord Esher, M.R. in *Salaman v. Warner*. As these Sri Lankan decisions both emanated from Divisional Benches which consisted of three Judges, the conflict of judicial opinion was referred to a Bench of five Judges in *Rajendran Chettiar and Two Others v. S. Narayanan Chettiar*, which preferred the test adopted by Lord Esher, M.R. in *Salaman v. Warner* and applied by Dheerarathne, J. in *Ranjit v. Kusumawathie*.

In my opinion, in the context of a plaint that has been rejected in terms of Section 46(2) of the Civil Procedure Code, the application of either of the two tests would lead to the same result. If a District Judge faced with an application under Section 46(2) of that Code, decides not to reject the plaint, the case will have to be tried until it is finally disposed of, and on the test adopted by Lord Esher, M.R. in *Salaman v. Warner,* his order would clearly be interlocutory and not a final one. Similarly, if one applies the test adopted by Lord Alverstone, C.J. in *Bozson's* case, even a District Judge who allows an application under Section 46(2) of the Civil Procedure Code and rejects the plaint, does not by his judgment or order finally disposed of the rights of the parties, as it is expressly stated in the very last sentence of Section 46(2) of the Code that the rejection of the plaint "shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action."

The decision of five judges of this Court in the *Rajendran Chettiar* case is not only binding on this Bench as it is presently constituted, but also reflects the practice of Court both in England as well as in Sri Lanka. As Lord Denning, M. R. observed in *Salter Rex and Co. v. Ghosh* [1971] 2 All ER 865 at page 866 –

> "Lord Alverstone CJ was right in logic but Lord Esher MR was right in experience. Lord Esher MR's test has always been applied in practice."

The above quoted observation is pertinent to the decision of this case, as it emphasizes the importance of precedent in deciding difficult questions, and it is important to recognize that the *Rajendran Chettiar* case is hardly distinguishable from the instant case as the plaint had been rejected by the original Court in both cases in terms of Section 46(2)(i) of the Civil Procedure Code on the ground that it was barred by a positive rule of law, and in that case a Bench of five judges of this Court have unanimously held that such an order is interlocutory in nature and not final, and that accordingly the procedure for appeal laid down in Section 754(2) has to be followed, which made it imperative to seek and obtain "leave to appeal".

In support of his application that this case be put up to the Hon. Chief Justice to consider referring it to a numerically superior Bench, the Respondent has also made a submission which was not presented and considered by the Bench of five judges that heard the *Rajendran Chettiar* case. Simply put, the Respondent's submission is that since an order rejecting a plaint is a "decree" as defined in Section 5 of the Civil Procedure Code, an appeal may be lodged against such an order by filing notice of appeal (as an appeal against a "final order") in terms of Section 754(3) and subsequent sections of the said Code. The Respondent has contended with great force that in interpreting Section 754 of the Civil Procedure Code, one should not lose sight of Section 754(3) of the Code which provided that-

> " Every appeal to the Court of Appeal [and now to the Provincial High Court] from any *judgment or decree* of any original court, shall be lodged by giving notice of appeal to the original court within such time and in the form and manner hereinafter provided."*(emphasis added)*

He went on to stress that accordingly, the procedure set out in Section 754(1) read with Section 754 (4) and Section 755 of the Civil Procedure Code will govern the form and manner of the procedure to be followed in appealing against any judgement or *decree*, and that the word "decree" which is not found in Section 754(1), Section 754(2) or defined in Section 754 (5) should be interpreted in the light of the definition of the said word contained in Section 5 of the Code, which is as follows:-

> ""decree" means *the formal expression of an adjudication* upon any right claimed or defence set up in a civil court, when such *adjudication, so far as regards the court expressing it, decides the action* or appeal *(An order rejecting a plaint is a decree within this definition)*." *(emphasis added)*

The Respondent, in the course of his submissions, cited Prof T. Nadarajah in *The Legal System of Ceylon in its Historical Setting* (1972 - E.J. Brill, Leyden) at page 233 as authority for the proposition that the Civil Procedure Code of our country in its original form was modelled on "the Indian Civil Code of 1882 with some features from the New York Civil Procedure Code of 1880 and the English rules of Court framed in 1883 and 1885" and that whereas in England a definition of "final order" was introduced for the first time by the Rules Committee in 1988 in the lines of the test adopted by Lord Esher in *Salaman v. Warner*, the definition of "decree" found in Section 5 of our Code was based on the Indian Code and adopted the test enunciated by Jessel, M.R. in *Shubrook v. Tufnell* (1882) 9 QBD 621, which was followed with some refinement by Lord Alverstone C.J. in *Bozson v. Altrincham Urban District Council.* It was the contention of the Respondent that since the said definition, contained in the original version of the Civil Procedure Code enacted in 1889 has remained unaltered despite the many amendments introduced by our legislatures to the other provisions of the Code, and changes of judicial attitude, both in Sri Lanka and other jurisdictions, and since Section 754 or any other provision of the Code does not contain any other definition of "decree", the "notice of appeal" procedure set out in Section 754(3) would apply in the light of the meaning of "decree" set out in Section 5 of the Code to an order rejecting a plaint.

While this submission, very ably presented by the Respondent, is at first sight somewhat plausible, learned President's Counsel for the Appellants has submitted that the Civil Procedure Code provides only two gateways to appellate review, namely those found in Sections 754 (1), which conferred a direct right of appeal and Section 754 (2) which is more stringent in that it can only be opened with the "leave" of court, and that access to each gateway depended on whether the decision appealed from was contained in a "judgement" or "order", which for the purpose of these provisions have been defined comprehensively in Section 754 (5) of the Code. He further submitted that the word "decree" is not used in either

of the gateway sections, and that there cannot be a "decree" without a judgement as it is clear from the definition of that word in Section 5 as well as the procedure outlined in Section 188 of the Code that a "decree" is a formal expression of an adjudication, and that there can be no adjudication where a plaint is rejected without hearing on the merits.

I am of the opinion that the submission of the Respondent that an "order" rejecting a plaint, by itself, constitutes a "decree" even without a judgement, is altogether irreconcilable with the scheme of the procedure set out in the Civil Procedure Code, and in particular the provisions of Chapter XX of the Code, and would clearly lead to manifest absurdity. The fallacy of the said submission can more readily be understood in the light of the changes that have been introduced into the original version of the Civil Procedure Code of 1889, through subsequent legislation. For the purposes of this appeal, it would suffice to look first at Section 754 of the Civil Procedure Code as found in Chapter 101 of the Legislative Enactments of Ceylon (1956 Revised Edition). That section did not distinguish between final and interlocutory orders and provided the same procedure for "every appeal to the Supreme Court from any judgement, decree, or order of any original court……". The appeal was to be lodged by filing a petition of appeal (not notice of appeal) in the original court but addressed to the Supreme Court within 10 or 7 days (depending on whether it is an appeal from the District Court or Court of Requests) from the date on which the decision sought to be appealed was pronounced, and there was no requirement as we now have, that the leave of the appellate court had to be first obtained for appealing against an order made by the original court in the course of any action. The Civil Procedure Code was repealed and replaced by the Administration of Justice (Amendment) Law No. 25 of 1975 with effect from 1st January 1976, and thereafter the provisions of the Code were resurrected with some modifications with effect from 15th December 1977, by Section 2 of the Civil Courts Procedure (Special Provisions) Law, No. 19 of 1977, with effect from 15th December 1977.

The current provisions of Section 754 of the Civil Procedure Code, which provide for two separate procedures for appealing against a "judgement" and an "order" respectively, found in Chapter 105 of the Legislative Enactments of the Republic of Sri Lanka were introduced by Act No. 20 of 1977, and the subsequent amending Act No. 79 of 1988 only amended Section 754(4) though it reproduced the rest of the sub-sections of Section 754. The Respondent heavily relied on the word "decree" which is found in Section 754(3), but did not refer us to Section 754(4), probably because the latter sub-section did not further his argument. Curiously though, in these two subsections the word "decree" is found in quit contrasting combinations. In Section 754(3), the reference is to "judgement or decree" though in Section 754(4) the words used are "decree or order", and while these peculiar combinations can continue to excite adventurous lawyers and even enlightened laymen such as the Respondent, and confound judges, until they are rectified by more cautious draftsmen, they have very little relevance in choosing between the two procedures for appeal outlined very clearly in Sections 754(1) and 754(2) of the Civil Procedure Code. It is trite law as well as well-established practice of our Courts that there are only two gateways to appellate review of a decision of an original court in a civil action or proceeding, namely through a "final" appeal in terms of Section 754 (1) and "interlocutory" appeal in terms of Section 754(2) of the Civil Procedure Code, and accordingly, I find no merit in the submission of the Respondent that Section 754(3) constitutes a third gateway to appellate review.

The Respondent has endeavoured to impress upon Court that irreparable prejudice that will be caused by a decision to reject the plaint under Section 46(2) of the Civil Procedure Code. However, I cannot see how any prejudice will be caused by such a rejection as it is expressly stated in that Section that such rejection "shall not of its own force preclude the plaintiff from presenting a fresh plaint in respect of the same cause of action." It is obvious that such a rejection does not operate as *res judicata*.

For the foregoing reasons, I am of the opinion that no useful purpose will be served by putting up this appeal to Hon. Chief Justice to nominate a numerically superior Bench to further consider the question which arose on this appeal. This Bench is clearly bound by the judgement of the Bench of five Judges of this Court in *Rajendran Chettiar and Two Others v. S. Narayanan Chettiar*, and accordingly, I answer questions (a) and (b) on which leave to appeal has been granted, in the affirmative. I hold that the procedure followed by the Respondent for the purpose of this appeal from the decision of the District Court of Jaffna, is not the proper procedure applicable to such appeal.

I accordingly, make order setting aside the order of the High Court of the Northern Province dated 26th March 2009. The appeal filed by the Respondent to the said High Court will stand dismissed. In all the circumstances of this case, I do not make any order for costs of this appeal or the appeal filed in the Provincial High Court.

JUDGE OF THE SUPREME COURT

HON. RATNAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT

HON. IMAM, J.
I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (HC) CA LA No. 99/2008
WP/HCCA/GPH No. 62/01(F)
D.C. Gampaha No. 33465/L

Jamburegoda Gamage Lakshman Jinadasa,
No. 15, Main Street,
Gampaha.

Plaintiff-Appellant (now deceased)

Priyanthi Chandrika Jinadasa,
No. 10, Church Road,
Gampaha.

Petitioner

Vs.

1. Pilitthu Wasam Gallage Pathma Hemamali,
   No. 3, Rest House Road,
   Gampaha.

2. Pilitthu Wasam Gallage Ranjith Siriwardana,
   No. 3, Rest House Road,
   Gampaha.

3. Pilitthu Wasam Gallage Swarna Kusum Siriwardana,
   No. 3, Rest House Road,
   Gampaha.

4. Pilitthu Wasam Gallage Deepa Priyadarshani Silva,
   No. 3, Rest House Road,
   Gampaha.

5. Nupe Vidane Arachchige Kusumawathi,
   No. 3, Rest House Road,
   Gampaha.

Defendants-Respondents-Respondents

BEFORE : Dr. Shirani A. Bandaranayake, J.
P.A. Ratnayake, P.C., J. &
Chandra Ekanayake, J.

COUNSEL : Hemasiri Withanachchi for Petitioner

Manohara de Silva, PC, with Pubudini Wickramaratne for Defendants-Respondents-Respondents

ARGUED ON: 08.11.2010

WRITTEN SUBMISSIONS
TENDERED ON: Plaintiff-Appellant : 10.01.2011
Defendants-Respondents-Respondents : 10.01.2011

DECIDED ON: 07.07.2011

Dr. Shirani A. Bandaranayake, CJ.

This is an application for leave to appeal from the judgment of the High Court of the Western Province (Civil Appeals) holden at Gampaha dated 15.07.2008. By that judgment the learned Judges of the High Court had dismissed the appeal of the plaintiff-appellant, now deceased. Thereafter the widow of the said plaintiff-appellant (hereinafter referred to as the petitioner), preferred an application before this Court for leave to appeal.

When this application for leave to appeal was taken for support, learned President's Counsel for the defendants-respondents-respondents (hereinafter referred to as the respondents) raised a preliminary objection stating that the application for leave to appeal is out of time.

Since a preliminary objection was raised, both parties were heard on the said objection.

Learned President's Counsel for the respondents submitted that the judgment of the High Court was delivered on 15.07.2008 and in terms of the Supreme Court Rules, 1990, the time limit within which leave to appeal applications are to be filed is six (06) weeks from the impugned judgment and therefore the said application for leave to appeal should have been filed on or before 26.08.2008. Since the present application had been filed only on 01.09.2008, learned President's Counsel contended that it had been filed out of time.

Learned Counsel for the petitioner took up the position that since this is an application for leave to appeal from the judgment of the High Court, the Supreme Court Rules of 1990 would not be applicable to such an application. Accordingly, it was contended that since there are no Rules for this type of applications, the concept that applications must be filed within 'a reasonable time' should be applicable. It was also submitted that attention should be given to the circumstances of this application which warrants the indulgence of this Court.

Having stated the submissions made by the learned President's Counsel for the respondents and the learned Counsel for the petitioner, let me now turn to consider the said submissions

on the basis of the preliminary objection raised by the learned President's Counsel for the respondents.

The Supreme Court Rules of 1990, deal with many matters pertaining to appeals, applications, stay of proceedings and applications under Article 126 of the Constitution.

Part I of the said Rules, refers to three types of applications dealing with leave, which includes special leave to appeal, leave to appeal and other appeals. Rule 7 which is under the category of applications for special leave to appeal from the judgments of the Court of Appeal clearly states that such an application should be made within six seeks (6) of the impugned judgment. The said Rule is as follows:

> "Every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought."

In terms of Rule 7, it is quite clear that any application for special leave to appeal should be made within six weeks from the order, judgment, decree or sentence of the Court of Appeal on which such leave is sought.

It is however to be borne in mind that the said Rule 7 deals only with applications for special leave to appeal from the judgments of the Court of Appeal and the present application for leave to appeal is from a judgment of the Civil Appellate High Court of the Western Province holden at Gampaha.

As stated earlier categories B and C of Part I of the Supreme Court Rules, 1990 deal with leave to appeal and other appeals, respectively. Whilst the category of leave to appeal deals with instances, where Court of Appeal had granted leave to appeal to the Supreme Court, other appeals refer to all other appeals to the Supreme Court from an order, judgment, decree or

sentence of the Court of Appeal or any other Court or tribunal. Thus, it is evident that the present application for leave to appeal from the judgment of the High Court of the Western Province (Civil Appeal) holden at Gampaha would come under the said category C. The said section 28(1), which refers to such appeals is as follows:

> "28(1) Save as otherwise specifically provided by or under any law passed by Parliament, the provisions of this rule shall apply to all other appeals to the Supreme Court from an order, judgment, decree or sentence of the Court of Appeal or any other Court or tribunal" (emphasis is added).

It is therefore not correct to state that there are no rules made by the Supreme Court that would be applicable to applications for leave to appeal from the High Court of the Provinces to the Supreme Court.

Considering the preliminary objection raised by the learned President's Counsel for the respondent, it is also necessary to be borne in mind the nature of this application. It is not disputed that in this case the petitioner had filed action in the District Court of Gampaha seeking, *inter alia*, a declaration that the petitioner is entitled to the land described in the schedule to the plaint and a decree evicting the respondents from the land in question and placing the petitioner in vacant possession.

Direct applications for leave to appeal from the High Court to the Supreme Court came into being only after the establishment of High Courts of the Provinces. Until such time, according to the procedure that prevailed, such applications were preferred from the order, judgment, decree or sentence of the Court of Appeal. In such circumstances, if the Court of Appeal had not granted leave to appeal, an application could be made to the Supreme Court for special leave to appeal. Rules 19 and 20 of the Supreme Court Rules refer to this position and Rule

20(3) in particular, deals with the time frame in such applications. The said Rule 20(3) is as follows:

> "Where the Court of Appeal does not grant or refuse to grant leave to appeal, an application for special leave to appeal to the Supreme Court may be made in terms of Rule 7."

Rule 7 clearly states that every such application shall be made within six weeks of the order, judgment, decree or sentence of the Court of Appeal in respect of which special leave to appeal is sought.

Accordingly it is quite clear that a litigant, who is dissatisfied with the decree of a criminal matter, which had come before the High Courts (Civil Appellate) of the Provinces would have to prefer an application before the Supreme Court within six (6) weeks of the order, judgment, decree or sentence in question.

This position was considered by the Supreme Court in the light of the situation regarding an application made on the basis of an Arbitral Award in **George Stuart and Co. Ltd. V Lankem Tea and Rubber Plantations (Pvt.) Ltd.** ([2004] 1 Sri L.R. 246), where it was stated that,

> "When no provision is made in the relevant Act, specifying the time frame in which an application for leave to appeal be made to the Supreme Court and simultaneously when there are Rules providing for such situations, the appropriate procedure would be to follow the current Rules which govern the leave to appeal application to the Supreme Court. **Consequently such an application would have to be filed within 42 days from the date of the Award**" (emphasis added).

Accordingly, it is evident that an application for leave to appeal from the High Court (Civil Appeal) of the Provinces to the Supreme Court should be filed within 42 days from the date of the judgment.

It is not disputed that the judgment of the High Court was delivered on 15.07.2008. It is also not disputed that the petitioner had filed this leave to appeal application on 01.09.2008. It is therefore quite apparent that the petitioner had filed her application for leave to appeal well after 42 days and therefore the petitioner had not complied with the Supreme Court Rules 1990.

Learned Counsel for the petitioner contended that although there is a delay in filing the leave to appeal application, it was not intentional and was due to circumstances which prevailed at that time. His position was that the original plaintiff-appellant had passed away on 15.08.2008 and that considering the social and cultural background of our society it is common knowledge that during a period, where there had been a bereavement of a close relative, the matters connected therein would take precedence over litigation.

Learned Counsel for the petitioner contended that even though the Supreme Court Rules may specify a time limit in preferring an application to the Supreme Court for leave to appeal, there could be a waiver with regard to the said time frame based on the discretion of the Court. Learned Counsel for the petitioner relied on the decisions in **Nirmala de Mel v Seneviratne** ([1982] 2 Sri L.R. 569), and **Jafferjee v Perera** (C.L.W. Vol. 79 pg. 81).

In **Nirmala de Mel v Seneviratne** (supra), the preliminary objection raised by the respondent was on the basis that the petitioner in that case had no status to file the appeal before the order of Court to substitute her and that the appeal was out of time. The Court whilst holding that it was within time since it was filed on a Monday, which was the next working day and therefore had been within time had also held that the petitioner could file the petition of

appeal prior to being ordered to be substituted for the reason that there was a *lacuna* in the Supreme Court Rules and therefore the said steps taken could be regarded as regular.

It is to be noted that **Nirmala de Mel v Seneviratne** (supra) is a case decided well before the present Supreme Court Rules came into being. In the present application as clearly stated earlier, the facts are totally different to **Seneviratne's** (supra) case. As has been stated clearly, there is no *lacuna* in the Supreme Court Rules and the said Rules are quite clear on the time limit permitted for such applications.

In **Jafferjee and others** (supra) it was apparent that there had been compliance with the conditions on which conditional leave was obtained long before the time limit imposed by Court for such compliance was over.

The question that arises in the context of the aforementioned decisions is that, in terms of the provisions laid down in Rule 7 of the Supreme Court Rues, 1990 as to whether there is a discretion for the Court to ignore or vary the stipulated time period of 42 days.

As clearly stated in **L.A. Sudath Rohana v Mohamed Zeena and others** (S.C. H.C. C.A. L.A. No. 111/2010 – S.C. Minutes of 17.03.2011)) Rules of the Supreme Court are made in terms of Article 136 of the Constitution, for the purpose of regulating the practice and procedure of this Court. Similar to the Civil Procedure Code, which is the principal source of procedure, which guides the Courts of civil jurisdiction, the Supreme Court Rules regulates the practice and procedure of the Supreme Court.

The language used in Rule 7, clearly shows that the provisions laid down in the said Rule are mandatory and that an application for leave for this Court should be made within six weeks of the order, judgment, decree or sentence of the Court below of which leave is sought from the Supreme Court. In such circumstances it is apparent that it is imperative that the application should be filed within the specified period of six (6) weeks.

The position taken up by the petitioner was that the original plaintiff had obtained a copy of the judgment of the High Court with a view to lodge an application for leave to appeal in this Court, but had been seriously taken all and died on 15.08.2008. The petitioner submitted that she had to attend to the funeral of the original plaintiff, being her husband and the religious ceremonies and due to that she could not prefer this application within the stipulated time period.

It is to be noted that the judgment of the High Court was delivered on 15.07.2008 and the original plaintiff had died one month later on 15.08.2008. The present petitioner, who is the widow of the original plaintiff, had stated in her petition that by the time she sought legal advice from her Attorney-at-Law, she was informed that the appealable period of time had lapsed.

It is therefore quite clear that the petitioner was fully aware that by the time she took steps to prefer an application for leave to appeal before this Court, that appealable period of time had lapsed. Further it is to be borne in mind that in any event the original plaintiff-appellant had not filed an application for leave to appeal from the judgment of the High Court before his demise.

Considering all the circumstances it is apparent that it is not possible to consider those as mitigating factors when the petitioner had failed to take all steps to ensure that the leave to appeal application is preferred within the stipulated time limit.

For the reasons aforesaid, I hold that the petitioner had not complied with the Supreme Court Rules of 1990. A long time of cases of this Court had decided that non compliance with Rule 8(3) as well as Rule 28(3) would result in the dismissal of an application for leave for this Court (**K. Reaindran v K. Velusomasundram** (S.C. (Spl.) L.A. Application No. 298/99 – S.C. Minutes of 07.02.2000), **N.A. Premadasa v The People's Bank** (S.C. (Spl.) L.A. Application No. 212/99 – S.C. Minutes of 24.02.2000), **Hameed v Majibdeen and others** (S.C. (Spl.) L.A.

Application No. 38/2001 – S.C. Minutes of 23.07.2001), **K.M. Samarasinghe v R.M.D. Ratnayake and others** (S.C. (Spl.) L.A. Application No. 51/2001 – S.C. Minutes of 27.07.2001), **Soong Che Foo v Harosha K. De Silva and others** (S.C. (Spl.) L.A. Application No. 184/2003 – S.C. Minutes of 25.11.2003), **C.A. Haroon v S.K. Muzoor and others** (S.C. (Spl.) L.A. Application No. 158/2006 – S.C. Minutes of 24.11.2006), **Samantha Niroshana v Senarath Abeyruwan** (S.C. (Spl.) L.A. Application No. 145/2006 – S.C. Minutes of 02.08.2007), **A.H.M. Fowzie and two others v Vehicles Lanka (Pvt.) Ltd.** ((2008) B.L.R. 127), **Woodman Exports (Pvt.) Ltd. V Commissioner-General of Labour** (S.C. (Spl.) L.A. Application No. 335/2008 – S.C. Minutes of 13.12.2010), **L.A. Sudath Rohana v Mohamed Zeena and others** (supra). It is also to be noted that in **George Stuart and Co. Ltd.** (supra), the application for leave to appeal was rejected since it was filed out of time.

In the circumstances, for the reasons aforesaid, I uphold the preliminary objection raised by the learned President's Counsel for the respondents and dismiss the petitioner's application for leave to appeal.

I make no order as to costs.

Chief Justice.

P.A. Ratnayake, P.C., J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court