SRI LANKA SUPREME COURT **Judgement Delivered (2013)**

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Judgments Delivered in 2013

17/12/2013	SC. FR. Application No. 231/2012	1. Mani Nuwan Jayawardana 2. T.W.N. Priyanga 3. Oshadha Randika Jayawardana (minor) The Petitioners of 55/2T-37,Maitland Place, Colombo 07. Petitioners Vs. 1. D.M.D. Dissanayaka, Principal, D.S. Senanayake College, Gregory's Road, Colombo 07. 2. Mayura Samarasinghe (Secretary) 3. Mr. Prince 1st to 3rd Respondents of the Interview Board (on admission to Year 1, 2012), D.S. Senanayake College, Gregory's Road, Colombo 07. 4. Ranjith Jayasundara (President) 5. Mr. Prince 4th & 5th Respondents of the Appeal Board (on admission to Year 1, 2012), D.S. Senanayake College, Gregory's Road, Colombo 07. 6. Director- National Schools, Ministry of Education, "Isurupaya", Pelawatte, Battaramulla. 7. S.M.G. Jayaratne, Secretary Ministry of Education, "Isurupaya", Pelawatte, Battaramulla. 8. Hon. Attorney General Attorney General's Department, Colombo 12. Respondents
17/12/2013	SC. FR. No. 138/2013	1. Akuretiyage Onethra Amavindi Through her father 2. Akuretiyage Mahesh Kumar Lanka No. 6, Thotupala Lane, Poramba, Amabalangoda. Petitioners Vs. 1. M.G.O.P. Panditharatne Principal, Dharmashoka Vidyalaya, Ambalangoda. 2. T. Matheesha Deeptha De Silva 3. H.D.U. Chandima 4. W. Chandana Sisira 5. Sumith Petthawadu All members of the Interview Board (on admission to year 1 – 2013) Dharmashoka Vidyalaya, Ambalangoda 6. Wasantha Siriwardhena 7. A.W. Sriyani Chandrika 8. M. Anura De Silva 9. M. Janaka Wimalasuriya All members of the Appeal Board (on admission to year 1 – 2013), Dharmashoka Vidyalaya, Ambalangoda. 10. S.M.S.R. De Silva Through his mother K.K.A. Krishanthi No. 12, Watarauma Road, Enderamulla, Amabalangoda. 11. Hon. Bandula Gunawardena Minister of Education, Ministry of Education, Isurupaya, Battaramulla. 12. Gotabhaya Jayaratne Secretary, Ministry of Education, Isurupaya, Battaramulla. 13. Director- National Schools, Ministry of Education, Isurupaya, Battaramulla. 14. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
09/12/2013	SC Appeal No. 120/2011	Orient Financial Services Corporation Ltd.,No. 100 Hyde Park Corner, Colombo 2. Petitioner-Petitioner-Petitioner Appellant Vs. 1. Range Forest Officer Department of Forest Conservation Regional Office, Ampara. 2. Hon. Attorney General Attorney General's Department Colombo 12. Respondent-Respondents-Respondent Respondents
27/11/2013	Case No. S.C.F.R 352/2010	1. Ms. A.M. Noon 46/ 2, Lady Lavinia Housing, 1st Templers Mawatha, Templers Road, Mount Lavinia. 2. K.P. Noon, 46/ 2, Lady Lavinia Housing, 1st Templers Mawatha, Templers Road, Mount Lavinia. Petitioners Vs. 1. University Grants Commission, 20, Ward Place, Colombo 07. & three others Respondents

17/11/2013	SC. APPEAL. 113/2011	D. K. Abeysinghe 272, Kahatuduwa, Polgasowita. PLAINTIFF-APPELLANT-PETITIONER Vs. 1. M. M. Heen Manike 2. K. P. Tilakasiri Perera Both of 186, Sri Vijiragnana Mawatha, Maharagama DEFENDANTS-RESPONDENTS-RESPONDENTS
17/11/2013	SC. Appeal No. 46/05	Rohan Ajith Jude Silva, of Walauwwa, Kochchikade. SUBSTITUTED DEFENDANT- PETITIONER-APPELLANT-APPELLANT Vs. Y.B. Aleckman, of Alight Motor Works, Kochchikade. PLAINTIFF-RESPONDENT- RESPONDENT-RESPONDENT
17/11/2013	SC. HC. CA. LA. 103/2013	Tangerine Beach Hotel P.O. Box 195 No. 236, Galle Road, Colombo 03. 1st Defendant-Appellant-Petitioner Vs. Andew Errol Smith No. 20A, Emma Street Caulfied South Victoria 3162 – Australia. Formerly at No. 4.39, Plummer Road, Metone, Victoria 3194, Australia. Plaintiff-Respondent-Respondent 2. Mercantile Investments Limited Galle Road, Colombo 03. 3. Maggonage Wimalasena of No. 46, Gemunu Mawatha, Kalutara South, Kalutara. Defendants-Respondents-Respondents
17/11/2013	SC. HC. CA. LA. 102/2013	Tangerine Beach Hotel P.O. Box 195 No. 236, Galle Road, Colombo 03. 1st Defendant-Appellant-Petitioner Vs. Rodney Errol Smith No. 4/39 Plummer Road Mentone Victoria, 3194 – Australia. Plaintiff-Respondent-Respondent 1. Mercantile Investments Limited Galle Road, Colombo 03. 2. Maggonage Wimalasena of No. 46, Gemunu Mawatha, Kalutara South, Kalutara. Defendants-Respondents-Respondents
17/11/2013	SC. HC. CA. LA. 101/2013	Tangerine Beach Hotel P.O. Box 195 No. 236, Galle Road, Colombo 03. 1st Defendant-Appellant-Petitioner Vs. Ryan William Smith No. 27, Melibee Street, Blairgowrie, Victoria 3942 Australia. Formerly at No. 4/39, Plummer Road, Mentone, Victoria 3194, Australia. Plaintiff-Respondent-Respondent 1. Mercantile Investments Limited Galle Road, Colombo 03. 2. Maggonage Wimalasena of No. 46, Gemunu Mawatha, Kalutara South, Kalutara. Defendants-Respondents-Respondents
17/11/2013	S.C. Appeal 139/2011	Don Gunawardana Weththasinghe, Egaloya, Bulathsinhala. PLAINTIFF-APPELLANT-PETITIONER Vs. 1A. D. Ariyawathi Mudalige, Egaloya, Bulathsinhala. 2. M.D. Munidasa, Raigam Waththa, Haburugala. 3. A.A. Somapala, Kobawaka, Gowinna. 4. J.V. Ranawaka. Egaloya, Bulathsinhala. 5A. Soma Mahanthanthila Manjula, Kobawaka, Gowinna. 6. Samanpura Nimalsena, Meegahakumbura, Bulathsinhala. DEFENDANTS-RESPONDENTS-RESPONDENTS
17/11/2013	SC (FR) Application No.43/2008	Ediriweera Arukpatabandige Sugath Rohan Jayasuriya, 194/2, Polgahawelena, Debarawewa, Tissamaharama. Petitioner Vs. 1. Police Constable Manikkaratnam, Police Station, Tissamaharama. 2. Constable 63623, Police Station, Tissamaharama. & four others Respondents

17/11/2013	S.C. Appeal No. 161/2010	D.F.A. Kapugeekiyana, No. 29, Halgahadeniya Road, Kalapaluwawa, Rajagiriya. 2nd Petitioner-Petitioner-Appellant Vs. 1. Hon. Janaka Bandara Tennakone, Minister of Lands, Ministry of Lands, “Govijana Mandiraya”, No. 80/5, Rajamalwatta Road, Battaramulla. 2. District Land Officer, Acquiring Officer, Divisional Secretariat, Kaduwela. 3. Urban Development Authority, Sethsiripaya, Battaramulla. & four others
11/11/2013	SC. Appeal 98/2011	Karunarathna Liyanage, No. 102/1A, Poorwarama Road, Kirulapone, Colombo 05. Plaintiff Vs. Mahara Mudiyanselage Loku Bandara, No. 16A, Subithipura, Battaramulla. Defendant And Between Mahara Mudiyanselage Loku Bandara, No. 16A, Subithipura, Battaramulla. Defendant-Petitioner Vs. Karunarathna Liyanage, No. 102/1A, Poorwarama Road, Kirulapone, Colombo 05. Plaintiff-Respondent And Between Mahara Mudiyanselage Loku Bandara, No. 16A, Subithipura, Battaramulla. Defendant-Petitioner-Petitioner Vs. Karunarathna Liyanage, No. 102/1A, Poorwarama Road, Kirulapone, Colombo 05. Plaintiff-Respondent-Respondent And Now Between Karunarathna Liyanage, No. 102/1A, Poorwarama Road, Kirulapone, Colombo 05. Plaintiff- Respondent-Respondent Petitioner Vs. Mahara Mudiyanselage Loku Bandara, No. 16A, Subithipura, Battaramulla. Defendant-Petitioner-Petitioner- Respondent
11/11/2013	S.C. Spl. L.A. No. 37/2012	Leon Peris Kumarasinghe, No. 23, Church Road, Nuwara Eliya. Respondent-Petitioner-Appellant-Petitioner Vs. Samantha Weliveriya, Director General, Sri Lanka Broadcasting Corporation, Torrington Square, Colombo 07. Applicant-Respondent-Respondent- Respondent
24/10/2013	SC (FR) Application No. 278/2008	1. Malalage Chaminda Tissa Peiris, 601/72/14, Thammanakulama, Anuradhapura. (now deceased) PETITIONER 1A. Malalage Gunadasa Peiris, No. 41/9, Wijaya Mawatha, Isurupura, Anuradhapura, SUBSTITUTED - PETITIONER -Vs- 1. Mr. Hettigedara Weerakoon, Inspector of Police, Police Station, Anuradhapura. 2. T.D.M.S. Nishanka, Police Officer in Charge (Traffic), Police Station, Anuradhapura. 3. Mr. Hettiarachchi, Inspector of Police, Police Station, Anuradhapura. 4. Mr. Withana, Sub-Inspector of Police, Police Station, Anuradhapura. 5. Mr. P.M. Wijeratne, Officer in Charge, Police Station, Anuradhapura. 6. Mr. Sarath Prema, Head Quarters Inspector of Police, Police Station, Anuradhapura. 7. Jayantha Wickramaratne, Inspector General of Police, Police Head Quarters, Colombo 01. 8. Hon. Attorney General, Attorney General’s Department, Colombo 02. RESPONDENTS
09/10/2013	SC. Appeal 80/2010	Mrs. M.L.R. Fernando “Gaya”, Nalluruwa, Panadura. Plaintiff Vs. Mrs. I.M.R. Perera of No. 354/2, Galle Road, Panadura. Defendant And Mrs. M.L.R. Fernando “Gaya”, Nalluruwa, Panadura. Plaintiff-Appellant Vs. Mrs. I.M.R. Perera of No. 354/2, Galle Road, Panadura. Defendant-Respondent And Between Mrs. I.M.R. Perera of No. 354/2, Galle Road, Panadura. Defendant-Respondent-Petitioner Vs. Mrs. M.L.R. Fernando “Gaya”, Nalluruwa, Panadura. Plaintiff-Appellant-Respondent

30/09/2013	S.C. Appeal No. 33A/2012	Nambukara Wakwellagamage Sujatha Janaki 257/l, Kosgahahena, Pannipitiya. Plaintiff vs 1.Milani Nimeshika Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. 2.Premadasa Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. 3.Dayawathi Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. Defendants AND BETWEEN 1.Milani Nimeshika Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. 1 s t Defendant-Petitioner vs Nambukara Wakwellagamage Sujatha Janaki 257/l, Kosgahahena, Pannipitiya. Plaintiff-Respondent AND NOW BETWEEN Premadasa Kariyawasam, No.19, Avissawella Road, K irulapona, Colombo 05. Dayawathi Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. 2 nd & 3 rd Defendant-Respondents AND NOW BETWEEN Milani Nimeshika Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. 1 s t Defendant-Petitioner-Appellant vs. Nambukara Wakwellagamage Sujatha Janaki 257/l, Kosgahahena, Pannipitiya. Plaintiff-Respondent-Respondent Premadasa Kariyawasam, No.19, Avissawella Road, K irulapona, Colombo 05. 2 nd Defendant-Respondent-Respondent Dayawathi Kariyawasam, No.19, Avissawella Road, Kirulapona, Colombo 05. Presently at 22/5/C, Nandimithra Place, (Robert Drive), Colombo 06. 3 rd Defendant- Respondent-Respondent.
25/09/2013	SC. Appeal 21/2013	Solaimuthu Rasu, Dickson Corner Colony, Stafford Estate, Ragala, Halgranaoya. Petitioner-Appellant Vs. 1. The Superintendent Stafford Estate, Ragala, Halgranaoya. 2. S.C.K. De Alwis Consultant/Plantation Expert, Plantation Reform Project, Ministry of Plantation Industries, Colombo 04. 3. The Attorney-General, Attorney-General's Department, Colombo 12. Respondent-Respondents AND NOW BETWEEN 1. The Superintendent Stafford Estate, Ragala, Halgranaoya. 2. S.C.K. De Alwis Consultant/Plantation Expert, Plantation Reform Project, Ministry of Plantation Industries, Colombo 04. 3. The Attorney-General, Attorney-General's Department, Colombo 12. Respondents-Respondents-Petitioners Vs. Solaimuthy Rasu, Dickson Corner Colony, Stafford Estate, Ragala, Halgranaoya. Petitioner -Appellant-Respondent
25/09/2013	SC. Appeal 21/2013	Solaimuthu Rasu, Dickson Corner Colony, Stafford Estate, Ragala, Halgranaoya. Petitioner-Appellant Vs. 1. The Superintendent Stafford Estate, Ragala, Halgranaoya. 2. S.C.K. De Alwis Consultant/Plantation Expert, Plantation Reform Project, Ministry of Plantation Industries, Colombo 04. 3. The Attorney-General, Attorney-General's Department, Colombo 12. Respondent-Respondents AND NOW BETWEEN 1. The Superintendent Stafford Estate, Ragala, Halgranaoya. 2. S.C.K. De Alwis Consultant/Plantation Expert, Plantation Reform Project, Ministry of Plantation Industries, Colombo 04. 3. The Attorney-General, Attorney-General's Department, Colombo 12. Respondents-Respondents-Petitioners Vs. Solaimuthy Rasu, Dickson Corner Colony, Stafford Estate, Ragala, Halgranaoya. Petitioner -Appellant-Respondent

25/09/2013	SC. Appeal 21/2013	Solaimuthu Rasu, Dickson Corner Colony, Stafford Estate, Ragala, Halgranaoya Petitioner-Appellant Vs. 1. The Superintendent Stafford Estate, Ragala, Halgranaoya. 2. S.C.K. De Alwis Consultant/Plantation Expert, Plantation Reform Project, Ministry of Plantation Industries, Colombo 04. 3. The Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondents AND NOW BETWEEN 1. The Superintendent Stafford Estate, Ragala, Halgranaoya. 2. S.C.K. De Alwis Consultant/Plantation Expert, Plantation Reform Project, Ministry of Plantation Industries, Colombo 04. 3. The Attorney General, Attorney General's Department, Colombo 12. Respondent-Respondents-Petitioners Vs. Solaimuthu Rasu, Dickson Corner Colony, Stafford Estate, Ragala, Halgranaoya Petitioner-Appellant-Respondent
04/08/2013	SC FR APPLICATION No. 414/2010	H.R.S. Dharmasiri, No.25/2, Galapitamada Road, Avissawella. PETITIONER -Vs- 1. Provincial Director of Health Services of the Sabaragamuwa Province, Office of the Provincial Director of Health Services, No. 75, Dharamapala Mawatha, Ratnapura. 2. Deputy Provincial Director of the Health Services (Finance) of the Sabaragamuwa Province, Office of the Provincial Director of Health Services, No. 75, Dharamapala Mawatha, Ratnapura. 3. Governor of the Sabaragamuwa Province, Office of the Governor of the Sabaragamuwa Province, Ratnapura. 4. Chief Secretary of the Sabaragamuwa Province, Office of the Chief Secretary of the Sabaragamuwa Province, Ratnapura. 5. The Secretary to the Ministry of Health of the Sabaragamuwa Province, Office of the Secretary to the Ministry of Health of the Sabaragamuwa Province, Ratnapura. 6. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
04/08/2013	SC CHC APPEAL No. 43/2010	Lionair (Private) Limited, Colombo Airport, Ratmalana. DEFENDANT-APPELLANT -Vs- Ceylinco Leasing Corporation Limited., No. 97, Hyde Park Corner, Colombo 02. PLAINTIFF-RESPONDENT
31/07/2013	SC Appeal No. 14/2012	Indrasena Arasaratnam Kenneth Virasinghe, C/O Air Vice Marshal A.B. Sosa, No. 36/4A, Sri Medhananda Avenue, Off Sujatha Road, Kalubowila, Dehiwela. PLAINTIFF – PETITIONER – RESPONDENT – APPELLANT -VS- Vajira Kalinga Wijewardena, No. 21/4, Buller's Lane, Colombo 07. 4TH DEFENDANT – RESPONDENT – PETITIONER - RESPONDENT
29/07/2013	SC. CHC. No. 41/2004	Peoples Bank, No.75 Sir Chittampalam A. Gardiner Mawatha, Colombo 02 Plaintiff-Appellant Vs. Good Fellows (Pvt) Ltd., No. 50/22 Mayura Place, Colombo 05 Defendant-Respondent

29/07/2013	SC (CHC) Appeal No. 55/2006	1. Araliya Impex (Private) Limited No. 69, Old Moor Street, Colombo 12. 2. Mylvaganam Rajkumar No. 58/24, Templers Road, Mount Lavinia. 3. Liyanage Mahesh Paul De Silva St. Leonards Kohalwila, Kelaniya. Defendants-Appellants -Vs.- Bank of Ceylon No. 04, Bank of Ceylon Mawatha, Colombo 1. Plaintiff-Respondent
17/07/2013	SC. Appeal 165/2010	1. Seyed Shahabdeen Najimuddin of No. 357, Peradeniya Road, Kandy. 2. Pichchei Hadjiar Shahabdeen of No. 357, Peradeniya Road, Kandy. Plaintiffs Vs. 1. Thureiratnam Nageshwari nee Sunderalingam of No. 307, Peradeniya Road, Kandy. 2. K.W.G. Chandrani Mangalika of No. 8/A, , Peradeniya Road, Kandy. 3. Anthony Sandanam of No. 8/A, Peradeniya Road, Kandy. 4. W.M.W.B. Weerabahu of No. 307, Peradeniya Road, Kandy. Defendants And Between 4. W.M.W.B. Weerabahu of No. 307, Peradeniya Road, Kandy. 4th Defendant-Appellant Vs. 1. Seyed Shahabdeen Najimuddin of No. 357, Peradeniya Road, Kandy. 2. Pichchei Hadjiar Shahabdeen of No. 357, Peradeniya Road, Kandy. Deceased-Plaintiff-Respondents 1a. S.N. Fathima Rushana 1b. S.N. Mohamed Zawahir 1c. S.N. Fathima Rizmiya 1d. S.N. Fathima Shihara 1e. S.N. Mohamed Zahir 1f. S.N. Fathima Saffna all of No. 12/5, Riverdale Road, Anniwatte, Kandy. Substituted-Plaintiff-Respondents 1. Thureiratnam Nageshwari nee Sunderalingam of No. 307, Peradeniya Road, Kandy. 2. K.W.G. Chandrani Mangalika of No. 8/A, , Peradeniya Road, Kandy. 3. Anthony Sandanam of No. 8/A, Peradeniya Road, Kandy. Defendant-Respondents And Now Between 1a. S.N. Fathima Rushana 1b. S.N. Mohamed Zawahir 1c. S.N. Fathima Rizmiya 1d. S.N. Fathima Shihara 1e. S.N. Mohamed Zahir 1f. S.N. Fathima Saffna all of No. 12/5, Riverdale Road, Anniwatte, Kandy. Substituted-Plaintiff-Respondents Petitioners 4. W.M.W.B. Weerabahu of No. 307, Peradeniya Road, Kandy. 4th Defendant- Appellant-Respondent 1. Thurairatnam Nageshwary nee Sunderalingam of No. 307, Peradeniya Road, Kandy. 2. K.W.G. Chandrani Mangalika of No. 8/A, , Peradeniya Road, Kandy. 3. Anthony Sandanam of No. 8/A, Peradeniya Road, Kandy. Defendant-Respondent-Respondents
02/07/2013	SC FR No. 313/09	1. Ven. Walahahangunawewa Dhammarathana Thero Rajamaha Viharaya Mihintale. 2. Ven. Mihintale Seelarathane Rajamaha Viharaya Mihintale. Petitioners Vs. 1. Sanjeewa Mahanama Officer-in-Charge Police Station Mihintale. 2. Chandana WeerarathnaWaduge Kandy Road,Mihintale. 3. Inspector General of Police Police Head Quarters Colombo 01. 4. Hon. Attorney General Attorney General's Department Colombo 12. Respondents
28/06/2013	SC RULE 03/2011	Nimal Jayasiri Weerasekara, Attorney - at - Law of the Supreme Court RESPONDENT Secretary, Bar Association of Sri Lanka, Colombo 12. COMPLAINANT -VS- Mr. Nimal Jayasiri Weerasekara, Attorney – at – Law, No. 21 A, Cooray Mawatha, Moragasmulla, Rajagiriya. RESPONDENT

28/06/2013	S.C. Appeal No. 67/2013	Hon. Attorney General, Attorney General's Department, Colombo 12. PETITIONER - APPELLANT -VS- Dr.Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, Residence of the Chief Justice of Sri Lanka, 129, Wijerama Mawatha, Colombo 07. Presently at: No. 170, Lake Drive, Colombo 08. PETITIONER - RESPONDENT 01. Hon. Chamal Rajapakse, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenapura, Kotte. 02. Hon. Anura Priyadarshana Yapa, Eriyagolla. Yakwilla. 03. Hon. Nimal Siripala De Silva, 93/20, Elvitigala Mawatha, Colombo 08. 04. Hon. A.D. Susil Premajayantha, 123/1, Station Road, Gangodawila, Nugegoda. 05. Hon. Rajitha Senaratne, CD 85, Gregory's Road, Colombo 07. 06. Hon. Wimal Weerawansa, 18, Rodney Place, Cotta Road, Colombo 08. 07. Hon. Dilan Perera, 30, Bandaranayake Mawatha, Badulla. 08. Hon. Neomal Perera, 3/3, Rockwood Place, Colombo 07. 09. Hon. Lakshman Kiriella, 121/1, Pahalawela Road, Palawatta, Battaramulla. 10. Hon. John Amaratunga, 88, Negambo Road, Kandana. 11. Hon. Rajav Arothiam Sampathan, 2D, Summit Flats, Keppetipola Road, Colombo 05. 12. Hon. Vijitha Herath, 44/3, Medawaththa Road, Mudungoda, Miriswatta, Gampaha. 13. Hon. W.B.D. Dassanayake, Secretary General of Parliament, Parliament Secretariat, Parliament of Sri Lanka, Sri Jayawardenepura Kotte. RESPONDENT -RESPONDENTS
27/06/2013	S.C. Appeal 214/12	Mr M.R.M. Ramzeen, Competent Authority, Sri Lanka Ports Authority. Colombo. Complainant Vs. Morgan Engineering (Pvt) Ltd., No. 31A, Morgan Road, Colombo 2. Respondent AND BETWEEN Morgan Engineering (Pvt) Ltd., No. 31A, Morgan Road, Colombo 2. Respondent-Petitioner Vs. Mr. L.H.M.B.B. Herath, Chief Manager Welfare and Industrial Relations, Sri Lanka Ports Authority, Colombo 01. Complainant-Respondent . AND BETWEEN Morgan Engineering (Pvt) Ltd., No. 31A, Morgan Road, Colombo 2. Respondent-Petitioner-Petitioner Vs. Mr. L.H.M.B.B. Herath, Chief Manager Welfare and Industrial Relations, Sri Lanka Ports Authority, Colombo 01. Complainant-Respondent-Respondent AND NOW BETWEEN Mr. L.H.M.B.B. Herath, Chief Manager Welfare and Industrial Relations, Sri Lanka Ports Authority, Colombo 01. Complainant-Respondent-Respondent-Petitioner Vs. Morgan Engineering (Pvt) Ltd., No. 31A, Morgan Road, Colombo 2. Respondent-Petitioner- Petitioner-Respondent
25/06/2013	SC Appeal No 38 - 39/06	Hatton National Bank Limited, No. 479, T.B. Jayah Mawatha, Colombo 10. CLAIMANT–RESPONDENT-APPELLANT -VS- 1. Casimir Kiran Atapattu 2. Tracy Judy de Silva Carrying on business in partnership under the name, style and firm of M/s Soul Entertainments of No. 400/60/7, Bauddhaloka Mawatha, Colombo 07. RESPONDENT-PETITIONER-RESPONDENT

14/06/2013	SC. Appeal No. 68/2012	Krishnan Nalinda Priyadarshana No. 55, Galabadawatta, Pitumpe, Padukka. Plaintiff Vs. 1. Kandana Arachchige Nilmini Dhammika Perera Ulagalle, Kosgashena, Paddukka, 2. Koddula Arachchige Lalith Perera Ulagalle, Kosgashena, Padukka. 3. Illukkumburaga Ruwan Kapila Nawasinghe 56B, Galabadawatta, Pitumpe, Padukka. Defendants And Between 1. Kandana Arachchige Nilmini Dhammika Perera Ulagalle, Kosgashena, Paddukka. 2. Koddula Arachchige Lalith Perera Ulagalle, Kosgashena, Padukka. 3. Illukkumburaga Ruwan Kapila Nawasinghe 56B, Galabadawatta, Pitumpe, Padukka. Defendant-Appellants Vs. Krishnan Nalinda Priyadarshana No. 55, Galabadawatta, Pitumpe, Padukka. Plaintiff-Respondent And Now Between 2. Koddula Arachchige Lalith Perera Ulagalle, Kosgashena, Padukka. 3. Illukkumburaga Ruwan Kapila Nawasinghe 56B, Galabadawatta, Pitumpe, Padukka. 2nd & 3rd Defendant- Appellant-Appellants Vs. Krishnan Nalinda Priyadarshana No. 55, Galabadawatta, Pitumpe, Padukka. Plaintiff-Respondent- Respondent 1. Kandana Arachchige Nilmini Dhammika Perera Ulagalle, Kosgashena, Paddukka, 1st Defendant-Appellant- Respondent
14/06/2013	SC. Appeal No. 67/2012	Krishnan Nalinda Priyadarshana No. 55, Galabadawatta, Pitumpe, Padukka. Plaintiff Vs. 1. Kandana Arachchige Nilmini Dhammika Perera Ulagalle, Kosgashena, Paddukka, 2. Koddula Arachchige Lalith Perera Ulagalle, Kosgashena, Padukka. 3. Illukkumburaga Ruwan Kapila Nawasinghe 56B, Galabadawatta, Pitumpe, Padukka. Defendants And Between 1. Kandana Arachchige Nilmini Dhammika Perera Ulagalle, Kosgashena, Paddukka. 2. Koddula Arachchige Lalith Perera Ulagalle, Kosgashena, Padukka. 3. Illukkumburaga Ruwan Kapila Nawasinghe 56B, Galabadawatta, Pitumpe, Padukka. Defendant-Appellants Vs. Krishnan Nalinda Priyadarshana No. 55, Galabadawatta, Pitumpe, Padukka. Plaintiff-Respondent And Now Between Kandana Arachchige Nilmini Dhammika Perera Ulagalle, Kosgashena, Paddukka, 1st Defendant-Appellant- Appellant Vs. Krishnan Nalinda Priyadarshana No. 55, Galabadawatta, Pitumpe, Padukka. Plaintiff-Respondent- Respondent 2. Koddula Arachchige Lalith Perera Ulagalle, Kosgashena, Padukka. 3. Illukkumburaga Ruwan Kapila Nawasinghe 56B, Galabadawatta, Pitumpe, Padukka. 2nd & 3rd Defendant- Appellant- Respondents.
14/06/2013	SC Appeal No. 158/2010	1. Samastha Lanka Nidahas Grama Niladhari Sangamaya, No.10A, Nawagampura - Stage 2, Wallampitiya, Colombo 14. 2. Chandra Kayseen Jayasuriya, President, Samastha Lanka Nidahas Grama Niladhari Sangamaya, No.10A, Nawagampura - Stage 2, Wallampitiya, Colombo 14, residing at Ridiyagama Road, Galalethota, Ambalantota 3. R.M. Sirisena, Secretary Samastha Lanka Nidahas Grama Niladhari Sangamaya, No.10A, Nawagampura - Stage 2, Wallampitiya, Colombo 14, residing at Ihalawawa, Kiralogama PETITIONERS – APPELLANTS -VS- 1. D. Dissanayake Secretary, Public Administration and Ministry of Home Affairs, Torrington Square, Colombo 7. 2. Ms. P. Siriwardena Director General of Establishment, Ministry of Public Administration and Home Affairs, Torrington Square, Colombo 7. RESPONDENTS - RESPONDENTS

17/05/2013	S.C.H.C. L.A. 86/12	1. Kamkaru Sevana, 10/1, Attidiya Road Ratmalana. 2. M.D.M. Senarathne No. 255/5B/1, Saman Mawatha, Nedimala, Dehiwala. 3. Mala Dassanayake, 43,Punsarawatte, Bettegama, Panadura. 4. K. Illangakoon, 133/3, 6th Lane, Uyana, Moratuwa. 5. Sunil Gajasinghe, 35, Goluma Pokuna Mawatha, Bolawalana, Negombo. 6. Sanet Dikkumbura , No. 99, Sri Gnanalankara Mawatha, Kalubowila, Dehiwala 7. Ranjith Liyanage 28, Araliya Mawatha, Sirimal Uyana, Ratmalana. 8. M. Sunitha Perera, Agamethi Mawatha, Bandaragama. Petitioners Vs. 1. Kingsly Perera, 10/1, Attidiya Road, Ratmalana. 2. Upali Gunarathne 59/1, Main Road, Attidiya, Ratmalana. 3. Nirmalan Daas 267/25, Galle Road, Colombo 03. 4. Lakshman Kumara Meragalla 213/21, Balika Niwasa Road, Rukmale, Pannipitiya. Respondents AND NOW In the matter of a Leave to Appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Articles 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka. 1. Kamkaru Sevana, 10/1, Attidiya Road Ratmalana. 2. M.D.M. Senarathne No. 255/5B/1, Saman Mawatha, Nedimala, Dehiwala. 3. Mala Dassanayake, 43, Punsarawatte, Bettegama, Panadura. 4. K. Illangakoon 133/3, 6th Lane, Uyana, Moratuwa. 5. Sunil Gajasinghe, 35, Goluma Pokuna Mawatha, Bolawalana, Negombo. 6. Sanet Dikkumbura No. 99, Sri Gnanalankara Mawatha, Kalubowila, Dehiwala 7. Ranjith Liyanage 28, Araliya Mawatha, Sirimal Uyana, Ratmalana. 8. M. Sunitha Perera, Agamethi Mawatha, Bandaragama. Petitioners-Petitioners Vs. 1 Kingsly Perera, 10/1, Attidiya Road, Ratmalana. 2. Upali Gunarathne 59/1, Main Road, Attidiya, Ratmalana. 3. Nirmalan Daas, 267/25, Galle Road, Colombo 03. 4. Lakshman Kumara Meragalla 213/21, Balika Niwasa Road, Rukmale, Pannipitiya. Respondents-Respondents
08/05/2013	SC. Appeal No. 117/2010	Hewa Kankanamage Pushpa Rajani No. 13, 1st Chapel Lane Wellawatta. Applicant Vs. Ruhunuge Sirisena 13A, 1st Chapel Lane, Wellawatta. Respondent And Between Ruhunuge Sirisena 13A, 1st Chapel Lane, Wellawatta. Respondent-Appellant Hewa Kankanamage Pushpa Rajani No. 13, 1st Chapel Lane Wellawatta. Applicant-Respondent And Now Between Ruhunuge Sirisena, 13A, 1st Chapel Lane, Wellawatta. Respondent-Appellant- Appellant Hewa Kankanamage Pushpa Rajani No. 13, 1st Chapel Lane Wellawatta. Applicant--Respondent- Respondent

07/05/2013	S.C.F.R. Application 620/10	1. Dharmakeerthi Ranathungage Gamini Senadheera, Hathpokuna, Polpitigama. 2. Madduma Patabendige Vidura, No. 15, Dharmaraja Mawatha, Issadeen Town, Matara. 3. Wanigasinghe Arachchige Ajith Senarathne, “Wasana, Araliya Mawatha, Puwakdandawa, Beliatta. 4. Kutti Pathira Amila Indrajith Pathirana, Heenmulla, Dharga Town 5. Abdul Asis Badar Niza, 4/82, Aluth Ala Road, Pinarawa, Badulla. 6. Pannipitiya Arachchige Sunil, 422, Government Servants Scheme, New Town, Polonnaruwa. 7. Konara Mudiyanselage Karunaratne, Panwewa, Balalla. 8. Mestiyage Don Badra Namali Gunatilake, 338/1, Bopatta Road, Gothatuwa, Angoda. 9. Aluthge Dona Padma Priyanthi, 346/A, Kuruppuhena, Malamulla,\ Panadura. 1 10. Heiyanthuduwage Suneetha Ratnayake, 199, Koswatta, Kalapaluwawa Road, Thalangama North. 11. Serasingha Mudiyanselage Janaka Kumara Serasingha, Pugalla Road, Kalugamuwa, Kurunegala. 12. Gamaralage Champika, 34, Meegastenna, Yatiyantota. 13. Agra Nanda Kumara Walawage, No. 8A, Sarasavi Garden, Nawala Road, Nugegoda. 14. Hiruwalage Chandrawathi Menike, 218, Polagena Mawatha, Rendapola, Dodangoda. 15. Kurukulasuriya Tharanga Fernando, 127/12, Linton Estate, Palathota, Kalutara South. 16. Danansuriya Arachchilage Kamal Dammika Kumara, 596A, Iriyagolla Road, Pahathgama, Hanwella. 17. Wickremasinghe Arachchige Saliya Wijaya Wickremasinghe, 108/2, Old Road, Pannipitiya. 18. Ansley Anuruddha Liyanage, 246/2, Kendaliyaddapaluwa, Ganemulla. 19. Halahapperumage Wimal Jayasiri Fonseka, 109/E, Bopitiya, Pamunugama. 20. Aparekkage Siril Ananda Perera, 281/6, 6th Lane, Pamunuwa Road, Maharagama. 2 21. Warakagoda Withanage Kokila Devi, Sriyani, 158, New Road, Palathota, Kalutara South. 22. Maduwe Gurusingha Anuradha Nishamani Silva, 126/2,Kitulawila Road, Kiriwaththuduwa. 23. Nalini Sunil Shantha, 257, Morawatta, Ruwanwella. 24. Munasinghe Arachchige Nirmala Geethanjalee, 11/5, Arliya Uyana, Depanama, Pannipitiya. Petitioners Vs. 1. Commissioner General of Labour, Labour Secretariat, P.O. Box 575, Colombo 5. 2. Labour Commissioner(Administration), Labour Secretariat, Narahenpita, Colombo 5. 3. Secretary, Ministry of Labour Relations and Productiivity Promotions, Labour Secretariat, Narahenpita, Colombo 5. 4. The Hon. Attorney-General, Attorney General's Department, Colombo 12. Respondents
03/05/2013	S.C. F.R. Application No. 367/10	Ravindra Lasantha Pathinayaka No. 314, Kaduwela Road, Koswatta, Thalangama North, Battaramulla. Petitioner Vs. 1. Bandara Police Sergeant (26433) Police Emergence Calling Unit, No. 03, Mihindu Mawatha, Colombo 12. 2. Thennakoon Police Constable (30032) Police Emergence Calling Unit, No. 03, Mihindu Mawatha, Colombo 12. SC. FR. No. 367/10 2 3. Anura Silva Assistant Superintendent of Police, Motor Traffic Division (Colombo North), No. 03, Mihindu Mawatha, Colombo 12. 4. Kapilarathne Officer-in-Charge, Police Emergence Calling Unit, No. 03, Mihindu Mawatha, Colombo 12. 5. The Inspector General of Police Police Headquarters, Colombo 01. 6. Hon. Attorney General Attorney General’s Department, Colombo 12. Respondents

05/04/2013	S.C.H.C. C.A. L.A. 277/11	Illangakoon Mudiyanselage Gnanathilaka Illangakoon, Bulupitiya, Uhumeeya, Kurunegala. Plaintiff-Respondent-Petitioner Vs. Anula Kumarihamy Lenawela, Lenawela Defendant-Appellant- Respondent
04/04/2013	S.C. (CHC) No. 11/2002	Master Feeds Limited, 14/2, Tower Building, 25, Station Road, Colombo 04. Defendant-Appellant Vs People's Bank No.75, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. Plaintiff-Respondent
26/02/2013	SC.FR No. 536/2010	T.R.Ratnasiri 23/4, Makola South, Makola. PETITIONER-PETITIONER Vs. 1. P.B.Jayasundara Secretary to the Ministry of Finance and Planning, The Secretariat Building, Colombo 01. 2. Sarath Jayathilake 117/30, Ananda Rajakaruna Mawatha, Colombo 10. 3. Thilak Perera Director of Customs, 40, Main Street, Colombo 11. 4. Director General of Customs Sri Lanka Customs Department, 40, Main Street, Colombo 12. Sudharma Karunarathna (May 2010-Jan 2012) Now the Secretary, Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 2. Neville Gunawardena (Jan 2012- December 2012) Now Director General Trade & Investment Policy, Ministry of Finance , General Secretariat, Colombo 1. Jagath Wijeweera (Dec 2012 to date) 5. Board of Investment of Sri Lanka, West Tower, World Trade Centre, Echelon Square, Colombo 01. 6. Colombo Dockyard Ltd, P.O.Box. 906, Port of Colombo, Colombo 15. 7. Mohan Pieris Former Attorney General, 3-14D, Kynsey Road, Colombo 8. 8. Attorney-General Attorney-General's Department, Colombo 12. RESPONDENTS-RESPONDENTS
22/02/2013	SC FR Application No. 448/2009	1. Amura Deshapriya Alles, No. 83/A, Kajugahawatta, Gothatuwa, Angoda. 2. Gamunu Thissa Lankathillaka Vithanage, "Sandakalum" Galathara, Mawanella. PETITIONERS -VS- 1. Road Passenger Services Authority of the Western Province, No. 59 Robert Gunawardena Mawatha, Battaramulla; and 15 others, all of the said Road Passenger Services Authority of the Western Province; 17. H.K.Asoka Wickckramanayake, No.16/1, Giridara, Kapugoda; 18. P.L.R.P.C Wijewarnasooriya, Samagi Mawatha, off Fathima Mawatha, Kalamulla, Kalutara; 19. Hon. Attorney General, Attorney Generals Department, Colombo 12. RESPONDENTS
22/02/2013	SC Appeal No. 85/2004	Competent Authority Pugoda Textiles Lanka Ltd. 997/15, Sri Jayawardenapura Mawatha Welikada Rajagiriya, and Three Others. 2. Charitha Ratwatte Secretary to the Treasury The Secretariat Colombo 01. RESPONDENTS-APPELLANTS -VS 1. W.A.Richard Ratnasiri Pelpita, Pugoda, and Two Thousand Sixty Two Others PETITIONERS – RESPONDENTS
22/02/2013	SC Appeal 30-31/2005	Kiran Atapattu, 40/60/7, Bauddhaloka Mawatha, Colombo 07. CLAIMANT-PETITIONER-APPELLANT VS Janashakthi General Insurance Co. Ltd., of No. 467, Muttiah Road, Colombo 03. RESPONDENT-RESPONDENT-RESPONDENT

22/02/2013	SC. FR. Application No. 431/2010	Warnakulasooriya Sunil Asoka Harischandra Fernando. Petitioner -Vs.- 1. Police Sergeant Dayawansa (Service No. 25084) Police Station, Madampe. 2. Sub Inspector Piyaseeli Police Station, Madampe. 3. Inspector of Police H.J.M.D. Indrajith Officer-in-Charge Police Station, Madampe. 4. Inspector General of Police, Police Head Quarters, Colombo 01. 5. Hon. Attorney General The Attorney General's Department, Colombo 12. Respondents
22/02/2013	SC SPL LA No. 173/2011	Mr. A.M. Ratnayake G 4/2, Railway Bungalow, Bungalow Road, Ratmanala Presently at No 101/2, adjoining to the temple Panadura PETITIONER-PETITIONER VS 1. Administrative Appeals Tribunal, No.5, Dudly Senanayake Mawatha, Colombo 08. 2. Justice N.E. Dissanayake, Chairman, Administrative Appeals Tribunal, No.5, Dudly Senanayake Mawatha, Colombo 08. 3. Justice Andrew Somawansa, Member, Administrative Appeals Tribunal, No.5, Dudly Senanayake Mawatha, Colombo 08. 4. Mr. E. T. A. Balasingham Member, Administrative Appeals Tribunal, No.5, Dudly Senanayake Mawatha, Colombo 08. 5. Vidyajothi Dr. Dayasiri Fernando Chairman, Public Service Commission, No. 177, Nawala Road, Narahenpita. 6. Mr. Palitha M. Kumarasinghe P.C. Member, Public Service Commission, No. 177, Nawala Road, Narahenpita. 7. Mrs. Sirimjavo A. Wijeratna Member, Public Service Commission, No. 177, Nawala Road, Narahenpita. 8. Mr. S.C. Mannapperuma, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita 9. Mr. Ananda Seneviratne Member, Public Service Commission, No. 177, Nawala Road, Narahenpita 10. Mr. N.H. Pathirana, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita 11. Mr. S. Thillandarajah, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita 12. Mr. M.D.W. Ariyawansa, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita 13. Mr. A. Mohamed Nahiya Member, Public Service Commission, No. 177, Nawala Road, Narahenpita. 14. Secretary, Public Service Commission, 11th Floor, West Tower, World Trade Centre, Colombo 01. 15. General Manager Railways, Railways Headquarters, Colombo 10. 16. Inquiring Officer Public Service Commission, Administrative Appeals Tribunal No. 5, Dudley Senanayake Mawatha Colombo 08. 17. Secretary, Ministry of Transport (Railways) D.R. Wijayawardena Mawatha, Maradana, Colombo 08. 18. Hon. Attorney General Attorney – General's Department, Colombo 12. RESPONDENT–RESPONDENT 19. Mr. Edmond Jayasooriya, Member, Administrative Appeals Tribunal No. 5, Dudley Senanayake Mawatha Colombo 08.
20/02/2013	S.C. Rule No. 01/2010	Mr. D. M. A. Jeewananda Dissanayake, No. 12K Ruben Perera Mawatha, Boralesgasmuwa. COMPLAINANT Vs. Mr. D.S. Bodhinagoda, Attorney-at-Law, No. 30/1 Wethara, Polgasowita. RESPONDENT

20/02/2013	SC.Appeal No.137/2010	International Dresses (Private) Limited, No.27, Angulana Station Road, Angulana, Moratuwa. Petitioner Vs. 1. W.D.J.Seneviratne, Minister of Power and Energy, (Formerly Minister of Labour) 493/1, T.B.Jayah Mawatha, Colombo 10. 2. Athauda Seneviratne, Minister of Labour, Labour Secretariat, Narahenpita, Colombo 5. 3. Secretary, Ministry of Labour, Labour Secretariat, Narahenpita, Colombo 5. 4. Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 5. 5. T. Piyasoma, No.77, Pannipitiya Road, Battaramulla. 6. S.R.Karunatillake, No.455, Chandrawanka Road, Pallimulla, Panadura. 7. M.H.Cyril, No.3/1, U.C.Quarters, Katubedda, Moratuwa. 8. Sudath Dissanayake, No.176, D.S.Wijesinghe Mawatha, (Mola Road) Katubedda, Moratuwa. 9. W.Hethuka Prabath Fernando, No.351/5, , Station Road, Angulana, Moratuwa. 10. W.G.Wimalaratne, No.7/3, Kanagaratne Place, Laxapathiya, Moratuwa. 11. P.H.L, A.De Silva No.99, Dawatagahawatta, Halpita, Polgasowita. 12. W.Chandrasiri No.52, Kandawala Road Ratmalana. 13. Shelton Senaratne No. 147/5, Station Road, Angulana, Moratuwa. 14. A.D.Sunil Ranjith No.188/B, Jayanthi Road, Hapugoda, Kandana. 15. Shaul Hameed, No.33/6, Station Road, Angulana, Moratuwa. 16. H.K.Sanath, Jayaratne, No.35, Arthur's Place, Kaldemulla, Moratuwa. 17. H.T.H.Fernando No.89,Galle Road, Sarikkamulla, Moratuwa. 18. G.H Ranjith De Silva, No.275, Galle Road, Dodanduwa. 19. H. Wasantha, No. 188/2, Na Uyana, Waskaduwa, Maha Waskaduwa. 20. R.K. Siripla, Udukumbura, Ahangama, 21. T.G.Sarath Wickramaratne, No.84/7 De Mel Road, Laxapathiya, Moratuwa, 22. A.B.A.Sampath De Silva, No.68, Rajamahavihara Road, Pitakotte. 23. K.L.Rohana Perera, No.6, Church Road, Angulana, Moratuwa. 24. K.M.Ariyaratne, No.5, Arthur’s Place, Angulana., Moratuwa. 25. Rohana Pushpakumara, No.204, Sunil Villa, Mahajana Mawatha, Angulana, Moratuwa. 26. Ravindra Kumara Rossiro, No.41, Uggalawatta, Bandaragama. 27. All Ceylon Commercial and Industrial Workers Union, No.457, Dr. Colvin R. De Silva Mawatha, Colombo 2. Respondents AND NOW CA Application No.414/2007 In the matter of an Appeal after the grant SC (Spl.LA)No.142/2010 of Special Leave to Appeal in terms SC.Appeal No.137/2010 of Article 128(2)of of the Constitution of the Democratic Socialist Republic of Sri Lanka International Dresses (Private) Limited, No.27, Angulana Station Road, Angulana, Moratuwa. Petitioner-Appellant Vs. 1. W.D.J.Seneviratne, Minister of Power and Energy, Formerly Minister of Labour) 493/1, T.B.Jayah Mawatha, Colombo 10. 2. Athauda Seneviratne, Minister of Justice, (Formerly Minister of Labour), Ministry of Justice, Colombo 12. 2A. Minister of Labour Labour Secretariat, Narahenpita, Colombo 5. 3. Secretary, Ministry of Labour, Labour Secretariat, Narahenpita, Colombo 5. 4. Commissioner of Labour, Labour Secretariat, Narahenpita, Colombo 5. 5. T. Piyasoma, No.77, Pannipitiya Road, Battaramulla. 6. S.R.Karunatillake, No.455, Chandrawanka Road, Pallimulla, Panadura. 7. M.H.Cyril, No.3/1, U.C.Quarters, Katubedda, Moratuwa. 8. Sudath Dissanayake, No.176, D.S.Wijesinghe Mawatha, (Mala Road) Katubedda, Moratuwa. 9. W.Hethuka Prabath Fernando, No.361/5, , Station Road, Angulana,Moratuwa. 10. W.G.Wimalaratne, No.7/3, Kanagaratne Place, Laxapathiya, Moratuwa. 11. P.H.L, A. De Silva No.99, Dawatagahawatta, Halpita Polgasowita, 12. W.Chandrasiri

15/02/2013	SC CHC Appeal No. 02/2004	Consolidated Steel Industries (Pvt) Limited, No.3, Fredrica Mawatha, Colombo 06. And also of No. 237/4, Hekitta Road, Wattala. Defendant-Petitioner-Appellant -VSPeople's Bank, No.75, Sir Chittampalam A Gardiner Mawatha, Colombo 02. Plaintiff-Respondent-Respondent

13/02/2013	SC. FR. Application No. 478/2009	No. 11, Ramakrishna Gardens, Colombo – 06. Petitioner -Vs.- 1. University of Peradeniya, Peradeniya. 2. Prof. H. Abeygunawardena Vice Chancellor, (Chairman of the Council) University of Peradeniya, Peradeniya. 3. Prof. A. Wickremasinghe Deputy Vice Chancellor, (Chairman of the Council) University of Peradeniya, Peradeniya. 4. Prof. P.W.M.B.B. Marambe Deen, Faculty of Agriculture (Member of the Council), University of Peradeniya, Peradeniya. 5. Prof. K.T. Silva Deen, Faculty of Arts (Member of the Council), University of Peradeniya, Peradeniya. 6. Dr. E.A.P.D. Amaratunge Deen, Faculty of Sciences, (Member of the Council), University of Peradeniya, Peradeniya. 7. Prof. S.B.S. Abayakoon Deen, Faculty of Engineering, (Member of the Council), University of Peradeniya, Peradeniya. 8. Prof. W.I. Amarasinghe Deen, Faculty of Medicine, (Member of the Council), University of Peradeniya, Peradeniya. 9. Prof. S.H.P.P. Karunaratne Deen, Faculty of Science, (Member of the Council), University of Peradeniya, Peradeniya. 10. Prof. P. Abenayake Deen, Faculty of Veterinary Medicine and Animal Science, (Member of the Council), University of Peradeniya, Peradeniya. 11. Prof. Malkanthi Chandrasekera Senate Representative, (Member of the Council), University of Peradeniya, Peradeniya. 12. Dr. S.D. Pathirana Senate Representative, (Member of the Council), University of Peradeniya, Peradeniya. 13. Prof. J. M. Gunadasa Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 14. Mr. W.L.L. Perera Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 15. Mr. K.A.U.I. Kumarapperuma Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 16. Mr. W.M. Jayawardena Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 17. Dr. H.M. Mauroof Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 18. Mr. D. Mathi Yugarajah Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 19. Mr. Mohan Samaranayake Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 20. Dr. Kapila Gunawardena Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 21. Prof. K. Tennakoon Council Member, (appointed by the UGC) University of Peradeniya, Peradeniya. 22. Mr. P. Rathees Teacher, St. Anne's Tamil Mahavidyalaya, Wankalai, Mannar. 23. Mr. S. Sutharshan C/o, Mrs. R. Susila, 456/F, Eariyagama, Peradeniya. 24. Ms. R. Sarmiladevi Kumara Kanda Estate, 18th Mile Post, Deltota Road, Galaha, Kandy. 25. Ms. S. Vijitha No. 4-5/2, 55th Lane, Colombo – 06. 26. Mrs. Lareena 122/A, Kalalpitiya, Ukkuwela, Matale. 27. University Grants Commission No. 20, Ward Place, Colombo – 07. 28. Dr. T. Manoharan (a member of the Interview Board) Head Department of Tamil, University of Peradeniya, Peradeniya. 29. Prof. M.A. Nuhman (a member of the Interview Board) Department of Tamil, University of Peradeniya, Peradeniya. 30. Hon. Attorney General Attorney General's Department, Hulftsdorp Street, Colombo – 12. Respondents

06/02/2013	S.C. Misc. 01/2011	Wakachiku Construction Co. Ltd., of No. 23-18, 2-Chome, Shimomeguroku, Tokyo 153-0064, Japan and having its Colombo Liaison Office at # 250- 3rd Floor, Apartment #6, Liberty Plaza, R.A. De Mel Mawatha, Colombo 3, Sri Lanka. Petitioner Vs. Road Development Authority, Sethsiripaya Battaramulla Respondent
05/02/2013	SC. Appeal No. 119/2010	Wimala Herath Rajawila, Hingurakgoda. Plaintiff -Vs- 1. M.D.G. Kamalawathie, No. 27/5, Flower Lane, Pepiliyana Road, Nugegoda. 2. S..A. Piyasena, Trackmo Institute, Wickramasinghe Road, Hingurakgoda. Defendants. And Between 1. M.D.G. Kamalawathie, No. 27/5, Flower Lane, Pepiliyana Road, Nugegoda. 2. S.A. Piyasena, Trackmo Institute, Wickramasinghe Road, Hingurakgoda. Defendant-Appellants -Vs- Wimala Herath (Deceased) 1. Sarathchandra Rajapakshe. 2. Ananda Kumara Rajapakshe 3. Wasantha Kumara Rajapakshe All are of: Rajawila, Hingurakgoda. Plaintiff-Respondents. And Now Between Wimala Herath (Deceased) 1. Sarathchandra Rajapakshe. 2. Ananda Kumara Rajapakshe 3. Wasantha Kumara Rajapakshe All are of: Rajawila, Hingurakgoda. Plaintiff-Respondent-Appellants -Vs- 1. M.D.G. Kamalawathie, No. 27/5, Flower Lane, Pepiliyana Road, Nugegoda. 2. S.A. Piyasena, Trackmo Institute, Wickramasinghe Road, Hingurakgoda. Defendant-Appellant-Respondents
24/01/2013	SC. Appeal No. 58/2011	Wijemunige Elbin Pallehagoda, Ellawelagewatta, Pallekanda, Walasmulla. Plaintiff Vs. 1. Wijemunige David Singho 2. Wijemunige Ranjith Alahapperuma 3. Wijemunige Senarath Jayatunga 4. Wijemunige Sriyani Wasanthi 5. Newsia Ireene Wijebandara 6. Wijemunige Chandrika Wijebandara All of Wadumaduwegedara, Wekandawela, Gonadeniya Defendants And Between Wijemunige Elbin Pallehagoda, Ellawelagewatta, Pallekanda, Walasmulla. Plaintiff-Appellant Vs. 1. Wijemunige David Singho 2. Wijemunige Ranjith Alahapperuma 3. Wijemunige Senarath Jayatunga 4. Wijemunige Sriyani Wasanthi 5. Newsia Ireene Wijebandara 6. Wijemunige Chandrika Wijebandara All of Wadumaduwegedara, Wekandawela, Gonadeniya Defendant-Respondents And Now Between 1. Wijemunige David Singho 2. Wijemunige Ranjith Alahapperuma 3. Wijemunige Senarath Jayatunga 4. Wijemunige Sriyani Wasanthi 5. Newsia Ireene Wijebandara 6. Wijemunige Chandrika Wijebandara All of Wadumaduwegedara, Wekandawela, Gonadeniya Defendant-Respondent- Appellants Wijemunige Elbin Pallehagoda, Ellawelagewatta, Pallekanda, Walasmulla. Plaintiff- Appellant-Respondent

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLICOF SRI LANKA

In the matter of an appeal in terms of Chapter LVIII and in particular in terms of Section 754 (1) of the Civil Procedure Code read together with the provisions of Sections 5 and 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 against the Judgment of the learned High Court Judge of the Commercial High Court of Colombo delivered on 10.06.2004.

SC. CHC. No. 41/2004

HC. Civil Case No. 255/2002(1)

People's Bank,
No: 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.
Plaintiff-Appellant

-Vs.-

Good Fellows (Pvt) Ltd.,
No. 50/22, Mayura Place,
Colombo 5.
Defendant-Respondent

BEFORE : **Tilakawardane, J.**
Ekanayake, J. &
Dep, PC, J.

COUNSEL : Kushan D Alwis, PC, with Kaushalya Nawaratne and Hiran Jayasuriya for the Plaintiff-Appellant.

M.U.M. Ali Sabry, PC, with Sanjeewa Dassanayake for the Defendant-Respondent.

ARGUED ON : 08.07.2013

DECIDED ON : 30.07.2013

Tilakawardane, J.

The Plaintiff – Appellant (hereinafter referred to as the Appellant Bank) instituted action against the Defendant – Respondent (hereinafter referred to as the Respondent) in the Commercial High Court of the Western province holden in Colombo in case No. 255/2002 seeking to recover a sum of US $ 347,972.72 and a sum of US $ 288,163.16 based on two Letters of Credit (marked as 'P3' and 'P6').

The Learned Judge of the Commercial High Court dismissed the Appellant Banks case by its judgment dated 10.06.2004. The Appellant Bank has now filed this appeal against the said judgment of the Commercial High

Court, on the following questions of Law.

1. The Learned Judge of the Commercial High Court had erred in law in holding that in the case of non-payment of the monies granted to the Respondent, the Appellant Bank can have a right to recover the said monies only on the issuing bank.

The Learned Judge of the Commercial High Court had misunderstood the action of the Appellant Bank to be an action instituted under the terms of the Letter of credit when in fact the action is based on the Guarantees marked as 'P10' and 'P11'.

A Company under the name of 'Speed Control New York Inc.' agreed to purchase certain goods from the Respondent. The payment for the said sale was organized through irrevocable Letters of Credit. In Terms of the said Letters of Credit 'Speed Control New York Inc.' which is the buyer, requested the 'Marine Midland Bank New York', the issuing bank, to open a documentary credit in favor of the Respondent, the Seller and/or Beneficiary. The Appellant Bank negotiated several Bills drawn under the said Letter of Credit and monies were paid to the Respondent (marked 'P3' and 'P4'). The Respondent has executed several guarantees to the repayment of the said monies. However, the Appellant Bank claims that no monies have yet been paid to the Appellant Bank.

The Appellant Banks case is that the Respondent has failed and neglected to pay the sums due to the Appellant Bank; however, the Respondent denies the Appellant Banks claim, on the basis that any liability to make payment under the Letters of Credit lies only with the issuing bank.

The Respondent's position is that, the issue has arisen in consequence of

negotiating a letter of credit bearing No. DC MTN 953706 originally for a sum of US $ 1,247,870/- issued by the Marine Midland Bank of New York in favor of the Respondent. The Respondent negotiated the said Letter of Credit with the Appellant Bank and assigned its rights under the said Letter of Credit in favor of the Appellant Bank in lieu of the funds received by the Respondent. Once the Letter of Credit has been given in favor of the Appellant Bank and the Respondent had exported the goods and handed over all relevant documents to the Appellant Bank, it is the responsibility Appellant Banks to seek payments from the said Marine Midland Bank of New York (Issuing Bank) based on the said Letter of Credit. Since the said Letter of credit was a clean bill, the Appellant is best able to recover the monies from the said issuing Bank.

The counsel for the Respondent further asserted that once the Appellant Bank had already referred the dispute for arbitration in the International Chamber of Commerce, that the Appellant Bank cannot redress remedies against the Respondent until the final determination from the International Chamber of Commerce is delivered.

The internationally accepted documentation for imports and exports, the Documentary Credits/ Letters of Credit are governed under the Documentary Credit and the Uniform Customs and Practices. The Uniform Customs Practices are binding on banks, the applicants for the credits and their beneficiaries. [*Goldets V Czarnikow (1979) All ER 726].* Accordingly, where a contract for the sale of goods provides for payment to be made by a bankers letter of credit, it is the buyers duty to arrange with the bankers for a documentary credit to be issued in favor of the seller in the currency specified.

A documentary credit issued by a creditworthy bank, guarantees payment to the seller on condition that he presents the correct documents and does so independently of the underlying contract of sale. The issuing banks creditworthiness is substituted for that of the buyers, and this security for the seller is normally the fundamental purpose of a letter of credit. The necessity for the seller to trust the buyer is removed. The seller is made sure of payment and the buyer is sure of receiving documents. It is for these reasons that banks will only agree to issue such instruments for creditworthy applicants and after satisfying themselves of creditworthiness and security considerations.

The Seller, however, has the responsibility of assessing the level of reliance he places upon the issuing bank and the political stability of the country concerned. From the viewpoint of the buyer, while the seller must produce conforming documents with the Letter of Credit, the buyer will still be reliant upon the standing of the supplier and their ability to manufacture/ ship goods in terms of the quality required.

There is a contract of sale between the buyer and the seller, under which the parties stipulate the documentary credit as the method of payment and undertake to perform certain obligations for the purpose of giving effect to the documentary credit. There is a contract of reimbursement or similar agreement between the applicant, the buyer, and the issuing bank, under which the issuing bank agrees to provide a documentary credit and the applicant undertakes to reimburse the bank and compensate its loss if necessary. There is a contractual undertaking between the beneficiary, the seller, and the issuing bank, under which the issuing bank promises or guarantees the payment to the beneficiary provided that he fulfills the obligations under the credit.

When the issuing bank deals with the beneficiary, the seller, directly, there would be an agent principal arrangement between the issuing bank and the nominated bank, i.e., an advising bank, negotiating bank or confirming bank, under which the issuing bank undertakes to reimburse and compensate the nominated bank for its services and the nominated bank undertakes to act as instructed by the issuing bank. If a nominated bank confirms the credit, there would be a contractual undertaking between the confirming bank and the beneficiary, under which the confirming bank guarantees the payment of the credit provided that the beneficiary performs the terms of the credit.

In considering the liability between the issuing bank and the confirming bank in case of non conforming documents, the English Court held that the Uniform Custom Practices required the issuing bank to examine the documents as they were and did not allow the issuing bank to send them to the buyer for the purpose of identifying the discrepancies. In *bankers Trust Co. V State bank of India (1991) 2 Lloyds Rep 443* the Bankers Trust failed to comply with the requirement to give timely notice to the negotiating bank of the alleged discrepancies and the negotiating bank was held entitled to claim reimbursement from the State Bank of India.

In the instant case, the issue to be considered is whether the Appellant bank which negotiated the letters of credit, has recourse against the seller, in this case the Respondent for recovery of the monies paid on the said letters of credit. The learned High Court judge held that the Appellant cannot recover from the Respondent, and can only proceed against the Issuing Bank, despite finding that the monies had been paid by the Appellant bank to the Respondent upon negotiating the letters of credit.

The Appellant banks position is that the above transaction is akin to a loan transaction. It is settled law that the Appellant Bank could either sue the Principal borrower or the guarantor or any of them. In the instant case the Appellant bank clearly has a right of recourse for payment of monies due under the Letter of Credit from the issuing bank (the principal). The Appellant bank also has a right of recourse against the Respondent as the seller, for recovery of the sums due. Therefore this court finds that based on the guarantees furnished by the Respondent, the Plaintiff may proceed against the Issuing Bank and/or the Respondent, but cannot under any circumstance recover from both.

The Respondent has also claimed that the Appellant Bank cannot maintain this action since the Plaint does not disclose a cause of action in terms of the guarantees but only on letters of credit. The Appellant banks position is that the action was instituted on the contractual agreement between the Appellant and the Respondent, which is based on the guarantees furnished by the Respondent marked P10 and P11. In considering the submissions of both parties, this Court finds that the action has been instituted based on the guarantees of the Respondent and not on the letters of credit.

The Respondents took up the further position that the Appellant Bank could not have instituted the action pending a final ruling on the dispute by the International Chamber of Commerce (hereinafter referred to as the ICC). The learned High Court judge relied on the contents of document P9 which provides that 'arrangements are underway to obtain a ruling from the ICC regarding the accuracy of the clean unpaid L/C bills…the total value of these two bills plus the interest will be held separately until a ruling is received in this regard'. The Appellant bank relied on the undertaking by

the Respondent to reimburse the Appellant unconditionally the monies due in terms of the said Letters of Credit together with the interest and other charges thereon and the specific waiver of all the Respondent's right to contest the amount or nature of the claim of the Appellant in respect of amounts paid by the Appellant under the guarantee (Vide, P10, P11).

The learned High Court judge in page 08 of the judgment speculates that the Appellant may be unjustly enriched where the company recovers the monies from the Respondent and on subsequently the Issuing Bank makes the due payment to the Appellant. However in the instant case, this Court finds that while the Appellant bank has a right of recourse against the Issuing bank and also against the Respondent, it may not under any circumstance recover from both. Therefore the issue of unjust enrichment of the Appellant bank does not arise in this case.

Under these circumstances this Court holds in favor of the Appellant bank and sets aside the judgment of the learned High Court Judge of the Commercial High Court Colombo dated 10.06.2004 and orders the Respondent to pay the Appellant bank the total monies as prayed for in the Plaint before the Commercial High Court which is;

a) In a sum of US $ 527,874/61 together with interest at the rate of 9% per annum on a sum of US $ 347,972/72 from 01.10.2001 until date of Decree and thereafter legal interest on the decreed sum until payment in full together with statutory charges there on.

b) In a sum of US $ 288,163/16 together with interest at the rate of 9% per annum on a sum of US $ 187,324/94 from 01.10.2001 until date of Decree and thereafter legal interest on the decreed sum until payment in full

together with statutory charges there on.

Accordingly the Appeal is allowed with costs payable by the Respondents to the Appellant bank in a sum of 50,000/-

JUDGE OF THE SUPREME COURT

Ekanayake, J.

I agree.

JUDGE OF THE SUPREME COURT

Dep, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC. HC. CA. LA. 101/2013
WP/HCCA/COL/291/2006(F)
D.C.Colombo Case No. 25127/MR

In the matter of an Appeal from the Judgment of the Learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden at Colombo dated the 26/02/2013 made in Case No. WP/HCCA/COL/291/2006 Final, under and in terms of Article 127 of the Constitution read together with Section 5C of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act, No 54 of 2006.

Tangerine Beach Hotel
P.O. Box 195
No. 236, Galle Road,
Colombo 03.
1st Defendant-Appellant-Petitioner

Vs.

Ryan William Smith
No. 27, Melibee Street,
Blairgowrie, Victoria 3942
Australia.

Formerly at No. 4/39, Plummer Road,
Mentone, Victoria 3194, Australia.
Plaintiff-Respondent-Respondent

1. Mercantile Investments Limited
Galle Road,
Colombo 03.
2. Maggonage Wimalasena of
No. 46, Gemunu Mawatha,
Kalutara South, Kalutara.

Defendants-Respondents-Respondents

BEFORE : **TILAKAWARDANE, J.**
MARSOOF, PC, J. &
DEP, PC, J.

COUNSEL : **Romesh de Silva PC with Harsha Amarasekera for the 1st Defendant-Appellant-Petitioner.**
Avindra Rodrigo with M.P. Maddumabandara for the Plaintiff-Respondent-Respondent.

ARGUED ON : **30.07.2013.**

DECIDED ON : **18.11.2013**

Tilakawardane J:

An application for Leave to Appeal before this Court was made by the 1st Defendant – Appellant – Petitioner (hereinafter referred to as the Petitioner) and the matter appeared before this Court on 30.07.2013. The appeal was against the decision of the Provincial High Court of Civil Appeal of the Western Province which delivered judgment on 26.02.2013.

It is the opinion of this Court that the following two questions of law that were raised for leave to appeal require the consideration of this Court.

1. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when they held the Petitioner vicariously liable for the actions of the 3rd Defendant.
2. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when it failed to take cognizance of the fact that the documents marked by the Plaintiff – Respondent – Respondent (hereinafter referred to as the Respondent) were admitted into evidence subject to proof and were allegedly not proven.

The facts that precede this appeal are as follows. The Respondents in the above captioned cases were three males: a father, a son and the brother of the father. The three passengers were being driven in vehicle number 65-2938 at the time of the accident. The said vehicle collided with train number 506 which was travelling from Colombo to Galle. The accident occurred at the Paunangoda Road rail at Hikkaduwa. The Petitioner of this case is the legal owner of the said vehicle.

The first issue that requires the consideration of this Court is whether there is a vicarious liability that falls on the part of the Petitioner, arising out of the actions of the driver, the 3rd Defendant. It is submitted by the Petitioner that there is no vicarious liability that falls on him due to the fact that the 3rd Defendant was not an employee of the Petitioner and was hence not within his control.

The Petitioner asserts that the 3rd Defendant is not his employee and that hence he is not liable vicariously for his actions. The Petitioner quoted the recent case of **Krishnan Nalinda Priyadarshana v Kandana Arachchige Nilmini Dhammika Perera** (case no. SC. Appeal 67/2012 decided on 14.06.2013) in which **Wanasundara J** stated as follows:

"In the instant case, the driver who drove was the employee of the owner of the lorry. The driver's wrongful act was done within the act of driving which he was employed to perform by the owner of the lorry. Even if the wrongful act was unauthorized by the employer and criminal in nature, the employer is vicariously liable for the employee's action, thus making the employer bound to pay damages caused by the employee."

The Petitioner further quoted the judgment on the **General Principles of Vicarious Liability in Tort** as laid down by **Salmond** in **"Law of Tort" 1907** which further clarifies the issue of the liability only falling upon an employer of the driver. The Petitioner also quoted cases such as **Ellis v Paranavitana** *58 NLR 373* and **Rafina and Another v The Port (Cargo) Corporation and Another** (1980)*2 SLR 189* both of which establish that the Sri Lankan Courts have previously decided that vicarious liability only falls upon the employer when there is a direct nexus between the employer and the employee. It is the assertion of the Petitioner that such a nexus does not exist between himself and the 3rd Defendant. The Petitioner alleges that in order to find him vicariously liable for the action of the 3rd Defendant the corporate veil must be lifted and that such an action by the Court would be contrary to the concept of "distinct legal entity" as created by the **Companies Act No. 7 of 2007**.

Conversely, it is the position of the Respondent that the Petitioner, as the lawful owner of the vehicle is vicariously liable for the actions of the ultimate user of the vehicle. Abundant case law affirms this position and this Court is inclined to agree with this assertion. The case of **Jafferjee v Munasinghe** *51 NLR 313* saw **Jayatileke J** cite the English case of **Chowdhary v Gillot** *2 A.E.R 541* which states that:

".. if a person lends his car to another, prima facie he does not place the driver under the control of the borrower, and the borrower does not become liable for the negligence of the driver."

Similarly, in the American case of **Seattle v Stone** *410P.2d 583.* **Weaver J** held that there is a prima facie responsibility that falls upon the registered owner of a vehicle. This prima facie responsibility can be rebutted by the owner if he is able to present evidence to the contrary to the Court. The provisions for such a rebuttal are found in **Section 214 (2) (b) (ii)** of the Motor **Traffic Act No. 14 of 1951** which states as follows:

".. *Provided, however, that- the owner, if he was not present in the motor vehicle at the time of such contravention, shall not be deemed under paragraph (b) to be guilty of an offence under this Act, if he proves to the satisfaction of the court that the contravention was committed*

without his consent or was not due to any act or omission on his part or that he had taken reasonable precautions to prevent such a contravention."

The view of **Rolfe B** in the case of **Reedie v The London and North Western Railway Company**(*1849)4Exch244, 154ER01201* was reaffirmed by **Rix LJ** in the recent case of **Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd** *(2006) QB510,529* where liability was imposed on the employer on the basis that:

"Those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently."

This principle was taken up by **Gratiaen J** in the case of **T. H. I. De Silva v Trust Co Ltd** *55 NLR 241.* It was held that despite the fact that the owner was not in the vehicle, the fact that he had delegated the task of driving the car to another for his own purposes, gives rise to vicarious liability of the owner. A similar view was set out by the English Judge **Denning J** in the case of **Ormrod v Crossville Motor Services Ltd** *(1953)2AER 755* in the following words:

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."

The applicability of this opinion to Sri Lankan law was affirmed in the case of **Ellis V Paranavithana** *58NLR 373*.

The ability to disprove this responsibility was discussed by **Streatfield J** in the case of **Samson v Aitchison** *AC 488* as follows:

"where the owner of the vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or

otherwise, the owner is liable as principal for damages caused by the negligence of the person actually driving."

Moreover, **Section 214(2)(b)** of the **Motor Traffic Act No. 14 of 1951** imposes prima facie liability for an accident on the driver and the owner of the vehicle. Subsection (b) reads as follows:

"*the driver and the owner of the motor vehicle shall also be guilty of an offence under this act, notwithstanding that a duty or prohibition, or the liability in respect of such contravention is not expressly imposed by such provision or regulation on the driver or the owner:."*

Accordingly, there is a statutory liability on the part of the owner with regards to damages that arise in the operation and use of his vehicle.

Hence, it is the opinion of this Court that the Petitioner has not adduced any evidence in order to establish that it has abandoned its right or authority to control the driver at the time that the said events unfolded as per **Section 214(2) (b) (ii)** as stated above. In fact the Petitioner, in vide page 21, on the 23rd of February 2006, adduced evidence in order to establish that it plays an active role in the selection of the drivers of its vehicle.

It has also been called into question before this Court as to whether the Petitioner, Tangerine Beach Hotel, has sufficient interest in the duties of the driver so as to be held liable for his action although, the 3rd Defendant, the driver, is an employee of Tangerine Tours Limited, it transpired in evidence that the Petitioner and Tangerine Tours Limited despite being distinct legal entities, share a common chairman, common directors and that they own shares in each other's companies and maintain a close relationship with each other. Hence, despite the fact that the contract of employment for the driver was provided for by Tangerine Tours Limited, sufficient evidence has been adduced in order to establish interest as well as proximity between the driver and the Petitioner.

The issue that was raised with regards to the evidence that was adduced by the Respondent was that the documents marked "P1", "P2" and "P3" were allegedly entered into evidence subject to proof by the Respondent. The Petitioners have objected to the validity of the said

documents on the basis that they were not proven and hence are not admissible in evidence in these cases. Furthermore, it is alleged by the Petitioner that the failure of proof by the Respondent should bar the judges from taking the said evidence into consideration. The evidence mentioned by the Petitioner is evidence that include medical reports from doctors in Australia indicating the condition of the passengers in the vehicle, that is, the three Respondents in the above captioned cases.

The law relating to the admissibility of evidence is laid down in **Section 154** of the **Civil Procedure Code**. The section states:

"*every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness, id I is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means of and under an order from, the court. if it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy here of shall be used in evidence instead."*

The explanation of the section further elaborates that:

"*If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it."*

The Petitioner alleges that the documents were objected to upon their admission to evidence; however, this Court has not been provided with adequate evidence of such an objection nor has it been specifically stated as to what the basis of the objection is. The law on the matter has been laid down with great clarity in the case of **Silva v Kindersley** *(1914). 18 N. L. R. 85* where the Court held that in a civil suit, when a document is tendered in evidence by one party and is not objected to by the other, the document is deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. Furthermore, in

the case of **Sri Lanka Ports Authority and Another v Jugolinija – Boat East** *[1981] 1 Sri LR 18* **Samarakoon CJ** held that:

"If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the curses curiae of the original courts."

Similar views were taken in cases such as **Cinemas Ltd v Soundararajam** *1988 (2) SLR 16* and **Balapitiya Gunanandana Thero v Talalle Mettananada Thero** *1997 (2) SLR 101.*

The Respondents tendered the documents into evidence on 07.06.2004 subject to proof and proved the grievous injuries suffered by him during the course of presenting the evidence. There is no evidence to the satisfaction of the Court that suggests that an objection was made in the first instance by the Petitioner.

The only available question then is whether the objection to the documents can be made upon appeal. In the Privy Council decision of the case of **Shahzadi Begam v Secretary of State for India** *(1907) 34 Cal 1059*, it was held that it was too late for an objection with regards to the admissibility of evidence of a document to be raised on the appeal. Such an objection may only be raised if the issue was called into question in the first instance. This view was upheld by **Hutchinson CJ** in **Sangarapillai v Arumugam** *(1909) 2 Leader 161* as well as in the case of **Siyadoris v Danoris** *42 NLR 311.*

Hence, this Court feels that it would be contrary to law and judicial precedent to allow the Petitioner to call into question the validity of evidence that has already been admitted.

Furthermore, the Petitioner has not specified the grounds on which the evidence is being called into question, nor have they provided this Court with a reasonable basis on which they object to the admissibility of the evidence. Additionally, this Courts draws attention to the evidence that has been adduced in vide page 304-309, which are the Bed Head Tickets of the Respondent. The evidence corroborates the statements contained in the doctor's report in the evidence that has been objected to by the Petitioner.

Section 3 of the **Evidence Ordinance** defines the word "proved" as:

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Accordingly, in the absence of any evidence to the contrary being presented by the Petitioner, this Court believes that there is no basis upon which the validity of the said evidence could be questioned and that the Respondents have established the validity of the said documents to the satisfaction of this Court.

For the aforementioned reasons the application for leave is denied. I also order cost in the sum of Rs. 100,000 to be paid to the Respondents.

JUDGE OF THE SUPREME COURT

MARSOOF, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

DEP, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC. HC. CA. LA. 102/2013
WP/HCCA/COL/308/2006(F)
D.C.Colombo Case No. 25069/MR

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Tangerine Beach Hotel
P.O. Box 195
No. 236, Galle Road,
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1st Defendant-Appellant-Petitioner

Vs.
Rodney Errol Smith
No. 4/39 Plummer Road Mentone
Victoria, 3194 – Australia.
Plaintiff-Respondent-Respondent

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2. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when it failed to take cognizance of the fact that the documents marked by the Plaintiff – Respondent – Respondent (hereinafter referred to as the

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The first issue that requires the consideration of this Court is whether there is a vicarious liability that falls on the part of the Petitioner, arising out of the actions of the driver, the 3rd Defendant. It is submitted by the Petitioner that there is no vicarious liability that falls on him due to the fact that the 3rd Defendant was not an employee of the Petitioner and was hence not within his control.

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is a direct nexus between the employer and the employee. It is the assertion of the Petitioner that such a nexus does not exist between himself and the 3rd Defendant. The Petitioner alleges that in order to find him vicariously liable for the action of the 3rd Defendant the corporate veil must be lifted and that such an action by the Court would be contrary to the concept of "distinct legal entity" as created by the **Companies Act No. 7 of 2007**.

Conversely, it is the position of the Respondent that the Petitioner, as the lawful owner of the vehicle is vicariously liable for the actions of the ultimate user of the vehicle. Abundant case law affirms this position and this Court is inclined to agree with this assertion. The case of **Jafferjee v Munasinghe** *51 NLR 313* saw **Jayatileke J** cite the English case of **Chowdhary v Gillot** *2 A.E.R 541* which states that:

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".. *Provided, however, that- the owner, if he was not present in the motor vehicle at the time of such contravention, shall not be deemed under paragraph (b) to be guilty of an offence under this Act, if he proves to the satisfaction of the court that the contravention was committed without his consent or was not due to any act or omission on his part or that he had taken reasonable precautions to prevent such a contravention."*

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This principle was taken up by **Gratiaen J** in the case of **T. H. I. De Silva v Trust Co Ltd** *55 NLR 241.* It was held that despite the fact that the owner was not in the vehicle, the fact that he had delegated the task of driving the car to another for his own purposes, gives rise to vicarious liability of the owner. A similar view was set out by the English Judge **Denning J** in the case of **Ormrod v Crossville Motor Services Ltd** *(1953)2AER 755* in the following words:

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."

The applicability of this opinion to Sri Lankan law was affirmed in the case of **Ellis V Paranavithana** *58NLR 373*.

The ability to disprove this responsibility was discussed by **Streatfield J** in the case of **Samson v Aitchison** *AC 488* as follows:

"where the owner of the vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damages caused by the negligence of the person actually driving."

Moreover, **Section 214(2)(b)** of the **Motor Traffic Act No. 14 of 1951** imposes prima facie liability for an accident on the driver and the owner of the vehicle. Subsection (b) reads as follows:

"*the driver and the owner of the motor vehicle shall also be guilty of an offence under this act, notwithstanding that a duty or prohibition, or the liability in respect of such contravention is not expressly imposed by such provision or regulation on the driver or the owner:.*"

Accordingly, there is a statutory liability on the part of the owner with regards to damages that arise in the operation and use of his vehicle.

Hence, it is the opinion of this Court that the Petitioner has not adduced any evidence in order to establish that it has abandoned its right or authority to control the driver at the time that the said events unfolded as per **Section 214(2) (b) (ii)** as stated above. In fact the Petitioner, in vide page 21, on the 23rd of February 2006, adduced evidence in order to establish that it plays an active role in the selection of the drivers of its vehicle.

It has also been called into question before this Court as to whether the Petitioner, Tangerine Beach Hotel, has sufficient interest in the duties of the driver so as to be held liable for his action although, the 3rd Defendant, the driver, is an employee of Tangerine Tours Limited, it transpired in evidence that the Petitioner and Tangerine Tours Limited despite being distinct legal entities, share a common chairman, common directors and that they own shares in each other's companies and maintain a close relationship with each other. Hence, despite the fact that the contract of employment for the driver was provided for by Tangerine Tours Limited, sufficient evidence has been adduced in order to establish interest as well as proximity between the driver and the Petitioner.

The issue that was raised with regards to the evidence that was adduced by the Respondent was that the documents marked "P1", "P2" and "P3" were allegedly entered into evidence subject to proof by the Respondent. The Petitioners have objected to the validity of the said documents on the basis that they were not proven and hence are not admissible in evidence in these cases. Furthermore, it is alleged by the Petitioner that the failure of proof by the Respondent should bar the judges from taking the said evidence into consideration. The evidence mentioned by the Petitioner is evidence that include medical reports from doctors in Australia indicating the condition of the passengers in the vehicle, that is, the three Respondents in the above captioned cases.

The law relating to the admissibility of evidence is laid down in **Section 154** of the **Civil Procedure Code**. The section states:

"*every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness, id I is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means of and under an order from, the court. if it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy here of shall be used in evidence instead."*

The explanation of the section further elaborates that:

"*If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it."*

The Petitioner alleges that the documents were objected to upon their admission to evidence; however, this Court has not been provided with adequate evidence of such an objection nor has it been specifically stated as to what the basis of the objection is. The law on the matter has been laid down with great clarity in the case of **Silva v Kindersley** *(1914). 18 N. L. R. 85* where the Court held that in a civil suit, when a document is tendered in evidence by one party and is not objected to by the other, the document is deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. Furthermore, in the case of **Sri Lanka Ports Authority and Another v Jugolinija – Boat East** *[1981] 1 Sri LR 18* **Samarakoon CJ** held that:

"If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the curses curiae of the original courts."

Similar views were taken in cases such as **Cinemas Ltd v Soundararajam** *1988 (2) SLR 16* and **Balapitiya Gunanandana Thero v Talalle Mettananada Thero** *1997 (2) SLR 101.*

The Respondents tendered the documents into evidence on 07.06.2004 subject to proof and proved the grievous injuries suffered by him during the course of presenting the evidence. There is no evidence to the satisfaction of the Court that suggests that an objection was made in the first instance by the Petitioner.

The only available question then is whether the objection to the documents can be made upon appeal. In the Privy Council decision of the case of **Shahzadi Begam v Secretary of State for India** *(1907) 34 Cal 1059*, it was held that it was too late for an objection with regards to the admissibility of evidence of a document to be raised on the appeal. Such an objection may only be raised if the issue was called into question in the first instance. This view was upheld by **Hutchinson CJ** in **Sangarapillai v Arumugam** *(1909) 2 Leader 161* as well as in the case of **Siyadoris v Danoris** *42 NLR 311.*

Hence, this Court feels that it would be contrary to law and judicial precedent to allow the Petitioner to call into question the validity of evidence that has already been admitted.

Furthermore, the Petitioner has not specified the grounds on which the evidence is being called into question, nor have they provided this Court with a reasonable basis on which they object to the admissibility of the evidence. Additionally, this Courts draws attention to the evidence that has been adduced in vide page 304-309, which are the Bed Head Tickets of the Respondent. The evidence corroborates the statements contained in the doctor's report in the evidence that has been objected to by the Petitioner.

Section 3 of the **Evidence Ordinance** defines the word "proved" as:

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Accordingly, in the absence of any evidence to the contrary being presented by the Petitioner, this Court believes that there is no basis upon which the validity of the said evidence could be questioned and that the Respondents have established the validity of the said documents to the satisfaction of this Court.

For the aforementioned reasons the application for leave is denied. I also order cost in the sum of Rs. 100,000 to be paid to the Respondents.

JUDGE OF THE SUPREME COURT

MARSOOF, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

DEP, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC. HC. CA. LA. 103/2013
WP/HCCA/COL/305/2006(F)
D.C.Colombo Case No. 25126/MR

In the matter of an Appeal from the Judgment of the Learned Judges of the Provincial High Court of Civil Appeal of the Western Province holden at Colombo dated 26.02.2013 made in Case No. WP/HCCA/COL/305/2006 Final, under and in terms of Article 127 of the Constitution read together with Section 5C of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 as amended by High Court of the Provinces (Special Provisions) (Amendment) Act, No 54 of 2006.

Tangerine Beach Hotel
P.O. Box 195
No. 236, Galle Road,
Colombo 03.
1st Defendant-Appellant-Petitioner

Vs.
Andew Errol Smith
No. 20A, Emma Street
Caulfied South
Victoria 3162 – Australia.

Formerly at No. 4.39, Plummer Road,
Metone, Victoria 3194, Australia.
Plaintiff-Respondent-Respondent

2. Mercantile Investments Limited
   Galle Road,
   Colombo 03.
3. Maggonage Wimalasena of
   No. 46, Gemunu Mawatha,
   Kalutara South, Kalutara.

Defendants-Respondents-Respondents

BEFORE : **TILAKAWARDANE, J.**
MARSOOF, PC, J. &
DEP, PC, J.

COUNSEL : **Romesh de Silva PC with Harsha Amarasekera for the 1st Defendant-Appellant-Petitioner.**
Avindra Rodrigo with M.P. Maddumabandara for the Plaintiff-Respondent-Respondent.

ARGUED ON : **30.07.2013.**

DECIDED ON : **18.11.2013**

Tilakawardane J:

An application for Leave to Appeal before this Court was made by the 1st Defendant – Appellant – Petitioner (hereinafter referred to as the Petitioner) and the matter appeared before this Court on 30.07.2013. The appeal was against the decision of the Provincial High Court of Civil Appeal of the Western Province which delivered judgment on 26.02.2013.

It is the opinion of this Court that the following two questions of law that were raised for leave to appeal require the consideration of this Court.

1. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when they held the Petitioner vicariously liable for the actions of the 3rd Defendant.
2. Whether the Provincial High Court of Civil Appeal of the Western Province had misdirected itself when it failed to take cognizance of the fact that the documents marked by the Plaintiff – Respondent – Respondent (hereinafter referred to as the Respondent) were admitted into evidence subject to proof and were allegedly not proven.

The facts that precede this appeal are as follows. The Respondents in the above captioned cases were three males: a father, a son and the brother of the father. The three passengers were being driven in vehicle number 65-2938 at the time of the accident. The said vehicle collided with train number 506 which was travelling from Colombo to Galle. The accident occurred at the Paunangoda Road rail at Hikkaduwa. The Petitioner of this case is the legal owner of the said vehicle.

The first issue that requires the consideration of this Court is whether there is a vicarious liability that falls on the part of the Petitioner, arising out of the actions of the driver, the 3rd Defendant. It is submitted by the Petitioner that there is no vicarious liability that falls on him due to the fact that the 3rd Defendant was not an employee of the Petitioner and was hence not within his control.

The Petitioner asserts that the 3rd Defendant is not his employee and that hence he is not liable vicariously for his actions. The Petitioner quoted the recent case of **Krishnan Nalinda Priyadarshana v Kandana Arachchige Nilmini Dhammika Perera** (case no. SC. Appeal 67/2012 decided on 14.06.2013) in which **Wanasundara J** stated as follows:

"In the instant case, the driver who drove was the employee of the owner of the lorry. The driver's wrongful act was done within the act of driving which he was employed to perform by the owner of the lorry. Even if the wrongful act was unauthorized by the employer and criminal in nature, the employer is vicariously liable for the employee's action, thus making the employer bound to pay damages caused by the employee."

The Petitioner further quoted the judgment on the **General Principles of Vicarious Liability in Tort** as laid down by **Salmond** in **"Law of Tort" 1907** which further clarifies the issue of the liability only falling upon an employer of the driver. The Petitioner also quoted cases such as **Ellis v Paranavitana** *58 NLR 373* and **Rafina and Another v The Port (Cargo) Corporation and Another** (1980)*2 SLR 189* both of which establish that the Sri Lankan Courts have previously decided that vicarious liability only falls upon the employer when there is a direct nexus between the employer and the employee. It is the assertion of the Petitioner that such a nexus does not exist between himself and the 3rd Defendant. The Petitioner alleges that in order to find him vicariously liable for the action of the 3rd Defendant the corporate veil must be lifted and that such an action by the Court would be contrary to the concept of "distinct legal entity" as created by the **Companies Act No. 7 of 2007**.

Conversely, it is the position of the Respondent that the Petitioner, as the lawful owner of the vehicle is vicariously liable for the actions of the ultimate user of the vehicle. Abundant case law affirms this position and this Court is inclined to agree with this assertion. The case of **Jafferjee v Munasinghe** *51 NLR 313* saw **Jayatileke J** cite the English case of **Chowdhary v Gillot** *2 A.E.R 541* which states that:

".. if a person lends his car to another, prima facie he does not place the driver under the control of the borrower, and the borrower does not become liable for the negligence of the driver."

Similarly, in the American case of **Seattle v Stone** *410P.2d 583.* **Weaver J** held that there is a prima facie responsibility that falls upon the registered owner of a vehicle. This prima facie responsibility can be rebutted by the owner if he is able to present evidence to the contrary to the Court. The provisions for such a rebuttal are found in **Section 214 (2) (b) (ii)** of the Motor **Traffic Act No. 14 of 1951** which states as follows:

".. *Provided, however, that- the owner, if he was not present in the motor vehicle at the time of such contravention, shall not be deemed under paragraph (b) to be guilty of an offence under this Act, if he proves to the satisfaction of the court that the contravention was committed*

without his consent or was not due to any act or omission on his part or that he had taken reasonable precautions to prevent such a contravention."

The view of **Rolfe B** in the case of **Reedie v The London and North Western Railway Company**(*1849)4Exch244, 154ER01201* was reaffirmed by **Rix LJ** in the recent case of **Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Ltd** *(2006) QB510,529* where liability was imposed on the employer on the basis that:

"Those who set in motion and profit from the activities of their employees should compensate those who are injured by such activities even when performed negligently."

This principle was taken up by **Gratiaen J** in the case of **T. H. I. De Silva v Trust Co Ltd** *55 NLR 241.* It was held that despite the fact that the owner was not in the vehicle, the fact that he had delegated the task of driving the car to another for his own purposes, gives rise to vicarious liability of the owner. A similar view was set out by the English Judge **Denning J** in the case of **Ormrod v Crossville Motor Services Ltd** *(1953)2AER 755* in the following words:

"The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver."

The applicability of this opinion to Sri Lankan law was affirmed in the case of **Ellis V Paranavithana** *58NLR 373*.

The ability to disprove this responsibility was discussed by **Streatfield J** in the case of **Samson v Aitchison** *AC 488* as follows:

"where the owner of the vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not itself exclude his right and duty of control; and therefore, in the absence of further proof that he has abandoned that right by contract or

otherwise, the owner is liable as principal for damages caused by the negligence of the person actually driving."

Moreover, **Section 214(2)(b)** of the **Motor Traffic Act No. 14 of 1951** imposes prima facie liability for an accident on the driver and the owner of the vehicle. Subsection (b) reads as follows:

"*the driver and the owner of the motor vehicle shall also be guilty of an offence under this act, notwithstanding that a duty or prohibition, or the liability in respect of such contravention is not expressly imposed by such provision or regulation on the driver or the owner:."*

Accordingly, there is a statutory liability on the part of the owner with regards to damages that arise in the operation and use of his vehicle.

Hence, it is the opinion of this Court that the Petitioner has not adduced any evidence in order to establish that it has abandoned its right or authority to control the driver at the time that the said events unfolded as per **Section 214(2) (b) (ii)** as stated above. In fact the Petitioner, in vide page 21, on the 23rd of February 2006, adduced evidence in order to establish that it plays an active role in the selection of the drivers of its vehicle.

It has also been called into question before this Court as to whether the Petitioner, Tangerine Beach Hotel, has sufficient interest in the duties of the driver so as to be held liable for his action although, the 3rd Defendant, the driver, is an employee of Tangerine Tours Limited, it transpired in evidence that the Petitioner and Tangerine Tours Limited despite being distinct legal entities, share a common chairman, common directors and that they own shares in each other's companies and maintain a close relationship with each other. Hence, despite the fact that the contract of employment for the driver was provided for by Tangerine Tours Limited, sufficient evidence has been adduced in order to establish interest as well as proximity between the driver and the Petitioner.

The issue that was raised with regards to the evidence that was adduced by the Respondent was that the documents marked "P1", "P2" and "P3" were allegedly entered into evidence subject to proof by the Respondent. The Petitioners have objected to the validity of the said

documents on the basis that they were not proven and hence are not admissible in evidence in these cases. Furthermore, it is alleged by the Petitioner that the failure of proof by the Respondent should bar the judges from taking the said evidence into consideration. The evidence mentioned by the Petitioner is evidence that include medical reports from doctors in Australia indicating the condition of the passengers in the vehicle, that is, the three Respondents in the above captioned cases.

The law relating to the admissibility of evidence is laid down in **Section 154** of the **Civil Procedure Code**. The section states:

"*every document or writing which a party intends to use as evidence against his opponent must be formally tendered by him in the course of proving his case at the time when its contents or purport are first immediately spoken to by a witness, id I is an original document already filed in the record of some action, or the deposition of a witness made therein, it must previously be procured from that record by means of and under an order from, the court. if it is a portion of the pleadings, or a decree or order of court made in another action, it shall not generally be removed therefrom, but a certified copy here of shall be used in evidence instead."*

The explanation of the section further elaborates that:

"*If the opposing party does not, on the document being tendered in evidence, object to its being received, and if the document is not such as is forbidden by law to be received in evidence, the court should admit it."*

The Petitioner alleges that the documents were objected to upon their admission to evidence; however, this Court has not been provided with adequate evidence of such an objection nor has it been specifically stated as to what the basis of the objection is. The law on the matter has been laid down with great clarity in the case of **Silva v Kindersley** *(1914). 18 N. L. R. 85* where the Court held that in a civil suit, when a document is tendered in evidence by one party and is not objected to by the other, the document is deemed to constitute legally admissible evidence as against the party who is sought to be affected by it. Furthermore, in

the case of **Sri Lanka Ports Authority and Another v Jugolinija – Boat East** *[1981] 1 Sri LR 18* **Samarakoon CJ** held that:

"If no objection is taken when at the close of a case documents are read in evidence they are evidence for all purposes of the law. This is the curses curiae of the original courts."

Similar views were taken in cases such as **Cinemas Ltd v Soundararajam** *1988 (2) SLR 16* and **Balapitiya Gunanandana Thero v Talalle Mettananada Thero** *1997 (2) SLR 101.*

The Respondents tendered the documents into evidence on 07.06.2004 subject to proof and proved the grievous injuries suffered by him during the course of presenting the evidence. There is no evidence to the satisfaction of the Court that suggests that an objection was made in the first instance by the Petitioner.

The only available question then is whether the objection to the documents can be made upon appeal. In the Privy Council decision of the case of **Shahzadi Begam v Secretary of State for India** *(1907) 34 Cal 1059*, it was held that it was too late for an objection with regards to the admissibility of evidence of a document to be raised on the appeal. Such an objection may only be raised if the issue was called into question in the first instance. This view was upheld by **Hutchinson CJ** in **Sangarapillai v Arumugam** *(1909) 2 Leader 161* as well as in the case of **Siyadoris v Danoris** *42 NLR 311.*

Hence, this Court feels that it would be contrary to law and judicial precedent to allow the Petitioner to call into question the validity of evidence that has already been admitted.

Furthermore, the Petitioner has not specified the grounds on which the evidence is being called into question, nor have they provided this Court with a reasonable basis on which they object to the admissibility of the evidence. Additionally, this Courts draws attention to the evidence that has been adduced in vide page 304-309, which are the Bed Head Tickets of the Respondent. The evidence corroborates the statements contained in the doctor's report in the evidence that has been objected to by the Petitioner.

Section 3 of the **Evidence Ordinance** defines the word "proved" as:

"A fact is said to be proved when, after considering the matters before it, the court either believes it to exist or considers its existence so probable that a prudent man ought, under the circumstances of the particular case, to act upon the supposition that it exists."

Accordingly, in the absence of any evidence to the contrary being presented by the Petitioner, this Court believes that there is no basis upon which the validity of the said evidence could be questioned and that the Respondents have established the validity of the said documents to the satisfaction of this Court.

For the aforementioned reasons the application for leave is denied. I also order cost in the sum of Rs. 100,000 to be paid to the Respondents.

JUDGE OF THE SUPREME COURT

MARSOOF, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

DEP, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. Appeal 139/2011
SC/HC/CALA/201/2011
WP/HCCA No. KAL/14/2003 [F]
D.C. Matugama No. 1015/L

In the matter of an Application for Leave to Appeal against the Judgment of Civil Appellate High Court of Western Province Holden at Kalutara.

Don Gunawardana Weththasinghe,
Egaloya, Bulathsinhala.

PLAINTIFF-APPELLANT-PETITIONER

Vs.

1A. D. Ariyawathi Mudalige, Egaloya, Bulathsinhala.
2. M.D. Munidasa, Raigam Waththa, Haburugala.
3. A.A. Somapala, Kobawaka, Gowinna.
4. J.V. Ranawaka. Egaloya, Bulathsinhala.
5A. Soma Mahanthanthila Manjula, Kobawaka, Gowinna.
6. Samanpura Nimalsena, Meegahakumbura, Bulathsinhala.

DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE : **TILAKAWARDANE.J**
DEP.P.C. J &
MARASINGHE J

COUNSEL : Mahinda Ralapanawa with Ms. Nadeesha Maduwanthi for the Plaintiff-Appellant-Appellant.

Uditha Egalahewa, P.C., with Ranga Dayananda instructed by Ms. Lilanthi de Silva for the 1A and 3rd Defendants-Respondents-Respondents

ARGUED ON : 13.06.2013

DECIDED ON : 18.11.2013

TILAKAWARDANE.J

The Appellant has sought Leave to Appeal from the decision of Judgment of the Civil Appellate High Court of Kalutara dated 03.05.2011 whereby the Civil Appellate High Court dismissed the Appeal of the Appellant.

This Court granted Special Leave to Appeal on 28.09.2011 on the following two questions of law as indicated in paragraph 23 of the Petition dated 13.06.2011: -

(1) Is the judgment of the District Court of Matugama Case bearing No. 1015/P supported by the evidence placed before the said Court?

(2) If the said judgment is supported by the evidence placed before Court, should the judgment of the District Court be affirmed?

The two questions set out above would encapsulate the essence and substance of the case and in order to give a correct decision on the matter, it may involve re-agitating a point already decided.

The Plaintiff-Appellant-Appellant [hereinafter referred to as the Appellant] has instituted an action in the District Court of Matugama seeking to partition Lot No. 4 of a land known as Egallawedeniya which is marked A and depicted in the Partition Plan No. 119 prepared by H.D. Perera, Licensed Surveyor which was in extent 3 Roods and 10.31 Perches.

This Court accepts the plan prepared subsequent to the decree of partition held by the Learned Judge of the District Court of Kalutara bearing No.28363. There appears to be no dispute with regards to the allotted partition of the corpus, whereby 2/3rd of the land was allotted to Dona Louisa Edirimanna Hamine and the remaining 1/3rd to Kalutara Muhandiramge Misilin Rodrigo, which was claimed by the 4th Defendant – Respondent, and she was granted 1/3rd share of the corpus which is not challenged.

Both parties have contended that the Honorable Judges of the Civil Appellate High Court Holden in Kalutara, in their Judgment dated 03.05. 2011 wrongly dismissed the Appeal of the Appellant who challenged the allotment of 15 perches of the corpus to the 3rd Defendant-Respondent (herein after referred to as the 3rd Respondent). In the Judgment, the High Court Judges had allotted 1/3rd undivided share to the Appellant, 1/3rd undivided share to the 1A Respondent including the transfer of the land according to his soil rights, 15 Perches from the northern side with road frontage to the 3rd Respondent and 1/3rd undivided share to the 4th Defendant- Respondent (herein after referred to as the 4th Respondent) and had, therefore, erred in fact and made a perverse finding as the total of the shares exceeded the extent of the corpus by 15 perches.

The Appellant's Counsel correctly asserted that the allotments of shares are inaccurate. Accordingly, the Judgment of the Civil Appellate High Court dated 03.05. 2011 has to be set aside and having considered these facts this Court sets aside the said judgment.

The partition action was filed by the Plaintiff-Appellant and there was no dispute with regard to the identity of the corpus.

It has further been accepted by the parties that the predecessor in title of the Plaintiff, Don Ilian Somapala Ranawaka, by Deed No 169 dated 03.06.1979 attested by W. Wimalasena, was only entitled to 1/3rd share of the undivided portion of the corpus and by virtue of Deed bearing No. 67 dated 16.05.1953 attested by Cholmondeley de Fonseka Gunawardana, Notary Public from Dona Louisa Edirimanna Hamine, she transferred the other half of her 2/3 share of land by virtue of Deed bearing

No. 66 dated 18.05.1953 prepared by the same Notary Public to the deceased to the 1st Defendant-Respondent-Respondent, was Don Moses Herman Ranawaka Appuhamy. After his demise, D. Ariyawathi Mudalige, the 1A Defendant-Respondent-Respondent [hereinafter referred to as 1A Respondent] was substituted in the place of the 1st Defendant-Respondent-Respondent.

Parties also concede unequivocally that the corpus that relates to this partition action was described in the Schedule to the Plaint as set out in the action instituted by the Plaintiff dated 09.07.1982. Parties have also agreed that the corpus is depicted in the Preliminary Plan No. 1045 dated 22.10.1982 marked as X, prepared by Athulathmudali, Licensed Surveyor in the District Court of Matugama bearing Case No. P/1015. This Plan was admittedly prepared by reference to a partition of Lot A of Egallawedeniya being Lot 4 in Plan No. 119 dated 18.07.1953 prepared by H.D. Perera, Licensed Surveyor that had been obtained from the records in D.C. Kalutara Case No. 28363. The vendor in this case was Don Ilian Somapala Ranawaka who was admittedly entitled to 1/3rd share of the undivided corpus in this case. They also admitted that the buildings in Lot 1 of the said Plan marked 1, 2, 3, 4 and 5 were allotted to the 1st Defendant and the buildings 6 and 7 were allotted to the Plaintiff-Appellant. Neither the 1st Defendant's allocation of 1/3rd share nor the 4th Defendant's allocation of 1/3rd share of the corpus was disputed.

Parties have accepted that the only question to be determined in this case pertains to the allocation that has been made to the Plaintiff-Appellant. Indeed, the main facts in this case are not disputed. It is agreed that the undivided portion of the said corpus was transferred first by the Agreement to Sell bearing No. 674 marked as P7 prepared by W.S.D. Fonseka and in a formal transfer, the vendor admittedly executed a Deed of Sale bearing Deed No. 169 marked as P8 attested by W.S.D. Fonseka on 08.03.1979. The gravamen of the arguments in this case pertains to the question of what rights and what share the vendor, Don Ilian Somapala Ranawaka possessed to transfer by the Agreement to Sell: P7 and the Deed of Sale: P8, to Don Goonewardane Wettasinghe, the vendee, the Plaintiff- Appellant.

In this context, a thorough examination of the words contained in P7 and P8 is necessary. It is to be

noted that at this time the corpus, which is the subject matter of this case, was undivided and a partition was sought by the case brought before the District Court of Matugama bearing No. 518/P. The Appellant's contention was that in terms of the words contained in P8 on 03.06.1979, by P8 he was allotted, he said "මට අයිතිවෙන සියලුම අයිතිවාසිකම්" where the vendor refers to the transferred share as being part of the land depicted and partitioned as Lot 4 set out in Plan No. 119 dated 18.07.1953. In his submissions he provides us with reasons for his entitlement, and challenged the 3rd Respondent. The translation of the document 3VI of page 337 is as follows:

> *In the Western Province, the District of Kalutara, in Pasdun Korale, in Gangaboda Pattu the 4th lot of the land of Egallawe Deniya; situated in Bulathsinhala; is surrounded by the main road and Land No 3 from the North, the Lot B of the land of Egallawe Deniya from the East, the land of Agallawe Deniya owned by A. P. Fernando from the South, the Lot 2 and 3 of this land from the West, and encompasses 3.0 Roods and 10.31 Perches.*
>
> *This land as per the Promise to Sale No. 674 as certified by Notary Public of Bulathsinhala, Ms. Malani Fonseka, as per the Sale of Title No. 169 as certified by Notary Public of Bulathsinhala, W. Wimalasena, includes a building built by me on the right hand side and excluding such building and my share from the right hand side, there is a balance share of undivided 15 Perches land and its trees and fruits facing the main road of 18 feet in the North.*

This claim preferred by the 3rd Respondent, which was challenged by the Appellant, was through a Deed of Conveyance bearing No.304 prepared by W. Wimalasena dated 22.7.1988 produced as 3V1. It is the Appellant's argument that as the entirety of the share that the vendor 'Don Illian Somapala Ranawaka' would have been entitled to by the Partition Case bearing No. 518/P, which was pending at the time, was transferred by P8 to Don Gunawardana Weththasinghe who was the predecessor in title of the Appellant. The 3rd Respondent could not have been given any share in this land nor was there any share left to be transferred through the Deed bearing No. 304 marked 3V1, on which the 3rd

Respondent relied.

It is also to be noted that the Partition Action bearing No. 518/P was withdrawn and no decree was entered subsequently and it was settled. On the admission of all parties to this case, the same vendor Don Ilian Somapala Ranawaka who purported to transfer all his rights in P8 was only entitled to 1/3rd of the corpus; he had no claim to any rights to the land which exceeded his share and therefore, he could not have transferred the 15 perches to the 3rd Respondent.

This court is of the opinion that deeds P8 and 3VI require appropriate interpretation. It is clear to this Court that the intent of the vendor was to transfer a land which was a part of a larger land of 3 Roods and 10.31 Perches and P8, the Deed on which the Appellant claimed and 3V1 on which the 3rd Respondent claimed was the same land, as it referred to the same allotment of Lot 4 and the same boundaries which was the entirety of the land allotted to Don Ilian Somapala Ranawaka. Yet this was not challenged during the submissions. All rights, title and interest he acquired through the partition case, were transferred to Don Gunawardana Weththasinghe the Appellant while the partition case was pending, by documents P7 and P8 referred to above. So Don Ilian Somapala Ranawaka had no rights left to transfer at the time he wrote 3V1 to the 3rd Respondent.

Hence, it must be noted that the partition decree had not been entered into at the time of transfer by P8. Therefore, it was incumbent upon the 3rd Defendant-Respondent to prove that the vendor Don Ilian Somapala Ranawaka retained, reserved or kept back a portion of the land within that corpus when he divested himself of the land referred to in P8.

This Court is of the view that the clauses relevant to the transfer explicitly states in Deed P8 dated 03.06.1979 that the vendor is transferring the shares that devolved on him in the partition case and he had not reserved any right, title and interest of that allotment to himself. Therefore, having freed himself of all rights devolved on him of this 1/3rd share that he was admittedly entitled to, he could not have thereafter transferred 15 Perches by 3V1 through the Deed bearing No. 169 to the 3rd

Defendant-Respondent.

The 3rd Respondent did not and could not prove that there was any portion that was remaining after the vendor Don Ilian Somapala Ranawaka transferred his share in terms of P8, as no reservation of any right, title and interest was made in terms of P8.

Therefore, this Court holds that no rights would be transferred by the Conveyance bearing No. 304 and marked as 3V1 and that the 3rd Respondent has no rights whatsoever in the said corpus.

The Appellant further claimed that the share that was allotted to him should be, in terms of Deed: P8, the land that is situated to the right hand side of Lot 4. It must be noted that at the time P7 and P8 were written there were buildings along the southern boundary. Therefore the intent of the transferor could not have been to transfer houses belonging to other persons and clearly what was intended was the land appurtenant the right side of Lot 4 in Plan No. 119 adverted to above, and is entitled to the buildings marked 6 and 7 of the said plan, which would include 1/3rd of the corpus.

For aforesaid reasons this Appeal is allowed. Therefore, the Judgment of the Civil Appellate High Court dated 03.05.2011 is set aside. The Judgment of the Additional District Judge, Mathugama dated 31.01.2003 is affirmed subject to variations set out above. No costs.

JUDGE OF THE SUPREME COURT

DEP. P.C. J

I agree.

JUDGE OF THE SUPREME COURT

SC. FR. No. 367/10

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

In the matter of an Application under Articles 17 and 126 of the Constitution of the Republic of Sri Lanka.

Ravindra Lasantha Pathinayaka
No. 314, Kaduwela Road,
Koswatta,
Thalangama North,
Battaramulla.

Petitioner

S.C. F.R. Application No. 367/10

Vs.

1. Bandara
   Police Sergeant (26433)
   Police Emergence Calling Unit,
   No. 03, Mihindu Mawatha,
   Colombo 12.

2. Thennakoon
   Police Constable (30032)
   Police Emergence Calling Unit,
   No. 03, Mihindu Mawatha,
   Colombo 12.

3. Anura Silva
Assistant Superintendent of Police,
Motor Traffic Division (Colombo North),
No. 03, Mihindu Mawatha,
Colombo 12.

4. Kapilarathne
Officer-in-Charge,
Police Emergence Calling Unit,
No. 03, Mihindu Mawatha,
Colombo 12.

5. The Inspector General of Police
Police Headquarters,
Colombo 01.

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

Respondents

BEFORE : **TILAKAWARDANE, J.**
SRIPAVAN, J. &
EKANAYAKE, J.

COUNSEL : Sanath Singhage for the Petitioner.
Shanaka Wijesinghe, SSC, for the Attorney General.

ARGUED ON : 04.04.2013

DECIDED ON : 03.05.2013

TILAKAWARDANE, J

This application was supported on 24.01.2011 and this Court has granted Leave to Proceed on an alleged violation of Article 12(1) of the Constitution.

The Petitioner states that on Saturday 22nd May 2010 at about 10.15 am he was driving motor vehicle bearing Registration Number WP-PA 5709 along the Ananda Coomaraswamy Mawatha (Green Path) from Kollupitiya towards Horton Place when he observed the red traffic signal at the Horton Place-four way Junction and stopped his vehicle. As he stopped the vehicle at the traffic light, the Petitioner observed Police Constable Darshana (PC 38832), attached to the Motor Traffic Division of the Cinnamon Garden Police Station, who was stationed near the roundabout, signaling the Petitioner to proceed despite the red light signal. This is a fairly common occurrence in Colombo particularly when roads are cleared due to the heavy traffic load or for security reasons.

Accordingly the Petitioner started to cross the four-way junction (round-about) to proceed towards Borella along Horton Place. While crossing the round-about the Petitioner noticed a white police car approximately 30 meters away on the Petitioners right side, driving towards the round-about from Torrington along C.W.W. Kannangara Mawatha. Soon after the Petitioner entered Horton Place, the said police car, which was driven by the 1st Respondent, drove parallel to the Petitioner and the 2nd Respondent signaled the Petitioner to stop his vehicle.

The Petitioner states that he parked his vehicle on the left side of Horton Place and approached the police car which was stopped behind his vehicle. The 1st and 2nd Respondents had got down from their car and the Petitioner noticed the 2nd Respondent writing something on a notebook on the instructions of the 1st Respondent.

The Petitioner states that the 2nd Respondent asked the Petitioner for his Driving License alleging that the Petitioner had crossed the four way junction disobeying the red signal on the traffic lights. The Petitioner states that the 1st and 2nd Respondents refused to listen to his explanation that he had crossed the traffic light based on the hand signals of the police officer (Darshana PC 38832) referred to above.

Despite his explanation the Petitioner's driving license bearing No. A005719664 was taken into the custody of the 2nd Respondent and he was issued a temporary driving permit bearing Number 692290 (hereinafter referred to as "the permit") signed by the 1st Respondent. The 2nd Respondent also ordered the Petitioner to obtain a spot fine ticket and pay the spot fine at the Police Station at No. 03, Mihindu Mawatha, Colombo 12, where the 1st to 4th Respondents were stationed. A copy of the permit issued by the 1st Respondent was marked as P2 and produced in this application.

It is significant to note that the permit, P2, is valid for a period of 11 days from 22.05.2010 to 01.06.2010. On the face of the permit, the Petitioner was required to appear in Court on 10.06.2010, which comes 8 days after the expiry of the permit P2 on 01.06.2010. Therefore the Petitioner would not have a valid driving license or a temporary permit from 01.06.2010 onwards.

By failing to issue a permit which is valid up to the Court date, the 1st and 2nd Respondents have deprived the Petitioner of the right to obtain a valid temporary driving license until 10.06.2010 and precluded the right to right of the Petitioner to the 14 day period, granted under law for payment of the fine, from the date on which the offence was committed. The Petitioner also states that the name of the Court in which he should appear had been left blank deliberately, to inconvenience him.

The Petitioner states that although he went to the Police Station on the following day, 23rd May 2010 and obtained a spot fine ticket, he did not pay the fine as he wished to prove his innocence in Court. The spot fine ticket obtained by the Petitioner is marked as P3.

The Petitioner states that he returned to the Police Station on 03.06.2010, with the intention of meeting the 4th Respondent to get the temporary permit amended, but that the 4th Respondent was not in his office. While the Petitioner was standing outside the 4th Respondent's office, he met the Deputy Inspector General of Police (hereinafter referred to as "DIG"), who listened to his grievance and apologized for the incident and instructed another officer nearby to attend to the Petitioner's matter.

The Petitioner states that the 1st Respondent who had overheard his conversation with the DIG approached the Petitioner and asked him why he was at the police station. On hearing the petitioners narration of the incident the DIG had apologized and ordered an officer standing close by to attend to the matter. The 1st Respondent had overheard the Petitioner's complaint to the DIG, however when the Petitioner requested the 1st Respondent to attend to the matter, both the 1st and the 2nd Respondent had categorically refused to amend the permit, or to take him to a superior officer to attend to the

matter. This resulted in the Petitioner to be compelled to use the same permit and to be derived of the name of the Court in which he had to appear, causing him great inconvenience.

Subsequently, the Petitioner met the 3rd Respondent and brought the above stated short comings in the temporary permit P2 to his attention and explained that such was in violation of Sections 135(4), 135(5) and 135(6) of the Motor Traffic Act.

The Petitioner also explained that the permit, P2, did not accord with the law as it did not state the name of the Court in which the Petitioner was to appear. Further, the Petitioner's Driving License had been retained by the Police beyond the date of the temporary permit P2, which did not cover the period up to the date on which he was due to appear in Court. The 3rd Respondent having listened to the Petitioner allegedly informed him that while he did have the power to correct the permit, he would not do so as the Petitioner knows and relies on the law too much.

Under the circumstances, the Petitioner claims the violation of his right to equal protection of the law protected under Article 12(1) of the Constitution. The Petitioner specifically claims that the acts of the 1st, 2nd and 3rd Respondents are tainted with malice and are unreasonable, discriminatory and arbitrary and therefore constitute an infringement of the petitioners Rights to equal protection under the law.

The Petitioner also states that the aforesaid Respondents had connived to place him in a position where he was unable to prove his innocence in Court, by deliberately omitting to state the name of the Court before which he was due to appear.

The Petitioner also pleaded that his rights under Article 14(1) (h) of the Constitution were also violated this matter was not argued in detailed before the Court perhaps on the ground that he was not precluded the opportunity to exercise his right of movement but merely deprived of the right of driving his motor vehicle and the Court accordingly does not see that there has been a violation in terms of Article 14(1) (h). In any event leave has not been granted for an alleged violation of this article of the Constitution.

It is interesting to note that whilst objections have been filed by the 1st and 2nd Respondents, the 2nd Respondent's statement is merely a bald denial of the Petitioner's allegations and supporting the contentions contained in the 1st Respondent's objections. Specifically, the 2nd Respondent denied the presence of the Police Constable 38832, Darshana, at the traffic signal as stated by the Petitioner.

In the counter affidavit filed by the 1st Respondent dated 17.11.2011, he denies the version of the Petitioner and states that the Petitioner had informed him that he would pay a fine within 14 days and that he had orally informed the Petitioner that the temporary permit would be valid until 10.06.2010 which was the date on which he had to appear in the Court.

When considering the evidence by way of affidavits several anomalies in the evidence of the Respondents specially the 1st Respondent is apparent. In this context, the Petitioner submitted the proceedings of the criminal case instituted against him in the Magistrate's Court of Colombo bearing No. 59586/7. It is to be noted that at the end of the trial the Petitioner had been acquitted on the charges preferred against him under Section 214 (1) (a) read with Sections 190 and of the Motor Traffic Act as amended by Act No. 40 of

1984 and Regulation 32(1 (a)) of the Gazette bearing No. 444/18 dated 13.03.1987, pertaining to the disobedience of traffic signals.

Even a cursory glance at the Proceeding reveals that whilst the Petition refers to the location where he had been apprehended as the Horton Place junction, the 1st Respondent's evidence given at the Magistrate's Court contradicts the place of apprehension of the petitioner in his own affidavit, and significantly in doing so, his version given in the Magistrate's court as to the place of apprehension supports the location as given by the Petitioner.

This is a material aspect of this incident and by giving evidence that is contrary to what he has filed in this Court in the Magistrate's Court of Colombo in the Motor Traffic Case the credibility of the 1st Respondent has been assailed in as much as such contradictory evidence given on affidavit to this Court on a material fact challenges the testimonial creditworthiness of the 1st Respondent. As the 2nd Respondent has also in his affidavit supported the 1st Respondent his evidence on affidavit too therefore becomes tainted.

Another important fact to be noted in this case is that in the submissions on behalf of the Respondents, the 1st Respondent accepts that the permit was not issued in conformity with the Motor Traffic Act in that the Petitioner was granted less than the 14 days provided under the Act to pay the fine or appear in Court.

The Senior State Counsel submitted that the disparity in the dates on P2, the Temporary Permit was due to an administrative mistake when it was prepared by the 1st Respondent. It is difficult for this Court to accept this position in view of the overall behavior of the 1st and 2nd Respondents as

alleged by the Petitioner which has not been challenged in any significant manner by the evidence placed before this Court by the 1st and 2nd Respondents. If it was in fact a single mistake, the same dates would not have appeared in the original Information Book Extracts, concerning this incident on 22.05.2010, which was produced to Court. This supports the contention of the Petitioner that this was a deliberate act, especially when it is considered in conjunction with the fact that the relevant Court was not mentioned on the permit. It therefore rules out any question of mistake and indeed supports the contention of malice by the 1st Respondent which was further evidenced by the 1st Respondent's response when he met the Petitioner at the Police Station on 03.06.2010. That is no doubt whatsoever that the permit had been issued by the 1st Respondent as the permit carries his name as the Officer who issued the temporary permit.

Failure to extend the permit beyond 01.06.2010 up to the Court date, deprived the Petitioner of his rights in terms of Section 135(4) of the Motor Traffic Act which provides that whilst a Police Officer may take charge of a license for the time being, he must issue to such a person a permit under his hand in the prescribed form setting out the prescribed particulars.

In the instant case, despite clear law, the 1st Respondent has failed to act within the law and follow the prescribed procedures as explained above.

With respect to the 3rd Respondent, strong allegations have been made in paragraph 25 of the Petition against his conduct. However, the 3rd Respondent has failed to file objections and he has not contested these facts. By failing to act on the complaint of the Petitioner regarding the violation of Section 135(4) of the Motor Traffic Act, the 3rd Respondent has violated the right of the Petitioner under Article 12(1) of the Constitution.

Therefore the conduct of the 1st, 2nd and 3rd Respondents, as per the reasons given above deliberately precluded the extension of the permit up to the date on which the Petitioner had to appear in Court namely 10.06.2010 thereby depriving the Petitioner his right to equal protection of the law under Article 12(1) of the Constitution.

The submission that the 1st Respondent had made a mistake is not supported as he appears to have entered the same date both on the Information Book Extracts as well as on the temporary permit. Even a cursory reading of the permit would disclose that permit lapsed prior to the date on which the Petitioner was due in Court. Additionally the failure of the 1st Respondent to enter the name of the relevant Court on the permit and the conduct of the Police Officers when the Petitioner presented himself at the Cinnamon Gardens Police Station to extend his permit taken cumulatively clearly discloses malice on the part of the 1st and 2nd Respondents.

The Petitioner has specifically stated that he tried to obtain the extension of the permit from the 1st and 2nd Respondents but that both Respondents ignored his requests. This rules out the position taken by the 1st Respondent that this was a bona fide mistake. Court finds that 1st, and 2nd Respondents have acted maliciously to deprive the Petitioner of the equal protection of the law guaranteed under Article 12(1) of the Constitution and that this has been proved before Court by strong cogent evidence. Having had the duty to rectify the permit and by deliberately refraining and/or omitting to do so, and by acting in the manner described by the Petitioner-facts not refuted or challenged by the 3rd Respondent- he too has deprived the petitioner of the equal protection of the Law.

This Court accordingly declares that the Fundamental Rights of the Petitioner guaranteed under Article 12(1) to have been infringed. The Courts has also considered their independent and collective actions in apportioning compensation. This Court grants compensation in a sum of Rs. 150,000/- (One Hundred and Fifty Thousand Rupees) to be paid personally by the 1st, and 2nd Respondents in equal shares of Rs 75,000/- each, to the Petitioner. A sum of Rs 25,000/- is to be to be paid by the 3rd Respondent to the Petitioner.

Application is accordingly allowed with costs in a sum of Rs.10,000/- (Ten Thousand Rupees) to be paid by the 1st, 2nd , and 3rd Respondents to the Petitioner.

The compensation and the costs amounting to Rs 185,000/- is to be paid within three months (03 months) from date of this Judgment.

JUDGE OF THE SUPREME COURT

SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

Ahm

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

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR. Application No. 431/2010

Warnakulasooriya Sunil Asoka
Harischandra Fernando.
Petitioner

-Vs.-

1. Police Sergeant Dayawansa
(Service No. 25084)
Police Station,
Madampe.

2. Sub Inspector Piyaseeli
Police Station,
Madampe.

3. Inspector of Police H.J.M.D. Indrajith
Officer-in-Charge
Police Station,
Madampe.

4. Inspector General of Police,
Police Head Quarters,
Colombo 01.

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

Respondents

Before : Shiranee Tilakawardane, J.
P. A. Ratnayake PC, J. &
S. I. Imam J.

Counsel : Shantha Jayawardane for the Petitioner.

Anura B. Meddegoda with Kirthana Krishnakumar and Achala Jayawardane for the 1st – 3rd Respondents.

Shanaka Wijesinghe, SSC, for the 4th Respondent.

Argued on : 21.01.2011, 01.02.2011, 22.02.2011 and 16.11.2011

Written Submissions of the Petitioner
Tendered on : 31.01.2012

Written Submissions of the 1st, 2nd and 3rd Respondents
Tendered on : 28.12.2011

Decided on : 22.02.2013

S,I.Imam, J.

Having heard all Counsel in this case, this Court granted Leave to proceed for the alleged violation of Article 11 of the Constitution on 03.09.2010.

The Petitioner in his Petition dated 02.08.2010 stated that on or about November 2009 he commenced employment in the "Mangalika Oil Mill" owned by Rukman Narasinghe of Karukkuwa, Madampe situated at Galahitiyawa, Madampe as a Machine Operator (Labourer). The Petitioner averred that his residence was situated approximately 400 Meters away from the aforesaid Oil Mill premises, and that his usual working hours at the Oil Mill were from 7.00 a.m. To 5.30 p.m. The Petitioner stated that there were 12 labourers inclusive of himself, and one Supervisor, of whom 7 of them namely Chathu, Karuppiah, Chaminda, Wimale, Ampare Jayantha, Nuwara Jayantha and Sudda resided at the Workers Quarters

situated at the Oil Mill premises. It was stated by the Petitioner that he did not spend the nights at the Oil Mill premises as he resided closeby. The Petitioner said that on 01.07.2010 after work he returnd home at approximately 5.40 p.m., and that he reported for work as usual on 02.07.2010 at 6.45 A.M., consequent to which he became aware that on the previous night several bags of desiccated coconut had been stolen from the Oil Mill by a wall of the Oil Mill having been broken. The Petitioner stated that he became aware that Somaweera Chandrasiri who is a relation of the owner Narasinghe and who functioned as the Manager of the Oil Mill had made a complaint to the Madampe Police Station pertaining to the theft. The Petitioner contended that on 02.07.2010 the employees in the Oil Mill premises engaged in their work in the Oil Mill premises with Lunch break at 12.00 Noon, subsequent to which the Petitioner went home for lunch, with leave having been granted to all the labourers for the afternoon. The Petitioner claimed that on 02.07.2010 after having lunch when he was at home at approximately 12.50 p.m. the 1st Respondent and another Police Officer of the Madampe Police Station whose name the Petitioner was unaware of arrived at the home of the Petitioner clad in Police Uniform in a Police Jeep arrested the Petitioner and ordered the Petitioner to come with them to the Madampe Police Station to record a statement from the Petitioner with regard to the aforesaid theft of some bags of desiccated coconut. The Petitioner said that his wife Matilda

Fernando, elder son Sameera Dave Fernando and mother Wimala Wijesooriya were present at his home and witnessed the Petitioner being arrested. The affidavits of the Petitioner's wife Matilda Fernando and mother Wimala Wijesooriya were marked and annexed to the Brief as (P1) and (P2) respectively. The Petitioner claimed that his elder son Sameera Dave Fernando on 14.07.2010 went abroad for employment. It was stated by the Petitioner that on 02.07.2010 at about 5.30 p.m. when he was at the Madampe Police Station, the 1st Respondent accompanied by Somaweera Chandrasiri brought in Leon Singho another labourer and the Watcher employed at the Oil Mill to the Police Station. The Petitioner claimed that Leon Singho and he were locked up in the Madampe Police Station in two separate cells. The Petitioner in his Petition vividly set out the manner in which the 1st Respondent and another Police Officer tortured the Petitioner on 03.07.2010 by initially having assaulted the Petitioner in both his palms with a wooden stick, and consequent to a denial by the Petitioner of any Knowledge of the theft, that the Petitioner was taken to a room in the Barracks, where he was stripped naked and assaulted by the 1st Respondent. The Petitioner explicitly narrated in hi Petition the manner in which both his hands were tied behind, suspended on a hook fixed to the roof and assaulted by the 1st Respondent in 4 fifteen minute sessions on the soles, buttocks and rib cage with a baton, in between which the Petitioner was bathed with **water** from a **water tap** contained in a Bucket.

On covering the head and face in a shopping bag containing chilly powder up to the neck of the Petitioner, which caused the Petitioner a severe burning pain in his eyes, throat and lungs and which the Petitioner claimed almost suffocated him. The Petitioner and Leon Singho were produced before the Chilaw Magistrate in Case No. B655/2010 (P-3) the B Report being dated **05.07.2010** signed by the 3rd Respondent alleging that the Petitioner and Leon Singho committed offences punishable under Sections 443 and 369 of the Penal Code by the theft of 40 bags of Desiccated coconut from Mangalika Oil Mill. Subsequently the learned Magistrate of Chilaw ordered that they be Remanded until 15.07.2010.

The Petitioner averred that on 05.07.2010 consequent to being taken to Remand Prison Chilaw a Prison Officer namely Ariyaratne having observed the injuries on the Petitioner obtained a statement from the Petitioner in which the Petitioner stated that he was assaulted at the Madampe Police Station and not at the Prison, which is included in the Case Record of B 655/2010 (P3). The aforesaid statement on 15.07.2010 was tendered by the Prison Officers to the learned Magistrate after which on 15.07.2010 the Petitioner was enlarged on Bail.

The Petitioner complained that subsequent to being enlarged on Bail as he suffered a severe pain in his chest and numbness in his legs on 16.07.2010

the Petitioner was admitted to The Government Hospital, Chilaw having been warded in Ward No. 4B of the Hospital and was **Discharged** on **19.07.2010** . The Petitioner alleged that his 1st, 2nd , 3rd and 4th ribs were fractured (P5) which was the result of torture inflicted on him by the 1st Respondent. On 19.07.2010 at about 10.00 a.m. just before being Discharged from Chilaw Government Hospital, the Petitioner stated that he was examined by the Judicial Medical Officer of Chilaw and the JMO,s Report was marked as P5. The Petitioner claimed that the conclusions of the Judicial Medical Officer as set out in his Report corroborated the Petitioner's version of the injuries inflicted on him by the 1st - 3rd Respondents at the Madampe Police Station on 03.07.2010, and hence has established by clear and cogent evidence that he was subjected to torture by the aforesaid Respondents. The Petitioner averred that he was entitled to the reliefs prayed for in the prayer to the Petition.

It was the contention of the 1st Respondent that it was upon information received from a private informant that the Petitioner and S.A. Leon Singho were arrested on **04.07.2010** at **noon** and the 1st Respondent **denied that** the **Petitioner** was in **Madampe Police custody on 03.07.2010.** The 1st Respondent **denied** that Leon Singho another labourer, and the watcher employed at "Mangalika Oil Mill" were brought to the Madampe Police Station on 02.07.2010 by the 1st Respondent accompanied by Somaweera

Chandrasiri, 1st Respondent conceded that the Petitioner and S.A. Leon Singho were poduced at the Chilaw Magistrate's Court bfore the Chilaw Magistrate on **05.07.2010** and remanded to Fiscal **custody.** Even the 2nd Respondent in his **Statement** of objections **denied** that the **Petitioner** was **arrested** on **02.07.2010** and stated that the 2nd **Respondent arrested** the **Petitioner** and S.A. Leon Singho on 04.07.2010 after noon, whereas the 1st Respondent recorded their statements on the **same day** at approximately **13.55 hours (1.55p.m.)**. The 3rd Respondent specifically denied the Arrest of the Petitioner on 02.07.2010, and stated that upon Information received from a Private Informant the Petitioner and S.A. Leon Singho were arrested on 04.07.2010 in the afternoon and that their **statements** were **recorded** by the **1st Respondent** on **04.07.2010 commencing** from **13.55 hours** (1.55p.m.) The 3rd Respondent at 1.55 p.m. Specifically denied the Arrest of the Petitioner.

I have examined the allegation of torture to the Petitioner and the views of the Respondents expressed in this regard. The question to be determined by this Court was whether these was a violation of article 11 of the Constitution by acts alleged to have been committed by the 1st to 3rd Respondents and/or any one or more of them towards the Petitioner which infringed the Petitioner's Fundamental rights guaranteed under Article 11 of the Constitution. Article 11 of the Constitution refer to Acts which

would constitute **"Torture, or cruel , inhuman or degrading treatment or punishment"** which violate the **Fundamental rights** of the aggrieved party. I have examined the facts of this case, the **Medical evidence** in support of the Petitioners **allegations** of **assault, Torture, Cruel, inhuman or degrading treatment and punishment,** the oral and written **submissions** of both the **Petitioner** and the **1st to 3rd Respondents** and the **Degree of Proof** required to **establish** an allegation of **Torture, Cruel, Inhuman or Degrading Treatment or Punishment. The Legal Authorities** in this regard are numerous.

1. **In Premadasa Vs. O/C Hakmana** and **Others SC App 127/94 SC Mon. 10 March 1995** it was held by Dr. A.R.B. Amerasinghe J that "..... the **mere fact that there was an assault and some injury may not be violative of Article 11**. Torture or Cruel, Inhuman or Degrading treatment or punishment may take **many forms**, but whether the relevant Criteria have been satisfied for the violation of Article 11 depends on the **circumstances** of each case. **Dr. A.R.B. Amerasinghe J** in **"Our Fundamental Rights of personal Security and Physical Liberty"** P. 28 stated that "..... The Supreme Court will declare conduct to be **violative of Article 11** only if it is satisfied that such Act was of **a Sort** the Court can **take cognizance** of but not otherwise."

2. **In Lucas Appuhamy v. Maturata and others [1994] 1 SLR P 401 at p. 404** it was held by the Supreme Court that the Evidence was **insufficient** to support the Petitioners allegations and held that the injuries of the Petitioner were **mere consistent** with the **Respondents version** of the **Cause of the inJury.** In this case the Petitioner tried to **escape** from the Police Officers **custody** and fell into a **pit.** It was held by Dr. amarasinghe J that "In my view the Petitioner has simply sustained inJuries in the process of the use of **reasonable force** in **making the Arrest**, and he has **failed** to establish that his **rights under Article 11** of the **Constitution were violated."**

3. **In Thadchanamoorthi vs AG[1980] FRD (1) 129 at p.159** the Police claimed that they had to use **some force as** the Petitioner had **resisted Arrest** and **attempted to escape**. In this Case Wanasundera, J held that the Meical Report only revealed **Evidence of Minor inJuries** and that evidence of **Torture was neither clear nor cogent** and that it **fell short** of **Minimum Proof** required to proceed, "The **inJuries** found on the **Petitioner** are of **Minor Nature**. Consisting of a few **Abrasions** and **two superficial wounds** on the **left** and **right forearms.** The Medical report does **not** carry his

case any further **even when viewed most sympathetically to the Petitioner"** Article 11 of the Constitution envisages that "No person shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment" and hence the protection in accordance with Article 11 of the Constitution is guaranteed to all persons. Dr. A.R.B. Amarasinghe, J in **his contribution on "Our Fundamental Rights of Personal Security and Physical Liberty" 1995 p. 43** concluded that Complaints made in respect of **violation of Article 11** of the **Constitution** are generally brought against Public Officers and if proved would carry **serious consequences** against them. Therefore it was surmised by His Lordship that the allegations complained of should be **strictly proved**.

In a series of decided cases such as **Velumurugu v Attorney General (1981) 1 FRD p 180, Goonewardene v. Perera and others (1983) 1 SLR p. 305, Kapugeekiyana v. Hettiarachchi (1984) 2 SLR p. 153** and **Malinda Channa Pieris and others v. Attorney General (1994) 1 SLR at p.6** have implicitly laid down the **Principle** that the **Civil standard** of **Persuasion** would apply, and a high degree of **Certainty** would be **required** 'before the balance of **probability** might be said to **tilt** in favourt of the **Petitioner** who has

been attempting to **discharge** his burden in proving that his Fundamental Rights guaranteed in terms of Article 11 had been **violated** by the Respondents as stated by Dr. A.R.B. Amarasinghe J in **"Our Fundamental Rights of Personal Security and Physical Liberty" 1995 p. 43.**

4. **In Malinda Channa Pieris and Others v. AG and Others [1994] 1 SLR at p. 6** it was pointed out that having regard to the **gravity of** the matter in issue a **"high degree of Certainty** is required before the **balance of probability** might be said to **tilt** in favour of a Petitioner …." as stated by **Dr. A.R.B. Amerasinghe, J.**

5. **In Jeganathan v Attorney General [1982] 1SLR p. 302** it was held that where **Public Officers** are accused of violating provisions of **Article 11**, the **allegations** must be **strictly provd**, for if **proved** they will carry **serious consequences" for such Officers.**

6. **In Namasivayam v Gunawardena [1989] SLR at p. 401** it was concluded that **"On the question whether the Petitioner was subjected to cruel treatment or torture, the Petitioner's averments stands uncorroborated by any Medical evidence and has been denied by the Respondents. The evidence is not**

sufficient for us to hold that there had been any violation of Article 11 of the Constitution.

7. **In Edward Sivalingam v S.I. Jayasekera and others SC FR 326/2008** wherein Judgment was delivered on 10.11.2011 by Tilakawardane, J some of the **critical issues** wee analysed when allegations of torture or of brutal assault were alleged.

It was held that "when considering the allegations made by the Petitioner against Officers of the CID it is important to bear in mind that the burden of proving these allegations **lies with the Petitioner. This Court has held repeatedly that the standard required is not proof beyond reasonable doubt but must be of a higher threshold then mere satisfaction. The standard of prood employed is on a balance of probabilities test and as such must have a higher degree of probability and where corroborative evidence is not available it would depend on the testimonial credit worthiness of the Petitioner"**

The Court further held that "in it's **deliberation** on the **violence** of rights alleged there must necessarily be an **Accurate deliberation** and **careful**

assessment of the **Petitioner's Case**. It was further held that **"testimonial Creditworthiness** has an added significant in the **absence** of any **independent records** to **substantiate** the **Petitioner's assertions."**

On an examination of the facts and other matters this case, the Petitioner stated that he was arrested by the 1st Respondent on **02.07.2010** after lunch at his **home**. The Petitioner alleged that he was tortured by the 1st Respondent and another Police Officer' of the Madampe Police on **03.07.2010.** The 1st to 3rd Respondents however averred that upon **information** received by a **private informant** the Petitioner and Leon Singho were arrested by the **2nd Respondent** at Galahitiyawa on **04.07.2010** at about **1.55p.m.** The 1st Respondent in his statement of objections stated that pursuant to a complaint made by Chandrasiri the Manager of Mangalika Oil Mill made on 02.07.2010 with regard to the theft of copra valued at Rs. 263,250/=, the 1st Respondent together with a team of Police Officers of the Madampe Police went to the **scene** of the **crime to conduct investigations.** The 1st Respondent further stated that on 02.07.2010 at approximately 1.00 p.m. left in a private vehicle to the **Kuliyapitiya Police Kennels Division** to bring the Police Dog from there, as the Police Dog attached to the Chilaw **Police Division** was **not well.** The 1st Respondent further stated that in the course of investigations

'Sheba' the police dog handled by PC 49105 Bandara proceeded upto the verandah of Leon Singho's residence and stopped there. As Leon singho was not at home the 1st Respondent together with PC 87427 Samitha had returned to the Police Station at about **5.50 p.m.** The 1st Respondent sated that the **Petitioner** and **Leon Singho** were **arrested** on 04.07.2010 afternoon, and that their statements were recorded at about **1.55 p.m.**

On an examination of the affidavits of the wife (P1) and mother (P2) of the Petitioner namely Matilda Fernando and Wimala Wijesooriya respectively they too state that the Petitioner was arrested by the 1st Respondent on **02.07.2010**. However the **main fact** to be considered was whether the **petitioner** was tortured, by the **1st to 3rd Respondents** to constitute **cruelty or torture** as envisaged by Artocle 11 of the Constitution. On a perusal of the Extracts of the Information Book of the Madampe Police Station namely, 1R, 1R2, 1R3 and 1R4 reveal that the Complaint of Chandrasiri (1R1) was made on **02.07.2010** and the entry pertaining to the arrest of the Petitioner and Leon Singho by the 2nd [1R4] Respondent is dated **04.07.2010** respectively. Hence beside the averment of the Petitioner, except (P1) and (P2) namely the **affidavits** of Matilda (wife) and Wimala (mother) respectively, there is no other material to suggest that the Petitioner was arrested on **02.07.2010.** Although the Petitioner alleged

that he was assaulted mercilessly by the 1st Respondent and another Police Officer of the Madampe Police on 03.07.2010, the Admission form of the Judicial Medical Officer dated 16.07.2010 **refers** to the **date of Assault as 31.06.2010**, although the JMO's Report refers to the date of Assault as **03.07.2010**. Assuming that the Admission form mistakenly refers to the date of assault as **31.06.2010, neither the JMO's Admission form** nor **Report indicate that the Petitioner** was **subject to torture.**

The Injuries referred to are **Exfoliation of superficial skin,** a healing **Abrasion** of the **left hand at** the **Wrist Joint placed in** an **encircling manner** and of a superficial nature, could have been the result of the Petitioner being **hand cuffed** at the **time** of **Arrest.**

Hence as the Petitioner has failed to prove by evidence or otherwise that he was subjected to Torture cruel, inhuman or degrading treatment or punishment by the 1st Respondent as alleged by the Petitioner, the Petitioner in my view has not achieved the standard of proof required by law and **has not** strictly proved torture by the 1st to 3rd Respondents to fall within the ambit of Article 11 of the Constitution.

Hence I dismiss the application of the Petitioner without costs.

JUDGE OF THE SUPREME COURT

Shiranee Tilakawardane, J.

I agree.

JUDGE OF THE SUPREME COURT

P. A. Ratnayake PC. J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC.FR No. 536/2010 In the matter of an Application in Revision and for the exercise of the inherent power and jurisdiction of the Supreme Court.

T.R.Ratnasiri
23/4, Makola South,
Makola.
PETITIONER-PETITIONER

Vs.

1. P.B.Jayasundara
   Secretary to the Ministry of Finance and Planning, The Secretariat Building,
   Colombo 01.
2. Sarath Jayathilake
   117/30, Ananda Rajakaruna Mawatha,
   Colombo 10.
3. Thilak Perera
   Director of Customs,
   40, Main Street,
   Colombo 11.
4. Director General of Customs
   Sri Lanka Customs Department,
   40, Main Street,
   Colombo 12.

Sudharma Karunarathna (May 2010-Jan 2012) Now the Secretary, Ministry of Plantation Industries, 55/75, Vauxhall Lane, Colombo 2.

Neville Gunawardena (Jan 2012-December 2012) Now Director General Trade & Investment Policy, Ministry of Finance , General Secretariat, Colombo 1.

Jagath Wijeweera (Dec 2012 to date)

5. Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 01.
6. Colombo Dockyard Ltd,
P.O.Box. 906, Port of Colombo,
Colombo 15.
7. Mohan Pieris
Former Attorney General,
3-14D, Kynsey Road,
Colombo 8.
8. Attorney-General
Attorney-General's Department,
Colombo 12.

RESPONDENTS-RESPONDENTS

BEFORE : **TILAKAWARDANE, J.**
RATNAYAKE, PC, J. &
WANASUNDERA, PC, J.

COUNSEL : N.Kodituwattu with N.R.A.D. Rupasinghe for the Petitioner.
K.Kanag-Iswaran PC with Harsha Cabral PC and Buddhika Illangatillake for the 6th Respondent.
Shavindra Fernando DSG with Milinda Gunetilleke DSG for the Attorney-General.

ARGUED &

DECIDED ON: 26.02.2013.

TILAKAWARDANE, J.

At the outset of his arguments the learned Counsel for the Petitioner, Mr. Kodituwakku states that he does not wish to make any allegations against anyone in this Application for Revision that he supports today. And if he has made any personal allegations that he agrees to expunge them from the Revision Application filed today. He further concedes, as do all counsel, that the matter comes up today only for the consideration of a limited matter based entirely on a pure question of law, which admittedly is a threshold issue to be determined before the actual application is considered. The question of law is whether a Revision Application could be preferred to the Supreme Court against a Fundamental Rights Application that had been previously determined by this Court.

As this is a pure question of law, Hon Justice P A Ratnayake, PC, J agrees to participate in this case.

Mr. Kodituwakku concedes that his arguments are based solely on the cases of Jeyaraj Fernandopulle Vs. Premachandra de Silva and others (1996 1 SLR page 70) and the case of Vasudva Nanayakkara Vs. P B Jayasundera and others (Case No S C Application No 209/07 SC minutes dated 13th October 2009) - both being Fundamental Rights Applications and heard before Divisional Benches. He also conceded that in the latter case, the decision of the former case was followed and both cases decided that this Court had no statutory powers to rehear, revise, review or further consider its decisions in a Fundamental Rights application.

Mr. Kodituwakku concedes that in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka there is no Right of Appeal on Judgments or Orders made in terms of Article 126 of the Constitution.

At the outset of his argument, counsel agree this was entirely a matter of law and on the threshold issue as to whether there were revisionary powers of this Court to review its own order.

In his enthusiasm in making his arguments, Mr. Kodituwakku adverted to a document P20 which is part of the facts of the case in the final decision that had been given on this matter previously. Mr. Fernando, Deputy Solicitor General vehemently objected to these matters being re-canvassed directly or indirectly in view of the five bench decision contained in Jeyaraj Fernandopulle Vs. Premachandra de Silva and others (*supra)* as this application is restricted merely to the question of law which is a threshold issue to be determined at the inception of the hearing of this Application.

Having heard submissions of counsel in this case, this bench sees no reason to vacate the Order dated 01.02.2013. A revision Application would not lie to review a decision in a Fundamental Rights Application. In Jeyaraj Fernandopulle Vs. Premachandra de Silva and others it was held that "the inherent powers of a court are adjuncts to existing jurisdiction to remedy injustice. They cannot be made the source of new jurisdictions to revise a judgment rendered by a court". Accordingly the Application for Revision of the Fundamental Rights Application is dismissed. No Costs.

JUDGE OF THE SUPREME COURT

RATNAYAKE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

WANASUNDERA, PC, 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 appeal under and in terms of Section 5(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Sections 754 and 758 of the Civil Procedure Code.

SC (CHC) Appeal No. 55/2006

Case No. H.C. (Civil) 197/2003(1)

1. Araliya Impex (Private) Limited
   No. 69, Old Moor Street,
   Colombo 12.

2. Mylvaganam Rajkumar
   No. 58/24, Templers Road,
   Mount Lavinia.

3. Liyanage Mahesh Paul De Silva
   St. Leonards Kohalwila,
   Kelaniya.

Defendants-Appellants

-Vs.-

Bank of Ceylon
No. 04, Bank of Ceylon Mawatha,
Colombo 1.

Plaintiff-Respondent

BEFORE : Tilakawardane, J.
Ekanayake, J. &
Dep, PC, J.

COUNSEL : M. Javed Mansoor for the Defendants-Appellants.

S. Rajaratnam, DSG, with Fazly Razik, SC, for the Plaintiff-Respondent.

ARGUED ON : 08.07.2013

DECIDED ON : 30.07.2013

Tilakawardane, J.

The High Court of the Western Province (exercising Civil Jurisdiction) holden in Colombo, (hereinafter referred to as the Commercial High Court) in its judgment dated 9th October 2006 found in favour of the Respondent on all issues and granted relief accordingly. The Application was preferred to this Court on 07.12.2006 and appeal taken up on the 29.05.2012. Issues before the Court are as follows:

1. Whether there was evidence in support of the amounts claimed by the Plaintiff- Respondent (hereinafter referred to as the Respondent) and whether the amounts claimed had been arrived at arbitrarily. Whether the Learned Judge had manifestly failed to asses and/ or evaluate the evidence before the Court.

2. Whether personal guarantees were sought from the 2nd Defendant – Appellant (hereinafter referred to as the 2nd Defendant) and the 3rd Defendant – Appellant (hereinafter referred to as the 3rd Defendant) at any stage.

3. Whether the Commercial High Court had jurisdiction to hear and determine this matter.

The 1st Defendant – Appellant (hereinafter referred to as the Appellant Company) applied for credit facilities (marked "P2") up to a limit of Rs. 30Million on 2nd September 1998. Thereafter the Appellant Company obtained a Hypothecation Loan (marked "P1") from the Respondent. This was on the security of a Mortgage Bond No. 15/98 (marked "P3") and a joint and several guarantee of the Directors of the Appellant Company in favour of the Respondent as stated at the bottom of page 1 of the Hypothecation Loan marked P1. The guarantee bond by the 2nd Appellant and the 3rd Appellant who were directors of the Appellant Company, dated 2nd September 1998, is marked P22.

The Appellant Company by letters dated; 08.09.2000 (marked "P4"), 22.09.2000 (marked "P7"), 22.09.2000 (marked "P10"), 04.10.2000 (marked "P13"), 19.10.2000 (marked "P16") and 02.08.2000 (marked "P19") admittedly borrowed money from the Respondent under the Hypothecation Loan marked P1.

Under the Guarantee Bond marked P22, the 2nd and 3rd Appellant provide a guarantee for the loans taken by the Appellant Company under Hypothecation Loan P1. Under law, the loan is secured by the guarantor and the Bank retains the right to sue both the borrower and the guarantor in the event of default by the borrower. The guarantor's liability only arises when the debt becomes due. Therefore when the 2nd

and 3rd Appellants signed P22, they were providing a personal guarantee of a maximum of Rs. 30 Million, although they were Directors of the Appellant Company. This would not have been in their capacity as Directors of the Appellant Company, as the Company would then be guaranteeing itself, which is not the intended purpose of a guarantee. Therefore at no time could it have been the intention, of the Respondent, the Appellant Company or the 2nd & 3rd Appellants, for the 2nd and 3rd Appellants to provide a guarantee for the Hypothecation Loan, P1, in their capacity as Directors.

The guarantee bond P22 dated 2nd September 1998, was signed on the same date as the Application for the Hypothecation Loan P2, and the Hypothecation Loan, P1. Paragraph 15 of the Guarantee Bond P22 states;

"IT BEING AGREED that I/we and each of us am/are and is liable in all respect hereunder not merely as surety or sureties or guarantor or guarantors but as sole or principle debtor or where this guarantee is signed or executed by more than one person as sole or principle debtors severally or separately and jointly and severally to the extent aforementioned, including the liability to be sued before recourse is had against the debtor, or without any recourse whatsoever being had to the debtor for any reason or cause whatsoever and in the absolute discretion of the Bank."

This clearly indicates that the 2nd and 3rd Appellants provided a personal guarantee for the Hypothecation loan and did not sign the documents in their capacity as Directors of the Appellant Company. Furthermore the 2nd & 3rd Appellants as Directors are responsible for reading all the terms of any agreement pertaining to the business of their Company, in fulfilment of their fiduciary duty as Directors to act for the benefit of the company. Further Section189 (a) of the Companies Act No7 of 2007

states that a director should not act in a manner which is *reckless or grossly negligent* and should exercise the *level of skill and care that may reasonably be expected of a person of his knowledge and expertise*. This concept is also supported by the case of **Lister Vs. Romford Ice and Cold Storage Co. Ltd.** (1957) A.C. 555.

It is apparent therefore that a Director signing a document on behalf of a company is expected to read the document thoroughly and ensure that it is in the company's best interests, prior to signing it. Therefore as the 2nd and 3rd Appellants are Directors of the Appellant Company, it would be deemed a breach of their duties as Directors if they had failed to read the terms of the Guarantee Bond P22.

In addition it is this Courts finding that even if, as argued by the Appellant Company and 2nd & 3rd Appellants, the guarantee was in their capacity as Directors at the point of making their signatures the word 'Director' would have been printed under the signature . However this is not the case in relation to the signatures on the Guarantee Bond P22.

For these reasons it is the finding of this Court that the Commercial High Court was correct in finding that the 2nd and 3rd Appellants had provided personal guarantees on the Hypothecation loan.

The Appellant Company challenges the 26% interest claimed on the loans, by the Respondent and the total sum deemed, by the judgment of the Commercial High Court, to be owed to the Respondent. This position is based on the interest rate indicated in paragraph 4 of P1 which provides that; “interest to be payable monthly at a rate of 24% per centum per annum”. However this Court highlights the fact that in the same paragraph it is provided that the interest rate can be changed by the Respondent from time to time or as agreed in relation to a specific loan. Furthermore similar wording is used at paragraph (f) of P3. Therefore it is this Court’s finding that the interest rate imposed on the

Appellant Company's loans was not an arbitrary figure but one the Respondents would have arrived at in relation to loans issued at the time.

Furthermore, the letters by the Appellant Company, P4, P7, P10, P13, P16 and P19, requesting the loans expressly state the interest rate as 26%. Further the letters were on the Appellant Company's letter head which is an indication that the Company was aware of the interest rate. By signing the letters the Appellant Company's Directors acknowledged the interest rate as 26%, and therefore it would be the applicable interest rate on the loans.

Further the learned Judge of the Commercial High Court in his judgment clearly set out his reasoning and indicated that he had considered the Statements of Account entered into evidence, and marked P11, P14, P17, P20, when calculating the sums due by the Appellant Company. Having perused these documents this court concurs with these findings.

Furthermore as the loans obtained by the Appellant Company were over a single year it is the finding of this Court that the change in interest would have been detected by the Appellant Company prior to this action being brought by the Respondent. Therefore if the Appellant Company found the interest rate to be incorrect it could have brought this error to the attention of the Respondent Bank by written communications. This was not done.

The Appellant Company and 2nd & 3rd Appellants submit that the figures inserted as interest were inserted after the 2nd & 3rd Defendants' signatures were obtained. However no evidence to support this submission could be identified. Therefore it is the finding of this Court that such an accusation is baseless.

In addition this Court highlights the fact that any application for a loan, made by a Company, would be evaluated thoroughly by the Company's Directors prior to agreement, specifically provisions relating to the interest payment. As there is no evidence to suggest that the 2nd & 3rd Appellants, Directors of the Appellant Company, were unable to carefully scrutinise the agreements prior to signing them, it is the finding of this Court that the learned Judge of the Commercial High Court had correctly given the necessary weight to the evidence put forward when considering the amounts due.

The Appellant Company and 2nd & 3rd Defendants also appeal the on the grounds that the Commercial High Court had no authority to hear the case. Section 7, High Court of Provinces (Special Provisions) Act No.10 of 1996 states;

2. (1) Every High Court established by Article 154P of the Constitution for a Province shall, with effect from such date as the Minister may, by Order published in the Gazette appoint, in respect of such High Court have exclusive jurisdiction and shall have cognizance of and full power to hear and determine, in the manner provided for by written law, all actions, applications and proceedings specified in the First Schedule to this Act, if the party or parties defendant to such action resides or reside, or the cause of action has arisen, or the contract sought to be enforced was made, or in the case of applications or proceedings under the Companies Act, No. 17 of 1982 the registered office of the Company is situated, within the province for which such High Court is established.

This section when read in conjunction with Item (1) of the First Schedule indicates that the High Court has jurisdiction over the case as any cases pertaining to debt where the cause of action relates to banking and exceeds Rs. 3Million (to which the Minister has changed the Rs. 1Million

requirement) the case falls within the jurisdiction of the High Court. In the current circumstances as the parties to the case are in the Western Province the case falls within the jurisdiction of the Commercial High Court holden in Colombo. The case of **Cornel and Company Ltd. Vs. Mitsui and Company Ltd. and Others** (2000) Vol.1 S.L.R. 57 confirms the issue of jurisdiction where the sum in question is over Rs. 3Million.

This Court holds that the Commercial High Court had jurisdiction over the case at hand and therefore the findings of the learned Judge of the Commercial High Court dated 09.1.2006 are affirmed. Further where the Appellant Company is unable to pay the total sum due it is enforceable against the 2nd & 3rd Appellants, up to Rs. 30 Million. The appeal is dismissed and this court order costs to be paid by the Defendant Appellants in sum of Rs 100,000/-to the Plaintiff Respondent.

JUDGE OF THE SUPREME COURT

Ekanayake, J.

I agree.

JUDGE OF THE SUPREME COURT

Dep, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to appeal in terms of Article 128 of the Constitution to be read with Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 14/2012
SC HC LA No. 369/2012
WP/HCCA/Col. No. 86/2010 (LA)
DC COL No. 14447/P

Indrasena Arasaratnam Kenneth Virasinghe,
C/O Air Vice Marshal A.B. Sosa,
No. 36/4A, Sri Medhananda Avenue,
Off Sujatha Road, Kalubowila,
Dehiwela.

PLAINTIFF – PETITIONER – RESPONDENT – APPELLANT

-VS-

Vajira Kalinga Wijewardena,
No. 21/4, Buller's Lane,
Colombo 07.

4TH DEFENDANT – RESPONDENT – PETITIONER - RESPONDENT

BEFORE : Hon. N.G. Amaratunga J,
Hon. S. Marsoof PC, J, and
Hon. S. Hettige PC, J

COUNSEL : Wijeyadasa Rajapaksha, PC with Rasika Dissanayake for the Plaintiff-Petitioner-Respondent-Appellant.

Kuwera de Zoysa, PC with Senaka de Seram for the 4th Defendant-Respondent-Petitioner-Respondent.

ARGUED ON : 17.09.2012

DECIDED ON : 01.08.2013

SALEEM MARSOOF J:

This appeal is in a way a sequel to the decisions of our appellate courts in *Virasinghe v Virasinghe* [2002] 1 SLR 1 (CA) and [2002] 1 SLR 264 (SC), and focuses on the consequences of the alleged delay in applying for delivery of possession of the *corpus* of a partition action, or part thereof, to which a person is entitled to by virtue of a final decree entered into, or a sale held, in terms of the Partition Law, No. 21 of 1977, as subsequently amended. The primary question on which this Court has granted the Plaintiff-Petitioner-Respondent-Appellant (hereinafter referred to as "the Appellant") leave to appeal against the judgment of the Provincial High Court of the Western Province holden in Colombo (hereinafter referred to as the "Civil Appellate High Court") dated 26th August 2011, is-

"Whether their Lordships of the Civil Appellate High Court have erred in law by failing to appreciate the fact that the twelve months time frame referred to in Section 52 of the Partition Law is applicable only if any interference or dispossession had occurred after the delivery of the possession?"

This Court also permitted, at the instance of the learned President's Counsel for the 4th Defendant-Respondent-Petitioner-Respondent (hereinafter referred to as "the Respondent"), another question for consideration, which is as follows:-

"In view of the averment in paragraph 5 of the Petition dated 28th January 2001 marked P12 filed by the Appellant in the District Court, is not Section 52A, the relevant provision in the Partition Law under which the application ought to have been made, and if so, is it time barred?"

The basic facts

A brief summary of the material facts of the case will be useful to understand the context in which these questions arise for determination in this appeal. The Appellant instituted in the District Court of Colombo, the partition action from which this appeal arose, seeking to partition the land described in the schedule to the Plaint, wherein he claimed an undivided half share of the *corpus,* while disclosing that his two brothers, the 1st and 2nd Defendants-Respondent-Petitioner-Respondents (hereinafter referred to respectively as "1st and 2nd Defendants") were entitled to the remaining part of the *corpus* on an equal basis.

At the trial there was no dispute with regard to the devolution of shares as claimed by the Appellant and the 1st and 2nd Defendants, and the learned District Judge pronounced the judgment dated 20th October 1993, holding that the Appellant was entitled to a half, and the 1st and 2nd Defendants each to one fourth, of the *corpus,* and that the 4th Defendant-Respondent-Petitioner-Respondent (hereinafter referred to as the "Respondent") was a monthly tenant of the house bearing assessment No. 21/4, Buller's Lane, Colombo 07, situated on the *corpus.* The learned District Judge also held that in all the circumstances of the case, partition is inexpedient and impracticable. Pursuant to the said judgment , on 25th October 1993, the District Court entered interlocutory decree for the sale of the common property, with the right of first refusal reserved to the said co-owners, namely, the Appellant and the 1st and 2nd Defendants as contemplated by Section 26(2)(b) of the Partition Law. After the final decree was entered on 22nd March 2002, the 1st and 2nd Defendants conveyed their shares in the *corpus* by Deed No 1133 dated 16th January 2003 attested by N.K.U Bandula, Notary Public, to the Appellant, who became the owner of the entire *corpus,* which transfer was subsequently approved by the District Court.

Since certain claims made by the 3rd Defendant Bank of Ceylon on a mortgage bond, were settled during the pendency of the case in the District Court, and there was no appeal against the finding of the learned District Court that no money was owed to the said Bank, the only matter that remained in contention was the claim of the Respondent as a tenant of the house bearing assessment No. 21/4, Buller's Lane, Colombo 07, situated on the *corpus.* By his Statement of Claim, the Respondent had claimed that he was the tenant of the said premises from 1st January 1985, and that by virtue of the Indenture of Lease bearing No. 74 dated 17th December 1985 executed by the 1st and 2nd Defendants and attested by S. Thurairaja, Notary Public, he also acquired leasehold rights over the premises for 10 years, which tenancy rights were protected by the Rent Act, No. 1 of 1972, as subsequently amended. He had also claimed that he was entitled to a sum of Rs. 200, 387.95, by way of compensation for improvements.

On an appeal by the Appellant to the Court of Appeal, that Court decided in *Virasinghe v Virasinghe* [2002] 1 SLR 1 (CA) *inter-alia* that the said Indenture of Lease, having been executed after the registration of *lis pendens* in the case, was a nullity, but that since a monthly tenancy had existed prior to the date of the execution of the said Deed of Lease, there was no legal impediment against the claim of the Respondent as monthly tenant. Significantly, the Court of Appeal also held "the protection afforded by the Rent Act is available to the 4th Defendant-Respondent as against all the co-owners on the ground that they had acquiesced in the letting." It was this aspect of the matter that had to be looked into by this Court in the *Virasinghe v Virasinghe* [2002] 1 SLR 264 (SC). In the course of his judgement in this case, S.N. Silva CJ (with Bandaranaike J and Yapa J concurring) observed at page 271 that "the 4th Defendant should not have been permitted to add another string to his bow by raising issues based on a monthly tenancy, being a matter in respect of which the Court could not enter a decree having finality." This Court clarified the position further and at page 273 of its judgement noted that any genuine claims of a tenant who is entitled to continue in occupation in that capacity are well safeguarded by the provisions of Sections 48 (1) and 52 (2) of the Partition Law read with Section 14 of the Rent Act, and that it would "be inconsistent with the scheme of the Partition Act and the provisions in the Rent Act to bring the claim of a monthly tenant within the scope of trial in a partition action." This Court accordingly, allowed the appeal and set aside judgement of the Court of Appeal, as well as the findings of the District Court in respect of issues Nos. 10, 11, 12 and 16 on the basis that these issues should not have formed the subject-matter of the trial in the partition action.

The impugned decision

Having thus set out the background facts, it is now possible to focus on the particular application that gave rise to the present appeal. Having fully acquired title to the entirety of the *corpus* by virtue of Deed No 1133 dated 16th January 2003, the Appellant made an application under Section 52(1) of the Partition Law for an order for delivery of possession. The District Court issued the order for delivery of possession in favour of the Appellant on or about 16th December 2003. When the Fiscal went to the *corpus* on 12th January 2004 to deliver possession of the premises to the Appellant, the Respondent, who claimed tenancy rights to the premises situated in the *corpus*, resisted the Fiscal relying on the aforesaid judgement of the Supreme Court. Thereafter the Appellant resorted to the procedure set out in Section 325(1) of the Civil Procedure Code to obtain possession of the *corpus*, and at the ensuing inquiry in the District Court, a preliminary objection was raised by the said Respondent on the basis that an application under Section 325(1) of the Code cannot be maintained for the purpose of taking possession of a *corpus* or part thereof under a decree issued in a partition action. The learned Additional District Judge by his order dated 6th December 2004 upheld the said preliminary objection and rejected the application of the Appellant.

Thereafter, the Appellant made a fresh application dated 28th January 2005 for delivery of possession under Section 52(2)(a) of the Partition Law, as the learned Additional District Judge has in his order dated 6th December 2004, expressed the view that the application for delivery of possession should be made under that section. This Order of the learned Additional District Judge was not canvassed in appeal by any of the parties. The Respondent filed his Statement of Objections dated 26th May 2005 wherein he raised two preliminary objections, of which what is material to the present appeal is objection (a) thereof, namely that "since in terms of Section 52 A of the Partition Law the application has not been made within twelve months of the date of dispossession or interference with possession, it is prescribed in law".

When the case came up for inquiry on 2nd September 2005, an application was made by the learned Counsel for the Respondent that the aforesaid preliminary objections be taken up for hearing prior to going into the merits of the case, but learned Counsel for the Appellant objected to the said application on the basis that the said preliminary objections *ex facia* have no merit and that the 4th Defendant was seeking to prolong the said case that has been instituted over twenty years ago. The learned Additional District Judge decided that the inquiry should be proceeded with, and permitted the Appellant to lead his evidence, and after the evidence-in-chief of the Appellant was led, learned Counsel for the Respondent moved for a postponement of the case for the cross-examination of the Appellant.

The Appellant objected to a an adjournment, a postponement was granted subject to a prepayment of costs to the Appellant, against which order an application for leave to appeal was filed in the Court of Appeal. Consequent to a settlement being reached in the Court of Appeal, the order for prepayment of cost was set aside and the case remitted to the District Court to proceed with the inquiry under Section 52(2)(a) of the Partition Law. Thereafter when the case was again taken up for inquiry in the District Court on 6th of May 2010 before the District Court, learned Counsel for the Respondent moved that the preliminary objections be taken up for hearing, and the court directed the parties to tender written submissions on the basis of which the preliminary objections would be disposed of.

The learned District Judge in his order on the preliminary objections dated 20th August 2010, took into consideration the fact that the Fiscal was resisted on 17th January 2004 by the Respondent when he sought to execute a writ for delivery of possession to the Appellant; that thereafter, the Appellant resorted to the procedure laid down in Section 325 of the Civil Procedure Code for the purpose of having the Respondent evicted and to take over possession of the *corpus*, which was held by the District Court by its order dated 6th December 2004 to be an inappropriate procedure to enforce a final decree in a partition case; that the Appellant cannot be faulted for resorting to the wrong procedure, as it is the obligation of this lawyer to properly advise him in regard to the appropriate remedy; that in any event, the preliminary objection in question was a mere technicality resorted to by the Respondent particularly in the context that the partition action was instituted in 1985 and the interlocutory decree entered in the action had been confirmed in 2003; that in any event, the subsequent application for delivery of possession had been filed without any undue delay, on 28th January 2005, within two months of the aforesaid order of the District Court, and proceeded to overrule the preliminary objection.

The Respondent appealed against the decision of the District Court to the Civil Appellate High Court, and the High Court, by its impugned judgment dated 26th August 2011, allowed the appeal, set aside the order of the District Court and upheld the preliminary objections taken up by the Respondent. The High Court reasoned that since the fresh application in terms of Section 52(2)(a) of the Partition Law had been filed by the Appellant on 28th January 2005, after one year and ten days from 17th January 2004, on which date the Respondent resisted the Fiscal and prevented him from handing over possession of the *corpus* to the Appellant in terms of the writ of execution issued by the District Court, the fresh application had been field after the expiry of twelve months prescribed in Section 52A(1) of the said Law, and cannot therefore be maintained. In coming to this conclusion, the Civil Appellate High Court observed that it was trite law that any mistake made by a lawyer in the presentation of his client's case is attributable to the client, and that a failure to comply with mandatory time limits prescribed by law cannot be excused on the basis that a party to a case has been misled by his Counsel in selecting the appropriate remedy.

The applicable law

Thus, the question for determination in this appeal, as formulated by learned President's Counsel for the Appellant, is whether the Civil Appellate High Court has erred in law "by failing to appreciate the fact that the twelve months time frame referred to in Section 52 of the Partition Law is applicable only if any interference or dispossession had occurred after the delivery of the possession?" Learned President's Counsel for the Respondent sought to formulate the same question in a slightly different way, and paraphrased it as follows:

> "In view of the averment in paragraph 5 of the Petition dated 28th January 2001 marked P12 filed by the Appellant in the District Court, is not Section 52A, the relevant provision in the Partition Law under which the application ought to have been made, and if so, is it time barred?"

It may be stated at the outset that Section 52 of the Partition Law, as opposed to Section 52A of the Law, does not impose any time limit for seeking an order for delivery of possession pursuant to a final decree in a partition action. Section 52 of the Law, which consists of two sub-sections, reads as follows:

> (1) Every party to a partition action who has been declared to be entitled to any land by any final decree entered under this Law and every person who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by the court, shall be entitled to obtain from the court, in the same action, on application made by motion in that behalf, an order for the delivery to him of possession of the land; Provided that where such party is liable to pay any amount as owelty or as compensation for improvements, he shall not be entitled to obtain such order until that amount is paid.
>
> (2) (a) Where the applicant for delivery of possession seeks to evict any person in occupation of a land or a house standing on the land *as tenant for a period not exceeding one month* who is liable to be evicted by the applicant, such application shall be made by petition to which such person in occupation shall be made respondent, setting out the material facts entitling the applicant to such order.
>
> (b)After hearing the respondent, if the court shall determine that the respondent having entered into occupation prior to the date of such final decree or certificate of sale, is entitled to continue in occupation of the said house as tenant under the applicant as landlord, the court shall dismiss the application;
>
> Otherwise it shall grant the application and direct that an order for delivery of possession of the said house and land to the applicant do issue. (*Emphasis added*)

Section 52 of the Partition Law exclusively deals with the procedure for obtaining possession of any land to which a party is declared entitled by any final decree or any purchase of land at any sale held under the Partition Law in whose favour a certificate of sale has been entered by court. The divide between Section 52(1) and (2) is indeed simple, and while Section 52(1) of the Law, deals with the recovery of possession from any person, whether he is a party to the partition action or not, other than a monthly tenant, Section 52(2) spells out the procedure for proceeding against a monthly tenant. However, neither sub-section specifies any timeframe, whether of twelve months or otherwise, for seeking an order for delivery of possession pursuant to a final decree in a partition action.

It is for this reason that the learned President's Counsel for the Respondent has submitted before this Court, as he did in the lower courts, that insofar as the subsequent application for an order for possession was made by the Appellant after the Respondent successfully resisted the Fiscal and prevented him from handing over possession of the *corpus* to the Appellant, he was precluded by Section 52A of the Partition Law from maintaining any application to regain possession lodged after twelve months from the date on which his possession of the land was interfered with or was lost. Section 52A of the Partition Law, which was inserted into the Law by Section 23 of Act No. 17 of 1997 provides as follows:-

> (1)Any person-
>
> (a) who has been declared entitled to any land by any final decree entered under this Law ; or
>
> (b) who has purchased any land at any sale held under this Law and in whose favour a certificate of sale in respect of the land so purchased has been entered by Court; or
>
> (c) who has derived title from a person referred to in paragraph (a), or paragraph (b)
>
> and whose possession has been, or is interfered with or who has been dispossessed, shall, if such interference or dispossession occurs within ten years of the date of the final decree of partition or the entering of the certificate of sale, as the case may be, be entitled to make application, in the same action, by way of petition for restoration of possession, *within twelve months of the date of such interference or dispossession*, as the case may be.
>
> (2)The person against whom the application for restoration of possession is made, shall be made the respondent to the application.
>
> (3) The Court shall, after due inquiry into the matter, make order for delivery of possession or otherwise as the justice of the case may require:
>
> Provided that, no order for delivery of possession of the land shall be made where the respondent is a person who derives his title to the land in dispute or part thereof directly from the final decree of partition or sale, or is a person who has acquired title to such land from a person who has derived title to such land under the final decree of partition or sale, or from the privies or heirs of such second mentioned person. (*Emphasis added*)

The twelve month time limit: is it applicable?

Learned President's Counsel for the Appellant has submitted that the above quoted provisions of the Partition Law amply demonstrate without any ambiguity that the requirement that an application should be lodged within a twelve month time frame, is relevant only where any interference or dispossession had occurred after the delivery of the possession of the *corpus*. He submitted that it is common ground in this case that the *corpus* has so far not been delivered to the Appellant, and is enjoyed by the Respondent contrary to law and against all norms of justice. He emphasised that an application is made under Section 52(2)(a) of the Partition Law not for the purpose of restoration of possession but only for delivery of possession, as there is adequate provision in Section 52A for any person whose possession is interfered with or who is dispossessed after the *corpus* was delivered to him, to regain his possession. He has stressed that these are distinct provisions intended to deal with entirely different situations.

Responding to these submissions, learned President's Counsel for the Respondent has pointed out that the Appellant who made his application under Section 52(2) of the Partition Law, should in all the circumstances of this case, have made his application in terms of Section 52A of the Law which specifically deals with a situation where there is interference with possession or dispossession. He has submitted that since the Appellant had been declared entitled to a half share of the *corpus* along with his two brothers who were declared entitled to the rest, and since he had thereafter purchased their rights and obtained certificates of sale as contemplated by Section 52A(1)(b) of the Partition Law, he was entitled to an order for restoration of possession in the same action, if there is any interference with his possession or he is dispossessed "within ten years of the date of the final decree of partition or the entering of the certificate of sale, as the case may be". He stressed that in terms of the aforesaid provision, he is bound to make his application for restoration of possession, "within twelve months of the date of such interference or dispossession, as the case may be", and should fail if his application is not made within the specified time limit. He argued, with great force, that the Appellant cannot overcome the time-bar by resorting to Section 52(2) when there is specific provision in regard to the matter in Section 52A of the Partition Law.

It is trite law that, as observed by M.D.H. Fernando J in *The Ceylon Brewery Limited v Jax Fernando, Proprietor, Maradana Wine Stores,* (2001) 1 SLR 270 at 271, "provisions which go to jurisdiction must be strictly complied with", and more so, when a time limit is laid down in any provision that confers jurisdiction on a court of law to entertain an application for any relief. There is no doubt that Section 52A of the Partition Law, which contains a time limit of twelve months for making an application for restoration of possession, is such a jurisdictional provision, and the aforesaid time limit is necessarily mandatory. However, that begs the question that arises for determination on this appeal, namely, whether the application of the Appellant can be characterised as an application seeking an order for possession, as it is contended on his behalf, or is an application for restoration of possession, as is contended by learned President's Counsel for the Respondent.

What was the nature of the application?

In answering the question as to the nature of the application dated 28th January 2005 made by the Appellant to the District Court, it is necessary to examine the context in which the question arises. It is the contention of the learned President's Counsel for the Appellant that the Appellant has never been in physical possession of the *corpus.* He has pointed out that the Respondent was put into occupation of the house situated in the *corpus* by the 1st and 2nd Defendants, on the basis of a monthly tenancy with effect from 1st January 1985, and that thereafter, as already noted, an Indenture of Lease bearing No.74 dated 17th December 1985 was executed by the said Defendants on 17th December 1984 for a period of 10 years, even after the expiry of which period, the Respondent has continued to occupy the said house. Learned President's Counsel for the Respondent has insisted that the Respondent was the tenant of all the co-owners of the corpus, and that this was decided by the District Court in this case, and the said decision was affirmed by the Court of Appeal in *Virasinghe v Virasinghe* [2002] 1 SLR 1 (CA), which appears to have taken the view that the Respondent was the tenant of all the co-owners by reason of their acquiescence in the tenancy.

However, it is noteworthy that the decisions of the District Court as well as the Court of Appeal in regard to this question were set aside on appeal by this Court in *Virasinghe v Virasinghe* [2002] 1 SLR 264 (SC). As S.N.Silva, CJ., took pains to explain at page 270 of his erudite judgment:

> "Thus, it is seen that the Partition Law makes the same distinction as section 2 of the Prevention of Frauds Ordinance of 1840 as amended, in respect of the type of lease that would not be considered as an

encumbrance affecting land. In both laws, whilst a lease for a specified period exceeding one month is considered an encumbrance affecting land and should be notarially executed, a lease at will or for a period not exceeding one month (same language used in both laws) is not considered an encumbrance affecting land. Therefore, it is not permissible to enter a finding, in a judgment, interlocutory decree or final decree, in a partition action with regard to any claim of a monthly tenant in respect of the land that is sought to be partitioned."

Having said that, his Lordship went on to observe at page 272 of his judgment that where any applicant for possession, who "does not recognize the person in occupation as a tenant, moves for an order for the delivery of possession in terms of Section 52(1), any person in occupation who claims to be a tenant entitled to continue such occupation of the house as tenant under the applicant as landlord, could resist the Fiscal and seek hearing from Court to establish his right in terms of Section 52(2)(b)". Hence, for the disposal of the present appeal it is not necessary to deal with the question, as to whether the Respondent is entitled to continue to occupy the said house as the tenant of the Appellant, as that question can be looked into in the course of the inquiry in the District Court under Section 52(2)(b) of the Partition Law.

There is no doubt that the Appellant is, in all the circumstances of this case, entitled to seek an order for delivery of possession in terms of Section 52 of the Partition Law. In considering the present application of the Appellant dated 28th January 2005, it is necessary to examine not only paragraph 5 thereof, as suggested by learned President's Counsel for the Respondent himself, but also its the preceding paragraphs of the said application, which narrate the history of the litigation in a concise manner. It will be apparent from these paragraphs, that after the final decree was entered in 2003, pursuant to an application made by the Appellant in terms of Section 52(1) of the Partition Law for an order for delivery of possession, the Fiscal proceeded to the *corpus* on 17th January 2004 to execute the writ of execution issued by the District Court on 12th January 2004. Upon the Respondent resisting the Fiscal on that date, after making a futile attempt to obtain possession of the *corpus* in terms of Section 325 of the Civil Procedure Code, the application dated 28th January 2005 was made seeking delivery of possession in terms of Section 52(2)(b) of the Partition Law. In paragraph 5 of the said application, the Appellant states as follows:-

> "එකී භුක්තිය භාරදීමේ ආඥාව ක්‍රියාත්මක කිරීමට 2004.01.17 වන දින කොළඹ දිසා අධිකරණයේ පිස්කල් නිළධාරී තැන නඩුවට අදාළ ස්ථානයට ගිය නමුත් ඉහත නම් සඳහන් හතරවෙනි විත්තිකාර-වගඋත්තරකරු පිස්කල් නිළධාරී තැන විසින් පැමිණිලිකාර-ඉල්ලුම්කරුට හෝ ඔහුගේ බලයලත් නියෝජිතයෙකුට භුක්තිය භාරදීම සම්බන්ධයෙන් විරෝධතාවය දක්වමින් එසේ භුක්තිය භාර දීමට ප්‍රතිවිරෝධය ප්‍රකාශ කරමින් ඊට අවස්ථාවක් ලබානොදි එය අවහිර කරන ලදි. ඒ අනුව එකී පිස්කල් නිළධාරීට නඩුවට අදාළ ස්ථානයේ භුක්තිය පැමිණිලිකාර-ඉල්ලුම්කරුට හෝ ඔහුගේ බලයලත් නියෝජිතයෙකුට භාරදීමට නුපුලුවන් විය. මෙම කරුණු එකී පිස්කල් තැන ගරු අධිකරණයට වාර්තාවක් මගින් ඉදිරිපත් කර ඇති අතර, එකී වාර්තාව මෙම පෙත්සමේ අත්‍යවශ්‍ය කොටසක් බැවින් එම වාර්තාව මෙහි අවශ්‍ය කොටසක් ලෙස ඉදිරිපත් කරයි."

It is manifest that this application has been made after approximately one year and ten days from the date of the resistance of the Fiscal. It is also clear that while the earlier application, which ended up in the Fiscal being resisted, was made under Section 52(1) of the Partition Law, the subsequent application in the context of which this appeal arises, was made in terms of Section 52(2)(a) of the Partition Law. In both these applications, the Appellant has moved for an order for delivery of possession to him, as the sole owner of the *corpus*. Neither provision under which the Appellant has sought an order for delivery of possession seek to impose any limitation of time for making the application, and in insisting that the application should have been made

within a twelve month time frame, the Respondent is relying on the provisions of Section 52A of the Partition Law, which the President's Counsel for the Appellant has submitted, caters for an entirely different situation.

Section 52A was introduced to the Partition Law by way of an amendment in 1997 to give relief to a person who having been in possession of the *corpus* of a partition action or part thereof, was declared entitled to the same by a final decree entered under the Partition Law, or who after acquiring possession of the corpus by virtue of any order for delivery of possession made in terms of Section 52 of the said Law, has been deprived of such possession or where such possession has been interfered with. In such a situation, the District Court is empowered by Section 52A(3) of the Partition Law to hold an inquiry and make order for delivery of possession (order for restoration of possession) or otherwise as the justice of the case may require.

The present appeal arises in an entirely different situation, as the Appellant claims that he has never enjoyed possession of the *corpus* in whole or in part. It is manifest that the Appellant has not invoked the provisions of Section 52A of the Partition Law, nor is he entitled to do so as that provision only caters to cases where a person who alleges that he has been in possession of the *corpus* or part thereof complains of an interference with his possession or of dispossession. All that the Appellant has sought to do through his application dated 28th January 2005, is to seek an order for delivery of possession in terms of Section 52(2) of the Partition Law, on the basis that he has never been in physical possession of the corpus of the partition action, or part thereof. In my view, just as much as the *rei vindicatio* action and the possessory remedy are the twin remedies provided by our common law for the protection of ownership (*dominium*) and possession (*possessio*) which are two different and distinct though complementary legal concepts with distinct elements and requirements, the partition decree with its Section 52 procedure for acquiring possession and the order for restoration of possession embodied in Section 52A of the Partition Law are the twin remedies provided by the Partition Law for the ending of co-ownership with the acquisition of sole ownership and the protection of possession. Just as much as the common law identifies distinct elements and requisites for the two common law remedies, the Partition Law too identifies distinct elements and requisites for the two primary remedies provided by the said Law, and the twelve months time frame is applicable to the latter of these two remedies.

In these circumstances, I am not at all impressed by the submission of the learned President's Counsel for the Respondent that the Appellant ought to have made his application for an "order for restoration of possession" in terms of Section 52A(3) of the Partition Law, nor am I persuaded by his submission that the words "whose possession has been, or is interfered with or who has been dispossessed" as used in Section 52A(1) of the Law apply "to both situations, where a person is dispossessed after the decree or where a person is unable to get possession due to the fact that the owner's possession has been interfered with on a continuing basis, even prior to the decree."

Conclusions

Since unlike Section 52A of the Partition Law, Section 52(2) does not contain any time limit for its invocation, I am of the opinion that the appeal should be allowed, and that for the foregoing reasons, both substantive questions on which leave to appeal has been granted should be answered in favour of the Appellant. I hold that the preliminary objection (a) raised before the District Court was rightly overruled by the order of that court dated 20th August 2010. I also hold that the Civil Appellate High Court erred in its decision dated 26th August 2011 in setting aside the said order of the District Court.

I accordingly make order setting aside the judgment of the High Court of the Provinces of the Western Province holden in Colombo dated 26th August 2011 and affirming the order of the District Court of Colombo dated 20th August 2010. Since in my view the prosecution of the application made by the Appellant for orders for delivery of possession have been unduly delayed by the raising of preliminary objection (a), which delay has accrued to the benefit of the Respondent, I hold that he should pay to the Appellant a sum of Rs. 100,000 by way of costs of this appeal.

JUDGE OF THE SUPREME COURT

NIMAL GAMINI AMARATUNGA J

JUDGE OF THE SUPREME COURT

SATHYA HETTIGE PC J

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal against Judgment of Court of Appeal dated 08.08.12 in Case No. CA(PHC) Appeal 37/2001 and in the High Court (Kandy) of the Central Province Case No. Certi 42/97.

Solaimuthu Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya.

Petitioner-Appellant

Vs.

S.C. Appeal No. 21/13
S.C.Spl. LA 203/12
CA/PHC/Appeal No. 37/2001
HC/CP Certi. 42/97

1. The Superintendent
Stafford Estate,
Ragala,
Halgranaoya.

2. S.C.K. De Alwis
Consultant/ Plantation Expert,
Plantation Reform Project,
Ministry of Plantation Industries,
Colombo 04.

-

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

Respondent-Respondents

AND NOW BETWEEN

1. The Superintendent
   Stafford Estate,
   Ragala,
   Halgranaoya.

2. S.C.K. De Alwis
   Consultant/ Plantation Expert,
   Plantation Reform Project,
   Ministry of Plantation Industries,
   Colombo 04.

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

Respondents-Respondents- Petitioners

Vs.

Solaimuthu Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya.

Petitioner-Appellant-Respondent

BEFORE : Mohan Pieris, P.C.,C.J.,
Sripavan, J.
Wanasundera, P.C.,J.

COUNSEL **:** Manohara de Silva, P.C. with Palitha Gamage for the 1st Respondent-Respondent-Petitioner.

Gomin Dayasiri with Palitha Gamage and Ms. Manoli Jinadasa for the 2nd Respondent-Respondent-Petitioner.

Y.J.W. Wijayatillake, P.C.,Solicitor General with Vikum de Abrew, S.S.C. And Yuresha Fernando, S.C. For the 3rd Respondent-Respondent-Petitioner.

M.A.Sumanthiran with Ganesharajah and Rajitha Abeysinghe for the Petitioner-Appellant-Respondent.

ARGUED ON : 11th July 2013
17th July 2013

WRITTEN SUBMISSIONS FILED : By the 2nd Respondent-Respondent-Petitioner on :- 24th July 2013 & 23rd August 2013
By the 3rd Respondent-Respondent-Petitioner
on :- 13th March 2013 & 25th July 2013.

DECIDED ON : 26th September 2013

SRIPAVAN, J.

The Respondent-Respondent-Petitioners(hereinafter called and referred to as the "Petitioners") sought, special leave to appeal against the judgment of the Court of Appeal dated 08-08-12 whereby the Court of Appeal set aside the judgment of the Provincial High Court dated 25-10-2000, holden at Kandy.

On 31.01.13 this Court granted Special Leave to Appeal on the following two questions :-

(i) Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?

(ii) Did the Court of Appeal err by failing to consider whether there is a right of appeal against the order of the High Court dismissing the application in limine for want of jurisdiction?

However, at the hearing before us on 17.07.13, all Counsel agreed to confine their submissions only on the first question referred to above; thus, this Court did not consider the second question in this judgment.

The facts in this application were not disputed by Counsel. It would appear that the Petitioner-Appellant-Respondent (hereinafter called and referred to as the "Respondent") instituted an action in the Provincial High Court of Kandy seeking, inter-alia -

(a) A Writ of Certiorari to quash a quit notice issued on him by the second Petitioner in terms of the State Lands (Recovery of Possession) Act No.7 of 1979 as amended ,

(b) A Writ of Prohibition, prohibiting the first and the second Petitioners from proceeding any further with the Writ of Execution evicting him from the land morefully described

in the schedule to the petition; and

(c) A Writ of Mandamus directing the First and the Second Petitioners not to interfere with his lawful possession of the said land.

The Petitioners filed their Statement of Objections on 27.02.96 and took up the position that :-

(a) the land in question is "State Land";
(b) the "quit notice" dated 07.10.97 was issued by the designated Competent Authority in terms of Section 3 of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended;
(c) the Respondent has no legal basis to invoke the writ jurisdiction of the Provincial High Court in view of the facts of the case; and
(d) in any event, the High Court of the Province lacks jurisdiction to hear and determine the matter as it relates to a "State Land".

The jurisdictional issue with regard to the powers of a Provincial High Court to grant a Writ of Certiorari to quash the quit notice issued under the provisions of the State Lands (Recovery of Possession) Act was taken up as a preliminary matter. The Provincial High Court after hearing oral and written submissions of the parties, by its order dated

25.10.2000 held that the Provincial High Court had no jurisdiction to entertain the said application and dismissed the same. The Respondent thereafter on 22.11.2000 preferred an appeal to the Court of Appeal on the basis that the Provincial High Court had misdirected itself by holding that the Court lacks jurisdiction to inquire into and to make a determination relating to notices filed under the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended. The Court of Appeal delivered its judgment on 08.08.12 holding, inter-alia, as follows :-

(i) that the subject of "State Land" is included in Appendix II of the "Provincial Council List" (List 1) to the 9th Schedule to the 13th Amendment to the Constitution.

(ii) that therefore "State Land" becomes a subject of the Provincial Council List even though State Land continue to vest in the Republic.

(iii) that therefore, the High Court of the Provinces have jurisdiction to hear and determine Writ Applications filed to quash the quit notice issued under the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

It must be noted that the demarcation between the Centre and the Provinces with regard to "State Land" must be clearly identified.

As observed by Fernando, J. in the Determination of the Agrarian Services .(Amendment) Bill [S.C. Special Determination 2/91 and 4/91], it is not possible to decide whether a matter is a List 1 or List 111

subject by merely looking at the headings in those lists. The headings may not be comprehensive and the descriptions which follow do not purport to be all inclusive definitions of the headings. Exclusions may be set out in the detailed descriptions which again may indicate that the headings are not comprehensive. As far as possible, an attempt must be made to reconcile entries in Lists I ,II and III of the Constitution and the Court must avoid attributing any conflict between the powers of the Centre and the Provinces.

Therefore it becomes necessary to examine and scrutinize the relevant Articles contained in the Constitution in relation to "Land" and "State Land" . Article 154(G)(1) grants power to every Provincial Council to make statutes applicable to the Province for which it is established with regard to any matter set out in List 1 of the Ninth Schedule (hereinafter referred to as the "Provincial Council List"). On an examination of the Provincial Council List, it would appear at item 18 as follows :

> "*Land- Land, that is to say, rights in or over land, land tenure, transfer and alienation of land, land use, land settlement and land improvement, to the extent set out in* ***Appendix II***"

Appendix II sets out as follows*:*

Land and Land Settlement

"State Land shall continue to vest in the Republic and may be disposed of in accordance with Article 33(d) and written law governing this matter.

Subject as aforesaid, land shall be a Provincial Council Subject, subject to the following special provisions:-

1. *State land -*

1.1 *State Land required for the purposes of the Government in a Province, in respect of a reserved or concurrent subject may be utilized by the Government in accordance with the laws governing the matter. The Government shall consult the relevant Provincial Council with regard to the utilization of such land in respect of such subject.*

1.2 *Government shall make available to every Provincial Council State land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall administer, control and utilize such State land, in accordance with the laws and statutes governing the matter.*

1.3 *Alienation or disposition of the State Land within a Province to any citizen or to any organization shall be by the President on the advice of the relevant Provincial Council, in accordance with the laws governing the matter."* (emphasis added)

Thus, it is important to bear in mind that "land" is a Provincial Council subject only to the extent set out in Appendix 1I. This Appendix imposes the restriction on the land powers given to Provincial Councils. The Constitutional limitations imposed by the legislature shows that in the exercise of its legislative powers, no exclusive power is vested in the Provincial Councils with regard to the subject of "land". The

restrictions and/or limitations in respect of the utilization of "State Land" as stated in Appendix II may be summarized as follows:-

1. In terms of 1.1 above, the Government of Sri Lanka can utilize State Land "in respect of a reserved or concurrent subject." However, this could only be done in compliance with the laws passed by Parliament and in consultation with the relevant Provincial Council, so that the Government and the Provincial Council reach consensus with regard to the use of such "State Land".

2. According to 1.2 above, it is important to note that a Provincial Council can utilize "State Land" only upon it being made available to it by the Government. It therefore implies that a Provincial Council cannot appropriate to itself without the government making "State Land" available to such Council. Such "State Land" can be made available by the Government only in respect of a Provincial Council subject. The only power casts upon the Provincial Council is to <u>administer,</u> <u>control</u> and <u>utilize</u> such "State Land" in accordance with the laws passed by Parliament and the statutes made by the Provincial Council.(emphasis added)

3. Paragraph 1.3 above, deals with alienation or disposition of "State Land" within a province upon an advice made by

such Provincial Council. It cannot be construed that the advice tendered by the Provincial Council binds the President. However it must be emphasized that if the President after an opinion or advice given, decides to dispose of the State Land, such disposal has to be in compliance with the laws enacted by Parliament.

Thus, with regard to the administration, control and utilization of "State Land", the legislative power of a Provincial Council is confined and restricted to the extent set out in paragraph 2 above. The Provincial Councils do not therefore exercise sovereign legislative powers and are only subsidiary bodies, exercising limited legislative powers subordinate to that of Parliament.

At this stage, it may be relevant to quote the observation made by Sharvananda C.J. *Re The Thirteenth Amendment to the Constitution* [(1987) 2 S.L.R. 312 at 320].

> "*The question that arises is whether the 13th Amendment Bill under consideration creates institutions of government which are supreme, independent and not subordinate within their defined spheres. Application of this test demonstrates that both in respect of the exercise of its legislative powers and in respect of exercise of executive powers no exclusive or independent power is vested in the Provincial Councils. The Parliament and President have ultimate control over them and remain*

supreme."

Shirani A. Bandaranayake, J. too in the Determination of the Bill titled "Land Ownership" [S.D. No. 26/2003 – 36/2003 Determination dated 10th December 2003] noted as follows:-

> "*With the passing of the Thirteenth Amendment to the Constitution, such Constitutional power vested with the President was qualified by virtue of paragraph 1:3 of Appendix* II *to the Ninth Schedule to the Constitution. By such provision the authority for alienation or disposition of the State land within a province to any citizen or to any organization was yet vested with the President..... In effect, even after the establishment of Provincial Councils in 1987, State land continued to be vested in the Republic and disposition could be carried out only in accordance with Article 33(d) of the Constitution read with 1:3 of Appendix II to the Ninth Schedule to the Constitution."*

Learned President's Counsel for the First Petitioner drew the attention of Court to item 9:1 of the Provincial Council list under the heading of "Agriculture and Agrarian Services" which reads thus:-

> Agriculture, including agricultural extension, promotion and education for provincial purposes (other than inter-provincial irrigation and land settlement schemes, State Land and plantation agriculture)

Here again, the subject relating to "State Land and plantation agriculture" is excluded from the legislative competence of Provincial

Councils.

Article 154 (G)(7) further provides that a Provincial Council has no power to make statutes on any matter set out in List II of the Ninth Schedule (hereinafter referred to as the "Reserved List"). One of the matters referred to in the Reserved List is "State Lands and Foreshore, except to the extent specified in Item 18 of List I". Thus, it is competent for the Centre to enact laws in respect of "State Lands" avoiding the powers given to the Provincial Councils as specified in item 18 of the Provincial Council List, on the basis that the subjects and functions not specified in List I (Provincial Council List) and List III fall within the ambit of the Reserved List.

In view of the foregoing analysis, and considering the true nature and character of the legislative powers given to Provincial Councils one could safely conclude that "Provincial Councils can only make statutes to administer, control and utilize State Land, if such State Land is made available to the Provincial Council by the Government for a Provincial Council subject.

It must be emphasized that Appendix II in item 3:4 provides that the powers of the Provincial Councils shall be exercised having due regard to the national policy formulated by The National Land Commission. The National Land Commission which includes representatives of all Provincial Councils would be responsible for the formulation of the National Policy with regard to the use of State Lands.

There is nothing to indicate that "State Land" which is the subject matter of this application and in respect of which a quit notice was issued by the second petitioner was a land, made available to the relevant Provincial Council by the Government for a Provincial Council subject. Hence, the said land is not under the administration and control of the relevant Provincial Council and no statute could have possibly been passed by the said Provincial Council with regard to the utilization of such Land. Therefore, this land does not fall within the ambit of any matters set out in the Provincial Council list.

Even if the Government makes available State Land to a Provincial Council, the title to the land still vests with the State. In such a situation, one has to consider whether recovery of possession of State Land is a Provincial Council subject.

The jurisdiction conferred upon on Provincial High Court with regard to the issue of writs is contained in Article 154P 4(b) of the Constitution. According to the said Article, a Provincial High Court shall have jurisdiction to issue, according to law:-

> *Order in the nature of Writs of Certiorari, prohibition, procedendo, mandamus and quo-warranto against any persons exercising, within the Province, any power under:-*
>
> *(I) any law; or*
>
> *(II) any statue made by the Provincial Council established for that Province;*

in respect of *any matter set out in the Provincial Council List*
(emphasis added)

There is much significance in the use of the words "any matter set out in the Provincial Council List." The fundamental principle of constitutional construction is to give effect to the intent of the framers and of the people adopting it. Therefore, it is the paramount duty of this Court to apply the words as used in the Constitution and construe them within its four corners.

In *Weragama* Vs. *Eksath Lanka Wathu Kamkaru Samithiya & Others* (1994) 1 S.L.R. 293, this Court opined that a Provincial High Court could in fact entertain matters that are strictly within the purview of the devolution of powers with regard to the subject matter as set out in the Provincial Council List.

Fernando, J. at page 298 said "*As to the intention of Parliament in adopting the Thirteenth Amendment, this Court cannot attribute an intention except that which appears from the words used by Parliament. I find nothing suggesting a general intention of devolving power to the Provinces; insofar as the three Lists are concerned, only what was specifically mentioned was devolved, and "all subjects and functions not specified in List I or List II" were reserved – thus contradicting any such general intentions.... There was nothing more than a re-arrangement of the jurisdictions of the judiciary."* If powers relating to Recovery/dispossession of State Lands, encroachment or alienation of State Lands are not in the Provincial Council List, matters

relating to them cannot be gone into by a High Court of the Province.

Accordingly, I hold that the Court of Appeal erred in holding that the Provincial High Court of Kandy had jurisdiction to issue a Writ of Certiorari, in respect of a quit notice issued under the State Lands (Recovery of Possession) Act. The order made by the Court of Appeal dated 08.08.12 is set aside and the order of the Provincial High Court of Kandy dated 25.10.2000 is affirmed.

The question of law, considered by this Court is thus answered in the affirmative.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal against Judgment of Court of Appeal dated 08.08.12 in Case No. CA (PHC) Appeal 37/2001 and in the High Court (Kandy) of the Central Province Case No. Certi. 42/97.

Solaimuthu Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya

Petitioner-Appellant

Vs.

SC. Appeal 21/2013
S.C. Spl. LA. 203/12
CA/PHC/Appeal No. 37/2001
HC/CP Certi. 42/97

1. The Superintendent
Stafford Estate,
Ragala,
Halgranaoya.

2. S.C.K. De Alwis
Consultant/Plantation Expert,
Plantation Reform Project,
Ministry of Plantation Industries,
Colombo 04.

3. The Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Respondents

SC. Appeal 21/2013

AND NOW BETWEEN

1. The Superintendent
Stafford Estate,
Ragala,
Halgranaoya.

2. S.C.K. De Alwis
Consultant/Plantation Expert,
Plantation Reform Project,
Ministry of Plantation Industries,
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Attorney General's Department,
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Respondent-Respondents-Petitioners

Vs.

Solaimuthu Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya

Petitioner-Appellant-Respondent

*** * * ***

SC. Appeal 21/2013

Before : **Mohan Pieris, P.C. C.J.,**

Sripavan, J

Wanasundera, PC,J.

Counsel : Manohara de Silva, PC. with Palitha Gamage for the 1st Respondent.

Gomin Dayasiri with Palitha Gamage and Ms. Manoli Jinadasa and Rakitha Abeygunawardena for the 2nd Respondent-Respondent-Petitioner.

Y.J.W. Wijayatillake, P.C., Solicitor General with Vikum de Abrew, SSC. And Yuresha Fernando, SC. for the 3rd Respondent-Respondent-Petitioner.

M.A. Sumanthiran with Ganesharajah and Rakitha Abeysinghe for the Petitioner –Appellant-Respondent.

Argued On : 11th July 2013
17th July 2013

Written Submissions:

By the 2nd Respondent-Respondent-Petitioner

Filed : on : 24th July & 23rd August 2013.

: By the 3rd Respondent-Respondent-Petitioner
on: 13th March 2013 & 25th July 2013

Decided On `: 26th September 2013

* * * *

Wanasundera, PC.J.

An application was filed for special leave to appeal from the impugned judgment of the Court of Appeal dated 08-08.12 wherein the Court of Appeal set aside the judgment dated 25th October 2000 of the Provincial High Court. I have had the benefit of reading

in draft the erudite judgments of my brothers, His Lordship the Chief Justice and His Lordship Justice Sripavan with both of which I agree. I would also, however, set down in brief my own views on the single important question of law which this Court decided and that is whether the Court of Appeal erred in deciding that the Provincial High Court had jurisdiction to hear cases where disposition or encroachment or alienations of state lands is/are in issue or where there is a challenge to a quit notice issued in respect of a State Land.

At this point may I quote Lord Denning in Magor and St. Nallons RDC. Vs. Newport Corporation (1950) 2 AER 1226, 1236 CA with regard to the onus of a Judge, "We do not sit here to pull the language of Parliament and of Ministers to pieces and make nonsense of it. That is an easy thing to do and it is a thing to which lawyers are too often prone. We sit here to find out the intention of Parliament and of Ministers and carry it out, and we do this better by filling in the gaps and making sense of the enactment than by opening it up to destructive analysis." As such, I am strongly of the view that the interpretation and analysis the provisions in the Thirteenth Amendment to the Constitution should never pave way to destruction of any sort.

I would refrain from going into the facts in the case as they have been dealt with exhaustively in the judgments of my brothers. It is abundantly clear that land in item 18 cannot include the dominium over State Land except the powers given over State Land in terms of the Constitution and any other powers given by virtue of any enactment. The devolution of State Land to the Provinces undoubtedly is subject to state land continuing to be vested in the Republic. There is no doubt that the President's power to make

grants and dispositions according to existing law remains unfettered. The interpretation in my view to be given to all the provisions governing this matter as set out in the judgments of my brothers is that the exercise of existing rights of ownership of state lands is unaffected but restricted to the limits of the powers given to Provincial Councils which must be exercised having regard to the national policy, that is, to be formulated by the National Land Commission.

This Court's determination in the Land Ownership Bill (S.D. No. 26/2003 – 36/2003) ignores everything else in the 9th schedule and errs in its interpretation of Appendix II 1.2. The resultant position is that the centre would cede its seisin over state lands to the Provincial Councils except in some limited circumstances as set out in the judgments of my brothers. It is observed that the draftsmen of our Constitution have given List II primacy leaving state lands in the safe dominium of the Republic and only delivered a specified segments of state lands in well delineated situations namely - "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement" and this is what is described as land in list I. As His Lordship the Chief Justice has adumbrated in his judgment, item 18 of List I is itself qualified by paragraph 1.2 of Appendix II namely Government shall **make available** to every Provincial Council State Land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall **administer, control and utilize such State land, in accordance with the laws and statutes governing the matter.**

This limited cession of state lands which must be for purposes of **administration, control and utilization of State lands made available by the government to a provincial council subject** must be understood in the context of the two important features of a unitary state when examining the matters in issue.

His Lordship Chief Justice Sharvananda in ***The Thirteenth Amendment to the Constitution*** (1987) 2 Sri. LR 312 went on to explain the term unitary in contrast with the term Federal. His Lordship went on to identify the supremacy of Central Parliament and the absence of subsidiary sovereign bodies as two essential qualities in an unitary state and that subsidiary bodies should never be equated or treated as being subsidiary sovereign bodies and that it finally means that there was no possibility of a conflict arising between the Centre and other authorities under a unitary Constitution. The Federal bodies are co-ordinate and independent of each other. In other words, a federal body can exercise its own powers within its jurisdiction without control from the other. In a Unitary state sovereignty of legislative power rests only with the centre.

I am also mindful of Mark Fernando J's observations in **Weragama vs Eksath Lanka Wathu Kamkaru Samitiya and others (1994) 4 Sri.LR 293** when he went on to observe that as to the intention of Parliament in adopting the 13th Amendment, the Court cannot attribute the intention except that which appears from the words used by Parliament and that all subjects and functions not specified in list 1 or list II were reserved thereby contradicting any such general intention to do otherwise. It is also my view that if powers relating to recovery/disposition of state lands, encroachment or

alienation of state lands are not in the Provincial Council list, any review pertaining to such matters cannot be gone into by the Provincial High Court.

Eva Wanasundera PC
Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal against judgment of Court of Appeal dated 08.08.12 in Case No. CA(PHC) Appeal 37/2001 and in the High Court (Kandy) of the Central Province Case No. Certi 42/97.

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Petitioner-Appellant

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AND NOW BETWEEN

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Colombo 12.

Respondents-Respondents-Petitioners

Vs.

Solaimuthy Rasu,
Dickson Corner Colony,
Stafford Estate,
Ragala,
Halgranaoya.

Petitioner -Appellant- Respondent

BEFORE : Mohan Pieris, P.C., C.J.,
Sripavan, J.
Wanasundera, P.C., J.

COUNSEL : Manohara de Silva, P.C. with Palitha Gamage for the 1st Respondent-Respondent Petitioner.

Gomin Dayasiri with Palitha Gamage and Ms. Manoli Jinadasa and Rakitha Abeygunawardena for the 2nd Respondent-Respondent-Petitioner.

Y.J.W. Wijayatillake, P.C., Solicitor General with Vikum de Abrew, S.S.C. And Yuresha Fernando, S.C. for the 3rd Respondent-Respondent-Petitioner.

M.A.Sumanthiran with Ganesharajah and Rakitha Abeysinghe for the Petitioner Appellant-Respondent.

WRITTEN SUBMISSIONS	**:**	By the 2nd Respondent-Respondent Petitioner on : 24th July 2013 & 23rd August 2013.
FILED	**:**	By the 3rd Respondent –Respondent Petitioner on : 13th March 2013 & 25th July 2013
ARGUED ON	:	11th July 2013 17th July 2013
DECIDED ON	:	26th September 2013

Mohan Pieris, PC CJ

This is an application for special leave to appeal from the judgment of the Court of Appeal dated 08.08.12 wherein the Court of Appeal set aside the judgment of the Provincial High Court dated 25.10.2000. I have read in draft the judgment of my brother Sripavan J and while I agree with his reasoning and conclusion on the matter, I would set down my own views on the question of law before us.

The instant application before us raises important questions of law and at the inception of the judgment it is pertinent to observe that the Respondent-Respondent-Petitioners (hereinafter called and referred to as "Petitioners") obtained special leave from this Court on the following two questions -

(i) Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State Lands is/are in issue?

(ii) Did the Court of Appeal err by failing to consider whether there is a right of appeal against the Order of the High Court dismissing the application *in limine* for want of jurisdiction?

Be that as it may, when this matter came up before us on 17.07.13, all Counsel agreed that they would make their submissions only on the first question of law and accordingly this Court proceeds to make its determination on the first question.

The Facts

The 2nd Petitioner - the competent authority initiated proceedings to recover a State Land in respect of an illegal occupation in the Magistrate's Court of Nuwara Eliya in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979. The Petitioner-Appellant-Respondent (hereinafter referred to as the "Respondent") filed an application in the High Court of the Province holden in Kandy praying for a writ of certiorari to quash the quit notice filed in the case. The 2nd Petitioner filed statement of objections and affidavit on 27.02.96 and raised the following preliminary objections.

(a) The said land is a State Land.

(b) The second Petitioner, as the duly designated competent authority in terms of the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 issued quit notice dated 7.10.1997 to the Respondent by virtue of Section 3 of the said Act;

(c) Thus the Respondent has no legal basis to invoke the writ jurisdiction of the Provincial High Court;

(d) The High Court of the Province stands denuded of jurisdiction to hear and determine the matter as the subject of the action pertains to State lands and the subject does not fall within the Provincial Council List - namely List I.

The Provincial High Court, after hearing the oral submissions and written submissions of the parties, by Order dated 17.11.2000, held that it had no jurisdiction to hear and determine the application and upheld the preliminary objection.

Thereupon the Respondent preferred an appeal dated 22.11.2000 to the Court of Appeal on the basis that the reasoning of the Learned High Court judge was erroneous vis-à-vis the provisions of the Constitution of the Democratic Socialist Republic of Sri Lanka.

It was the contention of the Respondent that the Provincial High Court had misdirected itself in holding that the Court was devoid of jurisdiction to inquire into and determine the application for writs in respect of notices filed under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. By its judgment dated 08.08.12 the Court of Appeal states, inter alia, as follows :

(i) The subject of State Land is included in Appendix II of the "Provincial Council List" (List I) to the 9th Schedule to the 13th Amendment to the Constitution;

(ii) Therefore State Land becomes the subject of the Provincial Council List even though State Land continues to vest in the Republic;

(iii) Therefore, the High Court of the Provinces has the power to hear and determine applications for prerogative remedies filed to quash quit notices issued under the State Lands (Recovery of Possession) Act No 7 of 1979 as amended.

The Court of Appeal in arriving at its conclusion placed reliance on the Determination of this Court dated 10.02.2013 on the Bill titled "**Land Ownership** "(S.D. No. 26/2003 – 36/2003). The Court of Appeal has also alluded to the judgment of the Supreme Court in **Vasudeva Nanayakkara v Choksy and Others (John Keells case)** {2008} 1 Sri.LR 134 wherein it was stated - "a precondition laid down in paragraph 1:3 is that an alienation of land or disposition of State Land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council. The advice would be of the Board of Ministers communicated through the Governor, the Board of Ministers being responsible in this regard to the Provincial Council." In the end after having stated that it was bound by the principles laid down in the judicial decisions, the Court of Appeal concluded that State Land becomes the subject of the Provincial Council.

It is from the said judgement of the Court of Appeal that the petitioners have preferred this appeal and submissions of Counsel were addressed to us, as I have stated at the beginning of this judgment, on the question of law-

> *Did the Court of Appeal err by deciding that the Provincial High Court has jurisdiction to hear cases where dispossession or encroachment or alienation of State lands is/are in issue?*

It remains now for this Court to engage in an analysis of the Constitutional provisions and the judicial precedents to determine whether the Court of Appeal came to the correct finding when it held that the Provincial High Court could exercise writ jurisdiction in respect of quit notices issued under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended.

The resolution of this question necessarily involves an examination of the nature and content of the subject matter of State Land that lies with a Province by virtue of the 13th Amendment to the Constitution and it is quite convenient to begin this examination by looking at the apportionment of land as delineated by the terms of the Supreme Law of the country that are found in the 13th Amendment. The 13th Amendment to the Constitution refers to State Land and Land in two different and distinct places. In my view the entirety of State Land is referred to in List II (Reserved List) and it is only from this germinal

origin that the Republic could assign to the Provincial Councils land for whatever purposes which are deemed appropriate. It is therefore axiomatic that the greater includes the lesser (Omne majus continent in se minus) and having regard to the fact that in a unitary state of government no cession of dominium takes place, **the Centre has not ceded its dominium over State Lands to the Provincial Councils except in some limited circumstances as would appear later in the judgment.**

It is only from a reserve or pool or a mass that a portion could be translocated and if the entirety of state land is not assigned but a portion with conditions, these are the attendant circumstances that would demonstrate an unequivocal intention not to cede what belongs to the Republic. One would be driven to the conclusion that the subject matter in its entirety would belong to the dominant owner of property.

If there is a reservation in List II, the inescapable inference follows that what is reserved to the Republic could only be the larger entirety out of which the 13th Amendment chose to assign some portions of State Land to the Provincial Councils and the pertinent question before us is the parameters with which of what is entrusted to the Provinces. All this has to be gathered from the settlement that the 13th amendment chose to make in 1987 and one cannot resile from their

explicit terms of the 13th Amendment and there must be deference to that intendment. If the Constitution contains provisions which impose restraints on institutions wielding power, there cannot be derogations from such limitations in the name of a liberal approach. It must be remembered that a Constitution is a totally different kind of enactment than ordinary statute. It is an organic instrument defining and regulating the power structure and power relationship; it embodies the hopes and aspirations of the people; it projects certain basic values and it sets out objectives and goals. I now proceed to indulge into an inquiry as to the power structure and power relationship as delineated in the 13th Amendment to the Constitution.

Teleological as it may appear, one has to go from List II to List I. As the Counsel for the 2nd Petitioner submitted, Land in Sri Lanka consists of lands belonging to individuals, corporate bodies, unincorporated bodies, charitable, social institutions, local authorities, temples, kovils, churches, mosques and trusts etc. The bulk of the land is vested in the state as state lands and are held by the state and/or its agencies.

State can make grants absolutely and more often it does so provisionally with conditions attached or by way of leases, permits, licenses as per provisions governing disposition of state lands. Such conveyances can be made by the State to any person/organization

entitled to hold land including Provincial Councils. All this partakes of the dominium that the State enjoys in having ownership and its attendant incidents of ownership such as its use and consistent with these characteristics it is pertinent to observe that the Constitution unequivocally in List II and in Appendix II has placed State Lands with the Centre, **"Except to extent specified in item 18 of List I"** [quoted from List II]. **Thus the Constitution as far as State Land is concerned traverses from List II via List I to final destination Appendix II.**

List II and List I

In List II (Reserved) it reads as follows :

> ***"State Lands and Foreshore except to the extent specified in item 18 of List I."***

In List I (Provincial Council) appearing in item 18 the sentence reads as follows :

> ***"Land - Land that is to say, rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II"***

A perusal of the above two provisions unequivocally points to the fact that State Lands as referred to in List II embraces the comprehensive entirety of the corpus of State Land out of what is carved out Land. It is not just land but land that is to say, rights in and over land, land settlement, land tenure, transfer and alienation

of land, land use, land settlement and land improvement to the extent set out in Appendix II"

List II connotes the greater mass of State Land that includes List 1 as the lesser. But what has been given as land for purposes to be gathered from Appendix II is itself circumscribed by the qualification **- that is to say…** One begins from the larger namely List II out of which List I originates. What is allocated remains embedded in item 18 of List I which demarcates the extent delivered to Provincial Councils.

As contended by the Learned Counsel for the 2nd Petitioner, the use of the phrase "that is to say" carries with it the notion that what is allocated as land is all that is specified in item 18 and nothing more. Having set out a narrow scope of the corpus of land in item 18, the Constitution in the same breath answers the question as to what extent land powers have been extended to Provincial Councils. The next phrase delineates and demarcates the extension - " rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II".

Thus the Constitution, in item 18 of List I circumscribes the land powers in that there are two terminals between which one encompasses the land given to provincial councils. The first terminal,

namely the use of the phrase "that is to say" indicates the limited powers conferred on the Provincial Councils and the second terminal "to the extent set out in Appendix II" indicates as to how far Provincial Councils can go in exercising the land powers that have been bestowed namely - "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement."

I now proceed to examine Appendix II which is an annexe to List 1.

We have seen that it was the intention of the framers of the Constitution to give an exalted position to State Lands in List II and leave it in the hands of the Republic and deliver a specified portion of State Lands to the Provinces namely -" rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement." and call it "Land" in List I . The lesser nomenclature "Land" in List I connotes the subsidiarity of the role that lands assigned to Provincial Councils play and it becomes patently clear upon a reading of Appendix II which brings out the purposes for which land has been assigned to Provincial Councils.

Appendix II

Appendix II begins with an unequivocal opener -"State Land shall continue to vest in the Republic and may be disposed of, in accordance with Article 33 (d) and written laws governing the matter. "This peremptory declaration is a pointer to the fact that State Land belongs to the Republic and not to a Province. The notion of disposition of State Land in accordance with Article 33 (d) and written laws governing the matter establishes beyond doubt that *dominium* over all "State Land" lies with the Republic and not with the Provincial Councils. In fact the relevant portion of Article 33 (d) would read as follows -

> "33 (d) - to keep the Public Seal of the Republic, and to make and execute under the Public Seal, the acts of appointment of the Prime Minister and other Ministers of the Cabinet of Ministers, the Chief Justice and other Judges of the Supreme Court, such grounds and disposition of lands and immovable property listed in the Republic as he is by law required or empowered to do, and use the Public Seal for sending all this whatsoever that shall pass the Seal."

Limited Extents of Powers Over Lands

Having set out the overarching dominium of State Lands with the Centre, Appendix II sets out special provisions which would qualify as further limitations on State Lands assigned to Provincial Councils. These special provisions apart from demonstrating the limited

extents of Provincial Councils over Land also display unmistakeably that State Land continue to be a subject of the Centre.

Having grafted the brooding presence of the Republic on all State Lands in List II, List I and then the Appendix II and subject to these pervasive provisions, State Land is declared to be a Provincial Council Subject in the second paragraph of Appendix II but that declaration is only explanatory of the purposes for which the Provincial Councils have been assigned with lands. Those purposes are evident in the special provisions 1.1, 1.2 and 1.3 of Appendix II.

These special provisions also strengthen the position that State Lands continue to be a subject located in the Centre.

Special Provision 1.1 - State Land required by the Government of Sri Lanka

State land required for the purposes of the government in a Province, in respect of a reserved or concurrent subject may be utilised by the Government in accordance with the laws governing the matter. The Government shall **consult** the relevant Provincial Council with regard to the utilisation of such land in respect of such subject.

The consultation specified in this special provision would not mean that the Government has to obtain the concurrence of the relevant Provincial Council. State Land continues to vest in the Republic and if there is a law as defined in Article 170 of the Constitution that governs the matter it is open to the Government to make use of the

State Land in the province of the purposes of a reserved or concurrent subject. Consultation would mean conference between the Government and the Provincial Council to enable them to reach some kind of agreement **–S.P.Gupta v Union of India A.I.R 1982 SC 140.** Such consultation would not detract from the fact that that particular State Land which the government requires continues to vest in the Republic.

Special Provision 1.2

Government shall **make available** to every Provincial Council State Land within the Province required by such Council for a Provincial Council subject. The Provincial Council shall **administer, control and utilize such State Land, in accordance with the laws and statutes governing the matter.**

We saw in item 18 of List 1 that the Provincial Councils have "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement." These rights, as item 18 of List I itself states, are subject to the special provision 1.2 of Appendix II.

The resulting position, on a harmonious interpretation of the Constitution would be that when the State makes available to every Provincial Council State Land within the Province required by such Council for a Provincial Council subject, the Provincial Council shall

administer, control and utilize such State Land, in accordance with the laws and statutes governing the matter.

In other words, Provincial Councils in exercising "rights in and over land, land settlement, land tenure, transfer and alienation of land, land use, land settlement and land improvement to the extent set out in Appendix II (conferred by List I) are limited to **administering, controlling and utilizing such State Lands as are given to them. In terms of Article 1.2 State Land is made available to the Provincial Council by the Government. In the background of this constitutional arrangement it defies logic and reason to conclude that State Lands is a Provincial Council Subject in the absence of a total subjection of State Lands to the domain of Provincial Councils.**

A perusal of the special provision 1.3 also strengthens the view that State Lands do not lie with Provincial Councils.

Special Provision 1.3

Alienation or disposition of the State Land within a Province to any citizen or to any organization shall be by the President, on the advice of the relevant Provincial Council in accordance with the laws governing the matter.

The provision once again emphasizes the overarching position inherent in the 13th Amendment to the Constitution that State Land will continue to vest in the Republic and may be disposed of by the

President in accordance with Article 33 (d) and written laws governing the matter. The use of the definite article "the" before the word State Land in this provision conclusively proves that the state land referred to in this provision is confined to the land made available to the Provincial Council for utilization for a Provincial Council subject by virtue of 1.2. If after having made available to a Provincial Council a state land for use, the government decides to dispose of this land to a citizen or organization, the government can take back the land but an element of advice has been introduced to facilitate such alienation or disposition. In the same way the Provincial Council too can initiate advice for the purpose of persuading the government to alienate or dispose of the land made available for a worthy cause. It has to be noted that the absence of the word "only" before the word advice indicates the non-binding nature of the advice the Provincial Council proffers. Thus these inbuilt limitations on the part of the Provincial Council establish beyond scintilla of doubt that the Centre continues to have State Lands as its subject and it does not fall within the province of Provincial Councils.

This Court observes that if the advice of the Provincial Council is non binding, the power of the President to alienate or dispose of State Land in terms of Article 33 (d) of the Constitution and other written laws remains unfettered. In the circumstances I cannot but disagree with the erroneous proposition of the law which this Court expressed in the determination on **the Land Ownership Bill (SD Nos. 26 - 36/2003)** that the power of disposition by the President

in terms of Article 33 (d) has been qualified by 1.3 of Appendix II. This view expressed in that determination is patently in error and unacceptable in view of the overall scheme of the 13th amendment which I have discussed herein. In the same breath the observations of the Supreme Court in **Vasudeva Nanayakkara v Choksy and Others (John Keells case)** {2008} 1 Sri.LR 134 that "a precondition laid down in paragraph 1:3 is that an alienation of land or disposition of State Land within a province shall be done in terms of the applicable law only on the advice of the Provincial Council" is also not supportable having regard to the reasoning I have adopted in the consideration of this all important question of Law. This reason is a non sequitur if one were to hold the advice of the Provincial Council binding having regard to the absence of the word "only" in 1.3 and the inextricable nexus between 1.2 and 1.3.

It is unfortunate that the Court of Appeal fell into the cardinal error of holding that the Provincial Council has jurisdiction to hear and determine applications for discretionary remedies in respect of quit notices under the provisions of the State Lands (Recovery of Possession) Act No 7 of 1979 as amended. This wrong reasoning of the Court of Appeal is indubitably due to the unsatisfactory treatment of the provisions of the 13th Amendment that resulted in patently unacceptable precedents that need a revisit in the light of the fact neither Counsel nor the Bench in the cases cited above has subjected the relevant provisions to careful scrutiny.

Be that as it may, I would observe that the national policy on all subjects and functions which include State Lands in terms of List II is also dispositive of the question within whose competence State Lands lie. Paragraph 3 of Appendix II which provides for the establishment of a National Land Commission by the Government declares in 3.1 that the National Land Commission will be responsible for the formulation of national policy with regard to the use of State Land. It is apparent that Provincial Councils will have to be guided by the directions issued by the National Land Commission and this too reinforces the contention that State Lands lie with the Centre and not with Provincial Councils.

Further there are other provisions that indicate that State Lands lie within the legislative competence of the Centre. Article 154 (G) (7) of the Constitution provides that a Provincial Council has no power to make statutes on any matter set out in List II (Reserved List). One of the matters referred to in that List is "State Lands and Foreshore" except to the extent specified in item 18 of List I. Thus, it is within the legislative competence of Parliament to enact laws in respect of "State Lands" bypassing the powers assigned with Provincial Council, on the premise that the subjects and functions not specified in List I and List II fall within the domain of the Reserved List. The Provincial Councils are also expressly debarred from enacting statutes on matters coming within the purview of the Reserved List.

All these features I have adumbrated above features redolent of the unitary nature of the state. Sharvananda C.J in ***Re The Thirteenth Amendment to the Constitution*** (1987) 2 Sri. LR 312 at p 319 referred to the two essential qualities of a Unitary State as (1) the supremacy of the Central Parliament and (2) the absence of subsidiary sovereign bodies. He analyzed the provisions of the 13th Amendment Bill in order to find out whether the Provincial Council system proposed in the Bills was contrary to these two principles. He referred to the essential qualities of a federal state and compared them with those of the unitary state. It is pertinent to recall what he stated in the judgment.

> *The term "Unitary" in Article 2 is used in contradistinction to the term "Federal" which means an association of semiautonomous units with the distribution of sovereign powers between the units and the Centre. In a Unitary State the national government is legally supreme over all other levels. The essence of a Unitary State is that this sovereignty is undivided - in other words, that the powers of the Central Government power are unrestricted. The two essential qualities of a Unitary State are (1) the supremacy of the Central Parliament and (2) the absence of subsidiary sovereign bodies. It does not mean the essence of subsidiary lawmaking bodies, but it does mean that they may exist and can be abolished at the discretion of the central authority. It does, therefore, mean that by no stretch of meaning of words can subsidiary bodies be called*

subsidiary sovereign bodies and finally, it means that there is no possibility of the Central and the other authorities come into conflicts with which the Central Government has not the legal power to cope…..

On the other, in a Federal State the field of government is divided between the Federal and State governments which are not subordinate one to another, but are co-ordinate and independent within the sphere allotted to them. The existence of co-ordinate authorities independent of each other is the gist of the federal principle. The Federal Government is sovereign in some matters and the State governments are sovereign in others. Each within its own sphere exercises its powers without control from the other. Neither is subordinate to the other. It is this feature which distinguishes a Federal from a Unitary Constitution, in the latter sovereignty rests only with the Central Government.

It is my considered view that the reasoning I have adopted having regard to structure of power sharing accords with the gladsome jurisprudence set out as above by Sharvannda C.J.

Having adopted the above analysis and in light of the structure and scheme of the constitutional settlement in the 13th amendment to the Constitution, the irresistible conclusion is that Provincial Council subject matter in relation to State Lands would only mean that the Provincial Councils would have legislative competence to make statutes only to administer, control and utilize State Land, if such

State Land is made available to the Provincial Councils by the Government for a Provincial Council subject. As I pointed out above, if and when a National Land Commission is in place, the guidelines formulated by such Commission would govern the power of the Provincial Councils over the subject matter as interpreted in this judgement in relation to State Lands.

When one transposes this interpretation on the phrase "any matter set out in the Provincial Council List" that is determinative on the ingredient necessary to issue a writ in the Provincial High Court in relation to State Land, the vital precondition which is found in Article 154P 4 (b) of the Constitution is sadly lacking in the instant case. In terms of that Article, a Provincial Council is empowered to issue prerogative remedies, according to law, only on the following grounds -

(a) There must be a person within the province who must have exercised power under
(b) Any law or
(c) Any statute made by the Provincial Council
(d) In respect of any matter set out in the Provincial Council List.

No doubt the Competent authority in the instant exercised his power of issuing a quit notice under a law namely State Lands (Recovery of Possession) Act as amended. But was it in respect of any matter set

out in the Provincial Council List? Certainly the answer to the question must respond to the qualifications contained in 1.2 of Appendix II namely administering, controlling and utilizing a State Land made available to a Provincial Council. The power exercised must have been in respect of these activities. The act of the Competent authority in issuing a quit notice for ejectment does not fall within the extents of matters specified in the Provincial Council List and therefore the Provincial High Court would have no jurisdiction to exercise writ jurisdiction in respect of quit notices issued under State Lands (Recovery of Possession) Act as amended.

In the circumstances the Court of Appeal erred in law in holding that the Provincial High Court of Kandy had jurisdiction to issue a writ of certiorari in respect of a quit notice issued under State Lands (Recovery of Possession) Act as amended. The order made by the Court of Appeal dated 08.08.12 is set aside and the order of the Provincial High Court of Kandy dated 25.10.2000 is affirmed.

The question of law considered by this Court is thus answered in the affirmative.

Mohan Pieris PC
Chief Justice

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

In the matter of an Application for Leave to Appeal in terms of Section 37 of the Arbitration Act No. 11 of 1995

Kiran Atapattu,
40/60/7, Bauddhaloka Mawatha,
Colombo 07.

SC Appeal 30-31/2005
HC/ARB/1202/2002
HC/ARB/1149/2002
HC/ARB/1150/2002
HC/ARB/1151/2002

CLAIMANT-PETITIONER-APPELLANT

VS

Janashakthi General Insurance Co. Ltd., of No. 467, Muttiah Road,
Colombo 03.

RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: Hon. N.G. Amaratunga, J.,
Hon. Saleem Marsoof, P.C., J. and
Hon. S. I. Imam, J.

COUNSEL: Faiz Musthapha P.C. with J.B. Shantha Perera for Claimant– Petitioner–Appellant.

Nigel Hatch P.C. with K. Geekiyanage and Ms. P. Abeywickrema for Respondent.

ARGUED ON: 24.02.2010; 01.06.2011; 14.05.2012

WRITTEN SUBMISSION OF THE APPELLANT: 02.07.2012

WRITTEN SUBMISSION OF THE RESPONDENT: 06.08.2012

DECIDED ON: 22.02.2013

SALEEM MARSOOF J:

In these appeals, which were taken together for hearing with the consent of all Counsel, the Appellant sought to challenge the consolidated judgment of the High Court which set aside three arbitral awards made by a tribunal of three arbitrators and refused the enforcement of the same. The said awards had been made in favour of the Appellant pursuant to three claims made by him on the basis of three insurance policies issued by the Respondent insurance company.

Before looking at the substantive questions of law arising for determination by this Court in these appeals, it will be useful to outline the salient facts that will be material to the decision of this Court. By the comprehensive motor vehicle policy marked P1A, Colombo Engineering Enterprises, of which the Appellant was sole proprietor, insured Nissan lorry bearing No.47-1370 for Rs. 800,000 with the Respondent on 10th September 1996 for the period 16th September 1997 to 15th September 1998. By the insurance policy marked P1B, the Appellant insured certain musical instruments and sound system equipments for Rs. 1,500,000/- with the Respondent on 30th November 1997 for the period from 30th November 1997 to 30th November 1998. By the policy marked P1C, a partnership firm named Soul Enterprises, of which the Appellant was precedent partner, obtained insurance cover from the Respondent for certain musical instruments and sound equipments for Rs. 1,341,500/- for the same period.

The Appellant claimed that on 5th July, 1998, the said Nissan lorry had carried to Kandy from Colombo, *inter alia*, a load of musical instruments and sound system equipments, being property covered by the other two polices marked P1B and P1C, for use for the purpose of providing music at a dinner dance to be held at La Kandyan Hotel, Kandy that evening. According to the Appellant, after the dance was over, the vehicle left the said hotel on at about 4 am the next morning to return to Colombo with the said musical instruments and sound system equipments, with one Nihal Perera, who was an employee of the Appellant attached to Colombo Engineering Enterprises who was in charge of the musical instruments and sound equipments, and several others. The Appellants claimed that when the said lorry was proceeding on Dangolla Road, having left the Hotel about twenty or thirty minutes back, it caught fire resulting in the destruction of the vehicle and the musical instruments and the sound system equipments carried in it. It was the Appellant's position that the said fire was caused by an electrical defect in the vehicle, and he claimed from the Respondent Rs. 7,531,500/- which included Rs. 800,000/- for the lorry, Rs. 2,481,500/- being the value of the musical instruments and Rs 4,250,000/- being the value of the sound setup, but the Respondent failed and neglected to honour the said claim on the basis that the vehicle had been deliberately set on fire by the Appellant, and that none of the instruments and equipments covered by the policies marked P1B and P1C had been carried in the lorry at the time of the fire.

Upon the claims by the Appellants being repudiated by the Respondents, the dispute was referred to arbitration before a panel of three arbitrators. The arbitrators heard the testimony of the Appellant's witnesses Nihal Perera, who had been in the lorry at the time of the fire, and F. Henry Silva, who was the officer in charge of crimes at the Peradeniya Police Station within the limits of which the incident by which the lorry and its contents were destroyed, had occurred, as well as the testimony of the Appellant, Kiran Atapattu, who testified on his own behalf. Thereafter Police Constable Weerasooriya of Peradeniya Police and K.I. Jegatheesan, a retired Government Analyst, who testified on behalf of the Respondent gave evidence, and the arbitrators unanimously upheld the claims of the Appellants. However, the arbitrators were not unanimous in regard to the quantum of their awards. In the consolidated majority award marked Z1 dated 30th January 2002, arbitrators Hon. Justice S.B. Goonewardene (Chairman) and Mr. Ben Eliathamby, P.C. (Member) awarded to the Appellants the sum of Rs. 2,350,000/- being the aggregate of the following:-

> In the claim on insurance policy marked P1A, an award in a sum of Rs. 385,000/- being the value of the covered item, and Rs. 130,000/- as costs of arbitration.
>
> In the claim on the insurance policy marked P1B, an award in a sum of Rs. 720,000/- being the value of the covered goods, together with a sum of Rs. 245,000/- as costs of arbitration.

In the claim relating to insurance policy marked P1C, an award in a sum of Rs. 645,000/- being the value of the covered goods, together with a sum of Rs. 225,000/- as costs of arbitration.

The third arbitrator, Mr. Nihal B. Peiris, in a separate award marked Z2, while agreeing with the reasons and findings of the majority of the Tribunal, awarded an aggregate of Rs. 4,486,500/- to the Appellant, which consisted of Rs. 500,000/- on the policy marked P1A, Rs. 1,500,000/- on the policy marked P1B, Rs. 1,341,500/- on the policy marked P1C, with costs.

The Respondent moved the High Court in terms of Section 32 of the Arbitration Act. No. 11 of 1995 seeking to set aside the aforesaid three awards, and the Appellant filed an application to have the said awards enforced in terms of Section 31 read with Section 34 of the said Act. When the said applications of the Appellant and Respondent were taken up for argument in the High Court on 30th June 2003, it was agreed by the parties to consolidate the said applications and determine them on the written submissions filed by the parties, and the Learned High Court Judge made order accordingly.

The High Court, by its impugned judgment dated 4th November 2004 allowed the application to set aside the awards, and refused the enforcement application. On 30th March 2005, this Court has granted leave to appeal on the questions set out in paragraph 27(i) to (iv) of the petition, which are reproduce below:-

(i) Has the High Court Judge misdirected himself in law in acting on the basis that the arbitrators had wrongly applied the burden of proof of fraud as being "beyond reasonable doubt"?

(ii) Has the High Court Judge misdirected himself in law in applying the burden of proof for establishing fraud in civil proceedings on a "balance of probabilities"?

(iii) Has the High Court Judge misdirected himself in law in rejecting the insurance policies marked P1A, P1B and P1C on the ground that the said documents were uncertified when both parties had admitted the said insurance policies P1A, P1B and P1C?

(iv) Has the High Court Judge misdirected himself in failing to consider the evidence led in the arbitration proceedings in determining the issues arising in this case?

In addition to the above questions, on an application by the learned President's Counsel for the Respondent, the Court also made order that the following substantial questions should be included for a full determination of the matters in dispute. These additional questions are as follows:-

1. Are the said arbitral awards made contrary to public policy, in that they have failed to consider that "double insurance" has been taken in respect of musical instruments?

2. Is the award of three sets of costs at the arbitration contrary to public policy considering that there was only one hearing in respect of all three claims?

Certification of Copies of the Arbitration Agreement and Award

Before getting into more intricate aspect of this judgment, it is convenient to deal at the outset with a very simple question, namely question (iii) raised by learned President's Counsel for the Appellant, as to whether the learned High Court Judge misdirected himself in law in rejecting

the insurance policies marked P1A, P1B and P1C on the ground that the said documents were uncertified, when the said policies had been admitted before the arbitral tribunal. There is no dispute that the application made by the Appellant under Section 31 of the Arbitration Act No. 11 of 1995 for the enforcement of the award was accompanied by copies of P1A, P1B and P1C certified by only the Attorney-at-law for the Appellant as "true copy" and was not the original of the said policies. The documents had been admitted by the parties at the commencement of the arbitral hearing, and were also relied upon by the Respondent in its application to set aside the award made under Section 32 of the Arbitration Act.

Section 31(2) of the Arbitration Act provides as follows:-

> *An application to enforce the award shall be accompanies by-*
>
> > *(a) the original of the award or a duly certified copy of such award; and*
> > *(b) the original arbitration agreement under which the award purports to have been made or a duly certified copy of such agreement.*
>
> *For the purposes of this sub-section, a copy of an award or of the arbitration agreement shall be deemed to have been duly certified if -*
>
> > *(i) it purports to have been certified by the arbitral tribunal or, by a member of that tribunal, and it has not been shown to the Court that it was not in fact so certified; or*
> > *(ii) it has been otherwise certified to the satisfaction of the court.*

One of the grounds on which the High Court decided to set aside the awards made by the tribunal was that the said policies, which constitute the contracts based on which the claims were made, had not been properly certified. Section 31 (2) is a mandatory provision, and provides that the application to enforce the award shall be accompanied by the original of the Arbitration Agreement and the original of the award or copies certified in the arbitral tribunal or a member of the tribunal or is otherwise certified, to the satisfaction of the Court. If the provision is not complied with, the application will have to be dismissed in *limine*. The defect cannot be cured by submitting the said duly certified documents at a subsequent stage. However, it is useful to note that when a similar objection to that taken up by the Respondent in this case, albeit with respect to the award and not the contract on the basis of which it was made, was taken up in *Kristley (Pvt) Ltd. v The State Timber Corporation (STC)*, (2002) 1 SLR 225, M.D.H. Fernando J, with whom Gunasekere J. and Wigneswеran J. agreed, dealt with the objection in the following manner at pages 239 to 240 of his judgment:-

> *The learned High Court Judge failed to give full effect to clause (ii) of section 31 (2). That clause unambiguously provides for a mode of certification additional to that prescribed by clause (i). But, for that clause certification by the Registrar of the Arbitration Centre would not have been acceptable. Clause (ii) requires the High Court in each case, having regard to the facts of the case, to decide whether the document is certified to its satisfaction. The learned Judge erred in laying down a general rule - founded on a virtual presumption of dishonesty - which totally excludes certification by an attorney-at-law regardless of the circumstances. The position might have been different if the application for enforcement had been rejected promptly on presentation, for then there might well have been insufficient reason to be satisfied that the copy was indeed a true copy: and that would have caused no injustice, as the claimant could have filed a fresh application. But, I incline to the view that even at that stage the application should not have been summarily rejected. The claimant should have been given an opportunity to tender duly certified copies, interpreting "accompany" in section 31 (2) purposively and widely (as in Sri Lanka General Workers' Union v. Samaranayake and*

Nagappa Chettiar v. Commissioner of Income Tax. Undoubtedly, section 31 (2) is mandatory, but not to the extent that one opportunity, and one opportunity only, will be allowed for compliance. In the present case, however, the order was not made immediately, but only after the lapse of the period of one year and fourteen days allowed for an application for enforcement. By that time, the learned Judge had consolidated the proceedings: hence he could not have ignored the certified copies filed in the STC's application, which admittedly, were identical in all material respects to the copies tendered with the claimant's application.

In my view, the above quoted words apply with equal force to the decision of the instant case, although what has been challenged in this case is not the award of the arbitral tribunal but the contract on the basis of which it was made. It is crucial that in both these cases the responded to the claim had in its application to set aside the award relied on the very documents objected to in the High Court. While it is of vital importance to protect and preserve the credibility and integrity of the arbitral process by eliminating all possibilities for unscrupulous persons abusing the process of court, it is equally important to provide an efficient mechanism for the enforcement of arbitral awards. In the light of these considerations, it is clear that the High Court erred in upholding the objection taken up by the Respondent to the copies of the policies marked P1A, P1B and P1C when they had been admitted at the commencement of the hearing at the arbitral tribunal and had also been relied upon by the Respondent itself in its application to set aside the award made under Section 32 of the Arbitration Act.

Was the Award made contrary to the Public Policy of Sri Lanka?

The question as to whether the award in question was contrary to the public policy of Sri Lanka, arises in the context of three separate questions coming up for determination in this case. The learned High Court Judge had held that the arbitral tribunal had violated the public policy of Sri Lanka when it erred in law in applying the higher standard of proof usually applicable in a criminal case to the proof of fraud by an insurer. Questions (i), (ii) and (iv) raised by learned President's Counsel for the Appellants relating to the proof of fraud are interrelated. The question of public policy has also been raised by learned President's Counsel for the Respondent directly in questions (1) and (2) suggested by him for the consideration of Court. These questions relate respectively to the concept of "double insurance" and the award of costs, and have been raised on the footing that the arbitral tribunal has misconstrued the applicable principles of law relating to these matters.

Before going into details, it may be useful to make some general remarks on the question of public policy in the context of the enforcement and setting aside of arbitral awards. While Section 26 of the Arbitration Act provides that "subject to the provisions of Part VII of this Act, the award made by the arbitral tribunal shall be final and binding on the parties to the arbitration agreement", Sections 32(1)(b)(ii) and 34(1)(b)(ii) of the Arbitration Act which appear in Part VII thereof, refer to the concept of public policy, and provide respectively that an arbitral award may be set aside and / or its enforcement refused on the ground that it is contrary to the public policy of Sri Lanka. In applying these provisions great caution should be exercised, particularly in the context that an arbital award is the end result of arbitration proceedings, which give effect to the intention of the parties to a dispute to refer their dispute for arbitration without resorting to the more time consuming process of litigation. The concept of party autonomy has been recognized by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, also known as the New York Convention, and is reflected in almost all the provisions of the Sri Lanka Arbitration Act, which has as its objective the efficient enforcement of arbitral awards, irrespective of whether they are foreign or local awards. The New York Convention as well as the Arbitration Act of Sri Lanka provide that an arbitral award may be set aside or refused enforcement if it is contrary to public policy.

It is in this connection important to bear in mind the *dictum* of Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd (*1902) AC 484 at page 500 that "public policy is always an unsafe and treacherous ground for legal decision". Seventy-eight years earlier, Burrough, J., in *Richardson v Mellish* (1824) 2 Bing 229 at page 252, had warned against the dangers that excessive reliance on the concept can give rise to, describing public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." Lord Denning MR, however, was not a man to shy away from unmanageable horses, and in *Enderby Town Football Club Ltd. v. Football Association. Ltd.* (1971) Ch. 591 at page 606, he responded to Burrough J's warning with his characteristic quip that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". The Supreme Court of India, in paragragraph 92 of its landmark decision in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd* AIR 2003 SC 2629; (2003) AIR SC 2629 at page 2639, observed that-

> *Had the timorous always held the field, not only the doctrine of public policy, but even the Common Law or the principles of Equity would never have evolved….. Practices which were considered perfectly normal at one time have today become obnoxious and oppressive to public conscience. If there is no head of public policy which covers a case, then the court must in consonance with public conscience and in keeping with public good and public interest declare such practice to be opposed to public policy.*

It is therefore obvious that while the dynamism of the concept of public policy cannot be denied, it is important to exercise extreme caution in applying the concept. It is in the light of these observations that this Court will proceed to consider the three questions outlined above in the context of the impugned decision of the High Court which overturned the findings of the arbitral tribunal, which was unanimous in holding that the Respondent was not entitled in the circumstances of the case to repudiate the claims made by the Appellant

Proof of fraud

Questions (i), (ii) and (iv) raised by learned President's Counsel for the Appellants relating to the proof of fraud maybe conveniently considered together. While it is common ground that the lorry bearing No. 47-1370 was almost totally destroyed by a fire, the dispute between the Appellant and the Respondent really centred around the question of how the fire was caused. The Appellant founded his claims under the relevant policies on the basis that the fire was accidental and was caused by some electrical problem in the lorry itself, and hence the Respondent was liable upon the contracts of insurance to indemnify the Applicant, while the Respondent resisted the claims on the basis that the lorry was deliberately set on fire and that the claims made for indemnity are fraudulent, with the result that they must altogether fail. The arbitrators unanimously upheld the claims although they differed in regard to the quantum payable under the policies.

It is trite law that all contracts of insurance are governed by the duty of *uberrimae fidei* or utmost good faith, and any fraudulent claims arising from self-induced loss including those caused with intent to commit fraud may be justifiably repudiated by the insurer. *See,* Lord Atkin in *Beresford v Royal Insurance Co [1938] A.C. 586; See also, Heyman v Darwins [1942] A.C. 356.* The basis of exclusion of the liability of an insurer to pay in such and similar circumstances, was explained by Lord Atkin in *Beresford* at page 595 in the following manner:

> "On ordinary principles of insurance law an assured cannot by his own deliberate act cause the event upon which the assurance money is payable. The insurers have not agreed to pay on that happening."

While it is clear that in such cases the burden of proof of establishing fraud falls on the insurer, the question that arises in this appeal is whether the applicable standard of proof is the criminal standard of proof beyond reasonable doubt, or the civil standard of preponderance of probabilities, or something in between. The learned High Court Judge had taken the view that it is the lesser of these two standards, namely proof on a preponderance of probabilities that applies in such a case to establish fraud, and has set aside the award in favour of the Appellant, and allowed the application of the Appellant for enforcing the same, on the basis that the arbitrators had erred in law and that their awards are contrary to the public policy of Sri Lanka.

The primary basis on which the Appellant challenged the finding of the High Court was that it had misapplied the standard of proof required to establish fraud in this case. Learned President' Counsel for the Appellant argued with great force that the High Court had erred in applying the civil standard of balance of probabilities for the proof of fraud, which was by its very nature a serious allegation requiring a higher degree of proof. He submitted that the High Court had in fact treated the unanimous award of the arbitral tribunal, which upheld the claims of the Appellant on the basis that there was no plausible evidence placed before it that could establish fraud to the satisfaction of the tribunal, was arrived at by applying the wrong standard of proof.

In this context, it is necessary to consider the judgment of the High Court carefully. The learned High Court Judge observed as follows in the course of his judgment:–

> මෙම නඩු තීන්දුව අනුව ප්‍රකාශ කර ඇත්තේ, බේරුම්කරුවෙකු නිවැරදි නීතිය අනුගමනය කළයුතු බවත් දිවයිනේ පවතින නීතියට යටත්ව කටයුතු කිරීමට බැඳී, ඇති බවත්ය. මේ අනුව සෑම බේරුම් කරුවෙකුම දිවයිනේ පවතින නිවැරදි නීති තත්ත්වයන් අනුව කටයුතු කිරීමට බැඳී ඇත. එසේ කටයුතු නොකර ප්‍රදානය කරණලද තීරක ප්‍රදානයක්, ශ්‍රී ලංකාවේ මහජන ප්‍රතිපත්තිය සමඟ ඝට්ටනය විය හැකිය.
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> මෙම නඩුවේ ප්‍රදානය කරණලද තීරක ප්‍රදානය අධිකරණය විසින් පරීක්ෂා කර බැලීමේදී අධිකරණයට සනාථ වන්නේ බේරුම්කරුවන් ඉදිරියේ ඉදිරිපත් කරණලද සාක්ෂි විමසා බැලීමේදී තීරක වරයා පෙත්සම්කරුවන් කර ඇතැයි කියන වංචාව සාධාරණ සැකයෙන් තොරව වගඋත්තරකරුවන් විසින් ඔප්පු කළයුතුබව තීරණය කර ඇති බවය. තීරක ප්‍රදානයේදී වැඩිදුරටත් කරුණු දක්වමින් තීරක වරයා 50 එන්.එල්.ආර්. 337 යටතේ වාර්තා ගතවන *ලක්ෂ්මන් වෙට්ටියාර් එදිව මුත්තයියා වෙට්ටියාර්* නඩුව අනුගමනය කරමින් වංචාව සාධාරණ සැකයෙන් තොරව මෙම බේරුම් කිරීමේ විමසීමේදී ඔප්පු කළයුතු බව සඳහන් කර ඇත.
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> මෙම තීරක ප්‍රදානය කිරීමට පෙර කරණලද විමසීමේදී පෙත්සම්කරුවන් විසින් වංචා සහගතව ලොරි රථයට ගිනි තැබීම සම්බන්ධයෙන් වගඋත්තරකරුවන් විසින් කරණලද චෝදනාව සාධාරණ සැකයෙන් තොරව ඔප්පු කර නැති බවට තීරක වරයා නිගමණය කර ඇත. එමෙන්ම මෙම වංචාව නීතිය අනුව සාධාරණ සැකයෙන් තොරව ඔප්පු කළයුතු බවටත් තීරක වරයා සඳහන් කර ඇත.
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> එහෙත් මේ සම්බන්ධයෙන් මෙම අධිකරණය විසින් කරුණු සැළකිල්ලට ගැනිමේදී, අධිකරණය විසින්, *නාරායන්වෙට්ටි එදිරිව මහාධිකරණය රැන්ගුන්*, 1941 ඒ.අයි.ආර්. (පී.සී.) 93 නඩු තීන්දුව කෙරෙහි අවධානය යොමුකරන ලදී. එම නඩුවේදී, 50 එන්. එල්. ආර්. 337 නඩුවෙතීන්දුව ප්‍රතික්ෂේපකර ඇත. එසේම *ඇසෝසියේටඩ් බැටරී මැනුපැක්චර් සිලෝන් ලිමිටඩ් එදිරිව සුලෙයිමාන් ඉංජිනියරින් වර්ක්ස් යුනයිටඩ්* 1975 (77) එන්.එල්.ආර්. 541 වෙනි පිටුවේ වාර්තා ගතවී ඇති නඩු තීන්දුව අනුව මෙවැනි වංචාවක් සිවිල් මුහුණුවරක් ගන්නා බැවින් එවැනි ආරාවුලකදී වංචාව, ඔප්පුකිරීමේ භාරය සාධාරණ සැකයකින් තොරව නොව සාක්ෂිවල වැඩිබර අනුව ඔප්පු කළයුතු බවට තීරණය වී ඇත.
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> තවද, ඊ. ආර්. එස්. කුමාරස්වාමි සාක්ෂි නීතියේ වෙළුම 02. ග්‍රන්ථයේ සඳහන් කරඇත්තේද, සිවිල් මුහුණුවරක් ගන්නා ලද ආරාවුලකදී එම ආරාවුල සාක්ෂි වැඩි බර අනුව ඔප්පු කළයුතු බවයි. මේ අනුව ලංකාවේ දැනට පවතින නීතිය යටතේ සිවිල් මුහුණුවරක් ගන්නා ලද ආරාවුලකදී 'වංචාව' සාධාරණ සැකයෙන් තොරව ඔප්පුකිරීම අවශ්‍ය

නොවන බවත් එය සාක්ෂිවල වැඩි බර අනුව ඔප්පුකිරීම ප්‍රමාණවත් බවත් සඳහන් වේ. රක්ෂණ නීතිය අනුවද වංචාව ඔප්පු කල යුත්තේ සාක්ෂි වැඩි බර අනුවය.

එබැවින් බේරුම් කිරීමේ ආඥා පනතේ 32(අ) බී. වගන්තිය අනුව මෙම නඩුවට ඉදිරිපත් කර ඇති තීරක ප්‍රදානය ශ්‍රී ලංකාවේ පවතින රාජ්‍ය ප්‍රතිපත්ති සමඟ ඝට්ටනය වෙනබව අධිකරණයට දක්නට ලැබෙයි. විශේෂයෙන් සාධාරණ සැකයෙන් තොරව වංචාවක් ඔප්පු කළයුතු බවට වැරදි නීතිමය සංකල්පයන් සඳහා තීරකවරුන් එළඹ තිබීම, ශ්‍රී ලංකාවේ පවතින නීති සංකල්පයන්ට විරුද්ධව තීරකවරුන් ගෙන ඇති තීරණයන් බව අධිකරණයට සනාථ වේ.

While learned President's Counsel for the Appellant sought to assail the reasoning of the High Court in the first and the last paragraphs of the passage quoted above on the basis that they were too widely formulated and suggested that a mere error of law on the face of the record could justify the setting aside of an arbitral award, learned President's Counsel for the Respondent submitted that such a formulation was consistent with the new and wider approach to public policy adopted by the Indian Supreme Court in *Oil & Natural Gas Corporation Ltd v Saw Pipes Ltd. supra.* However, our courts have adopted a more cautious approach and held that it is not every error of law but only a violation of a fundamental principle of law applicable in Sri Lanka that would be held to be contrary to public policy. As Shiranee Thilakawarane J., with whom Dissanayake J and Somawansa J concurred, observed in *Light Weight Body Armour Ltd., v Sri Lanka Army* [2007] BALR 10 at page 13, in the context of the facts of that case-

> *It is generally understood that the term public policy which was used in the 1958 New York Convention and many other treaties, covered fundamental principles of law and justice in substantive as well as procedural aspects. Thus instances such as corruption, bribery and fraud and similar serious cases would constitute a ground for setting aside. However, the facts of this case do not bear out any such incident of illegality, fraud or corruption in order to validate a challenge on the ground of public policy.*

However, it may not be necessary to go into the parameters of the concept of public policy in the context of the facts of this case, as it would appear from the decision of the Supreme Court of Sri Lanka in *Kristley (Pvt) Ltd v State Timber Corporation*, (2002) 1 SLR 225, that the Supreme Court took it for granted that an award procured by means of a forgery was contrary to public policy of Sri Lanka, although on the facts of that case, particularly in the absence of a specific issue on forgery raised before the arbitral tribunal, the Court held that the High Court was not justified in upholding the defence of forgery raised by the respondent.

Learned President's Counsel for the Appellant has also sought to challenge the decision of the High Court on the basis that it had misconstrued the standard of proof applicable for establishing fraud in an insurance case in arriving at the conclusion that the arbitral awards should be set aside and refusing enforcement. In my view, the High Court had not considered the fact that at page 6 of the majority award of the tribunal marked Z1, reference was in fact made to the early Sri Lankan decision of *Lakshmanan Chettiar v Muttiah Chettiar* 50 NLR 337, in which the Supreme Court laid down the principle that while the burden of proving fraud was on him who so alleges, the standard of proof was much higher than the civil standard of preponderance of probabilities. The arbitrators quoted extensively the following passage from Malcolm A. Clarke, *The Law of Insurance Contracts*, 2nd Edition at pages 711-2 pertaining to the law in England with respect to insurance contacts for the purpose of focusing firstly, on the law applicable to the question of fraud in insurance contracts, and secondly, to show what the approach of English Law was to such question:-

> *The duty of good faith between the insurer and insured is sometimes specified as the foundation, although not the only foundation, of the rule that fraud in a claim by the*

insured defeats the claim and terminates the contract of insurance. The rule is often spoken of as a contract term but a term that is 'in accordance with legal principles and sound policy'. Although at the time of the claim as at other times, the duty of good faith is most apparent as it affects the insured claimant, the duty must also be observed by the insurer. .....

The onus of proving fraud is on the insurer. In cases of fraudulent misstatement about the extent of loss, there may be little doubt that the statement was made, but the insurer must also prove that it was false and that the claimant knew it was false. In other cases the insurer's allegation of fraud may be more serious: that the loss occurred as claimed but was deliberately caused by the claimant. In all cases of alleged fraud, the onus, while not that of the criminal law, is greater than the usual balance of probabilities, because the 'more serious the allegation the higher the degree of probability' to be established. Indeed, if the allegation of fraud is that the insured fired his own property, the onus is close to that of facing the prosecution in a criminal case on the same facts, involving a high degree of probability."

It is in the light of this understanding of the law that the arbitral tribunal went on to analyze the evidence led in the case, and arrived at the conclusion that the Respondent had failed to discharge the burden placed on him to establish that the claims were fraudulent.

It is manifest that the approach of the arbitral tribunal was consistent with the law and practice in Sri Lanka. In *Lakshmanan Chettiar v. Muttiah Chettiar* 50 NLR 337, which was a civil action filed by a professional money lender against his agent claiming that he had fraudulently and in breach of trust assigned a decree made in his favour to a third party without any consideration, the court had to decide whether the assignment was fraudulent, and Howard, C.J. (with Canakaratne, J. concurring) held that the standard applicable to the proof of fraud was akin to the criminal standard. His Lordship observed at page 344, that "fraud, like any other charge of a criminal offence whether made in civil or criminal proceedings, must be established beyond reasonable doubt" as such a finding "cannot be based on suspicion and conjecture." This decision was followed in *Yoosoof v. Rajaratnam* 74 NLR 9, in which in the context of an inquiry under Section 325 of the Civil Procedure Code, G.P.A. Silva A.C.J., observed at page 13 that-

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

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

The balance of probability standard means that a court is satisfied an event occurred if the court considers that on the evidence, the occurrence of the event was more likely than not. When assessing the probabilities, the court will have in mind the factor, to

whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury.

Explaining the principles enunciated by the courts in this regard, Phipson on Evidence (16th Edition – 2005) at page 156, emphasizes that-

....attention should be paid to the nature of the allegation, the alternative version of facts suggested by the defence (which may not be that the event did not occur, but rather that it occurred in a different way, or at someone else's hand), and the inherent probabilities of such alternatives having occurred.

In the recent decision of this Court in *Francis Samarawickrema v Dona Enatto Hilda Jayasinghe and Another*, [2009] 1 SLR 293, the Supreme Court has adopted this approach, exploding the theory that fraud in a civil case has to be proved beyond reasonable doubt, subject of course to the to the qualification that in applying the standard of the balance of probabilities, the court should always bear in mind that, as Lord Nicholls observed in the *dicta* quoted earlier, that *the more serious the allegation the less likely it is that the event occurred and hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability*. In my view, since the applicable degree of proof would depend on the seriousness of the charge, the question whether it is the criminal or civil standard of proof that would apply in a civil case involving a charge of fraud, would become difficult to answer without a meaningless play on semantics.

In my opinion, the High Court failed in its impugned judgment, to subject the evidence led by the parties before the arbitral tribunal to careful scrutiny in arriving at its decision to set aside the award. The arbitral tribunal, which was conscious of the standard applicable to the proof of fraud had closely examined all evidence led in the case by both parties and unanimously concluded that the lorry and its contents had been destroyed by fire, and the said fire had been caused by an electrical short circuit in the lorry. Witness Nihal Perera, who testified on behalf of the Appellant, stated in evidence that he was one of the passengers in the vehicle at the relevant time. He stated that the vehicle had transported the musical instruments and sound equipments in question to be used at a dance at a Hotel in Kandy. After the dance, the instruments were being transported to Colombo. The lorry left the Hotel at about 4.00 am and was proceeding along the Kandy-Colombo road. After they had travelled for about 20 or 30 minutes, one of the other passengers in the said lorry banged on some portion of the lorry in the rear and alerted the witness and the other passengers that there was a fire. Nihal Perera testified that, as a result of the fire, the lorry and its contents were completely destroyed. He specifically stated that the fire was not caused by him or any other persons. He also produced two lists of goods that were destroyed. He clarified that he was seated in the cab section of the lorry as a passenger when he was alerted to the fire.

The Appellant, Kiran Atapattu, also testified to the fact that the musical instruments and sound equipments were transported to Kandy in the lorry and that in the early hours of the relevant day, he was contacted by telephone at his home in Colombo by the witness Nihal Perera who informed him that the lorry had caught fire on the return journey. He reached Kandy and went to the spot and he specifically denied the suggestion that the vehicle and its contents had been set on fire at his instance. His evidence was followed by the next witness who was Inspector F. Henry Silva who had been OIC Crimes at the Peradeniya Police Station, within the area of which the incident had occurred. He stated that, at about 6.30 am on the day of the incident, a complaint had been received at the Police Station relating to the fire and he visited the spot at

about 8.20 am. He observed that the lorry was almost completely burnt down. He observed a heap of ash within the vehicle and a set of drums inside the vehicle which was still burning. He observed a large number of musical instruments and equipments within the lorry some of which were burnt and others still burning. He had been at the scene for one hour and in the course of his investigations, he questioned the passengers who had been in the lorry and inmates of houses in the vicinity. According to his investigations and inquiry he concluded that the fire must have been caused by an electrical short circuit in the lorry. He also stated that a retired Deputy Inspector-General of Police had visited the scene along with K.I. Jegatheesan, a retired officer from the Government Analyst's Department, a few days after the fire.

Two witnesses were called to give evidence on behalf of the Respondent, namely, Police Constable Weerasooriya of Peredeniya Police and K.I.Jegatheesan, a retired Government Analyst. Witness Weerasooriya read out from the notes made by the I.P. Henry Silva. These notes indicated that I.P. Henry Silva had noticed that the tires and tubes of the vehicle had been burnt and the vehicle had settled on its rims. These observations included the fact that, when IP Henry Silva visited the scene, flames were still visible and the entire rear portion of the lorry had been burnt.

The main witness called on behalf of the Respondent was Jegatheesan, who testified as an expert. He stated that, at the request of the Respondent, he investigated the fire, and had visited the scene on 9th July 1998, several days after the vehicle had caught fire. His evidence suggests that the vehicle had not been guarded during the interval between the fire and his inspection. This witness was of the opinion that the fire had not started from the diesel tanks. His position was that the fire had definitely started from the inside of the lorry and not from the diesel tanks. He was also of the opinion that the fire had not started from the battery area and contended that the fire could not have occurred as a result of an electrical short circuit. He was of the opinion that the fire could have commenced with the use of an inflammable liquid such as petrol.

The arbitral tribunal formed the opinion that his testimony was insufficient to establish with any certainty that the fire was the result of arson, particularly considering the delay in the inspection made by Jegatheesan, which might have resulted in the destruction of whatever meager evidence that may have remained in the scene after the fire. It would appear that the evidence of this witness is flawed in that, on his own admission, he did not carry out any chemical or other scientific tests to determine the cause of the fire. Moreover, under cross-examination, he was compelled to admit that there was nothing in his report to establish that the fire had been deliberately caused, and that he could have written his report from his office without visiting the scene at all. The tribunal also viewed his evidence with caution as he was an expert engaged by the Respondent. In this context it is necessary to quote from the following pertinent observation made by the tribunal at page 15 of the majority award:-

> We do not go to the extent of stating that we disbelieve the witness, but in assessing the worth of his evidence, as in the case of any witness whose evidence is put forward as that of an expert, it is necessary to bear in mind the cautions that have been expressed from time to time by the courts in the evaluation of such evidence.

The tribunal referred in the course of its majority award to the early decision of this Court in *Soysa v Sanmugam* 10 NLR 355, where Hutchinson CJ, was inclined to treat the opinion of an expert as nothing more than slight corroboration of a conclusion arrived at independently, and in any event, never so strong as to turn the scale against the person charged with a criminal act if the other evidence is not conclusive. In the subsequent decision of *R v Perera* 31 NLR 449, Jayawardena A.J. called attention to the danger of acting on the unsupported testimony of an expert. Somewhat similar views have been taken in *Gratiaen Perera v The Queen* 61 NLR 522

and in *Samarakoon v Public Trustee* 65 NLR 100. There are many authorities which show that the courts are aware of the fact that experts are inclined to show conscious or unconscious bias towards those who call them, and are perhaps hostile to those who challenge their views in cross-examination. Thus, in an old case, *Cresswall v Jackson* (1860) F &F 24, Cockburn CJ expressed the view that the evidence of professional witness has to be viewed with some degree of distrust, for it is generally given with some bias. In the case of *Abinger v Ashton* (1874) LR 17 Jessel MR stated that an expert is employed and paid, not merely his expenses but much more by the persons who calls him, and there is undoubtedly a natural bias to do something of use for those who employ him and adequately remunerate him.

In this state of evidence and in the light of the applicable law, I am of the opinion that the finding of the tribunal in this regard is unimpeachable and consistent with authority both on the question of the standard of proof applicable in civil cases involving an allegation of fraud as well as the value of expert evidence. In my view, the High Court had erred in its finding that the awards of the arbitral tribunal should be set aside and its enforcement refused on the basis that the tribunal had misapplied the applicable law relating to the standard of proof in civil cases where fraud is alleged and had failed to assess the evidence led before the arbitral tribunal to determine whether the Respondent would have succeeded with its defence of arson even on a balance of probabilities. Accordingly, questions (i), (ii) and (iv) raised on behalf of the Appellant have to be answered in the affirmative.

The Question of Double Insurance

This court has also granted leave to appeal on the question whether the arbitral awards were made contrary to public policy, in that they have failed to consider that "double insurance" has been taken in respect of musical instruments. Although the question of "double insurance" was taken up on behalf of the Respondent, neither President's Counsel have addressed Court on this question, or adverted to it in their written submissions. However, it appears that this ground of challenge has been raised on the basis that the musical instruments and sound equipments covered by the insurance policies marked P1B and P1C are identical. I have given consideration in this context to the types of items covered by the two respective polices. The description of properties covered by P1B and their values were as follows:-

One Studio Master 24 Channel Audio Mixer	*200,000/-*
One Studio Master 12 Channel Audio Mixer	*100,000/-*
One Studio Master 08 Channel Audio Mixer	*50,000/-*
One Studio Master Audio Mixer	*50,000/-*
One Guitar Amplifier Attax 100 Huges & Kettneattax 100	*45,000/-*
One Roland GP 100 Pre-Amp processor	*55,000/-*
One Roland FC 200 Foot Controller	*40,000/-*
One Boss LU-300L (T) Volume Pedal	*5,000/-*
One Ibanez Electric Guitar-Model No. 540BMAU/N F407829	*65,000/-*
One Digitech GSP 2101 Guitar Pre-Amp Processor	*75,000/-*
Two Music Stands KHS BS 310-SLR 3,000/- Each	*6,000/-*
Three Ultimate KL-29B Axcel Guitar Stands SLR 3,000/- Each	*9,000/-*
One Ultimate MC-66B Mic Stand	*6,000/-*
Two Equalizers Yamaha Q 2031/A (LK01219 & LK01220) – SLR 50,000/- Each	*100,000/-*
One Sennhaiser Cordless Microphone BF 1501	*60,000/-*
Four JBL Monitor Speakers Eow Power 15 – SLR 75,000/- Each	*300,000/-*
Two Equalizers – SLR 60,000/- Each Compressor Limiter Dpr 402-02/3214 Spectral Enhansa – 2-374813GD	*120,000/-*

Three Apex Ultimate Microphone Stands SLR 3,000/- Each	*9,000/-*
Five Shure SM58 Microphones – SLR 12,000/- Each	*60,000/-*
One Roland XP-50 Keyboard – S/N XH58887	*100,000/-*
One Ariana D0200N Semi-Acqoustic Guitar (29183)	*20,000/-*
One Hohner Harmonica	*5,000/-*

This may be contrasted with the description of properties covered by the policy marked P1C and their values as set out in the said policy:-

Tama AF 522X5 Drum Set including: Two Brass Drums, Four Tom Toms, One Floor Tom, One Snare Drum, One Drum Stool, One Hi-Hat Stand, One Cable Hi-Hat, Four Boom Stands, One Double-Bags Drum Pedal, One Snare Drum Stand, One Hi-Hat, Two Crash Cymbals, One Rice Cymbal, One Splash Cymbal and two Drum Racks	*300,000/-*
One Alasis D445 Drum Module S/N D 53301743	*30,000/-*
One Roland SPD 11 Total Percussion AF 8212 T	*40,000/-*
One Roland Ju-1080 Module BH 72245	*68,500/-*
One Ensonic ASR- 10 Keyboard ASR 20422	*115,000/-*
One Roland A 80 Master Keyboard	*150,000/-*
One Ultimate AX-48R Apex Keyboard Stand	*24,000/-*
One Korg I-3 Keyboard - SN 433340	*150,000/-*
One Roland MC 50 MK II Micro Composer	*50,000/-*
One Jupiter TPS-547 GL Saprano Saxophone	*65,000/-*
One Ultimate AX- 48B Apex Keyboard Stand	*24,000/-*
One Roland JV 38 Keyboard - S/N AG 92490	*80,000/-*
One Bass Amplifier Head Wamp 2808	*86,000/-*
One Bass Speakerbox Warric 212-40	*55,000/-*
One Roland RSP 550-Connects Unit	*60,000/-*
One Art-Night Bass with Pedal	*90,000/-*

It is abundantly clear from this comparison that there is no question of double insurance arising in this case. Furthermore, it is clear from the evidence of witness Nihal Perera, who had given the lists of the items that were destroyed in the fire, that the properties covered by insurance policies marked P1B and P1C were in the lorry at the time the fire occurred. Inspector F. Henry Silva, OIC crimes at the Peradeniya Police Station, who visited the scene of the incident the following morning at 6.30 am, had observed a set of drums and a large number of other instruments within the lorry, some which were completely burnt and the others still burning. It is also significant that the insurer under both policies was the Respondent, who would have detected at the time of issuing the policy that they covered identical property, had that been the case. Question (1) raised by the Respondent, has to be answered in the negative.

The Award of Three Sets of Costs

The final question to be considered for the completion of this judgment is whether the award of three sets of costs at the arbitration are contrary to public policy, considering that there was only one hearing in respect of all three claims. There is no express provision in the Arbitration Act of 1995 with respect to the award of costs, but it is universally accepted that any arbitral tribunal may award costs as may be appropriate, unless such relief is precluded by the arbitration clause or terms of reference. In the impugned awards costs of arbitration have been separately awarded with respect to the three policies, despite the fact that the three claims made by the Appellant were consolidated by consent of parties and one hearing took place. In regard to this question too, no submissions were addressed to court, but having considered all

the relevant facts and circumstances of these claims, I am firmly of the opinion that the award of costs was not excessive and were reasonable. This question too, has to be answered in the negative.

Conclusions

For the foregoing reasons, I answer questions (i), (ii), (iii) and (iv) raised by learned President's Counsel for the Appellant, in the affirmative, and both questions raised by learned President's Counsel for the Respondent in the negative. I would allow the appeal, set aside the judgment of the High Court and refuse the application made by the Respondent to set aside the arbitral award. The Appellant's application for the enforcement of the award is allowed, and the High Court is directed to file the awards, give judgment according to the awards, and to enter decree accordingly.

The Appellant shall be entitled to costs of appeal to this court, and to costs in respect of the several applications filed in the High Court in a sum of Rs. 125,000/-.

JUDGE OF THE SUPREME COURT

AMARATUNGA J

JUDGE OF THE SUPREME COURT

IMAM J

JUDGE OF THE SUPREME COURT

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

In the matter of an application for leave to appeal in terms of Section 37 of the Arbitration Act No. 11 of 1995

Hatton National Bank Limited,
No. 479, T.B. Jayah Mawatha,
Colombo 10.

SC Appeal No 38 - 39/06
SC (HC) L.A. Appl. No 32 - 33/06
HC/ARB/1890/04

CLAIMANT–RESPONDENT-APPELLANT

-VS-

1. Casimir Kiran Atapattu
2. Tracy Judy de Silva

Carrying on business in partnership under the name, style and firm of M/s Soul Entertainments of No. 400/60/7, Bauddhaloka Mawatha,
Colombo 07.

RESPONDENT-PETITIONER-RESPONDENT

Before	**:**	Hon. N.G. Amaratunga J, Hon. Saleem Marsoof, P.C., J and Hon. P.A. Ratnayake J
Counsel	**:**	Nigel Hatch P.C. with K. Geekiyanage and Ms. P. Abeywickrema for the Appellant. Harsha Amarasekara P.C. with Kanchana Pieris for the Respondents.
Argued on	**:**	09.06.2011 ; 23.06.2011
Written Submission on:		27.07.2011
Decided on	**:**	25.06.2013

SALEEM MARSOOF J.

These appeals were taken up for argument together as they relate to the same arbitral award dated 9th December 2003. In the High Court, the application of the Appellant, Hatton National Bank Ltd., (hereinafter sometimes referred to as "HNB") to have the said award set aside, and the application filed by the Respondents, who were carrying on business in partnership under the name, style and firm of '*Soul Entertainments'*, (hereinafter sometimes referred to as "SOUL"), for the enforcement of the same, were consolidated, and one judgment was pronounced. By its judgment dated 13th February 2006, the High Court refused HNB's application to have the award set aside, and ordered the enforcement of the award as contemplated by Section 31(6) of the Arbitration Act No. 11 of 1995.

It may be useful at the outset to outline the material circumstances in which the aforesaid award dated 9th December 2003 was made. HNB, which is an incorporated banking company that also engages in the business of commercial leasing, had at the request of SOUL, granted certain financial accommodation to enable the latter to meet the initial expenses of importing into Sri Lanka one set of Apogee Speakers from the United States of America. As security for the said financial accommodation, SOUL entered into a

Lease Agreement, bearing No: 2609/007/119 dated 16th November 1995 (C1) providing for the lease of the said Apogee Speakers to SOUL for a period of 36 months. The fact that the delivery of the said set of speakers was accepted by SOUL has been acknowledged by the Acceptance Receipt marked P2, a copy of which was produced at the arbitration hearing by HNB.

It is common ground that SOUL had initially complied with the Lease Agreement and duly paid the lease rentals for more than half the period of lease, and it is also not disputed that HNB purported to terminate the said Agreement by its letter dated 2nd June 1998, (P3) on the alleged basis that SOUL had defaulted in the payment of rentals. More than a month after the said purported termination of the Lease Agreement, the said Apogee Speakers were claimed by SOUL to have been destroyed in a fire that also destroyed the lorry bearing No. 47-1430. It was the position of SOUL that the lorry caught fire while the speakers were being transported from the *La Kandyan* Hotel in Kandy to Colombo after a musical show and dinner dance held at the said hotel on 5th July 1998.

Certain arbitral awards which resulted from certain claims made by SOUL against Janashakthi General Insurance Company Limited, which had issued a comprehensive policy with respect to the said lorry, were the subject matter of the judgment of this Court in *Kiran Attapattu v Janashakthi General Insurance Company Limited*, SC Appeal No. 30-31/2005, which was pronounced on 22nd February, 2013. It is noteworthy that Janashakthi General Insurance Co. Ltd., which had repudiated the claims of SOUL on the ground that the fire was not accidental and had been self induced for the purpose of making false claims, failed to establish its defence of arson to the satisfaction of the arbitration tribunal, and this Court had reversed the decision of the High Court to set aside the decision of the arbitral tribunal. This Court concluded that the High Court had erred in holding that the tribunal had misapplied the applicable law relating to the standard of proof in civil cases where fraud is alleged.

It is evident that the arbitration proceedings that resulted in the impugned award dated 9th December 2003 commenced with a notice dated 21st July 1999 issued by HNB on SOUL and SOUL's response dated 26th July 1999. Since the aforesaid correspondence did not fully disclose the nature of the dispute or the ambit of the proposed arbitration, with the objective of clarifying the matters regarding which the parties were at variance, it was agreed at the very first sitting of the arbitral tribunal held on 22nd September 1999 that HNB would file a Statement of Claim and SOUL will file a Statement of Defence on certain specific dates that were agreed upon.

Accordingly, HNB filed its Statement of Claim (A) on 13th October 1999 claiming a sum of Rs. 1,770,400/- together with interest being the amounts due to it as arrears of rental on the Lease Agreement (C1), and a further sum of Rs. 4,250,000/- with interest being the value of the Apogee Speaker system that was leased out to SOUL. SOUL responded with its Statement of Defence (B) dated 5th November 1999 wherein it claiming that it has paid the lease rentals for 28 months and the purported letter of termination date 2nd June 1999 "is wrongful and / or is unlawful and / or is contrary to terms of the Lease Agreement and / or is of no force or avail in law". SOUL also contended that in any event the subject matter of the Lease Agreement, namely the Apogee Speaker system "was destroyed by fire which occurred on or about 5th July 1998 at Peradeniya" and thereby the Lease Agreement became frustrated. HNB, through its Replication dated 24th November 1999 (C), contested most of the averments in the said Statement of Defence.

The tribunal made its unanimous award dated 9th December 2003 after several days of hearing. By the said award, the tribunal partly rejected the claim made by HNB, and directed HNB to pay SOUL, on the basis of latter's counter-claim, a sum of Rs. 2,067,168/- found to be the amount of loss suffered by SOUL due to HNB's failure to insure the Apogee Speaker system, which amount was arrived at by deducting from Rs. 4,250,000/- being the agreed original value of the Apogee Speaker system, the sum of Rs. 720,000/- awarded to it by the arbitral awards made against Janashakthi Insurance Co. Ltd., in the connected case and a further sum of Rs. 1,462,832/- being

the lease rentals SOUL had neglected to pay HNB in terms of the Lease Agreement (C1), and interest thereon. The bone of contention in these appeals is essentially the legality of the rejection by the arbitral tribunal of the claim of HNB for the return of the Apogee Speaker system or its agreed value.

Before the High Court, HNB sought to have the award set aside primarily on the basis that it dealt with "a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration" (Section 32(1)(a)(iii) of the Arbitration Act No. 11 of 1995), and that, in any event, it "is in conflict with the public policy of Sri Lanka" (Section 32(1)(b)(ii) of the Arbitration Act). The High Court, by its judgment dated 13th February 2006, rejected the first of these contentions on the ground that no objection to the jurisdiction of the arbitral tribunal was raised by HNB at any stage before the said tribunal, and went on to reject the second contention of HNB on the ground that it had failed to establish that the award was in conflict with any public policy of Sri Lanka. The High Court emphasized that it did not possess appellate powers over an arbitral tribunal, and that it was not entitled to interfere with the findings of such a tribunal except to the extent provided in Part VII of the Arbitration Act. The Court concluded that in the circumstances, the application of HNB to set aside the award has to be refused, and the application of SOUL to enforce the award must be allowed.

On 18th May 2006, after hearing submissions of learned Counsel, this court has granted leave to appeal against the aforesaid judgement of the High Court in regard to the following substantial questions:-

(a) Has the High Court erred in law in determining and/or holding that the said arbitral award did not violate Section 32(1) (a) (iii) and/or Section 32 (1) (b) (ii) of the Arbitration Act No. 11 of 1995 having regard to the several findings contained in the said award unsupported by and/or contrary to the evidence, more particularly the finding that the said Lease Agreement (C1) did not constitute a valid lease of the property set out in the schedule there to by the Appellant as "Lessor" to the Respondents as "Lessee";

(b) Has the High Court erred in law in determining and/or holding that the said arbitral award did not violate Section 32(1) (a) (iii) and/or Section 32 (1) (b) (ii) of the Arbitration Act No. 11 of 1995 having particular regard to the finding contained in the said award that the said Lease Agreement (X1/C1/F1) did not constitute a valid lease of the property set out in the schedule by the Appellant as "Lessor" to the Respondents as "Lessees", notwithstanding the presence of an admission regarding the entering into of the said Lease Agreement andor the absence of an issue raised by the 1st Respondent relating to its illegality and/or the 1st Respondent's affirmation and reliance on the said Lease Agreement and that the Petitioner was the owner of the leased equipment in his Plaint in D.C. Colombo case No. 23778/ MR marked at the arbitration as C (40);

(c) Has the High Court erred in law in determining and/or holding that the said arbitral award had allegedly been made in accordance with the Issues raised by both parties thereby disregarding inter alia the Appellant's objection to issues to 9 and 10 raised by the 1st Respondent and/or the Tribunal's rejection of the additional issue sought to be raised by the petitioner as regards the 1st respondent seeking the identical relief in two forums namely, in D.C. Colombo action No. 23778/ MR which action is still pending as at date in the District Court and in his counter-claim in the application to arbitration.

(d) Has the High Court unlawfully declined to exercise jurisdiction and/or erred in law in determining and/or holding that the said Court cannot interfere with said arbitral award which purported to apply the principles set out in the Judgment in *Silva v Kumarihamy* 25 NLR 449 to the said Lease Agreement (C1);

(e) Has the High Court erred in law in failing to take cognisance of and/or determine that on the evidence, the 1st Respondent had approbated and reprobated and/or taken contradictory stands in his defence as regards inter alia the legality of the said Lease Agreement and/or that the Appellant was the owner of the leased equipment;

(f) Has the High Court erred in law in determining and/or holding that the Appellant was allegedly estopped from objecting to the jurisdiction of the Arbitrators as the Petitioner did not challenge same and/or because the Petitioner had allegedly not objected to the submission of matters not within the terms of and/or beyond the scope of submissions to arbitration despite the Appellant specifically impugning the said arbitral award on this aspect.

(g) Has the High Court unlawfully declined to exercise jurisdiction and/or erred in law in determining and/or holding that the said arbitral Tribunal can rely on "severability" and/or such other principles in arriving at its findings as contained in the said award which cannot be interfered with by the High Court despite the Petitioner specifically impugning the said arbitral award on these aspect;

(h) Has the High Court unlawfully declined to exercise jurisdiction and/or erred in law in determining and/or holding that the said Court cannot interfere with the findings of the said award and/or that the arbitral Tribunal can adhere to any legal principle in arriving at its findings as contained in the said award which cannot be interfered with by the High Court;

(i) Is the said Judgement of the High Court liable to be set aside for having misapplied and/or failed to apply fundamental principles of law relating to commercial leasing and/or by failing to take cognisance that under the said lease Agreement (C1) it is the Petitioner who was entitled to any insurance proceeds thereby disentitling the 1st Respondent to the award in his favour based on his purported counter-claim.

However, in my view these substantive questions may conveniently be reduced into the following primary questions:-

[1] Did the High Court err in holding that the impugned arbitral award dated 9th December 2003 should be enforced as it was not liable to be set aside on the basis that it purported to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration?

[2] Did the High Court err in holding that the failure of HNB to raise any objection before the arbitral tribunal under Section 11 of the Arbitration Act No. 11 of 1995 on the basis that it had no jurisdiction to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, preclude or prejudice the application of HNB to have the award set aside in terms of Section 32(1)(a)(iii) of the said Arbitration Act?

[3] If question [1] above is answered in the affirmative and question [2] is answered in the negative, is the entire award liable to be set aside in terms of Section 32(1)(a)(iii) of the Arbitration Act No. 11 of 1995, or can the decisions of the arbitral tribunal on the matters submitted to arbitration be separated from those not so submitted and upheld, while the part of the award which contains decisions on matters not submitted to arbitration is set aside as contemplated by the proviso to that Section?

[4] In any event, is the award dated 9th December 2003 liable to be set aside in terms of Section 32(1)(b)(ii) of the Arbitration Act No. 11 of 1995 on the basis that it is in conflict with the public policy of Sri Lanka?

I propose at the outset to focus on these primary questions, in the context of which the several substantive questions on which this Court has granted leave to appeal may readily be answered.

[1] Excess of Jurisdiction

Learned President's Counsel for HNB has contended before this Court that the arbitral tribunal has strayed outside its mandate. He has submitted that in the process, the arbitral tribunal has purported to deal with a dispute, difference or question not contemplated by or not falling within the terms of the submission to arbitration, thereby rendering the resulting award liable to be set aside in terms of Section 32(1)(a)(iii) of the Arbitration Act of 1995. He has further submitted that in the circumstances, the High Court erred in allowing the enforcement of the award contrary to Section 34(1)(a)(iii) of the said Act.

Section 32(1)(a)(iii) of the Arbitration Act No. 11 of 1995, provides that an arbitral award may be set aside by the High Court if it deals with a dispute falling outside the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration. Similarly, according to Section 34(1)(a)(iii) of the Arbitration Act, the High Court may refuse to recognize or enforce such an award, in these circumstances. The provisos to these provisions create exceptions in regard to decisions on matters submitted to arbitration which can be separated from those matters that were not so submitted, the effect of which may conveniently be considered when dealing with primary question [2] above.

In the context of the submission made on behalf of HNB that the impugned arbitral award ought to have been set aside or its enforcement refused in the High Court on the basis that the said award exceeded the mandate conferred on the tribunal by the parties, three possible situations have to be considered. Firstly, had there been no valid agreement to submit the dispute in question to arbitration and the arbitrators nevertheless handed down an award, the High Court has the jurisdiction to set aside the award or refuse to enforce the same as provided for in Section 32(1)(a)(i) and 34(1)(a)(i) of the Arbitration Act. These provisions have been formulated in the lines of Article V paragraph 1(a) of the U.N. Convention on the Recognition and Enforcement of Foreign Arbitral Awards,1958 (New York Convention). It is noteworthy that HNB and SOUL have not at any stage contested the validity of the agreement to arbitrate, and no submissions were made before this Court on the basis that there was no valid agreement to submit the dispute for arbitration or that the arbitral tribunal lacked the jurisdiction to entertain the dispute presented it for resolution by arbitration at the commencement of the arbitration proceedings.

Secondly, where there is a valid agreement to refer the dispute for arbitration, but the arbitrators in making their award exceed the scope of the dispute so referred for arbitration, that is, where the resulting award relates to differences beyond the ambit of the mandate of the arbitrators, the award may be set aside or its enforcement may be refused for want of jurisdiction. Thirdly, where the arbitrators purport to act within the scope of their mandate, but in the process exceed their authority by dealing with claims that the parties have not submitted to them, enforcement may be refused for transgression of the arbitrators' mandate. In the latter two instances, where the arbitrators rely on a valid arbitration agreement, Section 32(1)(a)(iii) and 34(1)(a)(iii) of the Arbitration Act, framed in the lines of Article V paragraph 1(c) of the New York Convention, come into play. What is sought to be challenged by HNB in these appeals is the award made by the tribunal on the basis of issues Nos. 9 and 10 raised by SOUL in the teeth of strong objection taken to them by learned Counsel for HNB, and the question is whether the arbitral tribunal by its order dated 28th February 2000 which allowed the said issues to be raised thereby expanding the scope of the dispute purported to be determined by it, and thereby transgressed its mandate. For

the determination of these appeals, it is therefore necessary to focus on the question as to what constituted the mandate of the arbitral tribunal in the instant case.

It is trite law that the mandate of the arbitrator or arbitral tribunal has to be discerned from the arbitration clause in the contract under which the dispute was referred for arbitration, or from the submission agreement, but will be further delineated for instance, by the Terms of Reference in an ICC arbitration. Since the instant case did not involve arbitration under the ICC Rules, and was in fact an *ad hoc* form of arbitration which did not require the filing of Terms of Reference, one has to first look at Article 25 of the Lease Agreement (C1), under which the dispute between HNB and SOUL was in fact referred for arbitration.

Article 25, which is titled 'Arbitration', provides as follows:-

> In the event of any default or non-observance by Lessee of the terms and conditions contained in this Lease Agreement or in any other case and in the event of any dispute, difference or question which may from time to time and at any time hereafter arise or occur between Lessor and Lessee or them respective representatives or permitted assigns touching or concerning or arising out of, under, in relation to, or in respect of, this Lease Agreement or any provision matter or thing contained herein or the subject matter hereof, or the operation, interpretation or construction hereof or of any clause hereof or as to the rights, duties, or liabilities of either party hereunder or in connection with the premises or their respective representatives or permitted assigns including all questions that may arise after the termination or cancellation of this lease, such dispute difference or question may, notwithstanding the remedies available under this Lease Agreement or in law, by Lessor only, after 14 days or Lessor presenting its final claim on disputed matters, be submitted in writing at its sole option for arbitration by a single arbitrator to be nominated by the parties or if such nomination is not practicable, by two arbitrators, one to be appointed by Lessor and the order by Lessee and the other by Lessee and an umpire to be nominated by the two arbitrators and if either party refuses to nominate an arbitrator, by sole arbitrator to be nominated by the other party.
>
> *Lessor shall forthwith notify Lessee of every matter in dispute or difference so submitted, and only such dispute or difference which has been so submitted and no other shall be the subject of arbitration between the parties.* It is hereby agreed that if either party refuses to take part in the arbitration proceedings or does not attend the same the arbitrator or the arbitrators and the umpire shall and shall be entitled to proceed with the arbitration in the absence of such party and make his or their award after notice to such party. The relevant provisions of the Arbitration Ordinance (Cap.98) and the provisions of the Civil Procedure Code or any statutory re-enactment or modification thereof for the time being in force in so far as the same may be applicable shall govern and shall be applicable to such arbitration.(*Emphasis added*)

Except for the fact that the above arbitration clause is one-sided and contemplates the initiation of arbitration proceedings only at the instance of the Lessor and not of the Lessee, it has been couched in extremely wide language to include every conceivable dispute, difference or question that could arise between the parties. No objection was raised by HNB or submissions made on its behalf before the tribunal, the High Court or at the hearing before this Court to the effect that the tribunal lacked jurisdiction to entertain the counter-claim of SOUL against HNB due to the one-sided nature of the arbitration clause, and HNB was content to contend that the arbitral tribunal strayed outside its mandate by purporting to deal with a dispute, difference or question not contemplated by or not falling within the terms of the submission to arbitration.

In this context, it is significant to note that since HNB's notice of arbitration dated 21st July 1999 and SOUL's response dated 26th July 1999 did not adequately clarify the ambit of the proposed

arbitration, and in the absence of any terms of reference to guide the tribunal in regard to the true nature of the dispute placed before it by the parties, on the first date of the arbitration hearing, the contending parties were persuaded to file a statement of claim and a statement of defence, which were intended to clarify the exact scope of the matters the parties wish to place before the tribunal. It is significant that despite the width of the arbitration clause in Article 25, the second paragraph of Article 25 clearly lays down that "only such dispute or difference which has been so submitted and no other shall be the subject of arbitration between the parties" and in all the circumstances of this case, it would be legitimate, in my opinion, to consider the contents of the statements of claim and defence filed by the parties for the purpose of defining the mandate of the arbitral tribunal.

A perusal of the Statement of Claim (A) filed by HNB would reveal that the basis of the claim was the alleged breach of the Lease Agreement by SOUL and the main remedies sought by HNB consisted of an award in a sum of Rs. 1,770,400/- as arrears of lease rental and interest hereon and a further award in a sum of Rs. 4,250,000/- being the value of the Apogee Speakers system leased out to SOUL by HNB, with interest thereon. It is noteworthy that the Statement of Defence (B) filed by SOUL specifically admitted entering into the Lease Agreement, and contained an averment in paragraph 4 thereof that SOUL had made 28 payments of lease rentals as provided in compliance with the lease agreement. The main defence as set out in paragraph 6 of the said Statement of Defence (B) was that the purported termination of the lease by HNB "is wrongful and/or is unlawful and/or contrary to the terms of the Lease Agreement and/or is of no force or avail in law". It was also averred by SOUL in paragraphs 7, 8 and 9 of the Statement of Defence (B) that HNB continued to accept monies from SOUL notwithstanding the aforesaid purported termination and was thereby estopped from asserting that the Lease Agreement has been terminated. In paragraphs 10 and 11 of the Statement of Defence (B), SOUL took up the position that the Apogee Speaker System was destroyed by a fire that took place on 5th July 1998, thereby frustrating the Lease Agreement and relieving SOUL from the obligation to pay the monies claimed by HNB. It is significant that the validity or lawfulness of the Lease Agreement itself was not challenged by SOUL in its Statement of Defence (B), and in fact SOUL had relied on its lawfulness and validity.

What followed thereafter was somewhat intriguing. On 28th February 2000 when the case came up for hearing at the arbitral tribunal after the filing of HNB's Statement of Claim and SOUL's Statement of Defence, certain admissions were recorded which included, an unqualified admission that that HNB "entered into a Lease Agreement No. 2609/007/119 dated 16.11.1995 with the Respondents annexed to the Statement of Claim as C1" (Admission No. 3). Learned Counsel for HNB suggested eight issues which were accepted by the tribunal subject to certain amendments to issue No. 2 proposed by learned Counsel for SOUL, and then learned Counsel for SOUL sought to formulate his issues. What he suggested as issues Nos. 9 and 10, which are quoted below, were strongly objected to by learned counsel for HNB.

9. Does the Appellant (HNB) have a right to enter into the agreement marked C1 annexed to the Claim?

10. Is the Appellant (HNB) the "owner" of the property more fully described in the agreement marked C1 (as set out therein)?

The contention of the learned counsel for HNB was that the above mentioned issues were not covered by the pleadings and in fact inconsistent with the position taken up by SOUL in its correspondence with HNB as well as its Statement of Defence (B). The arbitral tribunal, without giving any reasons, allowed issues Nos. 9 and 10 to stand. The remaining issues suggested by learned Counsel for SOUL were not objected to by HNB and were accepted by the tribunal as issues Nos. 11 to 28. It is noteworthy that the tribunal, however, permitted learned Counsel for

HNB to formulate certain consequential issues, which were permitted to stand as issues Nos. 29, 30 and 31. These issues are also quoted below:-

29. Is the Respondent (SOUL) estopped from challenging the Appellant (HNB) as to its right to enter into a lease agreement in view of the Respondent (SOUL) entering into a Lease Agreement marked C1, and/or in view of the admission No. 3?

30. Is the Respondent (SOUL) estopped from disputing the ownership of the property more fully described in the Agreement in view of the provisions in the said Lease Agreement marked C1?

31. Can the 1st Respondent (SOUL) have and/or maintain the said counter-claim (a) as it is misconceived in law in view of the terms of the Lease Agreement marked C1; and (b) as the Respondent (SOUL) is disentitled to any reliefs in Law in regard to its claim?

Having examined the relevant arbitration clause, the pleadings consisting of the statement of claim of HNB and the statement of defence filed by SOUL, the admissions recorded and the issues formulated at the commencement of the inquiry, it is now apposite to consider the award dated 9th December 2003, which was made unanimously by the arbitral tribunal based on the aforesaid admissions and issues after several dates of hearing at which the several witnesses called on behalf of HNB and SOUL had testified. In doing so, it is important to stress that as expressly provided in Section 26 of the Arbitration Act No 11 of 1995, subject to the provisions of Part VII of the said Act, the award made by the arbitral tribunal is "final and binding on the parties to the arbitration agreement", and factual matters will only be considered to the extent it is necessary to do so for determining whether the tribunal has purported to deal with a dispute, difference or question not contemplated by or not falling within the terms of the submission to arbitration, or in any other way exceeded its jurisdiction.

When examining the impugned arbitral award, it is noteworthy that at page 4 of the award, the tribunal rather inaccurately states that "the following issues were *agreed upon by the parties* at the commencement of the inquiry", and proceeds to set out the 31 issues on which its award was based, which included issues 9 and 10 to which learned Counsel for HNB had taken strong objection on the ground that it has not been pleaded and was in any event inconsistent with the defence taken up by SOUL in its Statement of Defence. When the tribunal ordered that the said issues should stand, learned Counsel for HNB was compelled to raise issues Nos. 29 to 31 to overcome the situation that arose from the order of the tribunal which upheld issues Nos. 9 and 10.

After proceeding to consider some of the evidence led in the case, at page 9 of the award, the tribunal made another startling statement, which is reproduced below:

> "Although as many as *thirty two issues were suggested and adopted with the consent of the parties,* at the commencement of the inquiry, it is clear that the principal matters which would have to be resolved in order to answer them all are: *whether or not the Agreement C1 is in law a legally binding Lease* whereby the Claimant as the Lessor leases to the Respondent as the Lessee the movable property described in the Schedule to the said document: *whether or not the Claimant, was under an obligation to insure the said property.*"(*Emphasis added*)

It is necessary to observe at once that the above paragraph is replete with errors. Firstly, there were only 31 issues adopted by the tribunal. Secondly, HNB did not consent to issues 9 and 10. Thirdly, the first matter which the tribunal chose as one of the primary issues in the arbitration, namely whether or not the Agreement C1 is in law a legally binding Lease, was never in issue between the parties and was not taken up in the Statement of Defence of SOUL as a justification

for its defaults in the payment of lease rentals. On the contrary, SOUL had taken up the position that it had made 28 out of 36 monthly payments of rentals in accordance with the Lease Agreement, as set out in its issue No. 11 raised before the tribunal. As learned Counsel for HNB submitted before the arbitral tribunal, issues Nos. 9 and 10 were altogether inconsistent with SOUL's conduct and pleadings.

Fourthly, the second matter which the tribunal considered important, namely whether the Claimant (HNB), was under an obligation to insure the leased property, was in fact raised in issue 21 by SOUL based on the counter-claim raised by it in its Statement of Defence. In paragraph 15 of the said Statement of Defence, SOUL had pleaded that "under and in terms of the aforesaid Lease Agreement, the Claimant HNB was obliged in law to insure the property leased as is more fully contemplated in Article 14 of the Lease Agreement". Issues Nos. 9 and 10 were therefore detrimental not only to the interests of HNB but also to the interests of SOUL, altogether inconsistent with the pleadings and prior correspondence between the parties, and the admissions recorded in the case. It is also obvious that in allowing issues 9 and 10 the tribunal acted in disregard of the cherished principle enunciated in decisions such as *Dinoris Appuhamy v Sophie Nona* 77 NLR 188 that issues cannot be permitted to be framed which will have the effect of converting an action or defence of one character into another of an inconsistent character.

As already noted, the arbitral tribunal in its unanimous award partially rejected relief to HNB on its claim against SOUL, by allowing only its claim for the arrears of lease rentals, while at the same time rejecting its claim for the return of the Apogee Speaker system or its agreed value of Rs. 4,250,000/-. The tribunal held at page 10 of its award, purportedly on an application of the principle enunciated in the decision of this Court in *Silva et al v Kumarihamy* 25 NLR 449, that the Lease Agreement (C1) between HNB and SOUL "cannot be held to constitute a valid lease of the property set out in its schedule" as the subject matter of the said lease belonged to SOUL on the date the said Lease Agreement was executed. The conclusion that SOUL was "in truth and in fact" the owner of the aid property was arrived at by the tribunal on the basis of issue No. 10, which was not an agreed issue in the case, in contravention of SOUL's express acknowledgment in Article 24 of the Lease Agreement that "the Property is and shall at all times remain the sole and exclusive property of the Lessor", and in total disregard of its own finding that SOUL had honoured the said Agreement by paying 28 out of the agreed 36 lease rentals.

It is also interesting to note that the tribunal sought to justify its self-contradictory award by seeking to sever from the said Lease Agreement the part including Article 14 thereof that obligated HNB as the Lessor to "have the property insured with insurers selected and approved by Lessor and in the name of Lessor but at the expense of Lessee" from that part of the Lease Agreement including Article 23 thereof that obligated SOUL to "deliver and surrender up the property" to HNB in the condition in which it was received. Curiously enough, the arbitral tribunal did not refuse to enforce the parts of the Lease Agreement including Article 17(2)(a) thereof, which conferred a right to "claim and receive immediate payment from the Lessee of a part or the entire amount of the total rent payable under this Lease Agreement", and on what basis it severed the HNB's claim for arrears of rental from its claim for the return of the Apogee Speaker system or payment of its value, was not explained anywhere in the award.

Indeed, the occasion for the application of the principle enunciated in *Silva v. Kumarihamy* for the purpose of rejecting the claim of HNB for the return of the Apogee Speaker system or the payment of its agreed value, was created by the tribunal's failure to reject issues Nos. 9 and 10 based on the objection taken to them by learned Counsel for HNB, despite the fact that they did not arise from the pleadings, and were altogether inconsistent with them. The important of pleadings and issues to arbitration proceedings was highlighted in the decision in *Kristely (Pvt.) Ltd. v The State Timber Corporation* (2002) 1 SLR 225, in which this Court set aside a decision of the High Court *inter alia* on the ground that the it was based on findings which did not arise from the issues agreed upon by the parties in the case, and in fact this Court faulted the High

Court for holding that it was the duty of the Arbitral Tribunal to have framed an issue on the question of forgery. The basis of the decision of this Court in *Kristley* was that "each party needed to know from the beginning what case it had to meet". It is significant to note that in that case, this Court held that the failure of the State Timber Corporation to raise an issue as regards forgery was fatal, and that the tribunal was not obliged to frame an issue as to forgery since "it was not even an issue which arose from the pleadings." (at page 244)

In conclusion, it needs to be emphasised that the manner in which the arbitral tribunal arrived at its astonishing award is most revealing, and demonstrates not only that the arbitral tribunal was, to say the least, altogether confused in regard to what exactly was legitimately in issue in the case, but also that it had wittingly or unwittingly strayed outside its mandate. It is trite law that the mandate of an arbitral tribunal to decide any dispute is based on party autonomy and is confined to the limits of the power conferred to it by the parties in express terms or by necessary implication. An arbitration tribunal does not have the freedom that Italian poet Robert Browning yearned for in his famous *Andrea del Sartio*, I. 97, or as those lesser mortals who are not that poetically inclined would put it, the freedom of the wild ass; it is obliged to act within, and not exceed, its mandate. In the instant case, it is manifest that the arbitral tribunal has overstepped the limits of its mandate and has sought to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or contain decisions on matters beyond the scope of the submission to arbitration. I hold that question [1] above has to be answered in favour of HNB and in the affirmative.

[2] Failure to Object to Jurisdiction

This brings me to the question whether the High Court erred in holding that the failure of HNB to take up an objection to the jurisdiction of the arbitral tribunal under Section 11 of the Arbitration Act No. 11 of 1995 on the basis that the admission of issues Nos. 9 and 10 resulted in the tribunal having to deal with a dispute not contemplated by or not falling within the terms of the submission to arbitration, would preclude or prejudice the application of HNB to have the award set aside in terms of Section 32(1)(a)(iii) of the said Arbitration Act. In fact, I note that one ground, on the basis of which the High Court refused the application of HNB to have the impugned award set aside, was the failure of HNB to take up an objection to jurisdiction when those issues were admitted by the arbitral tribunal.

In this context, it is relevant to note that Section 11 of the Arbitration Act does not compel a party to take up an objection to jurisdiction before the arbitral tribunal itself. That section enacts as follows:-

(i) An Arbitral tribunal may rule on its jurisdiction including any question, with respect to the existence or validity of the arbitration agreement or as to whether such agreement is contrary to public policy or is incapable of being performed; but any party to the arbitral proceedings may apply to the High Court for a determination of any such question.

(ii)Where an application has been made to the High Court under subsection (1) the arbitral tribunal may continue the arbitral proceedings pending the determination of such question by the High Court.

Section 11 gives any party to arbitration proceedings the option of taking up any jurisdictional objection before the tribunal or by applying to the High Court for a determination on a disputed question of jurisdiction. The question is whether, the failure of a party to adopt either of these courses, would prevent that party from seeking to have the arbitral award set aside, or from resisting its recognition and enforcement, on the ground that the arbitral tribunal exceeded its mandate. In answering this question, it will be useful to distinguish between what the authors of Redfern and Hunter, in *Law and Practice of International Commercial Arbitration*, 4th Edition, 5-

31 to 5-35 at pages 248 to 251, describe as an arbitral tribunal's total lack of jurisdiction from a partial lack of jurisdiction.

A total lack of jurisdiction would occur due to the incapacity of a party to the arbitration agreement, or where for illegality or otherwise, the agreement to arbitrate is not valid under the relevant law. A total challenge to jurisdiction could also arise where the arbitration agreement is not in writing, or the dispute placed before the tribunal is entirely outside the scope of the arbitration agreement. The portion is the same where the entire dispute is not arbitrable under the applicable law. In such cases, the alleged excess of jurisdiction may become apparent prior to the actual commencement of arbitration proceedings, and a party who failed to take up its objection to jurisdiction at the first available opportunity may in appropriate cases be deemed to have waived such objection.

The position may be different where there is only a partial lack of jurisdiction. A partial lack of jurisdiction may occur where it is asserted by one of the parties, as in instant case, that *some* of the claims (or counter-claims) that have been brought before the arbitral tribunal do not properly come within the mandate of the arbitral tribunal. Generally any lack of jurisdiction in this sense may be cured by agreement of the parties. However, where the opposing party does not agree to the extension of the agreement to arbitrate or the terms of reference so as to include the new claim, it may not be practical or prudent to take up an objection to jurisdiction prior to the tribunal making its award, and the partial excess of jurisdiction may be a legitimate ground for seeking to set aside the arbitral award or for resisting its enforcement. As the authors of Redfern and Hunter, observe in their work *Law and Practice of International Commercial Arbitration,* 4th Edition, 5-31 at pages 249 to 250:-

> .....There are many cases in which the other party objects to new claims being brought into the arbitration and has good legal grounds for its objection. *Such a party is unlikely to agree to extend the jurisdiction of the arbitral tribunal.* In these cases (and indeed, in any case where it seems that it may be exceeding its jurisdiction) the arbitral tribunal should proceed with caution. *If it does exceed its jurisdiction, its award will be imperilled and may be set aside or refused recognition and enforcement in whole or in part by a competent court*. (*Emphasis added*)

This is exactly what happened before the arbitral tribunal in this case. When the arbitral tribunal admitted issues Nos. 9 and 10 suggested by learned Counsel for SOUL, HNB reacted by seeking to raise issue Nos. 29, 30 and 31, in the hope that the tribunal will review the matter when making its final award. Obviously, HNB adopted what it thought was the more prudent course, not only from its own perspective, but also due to the impracticality of raising a jurisdictional objection which could have effectively delayed the arbitral proceedings. In my opinion, the failure to take up any jurisdictional objection at that stage did not amount to a waiver of HNB's right to challenge the resulting award in the High Court, and accordingly I hold that question [2] has to be answered in the affirmative.

[3] Severability of the Award

The proviso to Section 32(1)(a)(iii) and Section 34(1)(a)(iii) of the Arbitration Act No. 11 of 1995 recognize an important exception to the rigours of the rule that any arbitral award that exceeds the scope of the submission to arbitration may be set aside or refused recognition and enforcement. This exception allows a court to sever the parts of the award that deal with matters that were submitted by the parties for determination by the arbitral tribunal from the parts of the award that relate to matters not so submitted, to enable the decisions of the tribunal on matters falling within its mandate to be recognized and enforced, while the parts of the award which go beyond the scope of the submission for arbitration to be set aside. In view of my finding in [1] that the impugned arbitral award did exceed the mandate of the arbitral tribunal and my conclusion that

HNB was not precluded from challenging the award on the basis of excess of jurisdiction, it becomes necessary to separate the legitimate parts of the said award from the other parts of the award which resulted from the transgression of its own mandate by the arbitral tribunal.

Learned President's Counsel for HNB has submitted that by reason of Article 24 of the Lease Agreement (C1), SOUL was precluded from challenging HNB's title to the subject matter of the lease or the validity of the Lease Agreement which it had honoured by paying 28 out of the 36 lease rentals, and in fact it had not sought to question the title of HNB or its right to enter into the Lease Agreement through its correspondence or its Statement of Defence, and that by allowing SOUL to raise issues Nos. 9 and 10, the arbitral tribunal had not only allowed SOUL to approbate and reprobate, but the tribunal itself blatantly exceeded its mandate. He therefore submitted that in terms of the proviso to Section 32(1)(a)(iii) and Section 34(1)(a)(iii) of the Arbitration Act No. 11 of 1995, all parts of the arbitral award that exceeded the mandate of the tribunal should be severed from the rest of the award falling within the ambit of the dispute voluntarily and properly placed before the arbitral tribunal for determination, and I am of the view that the said submission is well founded.

For the purpose of delineating the limits or borders of the parts of the award that fall within the scope of the mandate of the tribunal from resulted from what resulted from the transgression of the said mandate, it is necessary to delve at some length into the mechanics of this astonishing arbitral award. It is best to begin with the key issues to see how they were assumed by the arbitral tribunal. It is noteworthy that having answered issues Nos. 9 and 10 in the negative and in favour of SOUL, the arbitral tribunal proceeded to answer issues Nos.1 (a) to 1(g), which sought *inter alia* to put into issue whether, under and in terms of the Lease Agreement (C1) SOUL undertook to pay the agreed rentals for a period of 36 months; whether it had agreed that in the event of any default in payment, interest at the rate of 36% per annum would be payable on the amounts in default; and whether it was agreed between HNB and SOUL that the title to the said leased property shall always remain vested in HNB, in the following manner:-

1. (a) } Yes, but are of no force or avail in law
   to } as the said Agreement does not, in law,
   (g) } constitute a valid lease.

The arbitral tribunal also went on to answer issue No. 2(1) which was whether SOUL had defaulted in the payment of lease rentals, in the affirmative and in favour of HNB, the tribunal declined to answer issues Nos. 2(b) and 2(c), which were as follows:-

2. (b) Did the Respondent accept in good order and condition the property leased under the said Lease Agreement in terms of the acceptance receipt marked P2?
   (c) Did the Claimant terminate the said Lease Agreement by letter dated 2nd June 1988?

It is noteworthy that issues Nos. 2(a), 2(b) and 2(c) led to certain additional issues suggested by HNB to help quantify amounts claimed by it, and for the purpose of fully dealing with the question of severability, it is necessary to reproduce below certain further issues raised and show before the tribunal and it had dealt with the claim of HNB for arrears of lease rentals and for the return of the Apogee Speaker system or its value.

Issues Nos. 3, 4, 5, 6, 7 and 8 went into the quantification of the arrears of lease rental payable by SOUL and the question of the return of the Apogee Speaker system or its value to HNB in the following manner:

3. Although demanded by the Claimant in the letter of termination dated 2nd June 1988; P3, did the Respondents fail and neglect to:

(a) pay the outstanding due and owing together with the interest thereon; and/or
(b) return the said Lease equipment to the Claimant?

4. Did the Respondents thereafter inform the Claimant that the said leased property was destroyed by fire on or about 5th July 1998?

5. (a) At the time of the said fire was the said leased property transported in vehicle No. 47-1370 owned by Colombo Engineering Enterprises which is owned and/or controlled by the 1st Respondent?
(b) was the claim, made by the said 1st Respondent to Janashakthi General Insurance Co. Ltd, in respect of the loss of, inter alia, the said leased equipment under the insurance policy of the said vehicle, repudiated by the said insurers?

6. After giving credit to the Respondents for all payments made under the said Lease Agreement P1, is there still due and owing from the Respondents, jointly and/or severally to the Claimant as at 30th November 1998 the sum of Rs. 1,770,400/- together with interest thereon at 36% per annum from the said date until payment in full?

7. Has the Respondents also failed and/or neglected to deliver and surrender up to the Claimant, the equipment which was leased under the said Lease Agreement P1 or to pay its agreed stipulated loss value which is Rs. 4,250,000/-?

8. If any one or more of issues No. 1 to 7 above are answered in the Claimant's favour, is the Claimant entitled to the reliefs prayed for in the prayer to the Statement of Claim against the Respondents jointly and/or severally?

The arbitral tribunal sought to answer these issues as follows:

3.(a) } Though they do not arise, yet no such payments
(b) } were made and the equipment was not returned.

4. Yes.

5. (a) } Yes, the said property was destroyed.
(b) } Yes, but, 1st Respondent was awarded
Rs. 720,000/= by the Arbitration Tribunal

6. Out of the 36 monthly payments, 8 such payments are due and owing to the Claimant (172,503 + 10,351/- x 8) = a sum of Rs. 1,462,832/-.

7. The 1st Respondent has neither returned the said equipment, nor paid such value.

8. A sum of Rs. 2,787,168/- with interest, as set out, is due and owing to the Claimant from the 1st Respondent.

In my view, the tribunal's answer to issue No.8 is altogether erroneous and could give little solace either to HNB or SOUL. Learned President Counsel for HNB has submitted that if issues Nos. 9 and 10 had not been permitted to stand, the sum of money due to HNB under issue No.8 would be much higher that Rs. 2,787,168/- as it would have also embraced the claim of Rs. 4,250,000/- been the agreed value of the Apogee Speaker system, which should have been awarded in favour of HNB, particularly in view of the tribunal's answer to issue No. 7. On the other hand, if all that HNB's entitled to under issue No.8 was the arrears of lease rental for eight months and interest thereon, the sum should be Rs. 1,462,832/- as shown in the tribunal's answer to issue No.6.

As already noted, the arbitral tribunal answered issues Nos. 9 and 10 in favour of SOUL, and proceeded to answer issues Nos. 11 to 31 also in favour of SOUL. It is not necessary for the

purpose of these appeals to set out the said issues at length, as the tribunal refrained from answering issues Nos. 12, 13, 14, 15, 17, 20, 29, 30 and 31 with the explanation that they "do not arise in view of the answer to Issue (1)". Issues 11, 16, 18, 19, 21, 22, 23, 24, 25, 26, 27 and 28 were also answered in favour of SOUL, and what is significant is that the answers of the tribunal to these issues resulted in the award of the sum of Rs. 2,067,168/- to SOUL, which figure was arrived at after setting off from the sum of Rs. 4,250,000/- awarded to SOUL by way of damages for the failure to insure the Apogee Speaker system as contemplated by Article 14 of the Lease Agreement (C1), the sum of Rs. 1,462,832/- found to be payable to HNB in terms of the tribunal's answer to issue No.7, and a further sum of Rs. 720,000/- which SOUL was able to recover from Janashakthi General Insurance Co. Ltd under certain arbitral awards made in separate arbitration proceedings, which awards were affirmed by this Court in its judgement pronounced on 22nd February 2013 in *Kiran Atapattu v Janashakthi General Insurance Company Limited*, SC Appeal No. 30-31/2005. The award of Rs. 4,250,000/- to SOUL as damages for the failure to insure the Apogee Speaker system was made mainly on the basis that the Lease Agreement (C1) is not valid in law, and therefore the alleged termination by HNB of the said Agreement by its letter dated 2nd June 1988 was also invalid, which were conclusions reached by the tribunal having transgressed its mandate by allowing issues Nos. 9 and 10 to stand without the consent of HNB, and in the teeth of strong objection taken by learned Counsel for HNB.

It is, however, significant to note that the arbitral tribunal had answered issue No. 7 in favour of HNB on the question of whether SOUL had "failed and/or neglected to deliver and surrender up to the Claimant, the equipment (Apogee Speaker system) which was leased under the said Lease Agreement (C1) or to pay its agreed stipulated value which is Rs. 4,250,000/-." It is also relevant to note that the Apogee Speaker system was destroyed by a fire that occurred during transit on the early hours of 6th July 1988 after being used at a musical show and dinner dance held at the *La Kandyan* Hotel on 5th July 1998, more than a month after the purported termination of the Lease Agreement for non-payment of lease rentals. In fact, in its Statement of Defence (B), SOUL had taken up the position that the lease agreement was frustrated by the said fire which made it impossible for it to return the Apogee Speaker system to HNB and discharged it from any obligation to pay to HNB its value or any arrears of lease rentals. In the circumstances it is clear that the arbitral tribunal has contradicted itself in allowing to HNB the arrears of lease rentals while rejecting its right for the value of the speaker system.

It is noteworthy that the arbitral tribunal refused to answer issues Nos. 2(b) and 2(c), which focused on whether SOUL had accepted in good order and condition the property leased under the Lease Agreement (C1) and whether HNB had terminated the said Lease Agreement by letter dated 2nd June 1988, simply on the basis that they "do not arise in view of the answer to issue 1". As already noted, the tribunal had refused to answer issues Nos. 1(a) to (g) on the basis of its purported finding that the Lease Agreement was of no force or avail in law as it did not, "in law, constitute a valid lease", a finding reached by the tribunal in the absence of any agreed issue before it as to the legality of the said Lease Agreement. Although issues Nos. 1(a) to (g) were vital for HNB to establish its claim for the return of the Apogee Speaker system, the tribunal disregarded them on the basis of its answers to issues Nos. 9 and 10, despite they did not directly raise any question regarding the validity of the said lease, and were admitted by the arbitral tribunal, in the teeth of strong objection taken by learned Counsel for HNB on the basis that they were outside the pleadings, inconsistent with the positions taken by SOUL in its correspondence and the admissions recorded in the case. In view of the finding of the arbitral tribunal that SOUL was in default of lease rentals at the relevant period, it was important for the tribunal to have answered the aforesaid issues to decide whether SOUL was liable to surrender the Apogee Speaker system to HNB in terms of Article 17(2)(b) read with Article 23 within 7 days of the letter dated 2nd June 1988, or to pay HNB its value.

The jurisdiction of the High Court under Part VII of the Arbitration Act is confined to the setting aside and the recognition and enforcement of arbitral awards, and does not allow the High Court

or this Court to reconstruct arbitral awards on the basis of their findings. Accordingly, answering question [3], I hold that the award made by the arbitral tribunal in favour of HNB for the sum of Rs. 1,462,832/-, being the lease rentals in arrears and interest thereon up to the date of the award namely, 9th December 2003, may be severed from the award made by the tribunal in favour of SOUL for a sum of Rs. 4,250,000/- by way of damages, to enable the award in favour of HNB to be recognized and enforced, and the award in favour of SOUL to be set-aside as being in excess of the mandate of the tribunal.

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(D) Public Policy

This brings me to the question whether the impugned arbitral award dated 9th December 2003 was in conflict with the public policy of Sri Lanka. Although the learned President's Counsel for the Appellant sought to assail the said award on the basis that that it was made in disregard of fundamental principles of law and was therefore in conflict with public policy of Sri Lanka.

Sections 32(1)(b)(ii) and 34(1)(b)(ii) of the Arbitration Act which appear in Part VII thereof, refer to the concept of public policy, and provide respectively that an arbitral award may be set aside and / or its enforcement refused on the ground that it is contrary to the public policy of Sri Lanka. These provisions echo the corresponding provisions of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 1958, also known as the New York Convention. However, it is important to bear in mind that and Burrough, J., had in *Richardson v Mellish* (1824) 2 Bing 229 at page 252, warned against the dangers that excessive reliance on the concept can give rise to, describing public policy as "a very unruly horse, and when once you get astride it you never know where it will carry you." Lord Davey in *Janson v. Driefontein Consolidated Gold Mines Ltd (*1902) AC 484 at page 500 had cautioned that "public policy is always an unsafe and treacherous ground for legal decision", to which Lord Denning MR, responded in *Enderby Town Football Club Ltd. v. Football Association. Ltd.* (1971) Ch. 591 at page 606, with his characteristic quip that "with a good man in the saddle, the unruly horse can be kept in control. It can jump over obstacles". The words of these great judges were sufficient to impress upon me that in applying the provisions of Sections 32(1)(b)(ii) and 34(1)(b)(ii) of the Arbitration Act, great caution should be exercised, particularly in the context that an arbitral award is the end result of arbitration proceedings, which give effect to the intention of the parties to a dispute to refer their dispute for arbitration without resorting to the more time consuming process of litigation. It is therefore fortunately that for the purpose of deciding these appeals, I do not go into the question of "public policy" in view of the conclusions reached by me in parts [1] to [3] of this judgment.

Conclusions

So far in this judgment I had refrained from seeking to answer the specific substantive questions on which leave to appeal had been granted to HNB by this Court, as I considered it convenient to deal with them under the headings [1] Excess of Jurisdiction, [2] Failure to Object to Jurisdiction [3] Severability of Award and [4] Public Policy. Having examined these primary questions, it is now easy to deal with the specific substantive questions on which leave to appeal had been granted by this Court.

Insofar as substantive questions (a) and (b) are concerned, it must be observed at the outset that Section 26 of the Arbitration Act of 1995 makes the arbitral award "final and binding on the parties to the arbitration agreement" subject to Part VII of the said Act, and it is not for the High Court, or for this Court sitting in appeal over decisions of the High Court under Part VII of the Arbitration Act to assess the correctness of any finding of the arbitral tribunal, particularly from an evidentiary perspective. Hence, I would in answering substantive questions (a),(b)(c)(d),(e) and (h), stress that the question as to whether the Lease Agreement (C1) constituted a valid lease of the property set out in the schedule thereto, was not a dispute falling within the mandate of the

arbitral tribunal, and therefore the arbitral tribunal erred in basing its award on a matter that was not properly in issue before the tribunal, just as much as the High Court erred in not setting aside and enforcing the said award. I have set out in great detail under the headings [1] Excess of Jurisdiction, and [2] Failure to Object to Jurisdiction, the reasons that led me to the aforesaid conclusions.

For the reasons explained in detail under the heading [2] Failure to Object to Jurisdiction, I would answer substantive questions (f) in the affirmative and in favour of HNB. Similarly, for the reasons fully set out under heading [3] Severability of the Award, I would in answering substantive question (g) hold that the award made by the arbitral tribunal in favour of HNB for the sum of Rs. 1,462,832/-, may be severed from the award made by the tribunal in favour of SOUL for a sum of Rs. 4,250,000/-, to enable the award in favour of HNB to be recognized and enforced, and the award in favour of SOUL to be set-aside as being in excess of the mandate of the tribunal. In regard to all the aforesaid substantive questions, I hold that the High Court fundamentally erred in failing to take cognizance of the fact that the arbitral tribunal had manifestly exceeded its mandate in allowing issues Nos. 9 and 10 suggested by SOUL to stand, and basing its judgment on the findings of the arbitral tribunal on these issues.

For the foregoing reasons, I answer substantive questions (a) to (h) on which leave to appeal had been granted by this Court in favour of HNB, and find that it is not necessary to answer question (i) for the purpose of disposing of these appeals. I would partly allow the appeals and set aside the judgment of the High Court dated 13th February 2006. I would also partly allow prayer (d) of the petition of HNB filed in this Court, and set aside the award dated 9th December 2003 made by the arbitral tribunal in favour of SOUL in excess of its mandate as prayed for by HNB in prayer (f) of its petition, but in view of my conclusion that the legitimate parts of the award maybe severed from its part that resulted from the transgression by the tribunal of its mandate, I would make order as prayed for by HNB in prayer (g) of its petition filed in this Court, and allow the award of the arbitral tribunal in favour of HNB for the sum of Rs. 1,462,832/- being the lease rentals in arrears with interest thereon at the legal rate from 31st May 1998 until the date of the award namely, 9th December 2003, and thereafter on the aggregate amount until payment in full, be recognized and enforced. The High Court is directed to file the award and give judgment in terms of the said award in favour of the Claimant-Respondent-Appellant (HNB) for the said sum of Rs. 1,462,832/- and interest thereon as aforesaid, and to enter decree accordingly.

The said Appellant (HNB) shall be entitled to costs of the appeals to this court, and to costs in respect of the several applications filed in the High Court in a sum of Rs. 125,000/-.

JUDGE OF THE SUPREME COURT

AMARATUNGA J

JUDGE OF THE SUPREME COURT

RATNAYAKE PC J

JUDGE OF THE SUPREME COURT

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

SC. Appeal No. 46/05
S.C. Spl. L.A. No. 53/2005
C.A. Appeal No. 46/95(F)
D.C. Negombo Case No. 7683/M

In the matter of an application for Special Leave to Appeal against judgment delivered on 14/02/2005 by the Court of Appeal in C.A. Appeal No. 46/95 (F)
D.C. Negombo Case No.7683/M.

Rohan Ajith Jude Silva, of Walauwwa, Kochchikade.
SUBSTITUTED DEFENDANT-PETITIONER-APPELLANT-APPELLANT

Vs.

Y.B. Aleckman, of Alight Motor Works, Kochchikade.
PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

Before : Tilakawardane, J.
Dep, PC J. &
Wanasundera, PC J.

Counsel : Saumya Amerasekara with Dhammika Walagedara for the Substituted-Defendant-Petitioner-Appellant-Appellant.
Kuvera de Soyza,PC with Amrith Rajapakshe for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 05/07/2013.

Decided on : 18/11/2013.

SHIRANEE TILAKAWARDANE, J.

Special Leave was granted by this Court in order to enable an Appeal against the Judgment delivered by the Court of Appeal on 14.02.2005.
Leave was granted on the following questions of law:

1. Whether the Court of Appeal erred by holding that there had been no reasonable grounds for the default of appearance on 05.02.1993 and in deciding that the case of **Kathiresu v Sinniah** (*71 NLR 450)* was inapplicable in this case;
2. Whether the Court of Appeal had erred in holding that, legally admissible evidence had been led at the *ex-parte* trial and further, by refusing to act in revision.

The facts relating to this appeal are as follows. Prior to the institution of this action the Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) was ejected from the premises located at No.11, Negombo Road, Kochikade, by the mother of the Substituted-Defendant-Petitioner-Appellant-Appellant (hereinafter referred to as the Petitioner). The said action was instituted in the District Court by the Petitioner's mother who was the original Defendant in this case. In this regard and judgment was entered in favour of the mother of the Petitioner (the original Defendant in this case) at the District Court which was later upheld by the Court of Appeal. Subsequently, the present action was instituted by the Respondent against the mother of the Petitioner (the original Defendant) on the grounds that the writ of the District Court in Negombo in the said case was wrongfully issued and that the loss and damage caused to the machinery and business of the Respondent by the Fiscal Officer was not compensated for by the Petitioner.

The context is created by the fact that the mother of the Petitioner, the original Defendant in this case on 28.10.1992 received summons from the Court with a plaint that claimed Rs. 1,825,000.00 in damages. Upon receipt of this summons the original Defendant the mother of the Petitioner along with her son, met with Mr. Panditharatne who accepted payment for the filing of the answer in accordance with the summons. He had then, mistakenly recorded the summons returnable date for filing Answers as 05.03.1993, as opposed to the actual date of 05.02.1993. Evidence to affirm this fact has been tendered by the Petitioner and marked as වි1 and වි6 (අ). This error was discovered subsequent to the scheduling of the *ex-parte* trial by the District Court to be held on 27.04.1993 and Mr. Panditharatne contacted Mr. E. B. K. De Zoysa, the Attorney retained by the Respondents, in order to ascertain whether the consent of the Respondents could be obtained to vacate the order fixing the case for *ex-parte* trial. However, Mr. De Zoysa failed to procure his clients' consent to do so. Therefore, Mr. Panditharatne also filed a motion in Court to provide the Court with the notice of his failure to appear on the said date.

On 27.04.1993 the case was taken up for an *ex-parte* trial and Mr. Panditharatne offered to pay the cost of the Respondent and moved to allow his client to file her answer. However, this offer too was rejected by the Respondent. Therefore , the case was heard by the District Court *ex-parte,* where the Respondent alleged that the abovementioned writ was issued wrongfully and the District Court entered judgment in favour of the Respondent as the evidence of the Respondent remained undisputed and un-contradicted.

In the District Court, the Petitioner's mother refused to vacate the *ex-parte* action as the Court was of the opinion that the failure of the Petitioner's mother to appear before the Court was due to her negligence and not a mistake. Furthermore, the Petitioner's appeal to the Court of Appeal to set aside the order of the District Court which refused to vacate the ex-parte decree was dismissed on the basis that the

Attorney-at-Law had not filed a proxy to appear while the Court further refused the plea to revise the ex-parte decree on the basis that though no documentary evidence was lead during the case, the Respondent had 'personal knowledge' of the case, which negated the need for such documentary evidence.

This issue madates the discussion of the present law pertaining to the failure of an Attorney to appear before Court on a given date with particular consideration as to whether a lawyer can appear on behalf of a client without a proxy or a defective proxy. In this regard, the Petitioners relied on the case of **Kathiresu v Sinniah** (*71 NLR 450)* where the Court vacated an *ex-parte* decree entered against the Defendant due to the fact that his lawyer had taken down the incorrect trial date erroneously. It was the opinion of the Court of Appeal in the present case that **Kathiresu v Sinniah** (71 NLR 450) was irrelevant as the proxy was filed at the time of the default of the Attorney, which the Court of Appeal believed were not the circumstances in the present case.

This Court notes that on 05.01.1993 the Petitioner (the original Defendant) has in fact signed the proxy as per Vide evidence at page 66 and 75 and the proxy was tendered to Court on 05.03.1993 and is marked "වී4" in evidence. The question then arises as to whether the act of signing the proxy qualifies as sufficient in Sri Lankan Courts to enable the Attorney – at – Law to appear on behalf of the client.

In this regard, the Court notes the case of **L.J.Peiris and Co. Limited v L.C.H. Peiris** (74 NLR 261) where **Thamodaram J** stated that:

"The relationship of a Proctor and client may well be a contract of agency but there is no law requiring that the contract should be in writing. A proxy is a writing given by a suitor to court authorizing the Proctor to act on his behalf".

Further, there is precedent to indicate that the Courts will look at the intention of

the parties as opposed to the actual documentation available at the relevant time.

In the case of **Paul Coir (Pvt) Ltd v Waas** (2002) (1 SLR 13) **Wigneswaran J** held:

"*Whether there was an agency visible between the lawyer and the client on the basis of the documents filed was not what the Courts look for. It was the real intention of the parties at the relevant time which the Court examined".*

As such an intention is tangibly apparent to the Court, this Court also takes into account the case of **Udeshi v Mather (1988)** (*1 SLR 12)* where **Athukorala J** held that an irregularity in the appointment of a proxy is curable so far as there is no legal bar, or impediment, that prevents the acts that have already been done from being ratified. This case is also authority for the rule found in Section 27(1) of the Civil Procedure Code which states that:
"The appointment of a registered attorney to make any appearance or application, or do any acts as aforesaid, shall be in writing signed by the client and shall be filed in Court; and every such appointment shall contain an address at which service of any process which under the provisions of this Chapter may be served on a registered attorney, instead of the party whom he represents, may be made.", being a directory provision and not a mandatory rule.

Accordingly, the failure of Mr. Panditharatne to file the proxy prior to the date of summons should not, in law be considered fatal to his client's action, in the light that there is no legal impediment to it being so ratified. This view was also upheld by **Hutchinson J** in the case of **Tillekeratne v Wijesinghe** (*11 NLR 270).*

In this context, this Court feels that the proxy was created, as was intended by the parties, at the moment in time when the Petitioner paid Mr. Panditharatne the sum of Rs.1000 and placed her signature on the proxy document, which was on 05.01.1993, one month ahead of the date on which the Answer of the Petitioner was

due to be filed in Court. Therefore, it is the opinion of this Court that a valid proxy does exist and did exist at the moment in which the Answer of the Petitioner was due.

The issue of whether the error made by Mr. Panditharatne was due to negligence or a mistake is also relevant to this case. Extensive case law suggests that Courts are inclined to consider the error of a lawyer, whilst noting dates that are relevant to his case, as mistakes and not acts of negligence. This Court quotes the case of **Kathiresu v Sinniah** (71 NLR 450) where **H.N.G.Fernando J** held that the absence of both the Proctor and the Petitioner on the given date, arising out of confusion of dates, was a mistake and not due to the negligence of the parties. Accordingly, Court set aside the *ex-parte* decree. The Learned Judge arrived at this decision by taking into consideration the precedent set out in the case of **Punchihamy v Rambukpotha** (16 Times of Ceylon Law Reports) where **De Krester J** held:

"*The whole case indicates very gross carelessness on the part of the Defendant and it is most unfortunate that there should be now, in addition, a mistake on the part of the proctor. The mistake however is there and must be given effect to."*

This Court feels that the abovementioned situation must be distinguished from that which is found in the case of **Packiyanathan v Singarajah** (1991) (*2 SLR 205)* and the case of **Schareguivel v Orr** (11NLR 302). In the said case of **Schareguivel v Orr** (11NLR 302) the Court held that:

" To my mind facts indicates that there was negligence on the part of the proctor and not personal negligence on the part of the proctor and not personal negligence in the part of the Plaintiff. That however is immaterial. The plaintiff must suffer for his proctor's negligence. This is clearly laid down by **Bonser CJ** in **Pakir Mohideen v Mohamadu Cassim** (4 NLR 299)."

In considering whether a mistake amounts to negligence as well as the distinction between these two elements, the Court finds the decision in **Packiyanathan v Singarajah** (2003)(2 SLR 205) relevant. Here, **Kulatunga J** noted that the distinguishing of a mistake from negligence '*will depend upon the facts and circumstances of each case'* and held that *' A mere mistake can generally be excused; but not negligence, especially continuing negligence.'* [(This sentiment is similarly echoed in **Wimalasiri and another v Premasiri** (2003 SLR 330)]. Accordingly, the Supreme Court refused to grant relief on basis that their conduct was negligent stemming from the fact that measures had not been taking by neither the Attorney-at-Law nor the Appellant until the lapse of 9 months subsequent to the ejectment.

The said cases are distinguished from the matter before this Court on the basis that Mr. Panditharatne and the Petitioner took all feasible measures to remedy the delay upon discovery of it. This effort made by them in rectifying the error qualifies it as one arising out of mistake as opposed to negligence.

The next issue which begs the consideration of this Court is the validity of the *ex-parte* judgment and the issues pertaining to the execution of the writ. The Respondent provided the Court with oral evidence of the damages caused but failed to adduce the decision of the Negombo District Court as evidence. This failure to adduce the decision of the Court is in contravention of Section 91 of the Evidence Ordinance which states that:

"when the terms of a contract, or of a grant, or of any other disposition of property have been reduced by or by consent of the parties to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained ."

Accordingly, the Respondent's oral evidence of the decision of the Negombo District Court, or lack thereof, is inadmissible due to the fact that the original primary evidence was in existence and not submitted to Court. Therefore, the District Court was not provided with all the relevant and material facts prior to arriving at its decision. The inadmissibility of oral evidence in the event of the existence of primary evidence was affirmed by **Basnayake CJ** in the case of **Queen v Murugan Ramasamy** (*64 NLR 433)* while this sentiment is further echoed in Section 59 of the Evidence Ordinance which states that: " *All facts, except the contents of documents, maybe proved by oral evidence",* and supported by E.S.S.R.Coomaraswamy in 'A Textbook of the Law of Evidence.' In this light, the existence of 'personal knowledge' , as held by the Court of Appeal is insufficient grounds upon which oral evidence, when primary documentary evidence exists, can be affirmed as sufficient and satisfactory.

The issue of imposing liability for damages on the Petitioner for the harm caused to the Respondent's machinery by the Fiscal Officer at the time of the ejectment was also raised in this Court. Precedent in this regard was established in the case of **Ranesinghe v Henry** (*1 NLR 303*)where Bonser CJ held that the cost of damages that are incurred in the process of executing a writ falls on the creditor, in this context on the Petitioner. It is noteworthy that at the time of the ejectment writ being executed by the Fiscal Officer, the Petitioner was not present at the scene hence making it impossible to hold her liable for the damages caused to the property of the Respondent. Furthermore, Section 85(1) of the Civil Procedure Code states that:

"The plaintiff may place evidence before the court in support of his claim by affidavit, or by oral testimony and move for judgment, and the court, if satisfied that the plaintiff is entitled to the relief claimed by him, either in its entirety or subject to modification, may enter such judgment in favour of the plaintiff as to it shall seem proper, and enter

decree accordingly."

It is the opinion of this Court that the *ex-parte* hearing could not have resulted in favour of either party without the Court having access to the evidence of the trial in the District Court. The incomplete information provided to the Court bars it from arriving at a legally accurate decision. Hence, this Court does not see how the burden of 'satisfaction' of the Court was adequately executed in the absence of crucial evidence in the form of the decision of the District Court.

On the reasons set out above this court holds in favour of the Petitioners on the questions of law. Accordingly, this Appeal is allowed. No costs.

JUDGE OF THE SUPREME COURT

P.DEP, PC J.

I agree

JUDGE OF THE SUPREME COURT

S.E.WANASUNDERA, PC 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 appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal No. 58/2011
SC.(HC) CA. LA. No. 267/10
SP/HCCA/MA/288/04(F)
DC. Walasmulla Case No.579/L

Wijemunige Elbin
Pallehagoda,
Ellawelagewatta,
Pallekanda, Walasmulla.

Plaintiff

Vs.

1. Wijemunige David Singho
2. Wijemunige Ranjith Alahapperuma
3. Wijemunige Senarath Jayatunga
4. Wijemunige Sriyani Wasanthi
5. Newsia Ireene Wijebandara
6. Wijemunige Chandrika Wijebandara

All of
Wadumaduwegedara,
Wekandawela,
Gonadeniya

Defendants

And Between

Wijemunige Elbin
Pallehagoda,
Ellawelagewatta,
Pallekanda, Walasmulla.

Plaintiff- Appellant

Vs.

1. Wijemunige David Singho
2. Wijemunige Ranjith Alahapperuma
3. Wijemunige Senarath Jayatunga
4. Wijemunige Sriyani Wasanthi

5. Newsia Ireene Wijebandara
6. Wijemunige Chandrika Wijebandara

All of
Wadumaduwegedara,
Wekandawela,
Gonadeniya

Defendant-Respondents

And Now Between

1. Wijemunige David Singho
2. Wijemunige Ranjith Alahapperuma
3. Wijemunige Senarath Jayatunga
4. Wijemunige Sriyani Wasanthi
5. Newsia Ireene Wijebandara
6. Wijemunige Chandrika Wijebandara

All of
Wadumaduwegedara,
Wekandawela,
Gonadeniya

Defendant-Respondent-Appellants

Wijemunige Elbin
Pallehagoda,
Ellawelagewatta,
Pallekanda, Walasmulla.

Plaintiff- Appellant-Respondent

****

SC. Appeal No. 58/2011

BEFORE : Shiranee Tilakawardane, J.
P.A. Ratnayake, PC. J. &
Imam. J.

COUNSEL : W. Dayaratne, PC. With Ms. R. Jayawardena, for 1st-6th Defendant-Respondent-Appellant.

Anuruddha Dharmawardane for the Plaintiff-Appellant-Respondent.

WRITTEN SUBMISSIONS OF 1ST- 6TH DEFENDANT-RESPONDENT-APPELLANT; **15-08-2012**

WRITTEN SUBMISSIONS OF PLAINTIFF-APPELLANT-RESPONDENT : **03-10-2012**

ARGUED ON: **19-09-2012**

DECIDED ON : **24-01-2013**

* * * * * * *

P.A. Ratnayake, PC. J.

This is an appeal from the Civil Appellate High Court of the Southern Province holden at Matara. Where the Civil Appellate High Court set aside the judgment of the District Court of Walasmulla and granted the reliefs prayed for by the Plaintiff-Appellant-Respondent hereinafter referred to as the "Respondent".

Respondent instituted action in the District Court of Walasmulla seeking a declaration of title to the corpus, ejectment of the Defendant-Respondent-Appellants hereinafter referred to as the "Appellants", and for damages.

The subject matter of this case is a land where the Respondent became entitled by virtue of a permit given by the State under the Provisions of the Land Development Ordinance. The extent of the land is given in the plaint as 2 acres and is described in paragraph 2. It is averred in the plaint that the Appellants forcibly entered a part of the land which is the subject matter in this case and was in unauthorized possession of the said part. The possession of the Appellants were also fortified by an order given by the Primary Court under Section 66 of the Primary Courts Procedure Act No.44 of 1979. In the circumstances, the Respondent filed action in the District Court to obtain relief as prayed for in the plaint. After the trial was concluded in the case, District Judge of Walasmulla by his Judgment dated 5th November 2004 dismissed the action of the Respondent. The main ground for dismissal appears to be the non identification of the subject matter. The Civil Appellate High Court in its judgment dated 2nd July 2010 has set aside the judgment of the District Court and granted relief to the Respondent. The Appellant appealed to the Supreme Court from the said judgment of the Civil Appellate High Court and the Supreme Court granted Leave to Appeal on the following questions of law;

(a) Did their Lordships err in law when they came to the conclusion that the Plaintiff/Appellant/Respondent has established his title to the corpus when it is clearly proved that the corpus described in the plaint has not been identified properly?

(b) Did there Lordships err in law when their Lordships came to a conclusion that in terms of two permits marked as 'පැ 1' and ' පැ 2' the Plaintiff/Appellant/Respondent has title to the corpus when the boundaries given in the said two permits are contrary to each other especially the northern boundary?

(b) Did their Lordships err in law when they failed to draw their minds to the fact that a larger land has been surveyed than the land described in the plaint as the corpus?

As could be observed all 3 questions of law are based on the non identification of the corpus.

In the plaint that has been filed and in the permit issued to the Plaintiff under the Land Development Ordinance Chap.464 which was produced marked 'P1' at the District Court the extent of the corpus is given as 2 acres. On the commission issued by Court, the Licensed Surveyor prepared Plan No. 18/ව where the extent was given as 3 Acres, 1 Rood and 23.12 Perches. The permit issued under the Land Development Ordinance does not refer to a survey Plan describing the land that is given to the Respondent. The permit only describes the metes and bounds of the land. The difference between the extent given in the permit and the land surveyed and depicted in survey plan 'X' and document 'X1' is substantial. The difference is 1 Acre 1 Rood and 23.12 Perches. In the circumstances there is a difficulty in reconciling the difference in the extents given in the permit "P1" and survey plan "X".

The evidence given by the Surveyor who did the survey could easily be construed to say that he was not certain as to whether the land he surveyed and depicted in the survey plan was the land that is described in the permit 'P1'. The Learned President's Counsel for the Appellant drew the attention of Court to the following statements made by the Surveyor contained at page 3 of the proceedings of 28.04.2004 when he was cross examined during the trial;

,ප්‍ර: අක්කර 2ක ඉඩමක් මනින්න කියල තිබ්යද්දි අක්කර 3ක ඉඩමක් මැනලා තිබෙනවා. මෙහි පරස්පරයක් තිබෙනවා නේ?

උ: ඔව්.

ප්‍ර: එහෙම වෙන්න හේතුව පැමිණිලිකරු පෙන්නපු ඉඩම?

උ:- එහෙම වෙන්නේ පැමිණිලිකරු පෙන්නපු ඉඩම සහ එයාට අයිති නැති කොටසක් පෙන්නල තිබෙනව.

ප්‍ර: පැමිණිලිකරු වැඩියෙන් පෙන්නල තිබෙනව?

උ: ඔව්.

ප්‍ර: මහත්තයාට ස්ථිර වශයෙන් කියන්න බැහැ පැමිණිල්ලේ සඳහන් ඉඩම කියා, වැඩිවෙලා තිබෙන නිසා?

උ: ඔව්.

ප්‍ර: මේ ඉඩමේ උතුරු මායිම පෙන්වා තිබෙනව?

උ: අවිනිශ්චිත කියා පෙන්නලා තිබෙනව. ලී කුඤ්ඤ පෙන්නල තිබෙනව. ගල් මායිම් නැහැ.

ප්‍ර: මහත්තයා පිළිගන්නව උතුරු මායිම දිගටම අවිනිශ්චිතයි කියා?

උ: ඔව්.

ප්‍ර: මහත්තයා **'X'** ලෙස සලකුණු කරල ඉදිරිපත් කරල තිබෙන ඉඩම මේ නඩුවේ ඉඩමද කියා හරියට කියන්න බැහැ?

උ: හරියට කියන්න බැහැ.**"**

He has specifically stated that the reason for the difference in the extent is due to his surveying and including in his plan as the subject matter of the case an area of land shown by the Plaintiff. In addition his above evidence is to the effect that he cannot positively say that the land depicted in the plan is the land described in the plaint due to the addition in the extent.

The Learned Counsel for the Respondent drew the attention of Court to the fact that during the Evidence-in Chief the Surveyor has specifically stated that he was satisfied that the land is the land described in the Commission where he says "කොමිසමේ සඳහන් ඉඩම කියා මම සෑහීමකට පත්වුනා. ඒ අනුව මැනලා 'X' සහ 'X1' වාර්තාව අධිකරණයට ඉදිරිපත් කළා., The Learned Counsel for the Respondent also brought to the notice of Court the fact that 1st Defendant in the District Court case (1st Defendant-Respondent- Appellant) was present during the survey and did not object to the survey or state that it was not the subject matter of the action as stated by the Surveyor in his evidence. The 1st Defendant in the District Court case has denied being present at the survey. During his cross examination he states as follows:-

ප්‍ර: තමා ඉඩම මනින වෙලාවේ හිටියා ?

උ: නැහැ.

ප්‍ර: තමා වෙනුවෙන් කවුද හිටියේ?

උ: අපේ ළමයි ගෙදර හිටියා. ළමයි මොනවා කිව්ද දන්නේ නැහැ**'".**

In re-examination he says " මනින අවස්ථාවේ මම හිටියේ නැහැ. 1වෙනි විත්තිකරු හිටියා කියා තිබේනම් වැරදියි' දරුවෝ ගෑණි හිටියා. මම ලෙඩවෙලා හම්බන්තොට රෝහලේ සිටියේ.". He has not produced any medical certificate or other evidence to show that he was else where. Even assuming he was present his conduct alone cannot be taken as a positive admission to the effect that the land surveyed was the subject matter described in the plaint. In my view the above fact alone would not vitiate the effect of the statement made by the Surveyor during his cross examination to the effect that the land depicted in his plan 'X' may not be the land described in the plaint.

Another argument that is advanced on behalf of the Appellants is the difference in the boundaries that are given in the Survey Plan and the permit 'P1'. In accordance with the permit 'P1' the boundaries are as follows:-

North - 100 yard road
East - by- lane
South - David Singho's land
West - Piyadasa's land

In accordance with the Survey Plan of the Court Commissioner the boundaries are given as follows:-

North - David Singho's land
East - by- lane
South - 100 yard road
West - Piyadasa's land

Accordingly, there appear to be a difference of the Northern and Southern boundaries. The Northern boundary in the Surveyor plan is given as the Southern boundary in the permit and the Southern boundary in the Surveyor plan is given as the Northern boundary in the permit. Prior to the permit 'P1' being issued to the Plaintiff-Respondent, he was issued an annual permit in respect of

the same land under the Land Development Ordinance. In that permit the boundaries given are the same as in the Survey plan. This permit has been produced marked 'P2' at the District Court. The District Land Officer who gave evidence at pages 6 and 7 of the proceedings of 28.04.2004 in reexamination states that the permits produced marked as 'P1' and 'P2' have been issued in respect of the same land. He states as follows:-

"නැවත ප්‍රශ්නඃ-තවම අවලංගු කරලා නැහැ. බලපත්‍ර දෙකම එකම ලෙජ්ර් අංකයක් යටතේ නිකුත් කරපු බලපත්‍ර දෙකක්.

අධිකරණයඃ- ප්‍රඃ- ලෙජ්රය බලා කියන්න බලපත්‍ර දෙක නිකුත් කරලා තිබෙන්නේ එකම ඉඩමකටද?

උඃ- වෑකඳවල අංක 58371

මායිම්ඃ- උතුරටඃ 100 පාර

නැගෙනහිරටඃ අතුරු පාර

දකුණාටඃ ඩේවිඩ් පදිංචි ඉඩම

බස්නාහිරටඃ පියදාසගේ අනවසර ඉඩම

ප්‍රඃ ඒ ඉඩමට අදාල බලපත්‍ර කීයක් නිකුත් කරල තිබෙනවද?

උඃ එකයි. එල් එල් 58371

උනවසර ඉඩමක් තමා, නියමානුකූල කිරීම සඳහා බලපත්‍රය දීල තිබෙනවා'"

In the circumstances mentioned above, it is clear that a mistake has been made in respect of the Northern and Southern boundaries in the permit 'P1' in that the Southern boundary is given as the Northern boundary and the Northern boundary is given as the Southern boundary. Accordingly in my view this mistake should not affect the identity of the corpus in this case.

As stated above the wrong description of the boundaries in the permit 'P1' can be overlooked. Nevertheless the difference in the extent given in the permit 'P1' and the survey plan X which is a substantial difference in the context of the statement made by the Surveyor during his cross examination to the effect that the land depicted in the plan 'X' may not be the land described in the plaint would certainly amount to a failure in the identification of the corpus.

In S.C. Appeal No. 104/05 decided on 27-10-2010 Hon. Saleem Marsoof J. states as follows:-

> "It is trite law that the identity of the property with respect to which a vindicatory action is instituted is as fundamental to the success of the action as the proof of the ownership (*dominium)* of the owner (*dominus*)…"
>
> "Where the property sought to be vindicated consists of land, the land sought to be vindicated must be identified by reference to a survey plan or other equally expeditious method. It is obvious that ownership cannot be ascribed without clear identification of the property that is subjected to such ownership…."

It is observed that the Appellants (Defendants in the District Court Case) have not done anything meaningful to establish their title to the part of the land presently possessed by them. In my view this fact alone will not assist the Respondent. In Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167 it has been held that the Plaintiff cannot ask for a declaration of title in his favour merely on the strength that the Defendants title is poor or not established.

In the circumstances mentioned above I answer all 3 questions of law on which Leave to Appeal was granted in the affirmative.

I set aside the judgment of the High Court in case No. SP/HCCA/MA/288/2004F of the Southern Province holden at Matara dated 2nd July 2010.

I observe that the Respondent was prevented from obtaining relief at the District Court due to the conduct of the licensed surveyor who functioned as a Court Commissioner. Accordingly, I set aside the judgment of the District Court of Walasmulla in case No. 579 L dated 05.11.2004 as well, and direct the District Court to rehear the case by adopting the evidence already led and only to lead any further evidence directly or indirectly relating to the identity of the corpus. I also direct that a commission be issued to a Licensed Surveyor by the District Court to re-survey the subject matter. District Court may issue requisite orders on the Surveyor General to forward copies of the relevant state plans to assist

the licensed Surveyor in the identification of the subject matter in this case. This case is to be concluded expeditiously. Accordingly the appeal is allowed without costs.

JUDGE OF THE SUPREME COURT

Shiranee Tilakawardane, J.

I agree

JUDGE OF THE SUPREME COURT

Imam. J.

agree

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal after granting Leave under Section 5(c) of the High Court of the Provincial (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 127(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal No. 67/2012
SC/HCCA/LA.No. 360/2011
WP/HCCA/AV No. 565/2008
D.C.Avissawella No. 23240/M

Krishnan Nalinda Priyadarshana
No. 55, Galabadawatta,
Pitumpe, Padukka.

Plaintiff

Vs.

1. Kandana Arachchige Nilmini Dhammika Perera
   Ulagalle, Kosgashena,
   Paddukka,

2. Koddula Arachchige Lalith Perera
   Ulagalle, Kosgashena,
   Padukka.

3. Illukkumburaga Ruwan Kapila Nawasinghe
   56B, Galabadawatta,
   Pitumpe, Padukka.

Defendants

And Between

1. Kandana Arachchige Nilmini Dhammika Perera
   Ulagalle, Kosgashena,
   Paddukka.

2. Koddula Arachchige Lalith Perera
   Ulagalle, Kosgashena,
   Padukka.

3. Illukkumburaga Ruwan Kapila Nawasinghe
56B, Galabadawatta,
Pitumpe, Padukka.

Defendant-Appellants

Vs.

Krishnan Nalinda Priyadarshana
No. 55, Galabadawatta,
Pitumpe, Padukka.

Plaintiff-Respondent

And Now Between

Kandana Arachchige Nilmini Dhammika Perera
Ulagalle, Kosgashena,
Paddukka,

1st Defendant-Appellant-Appellant

Vs.

Krishnan Nalinda Priyadarshana
No. 55, Galabadawatta,
Pitumpe, Padukka.

Plaintiff-Respondent-Respondent

2. Koddula Arachchige Lalith Perera
Ulagalle, Kosgashena,
Padukka.

3. Illukkumburaga Ruwan Kapila Nawasinghe
56B, Galabadawatta,
Pitumpe, Padukka.

2nd & 3rd Defendant-Appellant- Respondents.

* * * * *

SC. Appeal No. 67/2012

BEFORE : **Tilakawardane, J.**
Ekanayake, J. &
Wanasundera, PC., J.

COUNSEL : Maduranga Ratnayake for the 1st Defendant-Appellant-Appellant.

Thishya Weragoda with Nishan Prematthiratne, Mahela Liyanage and Niluka Dissanayake for the Plaintiff-Respondent-Respondent.

ARGUED ON : 01.03.2013

WRITTEN SUBISSION OF THE APPELLANT FILED ON: 14-03-2013

WRITTEN SUBISSION OF THE RESPONDENT FILED ON: 14-03-2013

DECIDED ON : 14-06-2013

* * * * *

Wanasundera, PC., J.

The two appeal cases bearing Nos. SC. 67/12 and SC. 68/12 have arisen out of one and the same Judgment of the Provincial High Court of the Western Province holden in Avissawella, and therefore are consolidated for convenience with the consent of all the Counsel who appeared at the hearing, agreeing that one judgment would bind all the parties in both cases.

In this appeal No. 67/12 the Supreme Court granted leave to appeal on 21.3.2012 on the questions of law set out in paragraphs 11(a), (b), (c), (d). (f) and (h) of the Petition dated 09.09.2011. Both parties agreed at the hearing that they would confine the arguments only to question 11(a) to read as “Did the Provincial High Court of the Western Province (holden at Avissawella) exercising its civil appellate jurisdiction, err in law when it held that the 1st Defendant was vicariously liable for the acts of the 3rd Defendant?"

The Provincial Civil Appellate High Court judgment which has been challenged is dated 01.08.2011. It is in favour of the Plaintiff awarding Rupees Two Million and costs and affirming the judgment of the District Court dated 17.01.2007. The appeal from the District Court was dismissed by the Civil Appellate High Court.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent), was 20 yrs of age at the time of the incident where he alleged that the 1st Defendant-Appellant-Appellant (hereinafter referred to as the Appellant) ,the owner of the lorry No. WPGJ 2267 had deliberately knocked down (hereinafter referred to as the incident) the Respondent. The lorry driver was the nephew of the lorry owner and her husband. It was undisputed that shortly prior to the incident the Respondent had been at the Police Station with regard to a complaint made by the Appellant's husband against the Respondent after an altercation between them on the same day. The driver accompanied by the husband of the Appellant had in the incident, knocked down the Respondent from behind, and after stopping the lorry, had thereafter got off the lorry and further assaulted him. Then they have taken him first to the Police Station and then to the hospital. The Respondent was badly injured. At the time he gave evidence in the District Court, he was a paraplegic with his lower body paralyzed, on a wheel chair, due to the injuries he had sustained. The record bears that there was a nonsummary inquiry in the Magistrate's Court and thereafter that the Appellant's husband and the driver were indicted for attempted murder in the High Court. The Counsel stated in Court that they are serving a sentence in prison at the moment.

This appeal arises out of “vicarious liability” in delict/tort placed by law on the employer (the owner of the lorry), for negligent acts of the employee (the driver of the lorry). The record bears that the Respondent instituted action for damages in the District Court through the Legal Aid Commission by a plaint dated 06.1.2004. Over 9 years have lapsed on litigation and more than 10 yrs have lapsed since the date of the incident.

The Learned Civil Appellate High Court Judges has evaluated the evidence on record and has considered the questions of law carefully before arriving at the conclusions in the judgment. The admitted facts at the District Court trial are that the Appellant owned the lorry at the time of the incident, and that the legal husband of the owner of the lorry accompanied the driver of the lorry at the time the incident took place.

The Respondent had shortly prior to the incident been walking on the same side of the road as the lorry was being driven. When he, on hearing the sound of an approaching lorry, looked back, and had seen the lorry veering into him. He had been knocked down and after he fell, he was beaten with iron rods by the 2nd and 3rd Defendants of the District Court case, ie. the lorry owner's husband and the driver. They have taken him in the lorry to the Police Station first and thereafter to the hospital. Neither the driver nor the owner of the lorry had given evidence at the trial. Even the owner's husband who was in the lorry at the time of the incident had not given evidence.

In any civil action, the District Judge makes the judgment on a balance of probabilities; in this case, there is no evidence on record for the defence. The Appellant had opted only to rely on the infirmities of the evidence of the Respondent and three witnesses who gave evidence on his behalf.

The argument of the Appellant, who is the owner of the lorry, was that, as the employer, she is not vicariously liable for the 'intentional acts' of the employee, the driver. It is admitted that the Appellant was the owner of the lorry and the lorry had been driven in a manner to deliberately run over the Respondent. The lorry driver was not on a 'frolic of

his own'. It was admitted that the lorry owner's husband was with the driver inside the lorry. In this instance, I hold that in law the incident speaks for itself - “res ipsa loquitor”. 'Vicarious liability', is a strict liability principle in civil law holding the owner of the vehicle liable in damages on the driver's acts of negligence. The owner did not give evidence to say that the driver has deliberately driven the lorry to harm the Respondent, therefore when he is injured; the owner is not liable for damages. Therefore the defence cannot now take up the position at the appeal stage to say that the action of the driver was deliberately done by him only and therefore the owner was not liable in delictual damages. There is a criminal action for attempted murder pending before the criminal High Court or may be, it is concluded against the lorry owner's husband and the lorry driver. But the outcome of the criminal action, whether the driver is convicted or not , holds no bar to the action for damages before a civil trial court. When a person gets injured due to a vehicle deliberately running into a person, it is prima-facie proof of the negligence of the driver. Only if the driver could prove contributory negligence on the part of the Respondent, the damages could be reduced or vitiated. In this case the defense has failed to prove contributory negligence of the Respondent. The owner of the lorry has not even tried to show that the driver's action of knocking down the Respondent was an 'independent act' of the driver with a purpose of his own. She could not have done so as her husband was in the lorry with the driver. The defence has taken up all these untenable arguments at the appeal stage and not at the trial stage. The suggestion that it was an 'intentional act' of the driver alone was not brought up at the trial in the District Court.

In *Priyani Soyza Vs. Arsekularatne, 2001 2 SLR 293* it was held that in an acquilian action, actual pecuniary loss must be established, the exception being 'damages for physical injury'. This instant case is one where physical injuries are so grave that the amount cannot be assessed by any Judge arithmetically, but grant the least by awarding what is asked for, by the Plaintiff. The learned Civil Appellate High Court Judge has analysed the documentary evidence and the facts proved by the Plaintiff and mentioned that the Defense was unable to either contradict the position in cross

examination or by leading contradictory evidence. The said analysis of facts are as follows:-

(a) that even after the incident, the Plaintiff was assaulted while being dragged along the road near the lorry

(b) that the Plaintiff sustained grievous injuries from the incident and is incapable of walking due to the injuries

(c) that he is unable to control passing urine and excreta

(d) that all the organs below the waist are lifeless and paralyzed

(e) that he has no ability to do anything without the help of others and

(f) that he has to spend the rest of his life on a wheel chair.

The Learned High Court Judge concurring with the District Judge awarded two million rupees as damages to the Respondent payable by the Appellant and this court affirms these findings.

The Counsel for the Appellant further argued that the damages on vicarious liability should have been apportioned between the employer and the employee. This argument is untenable as the vicarious liability is placed upon the owner of the vehicle (the employer) and not upon anybody else. As such the owner of the lorry is held liable in law to pay the full amount of damages, since she is jointly and severally liable to pay damages with the driver. The Plaintiff is entitled to claim and recover the money either from the owner of the lorry or from the driver of the lorry in cases such as this in the District Court. Only the amount is adjudged by the trial Judge. The law does not provide for any apportionment of damages.

The general principle of vicarious liability in respect of master-servant relationship which is accepted as part of our law in Sri Lanka, is based on the principle initially laid down by Salmond in “The Law of Torts”[1907] which states thus:

> "An employer will be liable not only for a wrongful act of an employee that he has authorized but also for a wrongful and unauthorised mode of doing some act authorised by the master. But a master (as opposed to an employer of an independant contractor) is liable even for acts which he has not authorised, provided they are so closely connected with the acts which he has authorised that they rightly may be regarded as modes,(although improper modes) of doing them"

English Law principles of vicarious liability being similar to the Roman Dutch Law principles of vicarious liability in Sri Lanka, the English Law principles have got invariably accepted and adopted into the Sri Lankan Law, which has been developed over the years. In *Lister vs. Hesley Hall Ltd. (2002) 1 AC 215* and in *Dubai Aluminium Co. Ltd. Vs. Salaam (2003) AC 366,* it was held that if an employer carries out a wrongful act which is unauthorised and/or intentional and/or fraudulent, the employer may be held liable depending upon the closeness of the connection between the employee's wrongdoing and the class of acts of which he was employed to perform.

In the instant case, the driver who drove was the employee of the owner of the lorry. The driver's wrongful act was done within the act of driving which he was employed to perform by the owner of the lorry. Even if the wrongful act was unauthorized by the employer and criminal in nature, the employer is vicariously liable for the employee's action, thus making the employer bound to pay damages caused by the employee.

In the circumstances of this case, I answer the question of law mentioned above in the negative and hold that the Provincial Civil Appellate High Court was quite correct in dismissing the appeal of the Appellants and affirming the judgment of the Learned District Judge. I hold that the 1st Defendant-Appellant-Appellant and the 3rd Defendant-Appellant- Respondent are jointly and severally liable to pay damages to the Plaintiff-Respondent-Respondent. I dismiss this appeal with costs and affirm the judgment of the Learned High Court Judge of the Civil Appellate High Court as well as the judgment of the Learned District Judge subject to the variation that the Plaintiff Respondent is

entitled to claim legal interest on the said award of rupees two million(Rs. 2000000/-) from the date of the Judgment of the District Court to date, and this Court makes order granting such claim of legal interest to be paid by the Appellant to the Respondent.

The Registrar of this Court is directed to send this judgment forthwith, along with the original case record to the District Court of Avissawella for enforcement of the Judgment.

JUDGE OF THE SUPREME COURT

Tilakawardane, J.

I agree.

JUDGE OF THE SUPREME COURT

Ekanayake, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal against the Judgment of the Court of Appeal under and in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

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

PETITIONER - APPELLANT

S.C. Appeal No. 67/2013
S.C. Spl. L.A. Application No.24/2013
C.A. (Writ) Application No. 411/2012

-VS-

Dr.Upatissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake,
Residence of the Chief Justice of Sri Lanka,
129, Wijerama Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive, Colombo 08.

PETITIONER - RESPONDENT

01. Hon. Chamal Rajapakse,
Speaker of Parliament,
Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.

02. Hon. Anura Priyadarshana Yapa,
Eriyagolla.
Yakwilla.

03. Hon. Nimal Siripala De Silva,
93/20, Elvitigala Mawatha,
Colombo 08.

04. Hon. A.D. Susil Premajayantha,
123/1, Station Road,
Gangodawila,
Nugegoda.

05. Hon. Rajitha Senaratne,
CD 85, Gregory's Road,
Colombo 07.

06. Hon. Wimal Weerawansa,
18, Rodney Place,
Cotta Road,
Colombo 08.

07. Hon. Dilan Perera,
30, Bandaranayake Mawatha,
Badulla.

08. Hon. Neomal Perera,
3/3, Rockwood Place,
Colombo 07.

09. Hon. Lakshman Kiriella,
121/1, Pahalawela Road,
Palawatta,
Battaramulla.

10. Hon. John Amaratunga,
88, Negambo Road,
Kandana.

11. Hon. Rajav Arothiam Sampathan,
2D, Summit Flats,
Keppetipola Road,
Colombo 05.

12. Hon. Vijitha Herath,
44/3, Medawaththa Road,
Mudungoda,
Miriswatta,
Gampaha.

13. Hon. W.B.D. Dassanayake,
Secretary General of Parliament,
Parliament Secretariat,
Parliament of Sri Lanka,
Sri Jayawardenepura Kotte.

RESPONDENT -RESPONDENTS

Before	**:**	Hon. S. Marsoof, PC., J, Hon. P.A. Ratnayake, PC., J, Hon. S. Hettige, PC., J, Hon. E. Wanasundera, PC., J and Hon. R. Marasingha, J.
Counsel	**:**	Palitha Fernando, Attorney General with A. Gnanathasan PC, Additional Solicitor General, W.J.G. Fernando DSG, S. Fernando DSG, Sanjay Rajaratnam DSG, Dilip Nawaz DSG, Janak De Silva DSG, Nerin Pulle SSC and Manohara Jayasinghe SC instructed by State Attorney Sujatha Pieris for the Petitioner-Appellant. Petitioner-Respondent and 1st to 10th and 13th Respondent-Respondents absent and unrepresented. M.A. Sumanthiran with Viran Corea and Niren Anketell for the 11th Respondent-Respondent. J.C. Welimuna with Sunil Watagala, Mewan Kiriella Bandara and Senura Abeywardhena for the 12th Respondent-Respondent.
Argued on	**:**	10.6.2013
Written Submissions	**:**	14.6.2013
Decided on	**:**	28.6.2013

SALEEM MARSOOF J.

This order pertains to certain preliminary objections taken up on behalf of the 11th and 12th Respondent-Respondents (hereinafter sometimes referred to as the "11th and 12th Respondents") in regard to the maintainability of this application.

Basic Facts

By way of introduction, it may be useful to set out in outline the basic facts that give rise to the aforesaid objections. The President of Sri Lanka has made order on 12th January, 2013 in terms of Article 107(2) of the Constitution of Sri Lanka removing the Petitioner-Respondent from the post of Chief Justice pursuant to a resolution for her impeachment being passed by Parliament and the President addressing Parliament as contemplated by Article 107 of the Constitution. Prior to this development, the Petitioner-Respondent had filed an application dated 19th December 2012 in the Court of Appeal seeking *inter alia* a writ in the nature of *certiorari* quashing the report of the

Parliamentary Select Committee that found her guilty of certain charges of misbehaviour and a writ of prohibition against the 1st Respondent-Respondent and/or the 2nd to 13th Respondent-Respondents (hereinafter sometimes collectively referred to as the "Respondent- Respondents") from taking any further steps pursuant to the said report. The Court of Appeal by its Judgement dated 7th January 2013, issued a writ of *certiorari* quashing the said findings and also a writ of prohibition on the Speaker and the Parliamentary Select Committee consisting of the 2nd to 12th Respondent-Respondents restraining them from proceeding to implement the motion of impeachment. The Petitioner-Appellant, the incumbent Attorney General of Sri Lanka, who had assisted the Court of Appeal on its invitation as *amicus Curiae*, sought special leave to appeal form this Court against the said decision of the Court of Appeal, and this Court on 30th April 2013 granted special leave to appeal on two substantive questions of law on the basis that they raise question of public or general importance.

For the purposes of this order it is material to note that after the application for special leave to appeal dated 15th February 2013 was lodged in the Registry of this Court, and notice was dispatched on the Petitioner-Respondent as well as the other Respondent-Respondents, by her motion dated 16th March 2013, the Petitioner-Respondent acknowledged receipt of notice and indicated that the said Respondent will not participate in these proceedings for the reasons set out in the said motion. Furthermore, by 30th April 2013 none of the notices issued on the Respondents-Respondents other than the notice dispatched on the 11th Respondent-Respondent (hereinafter sometimes referred to as the "11th Respondent") had been returned undelivered. The envelope in which the notice issued on the said 11th Respondent had been dispatched did not bear any endorsement relating to the return of the notice undelivered. When the application of the Petitioner-Appellant for special leave to appeal was supported before this Court on 30th April 2013, the Petitioner-Respondent as well as the Respondent-Respondents were absent and unrepresented. The Court heard the Petitioner-Appellant and granted special leave to appeal on the following two substantive questions of law on the basis that they raise question of public or general importance:

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?

2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

Court also directed that all parties should file their written submissions within four weeks, and issued notice on the Petitioner-Respondent as well as the Respondent-Respondents that the appeal has been fixed for hearing on 29th May 2013. However, by their respective motions dated 21st May 2013 and 22nd May 2013, the 11th and 12th Respondents informed Court that they could not file caveat or appear in Court on 30th April 2013 for the purpose of objecting to the grant of special leave to appeal against the Judgement of the Court of Appeal as they had not been served with any notice pursuant to the filing of the application for special leave to appeal by the Petitioner-Appellant. In the said motions they alleged that the Petitioner-Appellant has failed to

comply with several of the mandatory provisions of Rule 8 of the Supreme Court Rules, 1990, and moved that Court be "pleased to set aside the said order granting special leave to appeal" and cause the notice of the same to be served on the 11th and 12th Respondents to enable them to file caveat and be "heard in opposition to the grant of special leave to appeal".

The aforesaid motions were considered by this Court on 29th May 2013. The Court examined the contents of the aforesaid motions filed by the 11th and 12th Respondents, the affidavit of the 12th Respondent dated 22nd May 2013, all relevant motions filed by all parties and all journal entries contained in the Supreme Court docket, and held that there has been substantial compliance by the Petitioner-Appellant of the Supreme Court Rules, 1990, but in the interests of justice, the 11th and 12th Respondent-Respondents may be permitted "an opportunity to participate in the proceedings for the grant of special leave to appeal." Court, accordingly set aside its own order granting special leave to appeal "only with respect to the 11th and 12th Respondents". The following paragraphs of the order of Court dated 29th May 2013 clarifies the essence of its ruling on the submissions made on behalf of the Petitioner-Appellant as well as the 11th and 12th Respondents on that date:

> "Learned Counsel for 11th and 12th Respondents have agreed to file caveat within one week from today on behalf of these Respondents, and the question of Special Leave to Appeal with respect to these Respondents will be considered before the same Bench on 10.6.2013. The order granting Special Leave to Appeal against the other Respondents as well as against the Petitioner-Respondent will stand.
>
> Support application for Special Leave to Appeal with respect to 11th and 12th Respondents on 10.6.2013 before the same Bench.
>
> As far as the appeal is concerned, since Special Leave to Appeal had already been granted against the Petitioner-Respondent as well as the other Respondents, the date for hearing of the appeal will be determined on 10.6.2013. Registrar is directed to have this matter listed before the same Bench (namely Hon. Marsoof, PC.J, Hon. Ratnayake, PC.J, Hon. Hettige, PC.J, Hon. Wanasundera, PC.J, and Hon. Marasinghe,J) on 10.6.2013 for support".

Accordingly, on 10th June 2013, the Hon. Attorney-General, who was the Petitioner-Appellant made submissions afresh in support of his application for special leave to appeal, and learned Counsel for the 11th and 12th Respondents were heard in opposition to the grant of special leave to appeal. Submissions were made by Learned Counsel for the 11th and 12th Respondents as well as the learned Attorney-General in regard to the following preliminary objections to the application seeking special leave to appeal against the judgment of the Court of Appeal dated 7th January 2013 sought to be impugned:

1) The Petitioner-Appellant has failed to comply with Rule 8 of the Supreme Court Rules;
2) The Petitioner-Appellant cannot represent State interests and make an appeal against the judgment which the State has failed to comply with;

3) The Petitioner-Appellant is not entitled to seek to appeal against a judgment of the Court of Appeal in a case in which he was not a party and was invited by Court to assist court as *amicus curiae*;
4) The application of the Petitioner-Appellant is an abuse of the process of Court and is futile; and
5) The application of the Petitioner-Appellant has not been properly made as he has failed to file an affidavit in support of his petition filed in this case.

1) Failure to comply with Rule 8

Although in the motions dated 21st and 22nd May 2013 respectively filed by the 11th and 12th Respondent-Respondents and the Statement of Objection filed by the 11th Respondent-Respondent dated 7th June 2013, a failure to comply with certain mandatory provisions of Rule 8 of the Supreme Court Rules, 1990 had in general been alleged, in the course of oral submissions learned Counsel who appeared for the said Respondents stressed in particular the alleged non-compliance by the Petitioner-Appellant of Rule 8(3) of the said Supreme Court Rules, which is quoted below in full:

> "(3) The petitioner *shall tender with his application such number of notices* as is required for service on the respondents and himself *together with such number of copies of the documents referred to in sub-rule (1)* of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any, of the attorney-at-law, if any, who has been retained to appear for him at the hearing of the application, and shall *tender the required number of stamped addressed envelopes* for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars."(*Emphasis added*)

The gravamen of the submissions of learned Counsel for the 11th and 12th Respondents in regard to the allegation of non-compliance with Rule 8(3) was that the Petitioner-Appellant had not tendered to Court with his application for special leave to appeal, sufficient number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. Rule 8(1) requires the Registrar of the Court to "forthwith give notice, by registered post, of such application to each of the respondents" The said sub-rule also requires that "a copy of the petition, a copy of the judgment against which the application for special leave to appeal is preferred, and copies of affidavits and annexures filed therewith" to be attached to the notice to be issued by the Registrar. Learned Counsel for the said Respondents submitted, relying on a long line of decisions of this Court including those in *A.H.M. Fowzie & Others v. Vehicles Lanka (Pvt) Ltd.* (2008) BLR 127 and *Tissa Attanayake v The Commissioner General of Election and Others* (S.C. (Spl.) L.A. No. 55/2011 C.A. Writ Application No. 155/2011-SC Minutes dated 21.07.2011), that the failure to comply with Rule 8 of the Supreme Court Rules is fatal to the right of a Petitioner to prosecute his application, and accordingly warrants dismissal *in limine.*

In relation to the factual aspects of the case, learned Counsel for the 11th and 12th Respondents have invited attention to certain motions filed on behalf of the Petitioner-Appellant and a minute dated 26th February 2013 that show that initially the notices were dispatched only to the Petitioner-Respondent and the 11th and 12th Respondents, and that notices on the 1st to 10th and 13th Respondents had only been dispatched by the Registry on 22nd March 2013. From these facts, learned Counsel for the 11th and 12th Respondents invited Court to infer that the Petitioner-Appellant had failed to tender to Court along with his application for special leave to appeal, a sufficient number of notices and documents as required by Rule 8(1) of the Supreme Court Rules, and duly stamped addressed envelopes.

However, in this context this Court cannot ignore the minute of the Registrar of this Court addressed to the Listing Judge dated 18th February 2013 and the Listing Judge's direction dated 20th February 2012, which are reproduced below:

> "18/02/13
>
> Hon. Wanasundera PCJ.
>
> AAL for the Petitioner tendered motion dated 15/2/13 with proxy, petition affidavit and documents and motion that this application be filed to be mentioned on
> 02, 03 or 04 April 2013.
> Subt. for Your Ladyship's directions please.
> Registrar, Supreme Court
>
> R/SC
> List for 'support' on 4/4/2013 and notice to others through the Registry.
>
> Ew
> 20/2/13"

The case was accordingly listed for support on 4th April 2013, on which date the case was re-fixed for support on 30th April 2013.

In this connection, the learned Attorney-General has submitted that the question of compliance with Rules of Court is no more a live issue as this Court has, after a perusal of the record in these proceedings, made order on 29th May 2013 that "Court is of the opinion that there is substantial compliance with the rules of Court". He further submitted that the journal entries in this regard bear testimony to the fact that such notices and documents were in fact lodged in the Registry of this Court and that the said notices were in fact sent by the Registrar of the Court to all the Respondents.

Although It is clear from the journal entries that the Petitioner-Appellant has fully complied with Rule 8(3) of the Supreme Court Rules and tendered to Court sufficient number of notices, documents and stamped addressed envelopes for despatch of notice along with his application for special leave to appeal, as already noted, notices were in fact despatched in two instalments, namely, on 26th February 2013 to the Petitioner-Respondent and the 11th and 12th Respondents who were the only parties who participated in the proceedings in the Court of Appeal in this case, and subsequently on 25th March 2013 to the other Respondents. However, none of these

respondents have responded to the notices of this Court to date, and it may be inferred that the notices have been duly served. In all the circumstances, no prejudice what so ever has been caused to any of the parties in this case by reason of any non-compliance with Rule 8.

I also note that special leave to appeal had been granted in this case against the Petitioner-Respondent as well as the Respondent-Respondents on 30th April 2013, and the said order was set aside by the order of this Court dated 29th May 2013, only to the limited extent of enabling the 11th and 12th Respondents to file caveat and to be heard in opposition to the grant of special leave to appeal. As far as these Respondents were concerned, notice was despatched on them as early as on 26th February 2013, and they have been heard fully in opposition to the grant of special leave to appeal. In any event, as this Court was constrained to observe in its recent decision in *Sumith Ediriwickrama, Competent Authority, Pugoda Textiles Lanka Ltd. and Another v. W.A.Richard Ratnasiri and Others,* SC Appeal No. 85/2004 (SC Minutes dated 22.2.2013), this Court is bound to highlight and apply in the special circumstances of a case "the objective of achieving smooth functioning of this Court", and in all the circumstances of this case this preliminary objection has to be overruled.

2) Comply and Complain

Another preliminary objection taken up on behalf of the 11th and 12th Respondents is that since the legislative and executive arms of government have failed to comply with the impugned judgment of the Court of Appeal, the Attorney-General is not entitled to seek to have the judgment of the Appeal Court set aside or varied by way of appeal. It was submitted by learned Counsel for these Respondents that the Attorney-General was invoking the appellate jurisdiction of this Court as an "effective extension" of the executive arm of government, which has failed to honour and give effect to the decision of the Court of Appeal dated 7th January 2013. They submitted that the Petitioner-Appellant should first comply with the decision of the Court of Appeal and then complain.

The learned Attorney-General has submitted that the objection taken up by the said Respondents is completely misconceived, given that the Attorney-General did not represent any of the Respondents in Court of Appeal in this case. Learned Attorney-General pointed out that at no stage in the pleadings or in the submissions on behalf of the said Respondents was it suggested that the Petitioner-Appellant is seeking to represent the interests of Parliament or any of its committees or members, and submitted that he had decided to invoke the jurisdiction of this Court consistent with the dictates of his conscience to have a grave error committed by the Court of Appeal by seeking to extend its writ to Parliament, thereby eroding the sovereignty of the People. This Court has already granted special leave to appeal on the specific question that arises from the submissions made before this Court by the learned Attorney-General and learned Counsel for the 11th and 12th Respondents, namely whether the Court of Appeal erred in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament on the basis that the words "any Court of first instance or tribunal or other institution or any other person" in the said constitutional provision extend to the Parliament or a Committee thereof. Hence, in my view, it is not necessary at this stage for the Court to decide these questions, and it would suffice for me to hold that the

mere fact that the legislative and executive arms of government have not taken cognizance of or complied with the judgment of the Court of Appeal, does not deprive the Chief Law Officer of the State from exercising his constitutional rights under Article 128(2) of the Constitution to seek to rectify, what could turn out to be, a grave error of law. In my view, this preliminary objection too has to be overruled.

3) Amicus Curiae who is not a Party not entitled to Appeal

The third preliminary objection taken up by the 11th and 12th Respondents is that the Petitioner-Appellant in this case, in his capacity as the Attorney General, has no standing or legal authority whatsoever in law to invoke the appellate jurisdiction of this Court in terms of Article 128(2) of the Constitution. Learned Counsel for the said Respondents have stressed that the Attorney-General was not a party to CA Writ application 411/2012 in which the impugned judgment dated 7th January 2013 was pronounced, and had only participated in those proceedings on an invitation from the Court of Appeal to assist Court as *amicus curiae.* They submitted that the Court of Appeal was compelled to seek the assistance of the Attorney-General in this manner as fundamental questions of public or general importance arose in the case, and the said Court considered that the Attorney-General's participation as *amicus curiae* will assist the Court in arriving at its finding, particularly in the context that none of the Respondent-Respondents other than the 11th and 12th Respondents had appeared before that Court in response to its notice.

Leaned Counsel for the 11th Respondents invited the attention of this Court to decisions such as *Chandrasena v. De Silva* 63 NLR 143 and *Abeysundere v Abeysundere* (1998) 1 SLR 185 in which eminent Counsel had been invited by Court to assist as *amicus curiae*, and submitted that it would have been unimaginable for such a Counsel to lodge an appeal where the Court did not adopt the views of the *amicus curiae* in its own decision. Learned Counsel for the 12th Respondent submitted that the Attorney General has misrepresented that he is a "party noticed", and argued that the Attorney General cannot be both a party noticed and *amicus* at the same time. He pointed out that the Court of Appeal in *Land Reform Commission v. Grand Central Ltd* [1981] (2) SLR 147, had censured the Attorney-General when he acted contrary to tradition, prudence and propriety. He citing decisions such as *Moten v. Bricklayers, Masons & Plasterers INT'L Union of America*., 543 F.2d 224, 227 (D.C. Cir. 1976), that it would be most improper for an *amicus curiae* to seek to appeal against a decision made by a court with his assistance.

Focusing on the structure and language of Article 128 of the Constitution, learned Counsel for the 11th and 12th Respondents sought to highlight the concept of "aggrieved party" embodied in Article 128(1) of the Constitution, while the learned Attorney-General adopted an altogether different approach and contended that Article 128(2) cannot be restrictively interpreted. In order to appreciate the contentions of learned Counsel, it is necessary to consider the first two sub-articles of Articles 128, which are for convenience reproduced below:

> "(1) An appeal shall lie to the Supreme Court from any final order, judgement, decree or sentence of the Court of Appeal in any mater or proceedings, whether civil or criminal, which involves a substantial question of law, if the Court of Appeal grants leave to appeal to

the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings.

(2) the Supreme Court *may, in its discretion,* grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgement, decree or sentence made by the Court of Appeal in any matter or proceedings, whether civil or criminal, where the Court of Appeal has refused to grant leave to appeal to the Supreme Court, or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court:

Provided that the Supreme Court *shall grant leave to appeal* in every mater of proceedings in which it is satisfied that the question to be decided is of public or general importance. (*Emphasis added*)

learned Counsel for the 11th and 12th Respondents submitted that Article 128 of the Constitution must be read as a whole, and stressed that Article 128(2) cannot be read in isolation or independently from Article 128(1) which confined the right to seek leave to appeal from a decision of the Court of Appeal to an "*aggrieved party to such matter or proceedings*". They argued that a person who was not a party to a case or proceeding in the Court of Appeal, such as an *amicus curiae,* is not entitled in law to prefer an appeal against a judgement of the Court of Appeal, as the right to appeal is vested only on an "aggrieved party" under the first two sub-articles of Article 128 of the Constitution. For this proposition, they sought to rely on the decision of this Court in *Mendis v. Dublin De Silva* 1990 2 SLR 249, in which they contended that this Court had held that in terms Article 128 of the Constitution, an appeal lies to the Supreme Court at the instance of an aggrieved party, that is a person "against whom a decision has been pronounced which wrongly deprived him of something or wrongly affected his title to something." They further contended that the Attorney General has no mandate, authority or inherent power to seek to deny parties to a case of the benefit of a judgement that has not been challenged by any of them. They submitted that any other interpretation of Article 128 will open the flood gates for the State to intervene in private litigation through the office of Attorney-General, which is now directly vested under the President of Sri Lanka.

In response to these submissions, the learned Attorney-General submitted that there is no impediment for an appeal to be preferred in terms of Article 128(2) of the Constitution by a person who had assisted Court as *amicus curiae.* Citing the decision of this Court in *Bandaranaike v. Jagathsena* (1984) 2 SLR 397, he submitted that the concept of "aggrieved party" was confined in its application to Article 128(1) of the Constitution, and argued that Article 128(2) was much wider in several respects. He further submitted that in his capacity of the Chief Law Officer of the State, he was entitled to seek leave to appeal from a decision of the Court of Appeal where the appeal involves a matter of public or general importance. He emphasised that under the proviso to Article 128(2) of the Constitution, this Court is bound to grant leave to appeal on all matters in "every mater of proceedings in which it is satisfied that the question to be decided is of public or general importance."

Having carefully examined all these submissions, it is necessary to state at the outset that a person, whether he or she be an eminent counsel or not, who was called upon by Court to assist

as *amicus curiae* in any particular case or matter, cannot *qua amicus curiae* seek to appeal or move for special leave to appeal from any order or judgment that may thereafter be pronounced by Court. The principle is well illustrated by the United States Court of Appeals, District of Colombia Circuit decision of *Moten v. Bricklayers, Masons & Plasterers*, 543 F.2d 224 (D.C.Cir.1976), cited by learned Counsel for the for the 11th Respondent in this case, in which an employers' association appeared at hearings on a proposed settlement of the suit, but never sought to become a party. The Court of Appeals held that in these circumstances, the employers' association stands "in a relationship analogous to that of *amicus curiae* .... As *amicus curiae* may not appeal from a final judgment, the appeal ... must be dismissed for want of jurisdiction."(at page 227).

This Court cannot ignore the multifarious functions and the immense responsibility vested in the Attorney-General by the Constitution and other laws, which were subjected to minute examination by Ranasinghe J. in *Land Reform Commission v. Grand Central Ltd* [1981] (2) SLR 147 (CA). The sentiments expressed by the Court of Appeal in that case were echoed by a Five Judge Bench of the Supreme Court headed by Neville Samarakoon CJ., who noted in the course of his judgment in *Land Reform Commission v. Grand Central Limited* [1981] (1) SLR 250 (SC) at page 261 that-

> "The Attorney-General of this country is the leader of the Bar and the highest Legal Officer of the State. As Attorney-General he has a duty to Court, to the State and to the subject to be wholly detached, wholly independent and to act impartially with the sole object of establishing the truth. It is for that reason that all Courts in this Island request the appearance of the Attorney General as *amicus curiae* when the Court requires assistance, which assistance has in the past been readily given. That image will certainly be tarnished if he takes part in private litigation arising out of private disputes."

The learned Attorney-General has asserted that he is before this Court in his capacity as the Chief Legal Officer of the State seeking to discharge a duty vested in him under Article 128(2) of the Constitution seeking to remedy grave errors committed by the Court of Appeal on matters of extreme public and general importance. He has submitted that the mere circumstance that he had been invited by the Court of Appeal to assist Court in regard to these matters, does not, and cannot take away his exclusive duties as the Chief Legal Officer of the State, which he submits he is seeking to exercise in the highest traditions of his office.

The question for this Court in this context is a simple one. Should the ambit of Article 128(2) of the Constitution be construed restrictively in the light of the concept of "aggrieved party" found in Article 128(1), or should Article 128(2) be interpreted as a provision distinct and independent from Article 128(1) to extend the right to invoke the appellate jurisdiction of this Court to a broader category of persons? Submissions were made by learned Counsel as to whether Article 128(2) is separated from Article 128(1) by a full stop or a semi-colon, and as to whether the Sinhalese version of the Constitution should prevail over the Tamil or English versions where there is any inconsistency. This Court is vested with the exclusive power of interpreting the Constitution, and has not hesitated in extreme cases such as *Weragama v Eksath Lanka Wathu Kamkaru Samithiya and Others,* (1994) I SLR 293, to replace a semi-colon with a full stop to

overcome an "obvious error". What is most important is to give effect to the manifest intention of the law makers in the discharge of their legislative functions, and to me, as far as the question arising in this appeal is concerned, there can be no ambiguity or uncertainly in regard to the ambit of Article 128(2), which can be easily be gathered from its very provisions.

Article 128(1) of the Constitution of Sri Lanka seeks to confer the power to the Court of Appeal to grant leave to appeal e*x mero motu* or at the instance of any aggrieved party to any matter or proceedings before it, from any final order, Judgment, decree or sentence of that Court in any matter civil or criminal, which involves a substantial question of law. It is manifest that Article 128(2) differs from 128(1) in many ways. Firstly, the Supreme Court may grant special leave to appeal in terms of 128(2) even where the Court of Appeal has refused to grant leave to appeal or where regardless of whether the Court of Appeal has allowed or refused leave, the Supreme Court is of the opinion the matter is fit for review by the Supreme Court. Secondly, Article 128(2) contemplates the grant of special leave to appeal even against interlocutory orders of the Court of Appeal, which did not fall within the purview of Article 128(1). Thirdly, not only an "aggrieved party", but any person whomsoever who can satisfy Supreme Court that the matter is fit for review by it, may succeed in obtaining special leave to appeal under Article 128(2) of the Constitution. Fourthly, the Supreme Court has a broad discretion to grant special leave to appeal where it considers the matter fit for review by it, except where as provided in the proviso to Article 128(2), it is satisfied that the matter is of public or general importance, in which event the Supreme Court is bound to grant leave to appeal. In my view, the submission of learned Counsel for the 11th and 12th Respondents that Article 128(2) should be read in the light of Article 128(1) which confines the right to appeal to an "aggrieved party" is bereft of merit.

In *Bandaranaike v. Jagathsena* (1984) 2 SLR 397 the Supreme Court had to deal with a similar situation, and held that it has a wide discretion to entertain appeals even from a person who were not a party to the proceedings before the Court of Appeal. Colin-Thome J (with whom Wanasundera J and Cader J concurred) observed at page 406 of the judgment that-

> Under Article 128 (2), the Supreme Court has a wide discretion to grant special leave to appeal to the Supreme Court from a judgment of the Court of Appeal where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court. Under *Article 128 (2) you do not have to be a party in the original case.* (*Emphasis added*).

The third preliminary objection is therefore overruled.

4) Abuse of Process of Court

The next preliminary objection was that the application of the Petitioner-Appellant for special leave to appeal is an abuse of court. Learned Counsel for 11th Respondent made submissions on the basis that the impeachment resolution to remove the Petitioner-Respondent from the post of Chief Justice was debated in Parliament on 10th and 11th January 2013, and the President has made an order on 12th January 2013, removing her from Office. In these circumstances, he has submitted that both the Parliament and the President of Sri Lanka have failed to comply with the

judgement of the Court of Appeal, and hence any appeal from the decision of the Court of Appeal amounts to an abuse of process of Court.

The response of the learned Attorney-General to these submissions is that the sequence of events connected with the removal from office of the Petitioner-Respondent has resulted in a legal antinomy where the actions of the legislature and the executive appear to be at odds with the ruling of the Court of Appeal. He has submitted that the impugned judgment of the Court of Appeal is bad in law, and that Parliament, which is constitutionally vested with the powers that could ultimately lead to an order of removal from office of a superior court judge, as well as the President who is vested with the power to make such an order, were left with no choice but to exercise their powers under the Constitution notwithstanding an apparent inconsistency with the ruling of the Court of Appeal, which was made without jurisdiction.

In my opinion, the mere fact that the legislative and executive arms of government have not taken cognizance of or complied with the judgment of the Court of Appeal, does not deprive the Chief Law Officer of the State from exercising his constitutional rights under Article 128(2) of the Constitution to seek to rectify, what he considers a grave error of law. Accordingly, I have to overrule the fourth preliminary objection raised to the maintainability of this case.

5) Failure to file Affidavit

On the final preliminary objection raised by the 11th and 12th Respondents, learned Counsel have submitted that since the Attorney General has failed to file an affidavit in support of the allegations of facts set out in his purported application, the said application should be dismissed *in limine.* On the other hand, the learned Attorney-General has submitted that Rule 6 of the Supreme Court Rules, 1990 is pertinent to this matter. This Rule provides as follows:-

> Where any such *application contains allegations of fact which cannot be verified by reference to the judgement or order of the Court of Appeal* in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations an *affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal* or the original court or tribunal)..... Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the declarant is able of his own knowledge and observation to testify to: provided that statements of such declarant's belief may also be admitted , if reasonable grounds for such belief be set forth in such affidavit. *(Emphasis added)*

The Attorney General has submitted that the Petition of Appeal does not contain any allegations of fact, and that in consequence of a direction made by this Court on 4th April 2013, the record of the Court of Appeal was called for by this Court and has been received in the Registry. He has further submitted that in those circumstances Rule 6 did not impose any obligation on the Petitioner-Appellant to file any affidavit in support of his petition. He emphasises that his application for special leave to appeal raised several substantive questions of law, and in fact this Court has already granted special leave to appeal on two of them. I am persuaded that for those reasons, the preliminary objection must be overruled.

Conclusions

This Court has already granted special leave to appeal against the Petitioner-Respondent and the Respondent-Respondents on two substantial questions of law involving public and general importance, and was inclined to permit the 11th and 12th Respondent an opportunity of opposing the grant of special leave to appeal in the interest of justice. Court has heard learned Counsel for the aforesaid Respondents and learned Attorney-General on these preliminary objections, and I am of the firm opinion that they should be overruled, and I make order accordingly, overruling the same. I would also grant special leave to appeal against the 11th and 12th Respondent on the same questions which are for convenience set out below:

1) Did the Court of Appeal err in holding that the writ jurisdiction of that Court embodied in Article 140 of the Constitution extends to proceedings of Parliament or a Committee of Parliament?

2) Did the Court of Appeal err in holding that the words "any Court of first instance or tribunal or other institution or any other person" in Article 140 of the Constitution extends to the Parliament or a Committee of Parliament?

Written submissions of all parties shall be filed within two weeks from today. Registrar is directed to list this appeal to be mentioned on 16th July, 2013 for fixing a date for hearing.

JUDGE OF THE SUPREME COURT

P.A. RATNAYAKE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

S. HETTIGE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, PC, J.
I agree.

JUDGE OF THE SUPREME COURT

R. MARASINGHE, 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 Appeal after granting Leave under Section 5(c) of the High Court of the Provincial (Special Provisions) (Amendment) Act No. 54 of 2006 read with Article 127(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal No. 68/2012
SC/HCCA/LA.No. 361/2011
WP/HCCA/AV No. 565/2008
D.C.Avissawella No. 23240/M

Krishnan Nalinda Priyadarshana
No. 55, Galabadawatta,
Pitumpe, Padukka.

Plaintiff

Vs.

1. Kandana Arachchige Nilmini Dhammika Perera
   Ulagalle, Kosgashena,
   Paddukka,

2. Koddula Arachchige Lalith Perera
   Ulagalle, Kosgashena,
   Padukka.

3. Illukkumburaga Ruwan Kapila Nawasinghe
   56B, Galabadawatta,
   Pitumpe, Padukka.

Defendants

And Between

1. Kandana Arachchige Nilmini Dhammika Perera
   Ulagalle, Kosgashena,
   Paddukka.

2. Koddula Arachchige Lalith Perera
   Ulagalle, Kosgashena,
   Padukka.

3. Illukkumburaga Ruwan Kapila Nawasinghe
56B, Galabadawatta,
Pitumpe, Padukka.

Defendant-Appellants

Vs.

Krishnan Nalinda Priyadarshana
No. 55, Galabadawatta,
Pitumpe, Padukka.

Plaintiff-Respondent

And Now Between

2. Koddula Arachchige Lalith Perera
Ulagalle, Kosgashena,
Padukka.

3. Illukkumburaga Ruwan Kapila Nawasinghe
56B, Galabadawatta,
Pitumpe, Padukka.

2nd & 3rd Defendant-Appellant- Appellants

Vs.

Krishnan Nalinda Priyadarshana
No. 55, Galabadawatta,
Pitumpe, Padukka.

Plaintiff-Respondent-Respondent

1. Kandana Arachchige Nilmini Dhammika Perera
Ulagalle, Kosgashena,
Paddukka,

1st Defendant-Appellant-Respondent

* * * * *

SC. Appeal No. 68/2012

BEFORE : **Tilakawardane, J.**
Ekanayake, J. &
Wanasundera, PC., J.

COUNSEL : Shantha Jayawardene with Duleeka Imbuldeniya for the Defendant-Appellant-Appellants.

Thishya Weragoda with Nishan Prematthiratne, Mahela Liyanage and Niluka Dissanayake for the Plaintiff-Respondent-Respondent.

ARGUED ON : 01.03.2013

WRITTEN SUBISSION OF THE APPELLANT FILED ON: 14-03-2013

WRITTEN SUBISSION OF THE RESPONDENT FILED ON: 14-03-2013

DECIDED ON : 14-06-2013

* * * * *

Wanasundera, PC., J.

It was agreed by Counsel at the hearing of SC. Appeal 67/12 that parties in this appeal shall abide by the judgment in SC. Appeal 67/12.

I hold that the Provincial Civil Appellate High Court was quite correct in dismissing the appeal of the Appellants and affirming the judgment of the Learned District Judge. I hold that the 1st Defendant-Appellant-Respondent and the 3rd Defendant-Appellant-Appellant are jointly and severally liable to pay damages to the Plaintiff-Respondent-Respondent. I dismiss this appeal with costs and affirm the judgment of the Learned High Court Judge of the Civil Appellate High Court as well as the judgment of the Learned District Judge subject to the variation that the Plaintiff be paid legal interest on two million rupees (Rs. 2000000/-) from the date of the judgment of the District Court up to date and until the payment is actually done.

The Registrar of this Court is directed to send this judgment forthwith, along with the original case record to the District Court of Avissawella.

JUDGE OF THE SUPREME COURT

Tilakawardane, J.

I agree.

JUDGE OF THE SUPREME COURT

Ekanayake, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 80/2010

SC/HCCA/LA 261/2009
WP/HCCA/Kal 106/02 (F)
D.C. Panadura No. 341/RE

Mrs. M.L.R. Fernando
"Gaya", Nalluruwa,
Panadura.

Plaintiff

Vs.

Mrs. I.M.R. Perera of No. 354/2,
Galle Road,
Panadura.

Defendant

And

Mrs. M.L.R. Fernando
"Gaya", Nalluruwa,
Panadura.

Plaintiff-Appellant

Vs.

Mrs. I.M.R. Perera of No. 354/2,
Galle Road,
Panadura.

Defendant-Respondent

SC. Appeal 80/10

And Between

Mrs. I.M.R. Perera of No. 354/2,
Galle Road,
Panadura.

Defendant-Respondent-Petitioner

Vs.

Mrs. M.L.R. Fernando
"Gaya", Nalluruwa,
Panadura.

Plaintiff-Appellant-Respondent

* * * * * * *

Before : Tilakawardane, J.

Dep, PC. J. &

Wanasundera, PC,J.

Counsel : Rohan Sahabandu, PC. for the Defendant-Respondent-Petitioner.

Ikram Mohamed, PC. with M.S.A. Wadood and Milhan Ikram Mohamed for the Plaintiff-Appellant-Respondent.

Argued On : **17-06-2013**

Decided On : **10-10-2013**

*** * * ***

SC. Appeal 80/10

Wanasundera, PC.J.

Leave to Appeal was granted by this Court, in order to enable an Appeal against the judgment of the Western Province Civil Appellate High Court Holden in Kalutara dated 10.09.2009, on 04.08.2010 on the following questions of law as enumerated in paragraph 21 (a), (b) and (c) of the Petition dated 13.10.2009:

1. Has the repairs made by the Defendant caused deterioration to the premises in question which would come under the purview of **Section 22(1)(d)** of the **Rent Act No. 7 of 1972** as amended?

2. Was the replacement of Sinhala tiles (half round tiles) with Asbestos sheets caused deterioration to the premises?

3. In the circumstances pleaded, is the Plaintiff entitled to reliefs prayed for?

The Plaintiff-Appellant-Respondent [hereinafter referred to as the Respondent] instituted Action by Plaint dated 20.12.1995 in the District Court of Panadura, seeking the ejectment of the tenant, Defendant-Respondent-Petitioner [hereinafter referred to as the Petitioner] from premises formerly bearing Assessment No. 1/196 and presently bearing Assessment No. 354/, Galle Road, Main Street, Panadura on the ground that the condition of the premises had become deteriorated owing to acts committed by the Petitioner in terms of **Section 22(1)(d)** of the **Rent Act No. 07 of 1972**. Judgment was entered in favour of the Petitioner at the District Court and the Respondent appealed against this decision to the Court of Appeal and the said Appeal was transferred to the Western Province Civil Appellate High Court Holden in Kalutara where the decision of the District Court was disaffirmed. Subsequently, Action was instituted in the Supreme Court against the decision of the High Court.

The contentious issues of this case arise from the narrative which unfolded subsequent to the Respondent terminating the tenancy by giving the Petitioner Notice to Quit dated 22.09.1995 the abovementioned premises on or before

31.10.1995. This fulfils the pre-condition that the contract of tenancy must be terminated by a valid notice as laid out in C. A. No. 30/79 (F) (1984).

The standard rent of the said premises does not exceed Rs. 100/- per mensem. The Respondent asserted that during the tenancy, the Petitioner had failed to maintain the premises adequately by removing part of the roof of the premises.

The relevant premises in question constitute one half of the twin houses, the other of which has already been demolished by the owner. The roof house in question was tiled with 'Sinhala ulu" i.e 'half round tiles'. Subsequent to heavy rains in October 1991, as alleged by the Petitioner, the walls were soaked and cracked and the main beam was about to fall off. The Petitioner then complained to the Respondent but she is asserted to have not taken action to restore the roof but recorded at the Grama Sevaka's office on 04.11.1991 that she will not be held responsible for the safety of the tenants should a future accident regarding the premises, materialize. Subsequently, the Petitioner herself took action to repair the roof with asbestos sheets. The Respondent filed Action in the District Court prayed for an ejectment order claiming that this repair caused a 'deterioration' of the premises under **Section 22(1)(d)** of the **Rent Act No. 07 of 1972** which reads as follows:

> *" Notwithstanding anything in any other law, no action or proceedings for the ejectment of the tenant of any residential premises the standard rent (determined under Section 4) of which for a month exceeds one hundred rupees shall be instituted in or entertained by any Court, unless where- the tenant or any person residing or lodging with him or being his subtenant has, in the opinion of the Court been guilty of conduct which is a nuisance to adjoining occupiers or has been convicted of using the premises for an immoral or illegal purpose* ***or the condition of the premises has, in the opinion of the Court, deteriorated owing to acts committed by or to the neglect or default of the tenant*** *or any such person."*

The Respondent adduced evidence of a Chartered Architect who inspected the premises. The District Court dismissed the Respondent's action holding that the Petitioner was compelled to make the repairs and that the question of whether such

repairs amounted to deterioration or an improvement should be assessed from the point of view of an ordinary man and not the point of view of an expert.

The High Court refers to this observation and comments, that '*to determine the issue of the state or nature of the premises which it was and the alterations that have been made to it, are matters for expert opinion and thus an ordinary prudent man cannot possess the expert knowledge to determine such issues'.*

This Court is of the opinion that the High Court was pragmatic when making the above observation and asserts that expert evidence is a fundamental necessity upon which the question of whether repairs amount to deterioration or improvement remains.

In ascertaining this fact, the changes made to the original structure are pivotal in this case. The original status of the premises as well as its present state is dependent upon expert evidence and this Court relies on the Report dated 12.10.1997, marked "P1" in evidence, issued by the Chartered Architect by the name of M. Lalith De Silva who recorded that the original roof was a 'half round country tile roofing on a traditional timber structure'. He noted that at present, 'the heights of the walls had been reduced to reduce the roof slope to match the recently built corrugated asbestos cement sheet roofing' and that 'the height of the ridge has at least been lowered by *two feet* by the breaking of the original walls of the house.'

The issue that first arises is whether the above amount to a structural alteration. The Court takes into account the view of **Neil J** in **A. C. T. Constructions Ltd. V Customs Excise Commrs (1982)** *(1 All ER 84)* [as quoted in **Barakathulla v Hinniappuhamy (1982)** (*2 SLR 463)*] where he stated that an alteration with reference to a building is a *structural alteration*. In this light, the replacement of tiles with asbestos cement sheets and the reduction of the height of the walls by two feet undoubtedly amount to a structural alteration. This clarification prompts the fundamental issue of whether such a structural alteration amounts to an improvement or a deterioration of the premises.

In this regard, this Court quotes **Wille** in "**Landlord and Tenant in South Africa", 4th Edn (p.265)** where it is stated that:

> *"A necessary improvement is one which is necessary, for the protection or preservation of the leased property. The other forms of improvements are divided by authorities into useful improvements, namely, those which improve the property or add to its value and luxurious movements such as statutory."*

On face value, the repair appears to be in the form of an improvement because it involved the reparation of the roof. However, this Court must also consider whether this repair actually fulfils the function of an improvement. For instance, in **Musthapa Thamby Lebbe v Ruwanpathirane (1986)** *(1 SLR 201),* the construction of a water-sealed latrine subsequent to the demolition of a bucket latrine was considered by the Court to be an improvement as it *improved the condition* of the premises. In **Barakathulla v Hinniappuhamy (1982)** *(2 SLR 463),* the replacement of a tiled roof with asbestos was considered a useful repair (therefore an improvement) because it '*has not otherwise damaged the building*'. In the present case, whether it was a useful repair is contested as the alteration has, in fact, damaged the building with at least 2 feet of the wall being destroyed to align the asbestos sheets thereby changing the external appearance of the premises for the worse. Thus, this Court sees sufficient evidence of damage to ascertain the inapplicability of the above dicta.

Having established that these alterations do not amount to an improvement according to settled law, this Court takes into account the following elements of 'deterioration'. **Thamotheram J** in **De Zoysa v Victor De Silva (1970)** (*73 NLR 576*) noted that deterioration must amount to *making worse the premises* and this is confirmed by **Thambiah J** in **Musthapa Thamby Lebbe v Ruwanpathirane (1986**) *(1 SLR 201)* where he noted that the acts complained of must *cause some damage* to the premises let and thereby *worsen its condition* to obtain an ejectment on the ground of deterioration of the premises as contemplated in **Section 22(1)(d)** of the **Rent Act**. In **De Alwis v Wijewardena (1958)** (*59 NLR 36),* **Gunasekera J** held that '*substantial change for the worse'* amounted to deterioration. All these cases seek to affirm the view that a successful action of ejectment on this ground must encompass acts that cause damage to the premises and thereby worsen its condition.

In this regard, it is noteworthy that the Report of the Chartered Architect also observes that a fair quantity of valuable timber has disappeared thus reducing the value of the house and that the lowering of the roof slope by breaking the walls and changing the roof materials have distorted the architecture and character of the premises thereby making it appear 'unfinished.' It should be mentioned that though, traditionally, repairs done to an old house would usually make it 'newer' and thereby constitute an improvement, in this case, according to expert evidence, the repairs carried out have given the premises a 'disorganized' or disarranged appearance due to the structural alteration of the walls. Furthermore, in establishing the worsening of the premises, the Chartered Architect asserted that the present asbestos arrangement constitute a health hazard as well.

The Petitioner also relied on the case of **W. A. S. de Silva v L. Gooneratne** *1 MLR 6* where the act of removal of round tiles from the roof of the premises and replacing them with galvanized sheets was held to not constitute 'wilful damage' as the 'act complained of has not changed the nature or character of the property let in any manner.' This Court makes a distinction between this case and the present one as visible physical changes have been made to the 'nature and character' of the property resulting in the reduced value of the property.

A point of contention pursued by the Petitioner is that the decline of the 'value' of the premises does not come within the parameters of 'deterioration'. The Petitioner relied on **Musthapa Thamby Lebbe v Ruwanpathirane (1986*)*** *(1 SLR 201),* that deterioration is the act of making worse the premises to support this contention. However, this Court notes that the act of making worse the premises has not been restricted to physical alterations only and further notes that 'value' could be included in this definition for, given the present status of the premises, the value being reduced also contributes to making worse the premises in terms of its commercial worth should the Petitioner wish to lease the property to another or sell especially when accounting for the value it accrues as it ages. Further, the Petitioner would have to incur further financial burden in order to restore the premises to its former state as presently, the premises appear 'unfinished' and therefore, this Court finds

that the reduction of the value of the premises amounts to making worse as stated in **Musthapa Thamby Lebbe v Ruwanpathirane (1986)** (*1 SLR 201*).

In the above case, the Court further notes a passage from **Wille's "Landlord and Tenant in South Africa" (4th Edn. P. 288)** where it stated that:

> *"It is the duty of the tenant to take proper care of the leased property, to use, it for the purpose for which it was let and for no other purpose, and, on the termination of the lease, to restore the property to the landlord in the same condition in' which it 'was delivered to him, reasonable wear and tear excepted. It follows that the tenant must not abandon or neglect the property, or misuse, injure: or alter it in any way, and a fortiori he may not destroy it, or appropriate the substance of the property."*

This Court draws attention to the need to avoid alteration and avoid the appropriation of the substance of the property. The repairs have fundamentally altered the appearance of the premises and affected its value negatively, as confirmed by expert evidence, in contravention of the duties of a tenant. Furthermore, this Court relies on the expert evidence provided and notes 80% of the roof tiles which were displaced during the repairs should have been serviceable and these tiles, except for roughly 15, were absent.

This Court seeks to reaffirm the view that acts that improve the condition of the premises amount to useful improvements that enhance the value of the premises and distinguishes the present case as the alterations done have not resulted in an useful improvement but has changed the character of the premises and subsequently diminished its value as well.

This Court also notes the contradictory statements made by the Petitioner, first in stating that the Respondent consented to repairs. The High Court judgment notes that during trial proceedings, the Respondent allegedly obtained the Petitioner's consent to carry out the necessary structural adjustments. Yet this was contrary to what was recorded in the abovementioned statement made to the Grama Sevaka. Furthermore, the Respondent, during cross-examination, admitted that there was no written evidence of consent being given and therefore, this Court cannot place reliance merely upon the word of the Respondent. Secondly, there is an issue of whether the wall has actually collapsed as claimed in the Plaint before the District

Court [paragraph 6(2)]. There is no evidence that the wall had actually collapsed. The statement made by the Petitioner to the Grama Sevaka on 07.11.1991 marked 'V2' records that the heavy rains had soaked the walls and caused cracks and that the central beam of the roof was about to fall off and there is no acceptable evidence to affirm a collapse. During cross-examination, the Petitioner indicated that there was no demolition of the wall but that the reduced height of the wall was due to it breaking. Given that the difference of height is only 2 feet and taking into account expert evidence where it was stated that the wall had to be broken in order to place the asbestos sheets during cross-examination, this does not support the Petitioner's contention that the wall actually collapsed thereby warranting reconstruction.

The necessity for such an improvement is also disputed as the Respondent's father has already made substantial renovations to the premises. Furthermore, small renovations in the form of cementing the cracks that had appeared were undertaken subsequent to the complaint by the Petitioner.

In these circumstances, I answer the questions of law in favour of the Plaintiff-Appellant-Respondent and dismiss the Appeal setting aside the judgment of the District Court of Panadura No. 341/RE and confirming the judgment of the High Court dated 10.09.2009. However, I order no costs.

Judge of the Supreme Court

Tilakawardane, J.

I agree.

Judge of the Supreme Court

Dep, PC. J.

I agree.

Judge of the Supreme Court

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

In the matter of a Special Leave to Appeal under Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Sumith Ediriwickrama
Competent Authority
Pugoda Textiles Lanka Ltd.
997/15, Sri Jayawardenapura Mawatha
Welikada Rajagiriya, and
Three Others.

2. Charitha Ratwatte
Secretary to the Treasury
The Secretariat
Colombo 01.

RESPONDENTS-APPELLANTS

SC Appeal No. 85/2004

SC (Spl.) Leave to Appeal No. 330/2003 **-VS-**

C.A. Application No. 1682/2002

1. W.A.Richard Ratnasiri
Pelpita, Pugoda, and
Two Thousand Sixty Two Others

PETITIONERS – RESPONDENTS

BEFORE: Hon. Marsoof, PC, J,

Hon. Sripavan, and

Hon. Imam J

COUNSEL: Y.J.W.Wijayatilake, PC, Solicitor General, with H.P. Ekanayake, State Counsel for the Respondent-Appellants

Upul Jayasuriya for the Petitioners-Respondents

ARGUED ON: 18.12.2012

DECIDED ON: 22.02.2013

SALEEM MARSOOF J:

On 28th November 2012, when this case was due to be resumed before this bench, learned Counsel for the Petitioners-Respondents (hereinafter referred to as the Respondents) moved to raise the following two preliminary objections, which had not been previously taken up by learned Counsel on any of the previous dates in this case. The said objections were based on-

(1) the alleged non-compliance with Rules 3 and 7 of the Supreme Court Rules, 1990 insofar as the appeal is time-barred; and

(2) the alleged non-compliance with Rule 8(3) of the aforesaid Rules insofar as the Appellant had failed to properly take out notices on the Respondents.

Before dealing with the said preliminary objections, it is useful to set out the material of this case.

This Court has on 9th December 2004 granted special leave to appeal against the judgement of the Court of Appeal dated 28th October 2003. However, although thereafter the case came up for hearing on 4th August 2005, 1st December 2005 and 9th September 2006 hearing was postponed due to various reasons. On 21st June 2006 when the case was again taken up for hearing, a formula for the amicable resolution for the dispute was suggested by learned Counsel for the Respondents-Appellants (hereinafter referred to as the Appellants), and learned Counsel for the Appellants wished to obtain instructions in regard to the said proposals. Thereafter, the case was mentioned on several dates and on 21st August 2006 learned counsel for the Appellants agreed to release a sum of Rs. 10 million for the purpose of partially settling the claim made on behalf of the Respondents, without prejudice to the final outcome of the appeal.

When all endeavours in working out an amicable resolution of the dispute failed, the case was ultimately fixed for hearing before this bench on 11th January 2010, before which learned Counsel made submissions. The hearing was thereafter resumed on 10th March 2010, 2nd September 2011 and on 11th March 2012. On 21st March 2012, learned counsel for the Respondents objected to the learned Solicitor General appearing for the Appellants in this case on the basis that no proxies had been filed, and since in fact no proxies were available in the original docket, the Registrar of this Court was directed to clarify the position and report to Court, and hearing was resumed for 28th November 2012.

When hearing was resumed on 28th November 2012, although due to the load of work on that day there was no time to hear learned Counsel any further on the merits, Court brought to the notice of the learned Counsel for the Respondents that the Registrar of this Court has reported to Court that in fact the proxies had been filed along with the applications, but had been kept in a separate file of documents due to their bulk, and the said proxies were made available to court

for its perusal. Leaned counsel for the Respondents after satisfying himself that the learned Solicitor General was duly authorised to appear in the case, raised the aforesaid preliminary objections, and due to lack of time submissions on the preliminary objections were resumed for 18th December 2012, and learned Counsel agreed to file written submissions with respect to the preliminary objections.

On 18th December 2012, learned Counsel agreed that the said preliminary objections may be taken up for hearing before they are called upon to make further submissions on the merits, and the Court heard oral submissions of Counsel on the said preliminary objections, and reserved its determinations thereof. The two preliminary objections may be dealt with separately.

Non-compliance with Rules 3 and 7 – The Time Bar

In order to put the first preliminary objection relating to time-bar in its proper perspective, it may be mentioned that Rule 2 of the of the Supreme Court Rules, 1990 provides that every application for special leave to appeal to the Supreme Court filed in terms of Article 128(2) of the Constitution against a judgment or order of the Court of Appeal shall be made by a petition in that behalf together with affidavits and documents in support thereof as prescribed in Rule 6.

Rule 3 of the said Supreme Court inter-alia provides that the petition filed for the purpose of seeking special leave to appeal "shall contain a plain and concise statement of all such facts and matters as are necessary to enable the Supreme Court to determine whether special leave to appeal should be granted, *including the questions of law in respect of which special leave to appeal is sought*, and the circumstances rendering the case or matter fit for review by the Supreme Court." (*emphasis added*)

Rule 7 of the Supreme Court Rules, 1990, provides 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.*

In essence, the first preliminary objection taken up on behalf of the Respondents was that the amended petition dated 30th November 2004 filed by the Appellant was filed outside the mandatory time limit of six weeks provided in Rule 7 for the lodging of an application for special leave to appeal, although the original petition dated 9th December 2003 was filed within time. It is common ground that the judgement of the Court of Appeal appealed from was pronounced on 28th October 2003, and that the six week period for filing applications for leave to appeal expired on 9th December 2003, but learned Counsel for the Petitioner, relying on Rules 3 and 7 of the Supreme Court Rules, 1990, submitted that the purported amendment was out of time.

In this case petition was filed seeking special leave to appeal by the Appellant on 9th December 2003. Thereafter, on 10th November 2004 an application was made by the learned Solicitor-General to file an amended petition, and Court granted him permission to do so subject to any

objections that may be taken up on behalf of the Respondents to the amended petition. An amended petition was thereafter filed on 30th November 2004.

The order of the Supreme Court granting special leave to appeal was made on 9th December 2004 and the order of court is reproduced below:

09/04/12

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

Shiranee Tilakawardena J,

Raja Fernando J

Y.A.W. Wijethileke, DSG, for Petitioner

Upul jayasuriya for Respondents

Special Leave to Appeal is granted. Written Submissions according to rules.

List for hearing on 5.5.2005.

From this order it appears that no objection was taken to the amended petition by learned Counsel for the Respondents, but it is not specifically stated in the said order as to on what questions of law special leave was in fact granted.

It is necessary to explain at this stage the context and the importance of this preliminary objection to the Respondents. The main remedy granted by the Court of Appeal to the Respondents was a writ of mandamus against the Appellants to compel them to pay the Respondents the balanced components of their salaries arrears as claimed by them for the period May 1997 to 31st December 1999. In the original petition of appeal dated 9th December 2003, the jurisdiction of the Court of Appeal to grant such relief was not sought to be challenged. The three substantial questions of law set out in paragraph 14, on the basis of which special leave to appeal had been initially sought were as follows:-

(a) Did the Court of Appeal misinterpret the provisions of Section 3(4) of the Rehabilitation of Public Enterprises Act No. 29 of 1996?

(b) Did the Court of Appeal err in law and in fact in not considering that the Petitioners had accepted the Voluntary Retirement Scheme as a full and final settlement of all duties, including wages, due to the Petitioners?

(c) Did the Court of Appeal err in law and in fact in not considering that the Petitioners had accepted the compensation under the Voluntary Retirement Scheme as a full and final settlement of all dues, including wages, due to the Petitioners?

However, it appears from paragraph 15 of the amended petition dated 30th November 2004, that the substantial questions on which leave was sought differed significantly, in that though question (a) was identical from the corresponding question in the original petition and question (b) was in substance re-designated as question (c), question (b) was altogether new and read as follows:-

> *(b) Did the learned Judge of the Court of Appeal err in law by issuing a writ of mandamus to enforce a monetary claim against the State?*

Learned Counsel for the Respondents in the course of his submissions before this Court, strongly objected to question (b) which sought to challenge the jurisdiction of the Court of Appeal to grant a writ of mandamus in the circumstances of the case, mainly on the basis that it had neither been raised in the pleadings nor in the submissions of Counsel in the Court of Appeal, or even in the original application seeking special leave to appeal dated 9th December 2003. He stressed that he was willing to concede that the Appellants were not prevented by Rule 3 from setting out in their petition seeking special leave to appeal, any questions of law without taking them up in the Court of Appeal, but what he was objecting to was the inclusion of such questions for the first time in an amended petition, well outside the time limit for filing the application seeking special leave to appeal. He stressed that his objection was to the raising of fresh questions of law including those pertaining to the jurisdiction of the Court of Appeal outside the mandatory time limit prescribed for lodging applications for leave to appeal which has to be strictly complied with to avoid the opening of flood gates at the will and fancy of reckless litigants and their respective legal advisors.

In particular, learned Counsel for the Respondent invited the attention of Court to Section 39 of the Judicature Act which provides that any objection to jurisdiction must be taken at the first available opportunity in the relevant court, which in this instance was the Court of Appeal, and they cannot be raised for the first time on appeal, an objection to jurisdiction which had not been taken up in the pleadings filed in the Court of Appeal or even the initial petition filed in this Court.

Responding to these submissions, learned Solicitor General has submitted that the original application seeking special leave to appeal was filed in the Registry of this Court on 9th December 2003, within the time-limit prescribed in Rule 3 for such applications, and that the amendment to the petition was filed on 30th November 2004 after obtaining the permission of this Court on 10th November 2004. He submitted that insofar as the amended petition had been filed with the prior permission of this Court, the Appellants have not violated Rules 3 and 7 of the SC Rules 1990. He has further submitted that no prejudice has been caused to the Respondents by the said amendment to the petition of appeal.

Section 39 of the Judicature Act provides as follows:-

> *Whenever any defendant or accused party shall have pleaded in any action, proceeding or matter brought in any Court of First Instance neither party shall afterwards be entitled*

to object to the jurisdiction of such court, but such court shall be taken and held to have jurisdiction over such action, proceeding or matter.

The above provision is similar but not identical with the provisions of its predecessors, Section 43 in the Administration of Justice Law No. 44 of 1973 and Section 71 of the Courts Ordinance No. 1 of 1889, and they have from time to time been interpreted and applied by our courts.

This Court has granted special leave to appeal against the judgement of the Court of Appeal dated 28th October 2003 presumably on the substantial questions of law set out in paragraph 15 of the amended petition subsequently filed by the Appellant, despite it being filed outside the time period of 6 weeks permitted by Rules for filing of applications for special leave to appeal. Since no objections had been taken to the said amended petition on 28th October 2003, or on any of the other dates this case had been heard, and in fact this preliminary objection has been raised by learned Counsel for the Respondent only on 28th November 2012 when hearing was due to be resumed after several previous dates of hearing when learned Counsel had made submissions on the merits, it is my opinion that it is too late to raise an objection of this nature as a preliminary objection. Hence, the said preliminary objection is overruled.

Non-compliance with Rule 8(3) – Failure to take out Notices on all the Respondents

The second preliminary objection taken up by the learned Counsel for the Respondents is that this appeal warrants to be dismissed in *limine* as the Appellants have not complied with Rule 8(3) of the Supreme Court Rules 1990, since the Appellants have failed to tender the notices to be served on all Respondents. It is the position of the learned Counsel for the Respondents that notice had been served only on one or two of the thousands of respondents. He has submitted that it has been time again held by this Court that the tendering of the required number of notices to the Registrar of Court is a mandatory Rule of Court and non compliance of the same warrants the dismissal of such appeal or application in *limine.*

Rule 8(3) of the aforesaid SC Rules is quoted below:

The petitioner shall tender with his application such number of notices as is required for service on the respondents and himself together with such number of copies of the documents referred to in sub-rule (1) of this rule as is required for service on the respondents. The petitioner shall enter in such notices the names and addresses of the parties, and the name, address for service and telephone number of his instructing Attorney-at-law, if any, and the name, address and telephone number, if any, of the attorney-at-law, if any, who has been retained to appear for him at the hearing of the application, and shall tender the required number of stamped addressed envelopes for the service of notice on the respondents by registered post. The petitioner shall forthwith notify the Registrar of any change in such particulars.

It is further submitted by the learned Counsel for the Respondents that this Court has in *A.H.M. Fowzie v Vehicles Lanka (Pvt) Ltd* (2008) BLR 127 and in the very recent case of *Tissa*

Attanayake v The Commissioner General of Election and Others [S.C. (Spl.) L.A. No. 55/2011 C.A. Writ Application No. 155/2011 – decided on 21.07.2011], dismissed the relevant special leave to appeal applications, after dealing carefully with the said Rule, its application, authorities. This Court has, in interpreting the law on the Rule, held that the procedure laid down in the Supreme Court Rules of 1990 cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court. When there are mandatory Rules that should be followed and when there are preliminary objections raised on non-compliance of such Rules, those objections cannot be taken as mere technical objections, (copy of judgement annexed X1). He submits that in this case too the application of the Appellants should be dismissed in *limine.*

Responding to these submissions, the learned Solicitor General has submitted that the Appellants filed the instant application for special leave to appeal in time, and that after receiving notice, all the Respondents have tendered their Caveats together with their proxies on 10th February 2004. The said Respondents were represented by Counsel throughout the hearing for special leave to appeal, and even after the granting of special leave to appeal. He has further submitted that at no time during the pendency of the said special leave to appeal application, the Counsel for the Respondents raised any preliminary objection that notices have not been tendered according to the provisions laid down in Rule 8(3) of the said Rules, and the Counsel for the Respondents is raising the said objection nearly ten years after the said special leave to appeal application was filed in court and special leave to appeal was granted by this Court. He submits that hence no prejudice has been caused to the Respondents at all as the Respondents were represented in Court by Counsel and in fact the Respondents and the Appellants made several attempts at setting this case. He said that with the object of reaching a settlement, the Appellants, without prejudice to their case, had released a sum of money to the Respondents that was available, as an *ex gratia* payment, strictly on compassionate grounds. He submits that by reason of their acquiescence, the Respondents are precluded in law from raising the said preliminary objections at this stage as it is not only belated but the Respondents are estopped by law from doing so.

I am inclined to accept the said submissions of learned Solicitor General in view of the belated nature of the raising of this preliminary objection. This Court is inclined to highlight and apply in the special circumstances of this case the objective of achieving smooth functioning of this Court, and it will not be correct at this stage to do otherwise despite the decisions referred to by learned Counsel for the Respondents which were made when the objections were taken at the appropriate stage. Accordingly, this preliminary objection, too, is overruled.

Conclusions

Accordingly, the preliminary objections taken up by learned Counsel for the Respondents is overruled. I do not make any order for costs in all the circumstances of this case.

In view of the fact that the hearing of this case has been delayed due to taking up frivolous objections by learned Counsel for the Respondents, who even went to the extent of challenging the status of learned Solicitor General to appear in this case, it has become necessary to have it

fixed for hearing as expeditiously as possible before a Bench to be nominated by Hon. Chief Justice in such a manner that the two other members of this Bench who will remain after the retirement of Hon. Imam J, will be members of the Bench before which this case will be taken up for hearing on a date that is convenient to Court.

JUDGE OF THE SUPREME COURT

SRIPAVAN J
I agree

JUDGE OF THE SUPREME COURT

IMAM J
I agree

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 98/2011

SC/HCCA/LA 374/2010
SP/HCCA/KAG 28/2010/RV
D.C. Kegalle Case No. 7732/L

Karunarathna Liyanage,
No. 102/1A,
Poorwarama Road,
Kirulapone,
Colombo 05.

Plaintiff

Vs.

Mahara Mudiyanselage Loku Bandara,
No. 16A, Subithipura,
Battaramulla.

Defendant

And Between

Mahara Mudiyanselage Loku Bandara,
No. 16A, Subithipura,
Battaramulla.

Defendant-Petitioner

Vs.

Karunarathna Liyanage,
No. 102/1A,
Poorwarama Road,
Kirulapone,
Colombo 05.

Plaintiff-Respondent

And Between

Mahara Mudiyanselage Loku Bandara,
No. 16A, Subithipura,
Battaramulla.

Defendant-Petitioner-Petitioner

Vs.

Karunarathna Liyanage,
No. 102/1A,
Poorwarama Road,
Kirulapone,
Colombo 05.

Plaintiff-Respondent-Respondent

And Now Between

Karunarathna Liyanage,
No. 102/1A,
Poorwarama Road,
Kirulapone,
Colombo 05.

Plaintiff- Respondent-Respondent Petitioner

Vs.

Mahara Mudiyanselage Loku Bandara,
No. 16A, Subithipura,
Battaramulla.

Defendant-Petitioner-Petitioner-Respondent

* * * * *

SC. Appeal 98/2011

Before : **Tilakawardane, J.**
Dep, PC. J. &
Wanasundera, PC,J.

Counsel : Wijeyadasa Rajapaksha, PC. with Vidura Ranawaka and Nilantha Kumarage for the Plaintiff-Respondent- Respondent-Petitioner.

Sudarshani Cooray for the Defendant-Petitioner-Petitioner-Respondent.

Argued On : **22-03-2013**

Decided On : **12 .11.2013**

*** * * ***

Wanasundera, PC.J.

In this matter on 01.7.2011, leave to appeal was granted on the questions of law set out in paragraphs 'a', 'b', 'c', 'd' and 'f' of the petition dated 22.11.2010. This Court added one more question of law as follows:-

> "In any event, whether the Civil Appellate High Court of Kegalle was justified in making an order for the restoration of the relevant property to the Defendant, without holding an inquiry into the complaint made by the Defendant with regard to 'forcible dispossession contrary to law".

The Counsel of both parties, the Plaintiff-Respondent-Respondent-Petitioner (hereinafter referred to as the Plaintiff-Petitioner) and the Defendant-Petitioner-Petitioner-Respondent (hereinafter referred to as the Defendant-Respondent), at the

hearing on 22.3.2013 agreed that this Court should go into only the question of law which the Court suggested as aforementioned.

The Plaintiff-Petitioner had filed action in the District Court claiming that he is the owner of the lands described in the schedules to the plaint and praying for a declaration to that effect. He pleaded that the Defendant-Respondent was holding the lands subject to a constructive trust even though by deed No. 2364 dated 24.12.2008 the Plaintiff-Petitioner had transferred the land to the Defendant-Respondent. He further prayed that an interim injunction be granted restraining the Defendant-Respondent from alienating the land and from forcibly entering upon the same. The District Judge granted an enjoining order in the first instance and ordered that the Defendant-Respondent be noticed and summons be served with the enjoining order.

The Defendant-Respondent states that he in fact bought the land for good consideration and he came into occupation right after he bought the land and completed building the house which was half built at the time he bought it, developed the land etc. and was in possession of the land and building until the day he received summons, notice of injunction and the enjoining order, ie. 02.09.2009 when the Plaintiff came to the land with some others and forcibly evicted him. He filed objections and stated that he has already sold the land to another person namely Milton de Silva but since that person had gone abroad, he was still in possession holding the land on behalf of Milton de Silva. After the forced dispossession, on the next day in open Court he obtained permission of Court to take out his belongings which were in the house when he was forcibly evicted. In the presence of Grama Niladhari of the village he took his belongings, out of the house thereafter. Even though the enjoining order was granted to restrain the Defendant-Respondent from entering upon the said land, in fact by that time he had been there for over eight months. As such, the enjoining order was used by the Plaintiff-Petitioner to forcibly evict the Defendant-Respondent from the land.

After the dispossession of the Defendant-Respondent, the Plaintiff-Petitioner moved to withdraw the action on 06.10.2009. The District Judge then allowed the application of the Plaintiff- Petitioner and dismissed the action with costs. On the very next day ie. on

03.9.2009, the Defendant-Respondent by way of a motion moved the District Court to have him placed back in possession. On 23.02.2010 the District Court refused the application. The Defendant-Respondent filed a revision application as well as a leave to appeal application in the Civil Appellate High Court. The High Court took up both matters together and decided the matter in favour of the Defendant-Respondent making order that he be restored back into possession of the property from which he was evicted.

The Plaintiff-Petitioner has now appealed to this Court from that judgment and the only question of law to be decided now is the question raised by this Court.

The Defendant-Respondent had filed affidavits and documents with his objections to the grant of an interim injunction against him in the District Court. There is ample evidence to show that the Defendant-Respondent was in possession of the land and the house thereon from December, 2008 to 02.09.2009, such as the affidavits from the Grama Sevaka, the incumbent priest of the temple, the watcher of the Belgoda estate, friends who visited and the photographs with him in the house and on the estate, the workers who worked on the pineapple plantation etc. supported by the statements to the Police by the Defendant-Respondent and his watcher regarding threats to life and demands to leave the estate made to him, by the Plaintiff-Petitioner. On the other hand there is no evidence to show that the Plaintiff- Petitioner was in occupation of the house or in possession of the land by September, 2009 or any complaint to the police by the Plaintiff-Petitioner to show that the Defendant-Respondent was trying to come into possession or that the Defendant-Respondent was trying to get into the land forcibly. There should have been at least a police complaint to that effect before coming to Court. The Plaintiff-Petitioner filed a case in the District Court and received an enjoining order ex-parte having deliberately misrepresented facts to Court, the most important being that the Defendant-Respondent was trying to forcibly get into possession whereas the fact was that the Defendant-Respondent was in occupation of the house and in possession of the lands from the day he bought them on an outright transfer. Both the Defendant-Respondent and the Plaintiff-Petitioner are not uneducated or under

privileged persons and their businesses ran into millions of rupees. With the enjoining order obtained by misrepresentation only, the Defendant-Respondent was dispossessed by force. The process was contrary to law as the Court order was "to refrain the Defendant-Respondent from entering into possession" and not "to forcibly evict him who was in possession." Another fact to be noted is that no Court officers were present or used for this eviction. Only the Plaintiff-Petitioner and some other persons including police personnel had been used to evict the Defendant-Respondent who was in occupation. The Defendant-Respondent got permission from Court on the next day to remove his belongings from the house in front of the Grama-Sevaka and that was allowed which further supports the fact that the Defendant-Respondent had already been there for some time.

When any action filed in Court which gives an interim relief ex parte to any party, is withdrawn before the conclusion of the action, it is nothing but correct to set the status quo before the interim relief was granted, back into place. Otherwise such interim relief as an enjoining order could be used by many litigants to their advantage. It is in fact the duty of Court to put the parties to the same position as they were, before allowing withdrawal of the action. The District Judge should have been mindful of that fact and done his duty which he has failed to do.

Yet, in such a case, the party affected has only to bring it to the notice of the Judge and he would promptly act. In this case the junior lawyer who appeared on behalf of the Defendant-Respondent failed to do it as and when the action was withdrawn and thus created the repercussions thereafter. The very next day, the Defendant-Respondent brought it to the notice of Court by way of a motion. The Plaintiff-Petitioner also objected by way of a motion and the District Judge gave order after about a month that since there is no pending action, she cannot make any orders, hardly remembering that it was the duty of Court to set the status quo back to base right away before the interim relief was granted.

In the case of Sivapathalingam Vs. Sivasubramaniam 1990 1 SLR 378, the Court of Appeal issued an injunction on 26.05.1988 on the application of the Petitioner-

Appellant Sivapathalingam, which was valid until the Petitioner is able to file an action in the District Court of Jaffna or for six months in the first instance whichever is earlier, restraining the Respondents from preventing the Petitioner from entering the land described in the schedule. On 29.06.1989 the Court of Appeal stayed the operation of the injunction granted by it upon an ex-parte application by the Respondent. The Respondent claimed that he was in lawful possession of the land on an indenture of lease but the Petitioner had him ejected upon obtaining the injunction and on entering into possession demolished the parapet wall and gate on the east which had been in existence prior to August 1988. Upon the suspension of the injunction the Petitioner-Appellant filed papers complaining against the suspension without notice to him. On 25th July 1989 the Court of Appeal heard the argument and on 5th September 1989 dissolved and discharged the injunction. It was the injunction that brought about the dispossession of the Respondent and placing in possession of the Appellant.

It was held that "a Superior Court has jurisdiction in the exercise of its inherent power to direct a Court inferior to remedy an inquiry done by its act". Therefore when the injunction issued by the Court of Appeal on 26.05.1989 was dissolved, it was competent for the Court to direct that the Appellant who had obtained possession of the property on the strength of the injunction by displacing the Respondent, be in turn displaced and possession handed back to the Respondent. A Court whose act has caused injury to a suitor has an inherent power to make restitution. This power is exercisable by a Court of original jurisdiction as well as by a Superior Court.

The dispossession of the Defendant-Respondent by the Plaintiff-Petitioner, with only an enjoining order in hand to the effect that the Defendant- Respondent should be restrained from forcibly entering the land, is contrary to law. It is abuse of process of Court. An enjoining order to restrain someone from entering the land is not an instrument to evict someone who is already in possession of the house and land. The Plaintiff-Petitioner misused the document and by himself evicted the Defendant-Respondent with force unduly using police personnel and others and not the officers of Court. The dispossession was done through abuse of process of Court and when it was

brought to the notice of the District court by way of a motion the very next day after the dispossession, the Court wrongfully ordered that there is no pending case to be looked into as it was already withdrawn and turned a blind eye to the complaint of injustice and abuse of Court process by the Plaintiff-Petitioner. I am of the view that the Learned High Court Judges were quite correct in their order to put back the Defendant-Respondent into possession as that was the only way to get back to the status quo before the withdrawal of the action by the Plaintiff-Petitioner. It's the legal right of the affected party who was forcibly evicted abusing the process of Court, to be placed back in possession and that is where it is now.

Since there was enough evidence on record by way of affidavits, police complaints, statements of people, etc. before the Civil Appellate High Court, I am of the view that there was no necessity to hold an inquiry into the complaint made by the Defendant with regard to 'forcible dispossession contrary to law' at the stage when the case was before the High Court. The District Judge should have placed the Defendant- Respondent back in possession at the time when he agitated the 'loss of possession' in the District Court, after an inquiry into dispossession which was complained of at that time.

Therefore I confirm the judgment of the Civil Appellate High Court. Defendant-Respondent is granted costs in this Court as well as in the Civil Appellate High Court and the District Court of Kegalle. The appeal is dismissed.

Judge of the Supreme Court

Tilakawardane, J.

I agree.

Judge of the Supreme Court

Dep, PC. J.

I agree.

Judge of the Supreme Court

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

SC. APPEAL. 113/2011
SC. HC. CA. LA. 414/2010
WP/HCCA/MT/18/2002(F)
Mount Lavinia No. 612/96/L

In the matter of an Application made for Leave to Appeal under and in terms of Section 5C of the High Court of the DC. Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

D. K. Abeysinghe
272, Kahatuduwa,
Polgasowita.
PLAINTIFF-APPELLANT-PETITIONER

Vs.

1. M. M. Heen Manike
2. K. P. Tilakasiri Perera
Both of 186, Sri Vijiragnana Mawatha, Maharagama
DEFENDANTS-RESPONDENTS-RESPONDENTS

BEFORE : **TILAKAWARDANE, J.**
DEP, PC J.
WANASUNDERA, PC J.

Ikram Mohamed, PC with Mrs. A. T. Shyama Fernando and Mayura Gunawansa and Milhan Ikram Mohamed for the Plaintiff-Appellant-Petitioner.

Ranjan Suwandaratne with Anil Rajakaruna for the Defendants-Respondents-Respondents.

ARGUED ON: 17/06/2013

DECIDED ON: 18/11/2013

TILAKAWARDANE J:

Leave to Appeal was granted to the Plaintiff-Appellant-**Petitioner** (hereinafter referred to as the **Appellant**) on the 28.08.2011 against the judgment of the Provincial High Court of Civil Appeal of Mount Lavinia (hereinafter referred to as the High Court) bearing Case No. WP/HCCA/MT/18/02(F).

The Appellant instituted action in the District Court of Mount Lavinia bearing Case No. 612/96/L on the 30.04.1996 against the 1st and 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 1st Respondent and 2nd Respondent) seeking *inter alia* a declaration of title to the land described in Schedule 2 to the Plaint, marked Lot 1B of Plan No. 2023 dated 01.06.1995 made by Cyril Wickremage L.S., ejectment of the 1st and 2nd Respondents there from and recovery of damages from 19.01.1996 (the date on which the Respondents were given notice to quit) at Rs.20,000/- per month for wrongful occupation.

K.P. Peter Perera was the tenant of Guneris Abeysinghe from on or about 1964 until his death on the 14.05.1990. The Appellant, on the death of Guneris Abeysinghe (his father) on 07.08.1983, became the Landlord of Lot 1B of plan No. 2023 dated 01.06.1995 made by Cyril Wickremage L.S. and within it having premises bearing Assessment number 186/1, 186A and 186. K.P. Peter Perera was in occupation of premises bearing Assessment No. 186.

On 11.10.1987 the Appellant sent a letter marked P11 to K.P. Peter Perera

requesting that payment be made to the Appellant. There was no reply and no rent was paid or deposited in the Appellant's name till K.P. Peter Perera's death on the 14.05.1990. Upon the death of K.P. Peter Perera, the 1st Respondent, the deceased's partner, and the 2nd Respondent, the deceased's son, became the tenants of the Appellant.

The Learned District Court Judge entered judgment in favour of the Respondents on the basis that upon the death of Guneris Abeysinghe, K.P. Peter Perera became the lawful tenant of the Appellant and upon the death of K.P. Peter Perera, the 1st and 2nd Respondents, by operation of law, became the lawful tenants of the Appellant. The Appellant being aggrieved by the said judgment appealed to the Provincial High Court of Civil Appeal of Mount Lavinia, who dismissed the Appeal on the 03.11.2010.

Leave to Appeal was granted by the Supreme Court of the Democratic Socialist Republic of Sri Lanka on the 28.08.2011 on the following issues of law;

1. As the Appellant was found to have lawful title of the premises in question, whether the dismissal of the Appellant's action was erroneous in law?

2. Whether, in view of the 1st Respondent's admission that she was never married to K.P. Peter Perera, the finding in favour of the 1st Respondent was erroneous and contrary to ***Section 36(2)*** of the *Rent Act No. 7 of 1972*?

3. Have the Learned Judges erred in law in finding that both Respondents were lawful tenants of the Appellant?

This Court is of the opinion that the key point to answering the issues on which Leave to Appeal was granted is whether or not the 1st and 2nd Respondents were dependants for all purposes for which this Act applies as stated in **Section 36 (2) (a)** of the *Rent Act No. 7 of 1972* which reads as follows:

(2) Any person who-

(a) in the case of residential premises the annual value of which does not exceed the relevant amount and which has been let prior to the date of commencement of this Act-

(i) is the surviving spouse or child, parent, brother or sister of the deceased tenant of the premises or was a dependant of the deceased tenant immediately prior to his death; and

(ii) was a member of the household of the deceased tenant (whether in those premises or in any other premises) during the whole of the period of three months preceding his death;

The 1st Respondent states that she and K.P. Peter Perera were cohabiting as if they were husband and wife and therefore subsequent to the death of K.P. Peter Perera, the tenancy held by him passed on to her as she had been living with him since 1980 and therefore she satisfied the requirements of **Section 36 (2) (a)**.

However, it has been brought to this Court's attention that at Cross Examination, the 1st Respondent admitted that K.P. Peter Perera was married to another while he was living with her and that K.P. Peter Perera's wife was alive at the time of his demise. Therefore 1st Respondent is not a "spouse" for all intents and purposes of **Section 36(2) (a).**

The 2nd Respondent's claim is through the 1st Respondent. Therefore the question to be determined is whether the 1st Respondent is a dependant within the meaning of the Rent Act No.7 of 1972. The statute by **Section 36(2) (a)** imposes a restriction on the rights of the Landlord, as it enables the *surviving spouse or child, parent, brother or sister of the deceased tenant of the premises or was a dependant of the deceased tenant* to claim a tenancy right against the Landlord.

The degree to which a person is deemed to be a "dependant" under Section 36(2)(a) was discussed in the case of **Kodithuwakku Arachchi v Wadugodapitiya (1994)** *(3*

SLR 29), where it was held that the doctrine of *ejusdem generis* should be used when interpreting the meaning of "dependant". The case quoted the application of the doctrine from **Smelting Co. of Australia v The Commissioner of Inland Revenue [1897]** (*1 QB 175*), where *ejusdem generis* was described as meaning; 'a restriction on general words that immediately follow or which are closely associated with specific words and that their meaning must be limited by reference to the preceding words'.

Section 36 (2) (a) has now been repealed and replaced by **Section 36 (2) (a)** of the *Rent Act No.26 of 2002*. The new Section no longer mentions "dependant" and restricts claims under this Section to a *surviving spouse or child or parent or unmarried brother or sister of the deceased tenant or brother or sister of the deceased tenant if he was unmarried at the time of death.* It is the opinion of this Court that based on the new Section brought in by the 2002 Amendment of the Rent Act, the Legislature never intended to unduly restrict the rights of the Landlord by enabling a wide range of individuals to claim as dependants. Therefore, the definition of "dependant" should be interpreted by having regard to the words prior to it, i.e. "spouse" "child" "parent" "brother or sister", and therefore in order to be a dependant, it is the finding of this Court that a familial connection to the deceased is essential.

The Workman's Compensation Ordinance 19 of 1964 provides a definition for "dependant" at ***Section 2(1)*** of the Ordinance which reads as follows;

"dependant" means any of the following relatives of a deceased workman, namely:-

(a) a wife, a minor legitimate son, an unmarried legitimate daughter, or a widowed mother; and

(b) if wholly or in part dependant on the earnings of the workman at the time of his death, a husband, a parent other than a widowed mother, a minor illegitimate son, an unmarried illegitimate daughter, a daughter legitimate or illegitimate if married and a minor or if widowed, a minor brother, an unmarried or widowed sister, a widowed

daughter-in-law, a minor child of a deceased son or deceased daughter or, where no parent of the workman is alive, a paternal grandparent

This definition restricts the meaning of "dependant" and ensures that anyone claiming as a dependant has a clear familial connection to the person under whom they are claiming dependency. Though this definition is specific to compensation in the work place, the general wording of the section can be used to define the meaning of a "dependant" under the law.

Further, the definition provides a clear guide as to when an illegitimate child would be able to claim as a dependant.

Though the Respondents are not claiming at this point that the 2nd Respondent is a dependant of the deceased tenant, this Court would like to clarify that an illegitimate child does not have the same rights of dependency as a legitimate child under Sri Lankan law. Though some rights of dependency can be claimed, the restrictions are far greater on an illegitimate child, especially where the child is no longer a minor. This is also reflected in the above quoted definition from the *Workman's Compensation Ordinance*. It is this Court's intention to provide a clear and concise definition of "dependant" and thereby reduce the uncertainty that exists from the lack of such a definition. The Court will use the definition provided in the *Workman's Compensation Ordinance* as a guideline and attempt to coin a suitable definition that can be applied in relation to land law.

The case of **Kodithuwakku Arachchi v Wadugodapitiya (1994)** (*3 SLR 29*) identified the factors that Sri Lankan case law has considered when deciding whether an individual is a dependant under the Rent Act. The case set out three propositions that have been established by case law;

1. Dependency is not based on the legal obligation to maintain;
2. A dependant is a person who derives support wholly or mainly for his or her subsistence upon another;

3. It is a question of fact upon the facts and circumstances of each case whether a person is a dependant of another.

These three propositions are helpful in providing guidance as to when a person would be deemed to be a dependant under the Rent Act. Nevertheless a more concise definition of "dependant" is necessary.

The word "dependant" is defined in the Oxford English Dictionary to mean *a person who relies on another, especially a family member, for financial support*. This is an indication that a certain level of support, particularly financial in nature, from the other is a necessary requirement in order to show dependency. Further, it indicates that the person relying on another does not have to be a family member.

However, whether a non-family member should be allowed to claim dependency under the law would depend on the type of support provided by the deceased prior to his death. This Court finds that this restriction on non-family members claiming dependency is essential to avoid fraudulent claims. Further, it should be noted that it is only in exceptional circumstances that an individual with no immediate familial connection would be seen as a dependent of the other individual.

Under Canadian law the definition of "dependant" is provided in the *Succession Law Reform Act*, R.S.O. 1990 c.S.26 at **Section 57**. The definition is as follows;

"dependant" means,

> *(a) the spouse of the deceased,*
>
> *(b) a parent of the deceased,*
>
> *(c) a child of the deceased, or*
>
> *(d) a brother or sister of the deceased,*
>
> *to whom the deceased was providing support or was under a legal obligation to provide support immediately before his or her death;*

The Canadian definition of “child” as stated at ***Section 1(1)*** of the above named Act states that a child *includes a child conceived before and borne alive after the parent's death*.

The definition of “dependant” here is similar to that in the *Workman's Compensation Ordinance,* save that the Ordinance goes on to specify and differentiate legitimate and illegitimate children as well as define dependants in relation to the “earnings” of the deceased employee.

Therefore, it is essential to recognize what key features are important to identifying a dependant generally and the additional requirements to define a dependant under the Rent Act. The underlying definition of a dependant should not change; however, whether a person is a dependant would vary depending on the circumstances under which the question of dependency is assessed.

Based on this Court's reading of the *Canadian Act*, the definition of dependant provided in the *Workman's Compensation Ordinance* of Sri Lanka as well as Sri Lankan case law, it has become clear that the essential elements for determining if an individual is a “dependant” are whether he or she is;

the spouse of the deceased;

a minor legitimate child of the deceased;

a minor illegitimate child of the deceased where the child has been receiving the support of the deceased and/or the child is accepted by law (either through a birth certificate or other reliable source) to be child of the deceased;

a parent of the deceased;

a brother or sister who was supported the deceased;

a legitimate unemployed male or female child over the age of 18 or an unmarried legitimate female child over the age of 18 who is reliant on the deceased for financial support.

It is essential that in all of the above instances he or she is reliant on the other for

support. The type of support required would depend on the circumstances under which the claim of dependency was being made. However, the degree of support granted is required to be wholly or substantially from the deceased. Further, as stated previously, there may be exceptional circumstances where a person having none of the above familial connections maybe able to claim as a dependant. In addition the burden of proof is on the person claiming to be a dependant, to establish through evidence, the facts and circumstances that would be relevant and sufficient to prove that the person is "dependent".

In relation to the Rent Act, it would depend on whether the person claiming a right of dependency was one of the above mentioned individuals and was living with the deceased tenant at the time of his or her death and was dependent for support at the time. Further, as the exercise of this right would stem from the Landlord's right in the property it is essential to ensure that those claiming under ***Section 36(2)*** were *prima facie* dependant on the deceased.

Therefore, if the 2nd Respondent was claiming as a dependant under ***Section 36 (2) (a)***, he would not be successful as, at the date of giving evidence (19.04.2000) the 2nd Respondent was 32 years of age and therefore when K.P. Peter Perera died on the 14.04.1990 he would have been at least 22 years of age and hence he would not have been a minor. In addition, since he is an illegitimate child of the deceased tenant, he would not be seen as a dependant of the deceased tenant on the evidence presented to the Court.

The 2nd Respondent's claim is through his mother, the 1st Respondent, whom the Respondents submit is a dependant under ***Section 36(2) (a)*** of the 1972 Act. However, it is this Court's opinion that the 1st Respondent is not a dependant for all intents and purposes of this Act, despite the Respondents vehemently stating that she was a dependant of the deceased tenant, as she fell within the definition of a "dependant" stated above. Further, though the 1st Respondent states that she and the deceased, K.P. Peter Perera had been living as husband and wife, it has been

depicted in evidence that the deceased was married and his wife was still alive at the time of his death, therefore the 1st Respondent cannot be said to have the same rights as a spouse. Further, there are no exceptional circumstances proved by the Respondents to enable the 1st Respondent to claim as a dependant.

As the 1st Respondent is not a "dependant", the 2nd Respondent's claim, which is based on the 1st Respondent's right as a dependant, fails.

Therefore, it is the finding of this Court that the Learned Judge of the District Court and the Learned Judge of the Civil Appeal High Court erred in their findings that the 1st Respondent is the lawful tenant of the said property.

The Judgment of the High Court dated 03.11.2010 is set aside and Judgment is entered in favour of the Plaintiff -Appellant-Petitioner as prayed for with costs in a sum of Rs 30,000/-.

JUDGE OF THE SUPREME COURT

DEP, PC J.

I agree

JUDGE OF THE SUPREME COURT

WANASUNDERA, PC 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 appeal filed under Section 14(2) of the Maintenance Act No. 37 of 1999.

SC. Appeal No. 117/2010

HC. Colombo Appeal No. 264/08
HC.Colombo Revision Application No. 168/08
M.C. Mt. Lavinia No. 273/Maintenance

Hewa Kankanamage Pushpa Rajani
No. 13, 1st Chapel Lane
Wellawatta.

Applicant

Vs.

Ruhunuge Sirisena
13A, 1st Chapel Lane,
Wellawatta.

Respondent

And Between

Ruhunuge Sirisena
13A, 1st Chapel Lane,
Wellawatta.

Respondent-Appellant

Hewa Kankanamage Pushpa Rajani
No. 13, 1st Chapel Lane
Wellawatta.

Applicant-Respondent

And Now Between

Ruhunuge Sirisena

13A, 1st Chapel Lane,
Wellawatta.

Respondent-Appellant-Appellant

Hewa Kankanamage Pushpa Rajani
No. 13, 1st Chapel Lane
Wellawatta.

Applicant--Respondent-Respondent

* * * * *

BEFORE : **Amaratunga, J.**
Marsoof, PC., J. &
Wanasundera, PC., J.

COUNSEL : Rohan Sahabandu PC. for Respondent-Appellant-Appellant.

G.D. Kulatilake for Applicant-Respondent-Respondent

ARGUED ON : 27.02.2013

DECIDED ON : 08-05-2013

* * * * *

Wanasundera, PC., J.

The Respondent - Appellant - Appellant (hereinafter referred to as the Appellant) in this case has come before the Supreme Court being aggrieved by the judgment of the High Court of the Western Province established under Article 154P of the Constitution which had dismissed an appeal filed by him against the order of the Magistrate' Court of Mount Lavinia awarding maintenance for his wife, the Applicant – Respondent – Respondent (hereinafter referred to as the Respondent) and the children..

The Appellant had also filed the Revision Application No. 168/2008 before the High Court against the same final order of the Magistrate's Court. Both the final appeal and the Revision Application were consolidated and taken up for hearing by the High Court together. Both cases were dismissed by the Learned High Court Judge by his judgment and order dated 14.07.2010.

The Appellant sought leave to appeal to the Supreme Court from the High Court itself, as provided for in Section 14(2) of the Maintenance Act No. 37 of 1999 and the Learned High Court Judge granted leave on 23.08.2010 in the absence of the Respondent. Later on, the Respondent appealed to the High Court Judge not to grant leave to appeal but after hearing the submissions, the High Court Judge made order on 03.9.2010 confirming the leave granted to the Appellant on 23.08.2010, on five questions of law which the Supreme Court is invited to deal with at the hearing.

The questions of law on which leave was granted are enumerated as follows:-

1. Did the High Court err in law in holding that the Respondent had discharged the burden cast on her by law, of proving the income and means of the Appellant?

2. Did the High Court err in law in casting a burden on the Appellant of proving that he was not earning such income as alleged by Respondent in her oral testimony, whereby casting upon the Appellant the burden of proving a negative?

3. Did the High Court err in law in failing to consider whether the Respondent had failed to establish and/or discharge the burden cast on her of 'neglect' and/or unreasonable refusal and/or refusal by the Appellant to maintain the Respondent and the three children, as provided in Section 2 of the Maintenance Act No. 37 of 1999?

4. Did the High Court err in law in failing to consider whether the Respondent has failed to discharge the burden cast on her, in terms of Section 2 of the Maintenance Act No. 37 of 1999, to prove that the

Appellant has neglected and/or reasonably refused and/or refused to maintain the Respondent and the three children?

5. Did the High Court err in law in failing to address its mind to the income of the Appellant and/or his ability to earn and/or the means and circumstances of the Appellant in terms of Section 2 of the Maintenance Act No. 37 of 1999?

Hereinafter I proceed to analyse the High Court judgment dated 14.7.2010 having the aforementioned questions of law in mind. The final order of the Magistrate's Court of Mt. Lavinia case No. 273/Maintenance was the basis for the High Court judgment. The appeal to the High Court was made under Section 14(1) of the Maintenance Act No. 37 of 1999 by the Appellant.

The facts could be summarised in this way. R. Sirisena married H.K.P. Ranjani on 18.1.1989 and they had three children. At the time of filing the maintenance action on 13.6.2006 the children were 16 yrs, 10 yrs and 9 yrs old. The wife Ranjani knew at the time of her marriage to R. Sirisena that he had three more children as a result of him having lived in adultery with another female namely Wimalawathie who was not divorced from her husband. In 2006 those children were 36 yrs, 35 yrs and 27 yrs of age and as such those three children were much elder to Ranjani's three children.

R. Sirisena and Ranjani are living in different portions of a four storyed big building in the 1st Chapel Lane, Wellawatta. R. Sirisena is at No. 13A, 1st Chapel Lane and Ranjani with her three children are at No. 13, 1st Chapel Lane. There is a garment factory in one of the four storeys of this building which was run by R. Sirisena and Ranjani but it is now run by R. Sirisena and his 27 years old son of his first bed, Amila. Problems allegedly started when Ranjani did not agree to sell a property worth of One Hundred and Fifty Million rupees and the money to be given to the 27 years old son Amila who was the youngest child from the 1st bed of Sirisena. Allegedly R. Sirisena harassed Ranjani physically and mentally and finally filed a divorce case in the District Court of Mt. Lavinia. The case number is 4897/D where Ranjani is the Defendant and it is still pending. R. Sirisena has filed two other cases against Ranjani with regard to properties

which are in the name of both husband and wife, worth millions of rupees, namely 46/05 Trust and 48/06 Trust. Ranjani decided to file the maintenance case only after all the other three cases were filed against her by R. Sirisena and only when R. Sirisena allegedly neglected to look after her and the children. The neglect and/or refusal to maintain the wife and the three children had allegedly lasted for 8 months before Ranjani filed the maintenance case.

The Magistrate hearing the case acting under Section 11(1) of the Maintenance Act made an interim order for the Appellant to pay Rs.15000/- per month, on 25.10.2006. The Respondent Ranjani prayed for a monthly maintenance payment of Rs.125000/- in her application to the Magistrate's Court but at the end of the hearing the Magistrate ordered only Rs.55000 as the monthly maintenance which amount is less than half the amount claimed by the Respondent Ranjani. The Appellant Sirisena in the Magistrate's Court has not paid that amount but had appealed to the High Court and now to the Supreme Court. The date of the order of the Magistrate is 19.9.2008. The date of the High Court judgment in HCMCA 264/08 is 14.7.2010. In the Revision application filed by the Appellant husband Sirisena in the High Court he has obtained a stay order, staying the payment of Rs.55000/- and consented to add Rs.10000/- to the interim order of maintenance of Rs.15000/- granted by the Magistrate, making it Rs.25000/- per month as maintenance to the wife and 3 children. The High Court dismissed the appeal of the Appellant Sirisena on 14.7.2010. As such the Appellant R. Sirisena is in arrears of payment of maintenance from 19.9.2008 up to date.

The learned High Court Judge had quoted authorities to the effect that the Appellate Courts should not interfere with the judgment of the lower Courts unless there is a grave legal discrepancy in the decision of the lower Court or there is a grave error in the analysis of the evidence before the lower Court. I fully endorse his views and appreciate the citations in that regard, namely *Jayasuriya Vs. Sri Lanka State Plantations Corporation 1995, 2 SLR 379, Ceylon Cinema and Films Studio Employees Union Vs. Liberty Cinema Ltd. 1994 3 SLR 121 and Bandaranaike Vs. Jagathsena & Others 1984, 2 SLR 397*. Having said that the Learned High Court Judge has gone deeply into the analysis of the evidence done by the Magistrate and come to

the conclusion that the basis on which the amount to be paid as maintenance was just and equitable and reasonable and that, therefore the judgment should not be interfered with.

The questions of law before the Supreme Court are based on Section 2 of the Maintenance Act No. 37 of 1999. Section 2(1) is with regard to the maintenance of a wife. Section 2(2) is with regard to the maintenance of children. Section 2(1) reads as follows:-

> "Where any person having sufficient means, neglects or unreasonably refuses to maintain such person's spouse who is unable to maintain himself or herself, the Magistrate may, upon an application being made for maintenance, and upon proof of such neglect or unreasonable refusal, order such person to make a monthly allowance for the maintenance of such spouse at such monthly rate as the Magistrate thinks fit, having regard to the income of such person and the means and circumstances of such spouse;
>
> Provided however, that no such order shall be made if the applicant spouse is living in adultery or both the spouses are living separately by mutual consent."

How to inquire into a maintenance application is set out in Section 11 of the Act. It reads:-

Section 11(1) "Every application for an order of maintenance or to enforce an order of maintenance shall be supported by an affidavit stating the facts in support of the application, and the Magistrate shall, if satisfied that the facts set out in the affidavit are sufficient, issue a summons together with a copy of such affidavit, on the person against whom the application is made to appear and to show cause why the application should not be granted;

Provided however the Magistrate may in his discretion at any time make an interim order for the payment of a monthly allowance which shall remain operative until an order on the application is made, unless such interim

order is earlier varied or revoked, and such interim order shall have effect from the date of the application or from such later date as the Magistrate may fix."

When an application for maintenance is made before the Magistrate with an affidavit by the Applicant, from there onwards, the Magistrate is bound to act on the evidence before Court sworn in the affidavit. If what is said on oath in the affidavit by the Applicant is satisfactory and sufficient to create a prima-facie case to be tried by the Magistrate, it is only then that the Magistrate sends the summons. The summons tells the Respondent "**to show cause why the application should not be granted**?" In any civil case the summons issued directs the receiver only to file in Court the answer to the plaint therewith and not to show cause . An application made under Section 2 of the Maintenance Act is not a civil case. Section 12 of the Maintenance Act 37 of 1999 reads as follows:-

" The Magistrate may proceed in the manner provided in Chapter V and VI of the Code of Criminal Procedure Act, No. 15 of 1979 to compel the attendance of the person against whom the application is made and of any person required by the applicant or the person against whom the application is made or by the Magistrate to give evidence, and the production of any document necessary, for the purposes of the inquiry."

It is quite clear that a maintenance inquiry is more of a criminal nature and quite far from a civil action. Furthermore Section 10 provides that an application for an order of maintenance is free of stamp duty. Section 5 deals with enforcement of orders which gives the Magistrate the power to sentence the person in breach of a maintenance order to imprisonment.

Section 6 deals with an 'attachment of salary of the Respondent'. In summary this Section gives the Magistrate the power to direct the employer of the Respondent to deduct an ordered amount from the salary and/or earnings of the Respondent and pay it to the Applicant. Section 6(2) (b) reads thus:-

" The Magistrate may also by an order served on the Respondent, require him to furnish to the Court within such period as may be specified in such order, a statement specifying-

(a) the name and address of his employer or employers as the case may be, if he has more than one employer;

(b) such particulars as to his salary, inclusive of deductions, as may be within his knowledge; and

(c) any other particulars as are required or necessary to enable his employer or employers to identify him."

The wording here shows that the Magistrate could **order the Respondent to furnish to Court his income and all the details**. I am of the view that this suggests that the Respondent in any maintenance inquiry is called upon to prove his income. The Applicant- wife and/or children do not have the knowledge of the exact income of the Respondent and when the Respondent is before Court, the Magistrate orders the person to give details of his income, the place from where he gets the income etc. and it is prima facie proof of his income. The Applicant is not called upon by way of the Provisions in the Act to prove the Respondent's income. The Applicant wife has only to get the Respondent to come to court and then Court has the authority to get him to divulge his income, so that Court can make an attachment of salary order, in cases where the husband is working under another employer. In the instant case, the husband is self-employed.

Therefore as it is mentioned in Section 11 of the Act, in the Magistrate's Court the Respondent has to show cause why the application should not be granted. The burden of proof of his income is cast on the Respondent and not the Applicant in such an instant.

As mentioned in Section 2 the Applicant has to prove;

(a) that the Respondent has sufficient means,

(b) that the Respondent has unreasonably refused to maintain the wife/children, and

(c) that the Applicant is unable to maintain herself and/or the children.

In this case the Applicant in the Magistrate Court has given evidence. She had been educated in the Mathematics stream up to the Advanced Level class in school. She had helped the husband to develop his businesses. 'They had earned together and bought properties together. They became rich and had lived a comfortable life. The husband had looked after her and the children until the time he got down one of his sons from the first bed, namely Amila and Amila's wife into the same building to live . The husband Sirisena wanted his wife Ranjani to consent to sell immovable properties worth millions of rupees and give money to children of the first bed who were all adults. The evidence of the wife with regard to the husband's properties and income was corroborated by other government officials who gave evidence. The husband did not disprove or challenge her evidence even in cross examination. In her evidence she has detailed his income from house rent, business and the value of his properties. The documents to prove ownership of the properties etc. are in the hands of the Respondent. He never denied his worth but tried to say that he has heart ailments and had to undergo an operation. His evidence was that he is living with the money given by his older children from the first bed which the Magistrate decided on a balance of probabilities to be not of any true value as evidence to disprove that he has sufficient means. The Applicant wife was not working and not having any businesses of her own because she developed the business of the husband and her properties are co-owned with him. She had no means to live and look after the children. Trying to give what the children needed in continuation of the comfortable life they were used to, she was in debt having sold her jewellery etc. The evidence of the Applicant showed amply that she is unable to maintain herself and children in the way that they were used to. The husband having the means was not maintaining the wife and children which proved the element of neglect or unreasonably refusing to maintain the family.

Thus I am of the view that the Applicant wife in the Magistrate's Court has proved all the elements she was called upon to prove under Section 2 of the Maintenance Act. The burden of proving 'why the application should not be granted' is on the Respondent

husband. He has failed to show cause why the application should not be allowed. The learned Magistrate has considered the evidence as a whole by both parties and having regard to the income of the Respondent husband and the means and circumstances of the Applicant wife and children, the Magistrate has weighed them carefully. The Magistrate has decided on the balance of probabilities.

Due to the aforementioned reasons I have decided the five questions of law on which leave was granted in the negative. I hold that Section 2 of the Maintenance Act places the burden on the Applicant to prove that the Applicant is unable to maintain herself; that the Respondent has neglected or unreasonably refused to maintain such Applicant and that the Respondent has sufficient means to maintain the Applicant. On the other hand Section 11 of the Maintenance Act places the burden of proof on the Respondent to show cause why the application should not be granted. In other words the burden of proof of showing that the Respondent does not have sufficient means is on the Respondent. In this case in the Magistrate's Court the Respondent has totally failed to show cause why the application of the Applicant should not be granted because he never came out with his monthly income and did not challenge the ownership of the immovable properties and the income from renting out his other houses in the same lane and profits earned from the garment business run inside the same four storeyed building. The Magistrate had decided on the monthly maintenance having considered the evidence on a balance of probabilities. The High Court has affirmed it.

I affirm the judgment of the High Court dated 14.7.2010 and further determine that the Applicant-Respondent-Respondent is entitled to the arrears of payment of maintenance from 19.09.2008 the date of the order of the Magistrate with legal interest as of today and dismiss the appeal of the Respondent-Appellant-Appellant with taxed costs. I order that this judgment be sent to the Magistrate’s Court of Mt. Lavinia forthwith for enforcement of the order as provided for in Section 5 of the Maintenance Act No. 37 of 1999.

JUDGE OF THE SUPREME COURT

Amaratunga, J.

I agree.

JUDGE OF THE SUPREME COURT

Marsoof,PC.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 Article 127(2) of the Constitution read with Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 64 of 2006.

SC. Appeal No. 119/2010

NCP/HCCA/ARP/622/2009
DC. Polonnaruwa No.5414/L

Wimala Herath
Rajawila,
Hingurakgoda.

Plaintiff

-Vs-

1. M.D.G. Kamalawathie,
   No. 27/5, Flower Lane,
   Pepiliyana Road,
   Nugegoda.

2. S..A. Piyasena,
   Trackmo Institute,
   Wickramasinghe Road,
   Hingurakgoda.

Defendants.

And Between

1. M.D.G. Kamalawathie,
   No. 27/5, Flower Lane,
   Pepiliyana Road,
   Nugegoda.

2. S.A. Piyasena,
   Trackmo Institute,
   Wickramasinghe Road,
   Hingurakgoda.

Defendant-Appellants

-Vs-

Wimala Herath (Deceased)

1. Sarathchandra Rajapakshe.
2. Ananda Kumara Rajapakshe
3. Wasantha Kumara Rajapakshe

All are of:
Rajawila,
Hingurakgoda.

Plaintiff-Respondents.

And Now Between

Wimala Herath (Deceased)

1. Sarathchandra Rajapakshe.
2. Ananda Kumara Rajapakshe
3. Wasantha Kumara Rajapakshe

All are of:
Rajawila,
Hingurakgoda.

Plaintiff-Respondent-Appellants

-Vs-

1. M.D.G. Kamalawathie,
No. 27/5, Flower Lane,
Pepiliyana Road,
Nugegoda.

2. S.A. Piyasena,
Trackmo Institute,
Wickramasinghe Road,
Hingurakgoda.

Defendant-Appellant-Respondents

*** * * * ***

SC. Appeal No. 119/2010

BEFORE : **Saleem Marsoof, PC. J.**
S.I. Imam,J.
Eva Wanasundera, PC.J.

COUNSEL : Uditha Egalahewa PC. With Gihan Galabadage for the Plaintiff-Respondent-Appellants.

W. Dayarathne PC. With Shiroma Peiris and Nadeeka K. Arachchi for the 2nd Defendant-Appellant-Respondent.

ARGUED ON : **07-11-2012**

WRITTEN SUBMISSIONS OF THE PLAINTIFF-RESPONDENT-APPELLANT FILED ON: 28-11-2012

WRITTEN SUBMISSIONS OF THE 2ND DEFENDANT-APPELLANT-RESPONDENT FILED ON: 05-12-2012

DECIDED ON : **05- 02-2013**

*** * * ***

Eva Wanasundera, PC.J.

The Plaintiff-Respondent-Appellant Wimala Herath filed action on 16th October 1991 in the District Court of Polonnaruwa in case No. 5414/L seeking a declaration that she is the owner of the lands described in the two schedules "ඇ" and "ඈ" to the plaint under the Permit No. 156 dated 11.8.1987 issued under the Land Development Ordinance and further sought to eject the Defendant-Appellant-Respondents from the land in schedule "ඈ" (the 2nd schedule). Schedule to the plaint "ඇ" related to an allotment of land of an extent of 2A. 1R. 26P, and Schedule "ඈ" referred to a land smaller in extent. The salient point of

fact to be noted in this case is that the 30 perch block of land referred to in Schedule "ඵ" is within the boundaries of the 2A. 1R. 26P. block of land referred to in Schedule "ඳ". In other words land in the 2nd Schedule "ඵ" is part and parcel of land in the 1st Schedule "ඳ". The 30 P. parcel of land is carved out of the 2A. 1R. 26P. block of a bigger land bordering the main road named "Wickremasinghe Road".

The Defendant-Appellant-Respondents' position in the District Court in the answer dated 9th March 1995 was that the 1st Defendant--Appellant-Respondent was the holder of a permit for the 30 perch block of land under the Land Development Ordinance permit No. 156A, ie. the land described in Schedule "ඵ" to the plaint which is the 2nd Schedule. Furthermore the Defendant-Appellant-Respondents moved for compensation for improvements done on the land.

At the end of the trial before the District Court the District Judge held in favour of the original Plaintiff and delivered judgment dated 15.08.2001, holding that,

a) the Plaintiff was the lawful owner of the lands in both schedules to the plaint,

b) that other permits if any issued to any other person in respect of the said lands were null and void,

c) that the Defendants and whoever holds under them should be ejected and

d) ordered compensation of 2 lakhs of Rupees to be paid to the Defendants by the Plaintiffs as compensation for improvements on the land in schedule "ඵ"(ie. Schedule No. 2).

The Defendants in the District Court case being aggrieved by the judgment of the District Judge appealed to the Civil Appellate High Court of the North Central Province holden at Anuradhapura and the appeal was heard under case No.

NCP/HCCA/ARP/622/2009. Judgment of this case was delivered on 17.02.2010, setting aside the judgment of the District Court and thus the plaint was dismissed.

When the Plaintiff-Respondent-Appellants being aggrieved by the judgment of the Civil Appellate High Court sought leave to appeal from this Court, leave was granted on 15.09.2010 on three questions of law contained in paragraph 11(e),(f) and (h) of the Leave to Appeal application to this Court which I would like to enumerate as follows:-

11 (e) Did the Honourable Judges of the said Civil Appellate High Court err in law by holding that the Petitioners, though entitled to the title and the possession of the land morefully described in the Schedule "ඒ" to the plaint on permit bearing No. 156 dated 11th August 1987, that the Respondent was entitled to the land morefully described in the schedule "ඓ" to the plaint on permit bearing No. 156/A, which formed part of the land morefully described in the said permit bearing No. 156?

(f) Did the Honourable Judges of the said Civil Appellate High Court err in law by holding that it was unnecessary to cancel the permit bearing No. 156 prior to the issuance of permit bearing No. 156A that contained a portion of land morefully described in the permit bearing No. 156?

(h) Did the Honourable Judges of the said Civil Appellate High Court err in evaluating the provisions of the Land Development Ordinance No. 19 of 1935 as amended?

The material facts in this case could be summarized as follows for better understanding of the factual background for the purpose of deciding on the contentions of law arisen to be decided by me which in turn would be finally affecting the parties to this case. The Plaintiff in the District Court was Wimala

Herath whose husband was D.W. Rajapaksha alias R.A. Dharmawansha. The original permit holder of permit No. 156 for the land of 2A. 1R. 26P. was D.W. Rajapakse in 1946. In 1967 one N.D. Gunathilaka was given permission by D.W. Rajapaksha to run a garage on a portion of the land bordering the main road. That portion of the land was about 30P. When D.W. Rajapaksha died, his wife the Plaintiff, Wimala Herath received the said permit under him for lot 156. From 11.08.1987 Wimala Herath was the permit holder. The Govt. Agent granted a permit, 156A, for the aforesaid 30P. to N.D. Gunathilaka on 20.7.1973, after an inquiry and taking into consideration the alleged consent in writing given by the deceased D.W. Rajapaksha. Thereafter N.D. Gunathilaka died and his wife M.D.G. Kamalawathie in turn was issued the said permit 156A for 30P. While the case was pending in the Civil Appellate High Court the Plaintiff Wimala Herath died and the present Plaintiff-Respondent-Appellants are the three children of D.W. Rajapaksha and Wimala Herath.

On the questions of law aforementioned I have viewed the judgment of the Civil appellate High Court. The permit No. 156 was issued for 2A. 1R. 26P. The Appellants are holding under that permit and that fact was not an issue at any time. The permit No. 156 is admittedly legal and valid. The Govt. Agent issued permit No. 156A for 30P. which land is situated inside the land described in permit No. 156. According to the Provisions of the Land Development Ordinance No. 19 of 1935 as amended, there is no way to expunge a portion out of this land already given on a permit, and grant a separate permit for that expunged portion, with or without the consent of the first permit holders. In fact no permit holder could agree to do so, according to the provisions of law. If at all, the 1st permit could be cancelled on lawful grounds and it is only thereafter that the land could be divided and separate permits be issued. The Govt. Agent at that time has issued permit 156A in the most wrongful way. He has neither considered the provisions of law nor the repercussions which could arise thereafter. In the case of *Seenithambi vs. Ahamadulebbe* 74 NLR 222, the Gal-Oya Development Board issued one permit to A in 1954 and another to B in 1960 for the same allotments of land. The Supreme Court held that strict proof of

due cancellation of the permit issued to A was necessary before his title could be defeated. The Learned Judges of the Civil Appellate High Court have interpreted the decision of this case in the wrong way and dismissed the plaint. The ratio decidendi of that judgment is that once a permit is given for a particular allotment of land, without a cancellation of that permit, no other permit granted for the same could be legally valid. It goes without saying that no other permit granted for part of the same land could be legally valid. Therefore it is quite clear in this case that with the admission of both parties, that permit 156 is legally valid and prevailing from that time up to date, that a portion or part of the same land cannot be expunged and be given to another person on another permit, ie. 156A. Therefore I hold that permit 156A is illegal and void.

The Respondents' argument that permit 156A was given with the consent of the original permit holders and long possession does not hold water in the light of the permit being illegal and void.

I set aside the judgment of the Civil Appellate High Court of the North Central Province holden at Anuradhapura dated 17th February 2010 and uphold the judgment of the District Court of Polonnaruwa dated 15th August 2001. However I order no costs.

Judge of the Supreme Court

Saleem Marsoof, PC. J.

I agree

Judge of the Supreme Court

S.I. Imam,J

I agree

Judge of the Supreme Court

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

In the matter of Special Leave to Appeal Application under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal No. 120/2011
SC (SPL) Leave to Appeal Application No. SC (SPL)/LA/92/2011
CA (PHC) APN No. 26/2011
PHC Ampara Revision Application: HC/AMP/REVISION/343/2009
MC Ampara No. 31773

Orient Financial Services Corporation Ltd.,
No. 100 Hyde Park Corner, Colombo 2.

Petitioner-Petitioner-Petitioner Appellant

Vs.

1. Range Forest Officer
   Department of Forest Conservation
   Regional Office, Ampara.

2. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

Respondent-Respondents-Respondent Respondents

Before	:	Hon. Tilakawardane, J. Hon. Ekanayake, J. Hon. Dep, PC, J.
Counsel	:	Asthika Devendra for the Appellant.
		Thusith Mudalige, SSC for Attorney General
Argued on	:	21.10.2013
Decided on	:	10.12.2013

Priyasath Dep, PC., J.

This is an Appeal against the Judgment of the Court of Appeal dated 28.04.2011which affirmed the judgment of the High Court of Ampara. The High Court affirmed the order of forfeiture of a vehicle made by the learned Magistrate of Ampara under Section 40 of the Forest Ordinance as amended by Acts numbers 13 of 1982,84 of 1988 and 23of 1995.

The Petitioner –Petitioner-Petitioner-Appellant (hereinafter referred to as the Appellant) is a Finance Company which under a lease agreement let the vehicle bearing No. EPLE 3471 to D.P. Anura Kumara who became the registered owner of the vehicle. The said Anura Kumara was charged in the Magistrate Court of Ampara bearing Case No. 31773/8 for transporting timber (teak) without a permit, an offence punishable under Section 25 (1) read with section 40 of the Forest Ordinance. He pleaded guilty to the charges. Thereafter an Inquiry was held regarding the confiscation of the vehicle under section 40A of the Forest Ordinance.

The Appellant who is the absolute owner claimed the vehicle on the basis that it has taken necessary precautions to prevent the commission of offence and the offence was committed without its knowledge. At the inquiry T S.L.Indika, a senior sales executive gave evidence on behalf of the Appellant. He produced the registration book and the lease agreement. After the inquiry the learned Magistrate by his order dated 19.03.2009 confiscated the vehicle. The learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the registered owner and failing that from the guarantors or sureties. Further the learned Magistrate observed that even after the conviction of the registered owner, the Appellant had failed to terminate the lease agreement. In the order it was stated that if the vehicle is given to the appellant there was a possibility that it could give the vehicle back to the accused (registered owner).This will defeat the object of section 40 of the Forest Ordinance.

The Appellant filed a Revision Application in the High Court of Ampara and the learned High Court Judge by his order dated 02.11.2010 affirmed the order of the learned Magistrate. The Appellant appealed against the judgment of the High Court to the Court of Appeal. The Court of Appeal without issuing notice dismissed the Petition. The Court of Appeal for the reasons set out in its order dated 28.4.2011 held that the owner envisaged in law is not the absolute owner and the owner envisaged in law in a case of this nature is the person who has control over the use of the vehicle. The absolute owner has no control over the use of the vehicle except to retake the possession of the vehicle for non-payment of installments. If the vehicle is confiscated holding that the absolute owner is not the owner envisaged in law, no injustice will be caused to him as he could recover the amount due from the registered owner by way of action in the District Court on the basis of violation of the agreement'

Being aggrieved by the order of the Court of Appeal the Appellant filed a Special Leave to Appeal Application to this court and obtained leave on the following questions of law.

A) Did their Lordships of the Court of Appeal misconceive in law when they held that the 'owner contemplated by law' cannot be the absolute owner but the registered owner?

B) Did their Lordships of the Court of Appeal err when they failed to appreciate that the Respondents had not taken up the position that the Petitioner Company was not the owner of the vehicle concerned either in the Magistrate's Court or the High Court and therefore it was not a matter before the Court of Appeal for consideration.

At this stage it is relevant to refer to Section 40(1) of the Forest Ordinance as amended by Act No 13 of 1982 which deals with forfeiture of timber, tools, boats, carts, cattle and vehicles used in the commission of offences under the Ordinance. The relevant section reads as follows:

40. (1) Upon the conviction of any person for a forest offence –

(a) All timber or forest produce which is not the property of the State in respect of which such offence has been committed ; and

(b) All tools, boats, carts, cattle and motor vehicles used in committing such offence (whether such tools, boats, carts, cattle and motor vehicles are owned by such person or not),

shall by reason of such conviction, be forfeited to the State.

The amendment to section 40 of the Forest Ordinance by Act No. 13 of 1982 substituted the words "shall by reason of such conviction be forfeited to the State" for the words shall be liable by order of the convicting Magistrate to confiscation" According to the plain reading of this section it appears that upon conviction the confiscation is automatic. The strict interpretation of this Section will no doubt cause prejudice to the third parties who are the owners of such vehicles.

The implications of the amended section 40 of the Forest Ordinance was considered by Sharvananda, J. in Manawadu v. Attorney General (1987 2 SLR30) It was held that:

> "By Section 7 of Act No. 13 of 1982 it was not intended to deprive an owner of his vehicle used by the offender in committing a 'forest offence' without his (owner's) knowledge and without his participation. The word 'forfeited' must be given the meaning 'liable to be forfeited' so as to avoid the injustice that would flow on the construction that forfeiture of the vehicle is automatic on the conviction of the accused .The amended sub-section 40 does not exclude by necessary implication the rule of '*audi alteram partem*' . The owner of the lorry not a party to the case is entitled to be heard on the question of forfeiture of the lorry, if he

satisfies the court that the accused committed the offence without his knowledge or participation, his lorry will not be liable to forfeiture.

The Magistrate must hear the owner of the lorry on the question of showing cause why the lorry is not liable to be forfeited. If the Magistrate is satisfied with the cause shown, he must restore the lorry to the owner. The Magistrate may consider the question of releasing the lorry to the owner pending inquiry, on his entering into a bond with sufficient security to abide by the order that may ultimately be binding on him"

The Supreme Court has consistently followed the case of Manawadu vs the Attorney General. Therefore it is settled law that before an order for forfeiture is made the owner should be given an opportunity to show cause. If the owner on balance of probability satisfies the court that he had taken precautions to prevent the commission of the offence or the offence was committed without his knowledge nor he was privy to the commission of the offence then the vehicle has to be released to the owner.

The next question that arises is who is the owner as contemplated under Section 40 of the Forest Ordinance. In the case of vehicles let under hire -purchase or lease agreements there are two owners, namely the registered and the absolute owner.

The counsel for the Appellant relied on Section 433A which was introduced by Code of Criminal Procedure (Amendment) Act No. 12 of 1990.Section 433A reads as follows:

433A (1) In the case of a vehicle let under a hire purchase or leasing agreement, the person registered as the absolute owner of such vehicle under the Motor Traffic Act (Chapter 203) shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter.

(2) In the event of more than one person being registered as the absolute owner of any vehicle referred to in subsection (1), the person who has been so registered first in point of time in respect of such vehicle shall be deemed to be the person entitled to possession of such vehicle for the purpose of this Chapter".

The Chapter referred to in this section is the Chapter XXXVIII of the Code of Criminal Procedure Act dealing with disposal of property pending trial and after the conclusion of the case. (Sections 425 -433)

(The Forest Ordinance (Amendment) Act No 65 of 2009 deemed Section 433A inapplicable to persons who pleads guilty to or is found guilty of a forest offence. The implications of this amendment will not be considered in this Appeal as the amendment came into force after the order of confiscation was made by the learned Magistrate)

The Learned Counsel for the Appellant relied on the judgment in Mercantile Investment Ltd. Vs. Mohamed Mauloom and others ((1998) 3Sri L.R.32) where it was held that 'In view of Section 433 A (1) of Act No 12 of 1990, the Petitioner being the

absolute owner is entitled to possession of the vehicle, even though the Claimant-Respondent had been given its possession on a lease agreement. It was incumbent on the part of the Magistrate to have given the petitioner an opportunity to show cause before he made the order to confiscate the vehicle.'

This matter was again considered in The Finance Private Ltd. v Agampodi Mahapedige Priyantha Chandana and others in Supreme Court Appeal No.105A/2008 decided on 30.09.2010.

This was an appeal against the judgment of the High Court of Hambantota affirming the order of confiscation of a vehicle made by the Magistrate of Tangalle in Case No. 61770. In this case the Magistrate granted an opportunity to the absolute owner (Appellant) to show cause .The registered owner did not take part in the inquiry. An Assistant Manager of the Appellant company gave evidence and stated that the Appellant Company has no knowledge of the use of the vehicle and that the vehicle was not within the control of the appellant. The learned Magistrate held that Appellant had not satisfactorily convinced the courts that had taken every possible measure to prevent the commission of the offence. The learned Magistrate proceeded to confiscate the vehicle. The High Court affirmed the order of confiscation. At the hearing of the Appeal, the counsel for the absolute owner argued that the burden is only on the registered owner to satisfy court that the accused had committed the offence without his knowledge or participation and this will not be applicable to an absolute owner. The Supreme Court rejected the argument and dismissed the appeal.

In this case, Her Ladyship the Chief Justice Shirani Bandaranayake considering the ratio decidendi of previous decisions, held that 'it is abundantly clear that in terms of section 40 of the Forest Ordinance as amended if the owner of the vehicle in question was a third party, no order of confiscation shall be made if that owner has proved to the satisfaction of the court that he had taken all precautions to prevent the use of the said vehicle for the commission of the offence. The ratio decidendi of all the afore mentioned decisions also show that the owner has to establish the said matter on balance of probability. It was further held that "it is therefore apparent that both the absolute owner and the registered owner should be treated equally and there cannot be any type of privileges offered to an absolute owner, such as a finance company in terms of the applicable law in the country. Accordingly, it would be necessary for the absolute owner to show the steps he had taken to prevent the use of the vehicle for the commission of the offence and that the said offence had been committed without his knowledge."

In the case before this Court the registered owner was found guilty on his own plea and was convicted. The learned Magistrate provided an opportunity to the absolute owner to participate in the inquiry and a representative of the company gave evidence. After the inquiry, the learned Magistrate confiscated the vehicle. The learned Magistrate was of the view that in terms of the lease agreement the absolute owner can recover the loss from the registered owner and failing that from the guarantors or sureties. Further the learned Magistrate observed that even after the conviction of the registered owner, the Appellant had failed to terminate the lease agreement. In the order it was stated that if the

vehicle is given to the Appellant the vehicle could be given back to the accused (registered owner).This will defeat the object of Section 40 of the Forest Ordinance.

Aggrieved by the order of the learned Magistrate a Revision Application was filed by the absolute owner. The learned High Judge dismissed the Application. Thereafter an Appeal was filed in the Court of Appeal. The Court of Appeal was of the view that the owner contemplated under the Forest Ordinance is the registered owner. It has posed the question "can it be said that the absolute owner (the Finance company) committed the offence or it was committed with the knowledge or participation of the absolute owner. The answer is obviously no. Surely a Finance company cannot participate in the commission of an offence of this nature when the vehicle is not with them. It cannot be said that the Finance company has the knowledge of the commission of the offence. When the vehicle was not with them. The owner envisaged in law cannot be the absolute owner".

The learned Magistrate had taken up the position that confiscation will not cause loss to the absolute owner as it has a remedy in the civil court. The Court of Appeal while affirming the order of the Magistrate went further to hold that the owner contemplated under Section 40 of the Forest Ordinance is the registered owner and not the absolute owner

The registered owner who has the possession and full control of the vehicle is responsible for the use of the vehicle. He is the person who is in a position to take necessary precautions to prevent the commission of an offence .Therefore the registered owner to whom the absolute owner has granted possession of the vehicle and who has the control over the vehicle is required to satisfy court that he had taken precautions to prevent the commission of the offences and that the offence was committed without his knowledge.

In cases where the absolute owner repossesses the vehicle or the vehicle was returned by the registered owner to the absolute owner it becomes the possessor and in control of the vehicle. In such a situation if an offence was committed the absolute owner has to satisfy court that necessary precautions were taken and the offence was committed without its knowledge. The person who is in possession of the vehicle is the best person to satisfy the court that steps were taken to prevent the commission of the offence and the offence was committed without his knowledge.

In answering the first question of law, the owner, contemplated under Section 40 of the Forest Ordinance read with Section 433A of the Code of Criminal Procedure Act includes the registered owner as well as the absolute owner. However when it comes to showing cause as to why the vehicle should not be confiscated, only the person who is in possession and control of the vehicle could give evidence to the effect that the offence was committed without his knowledge and he had taken necessary steps to prevent the commission of the offence. According to the Section 433A the absolute owner is deemed to be the person entitled the possession of the vehicle. The absolute owner has a right to be heard at a claim inquiry. In this case the learned Magistrate afforded an opportunity to the absolute owner to show cause and only after such a hearing confiscated the vehicle

The second question of law refers to the question whether the Court of Appeal erred in law when it considered the question whether the Appellant Company is the owner or not contemplated under Section 40 of the Forest Ordinance when the matter was not raised by the Respondents in the Magistrates Court and in the High Court. The Court of Appeal on its own raised that question. Who is the owner contemplated under Section 40 requires a legal interpretation and is question of law. Therefore Court of Appeal did not err when it considered this question of law.

It is necessary at this stage to consider whether the order of the Magistrate is in accordance with the law. The Magistrate afforded an opportunity to the absolute owner to show cause and after considering the evidence the order of confiscation was made. The learned Magistrate has followed the proper procedure .The next question is whether the reasons given by the Magistrate to confiscate the vehicle is correct.

It is necessary for this purpose to consider the intention of the legislature when it repealed the previous section 40 of the Forest Ordinance and substituted new Section 40 by Act No. 13 of 1982. Illicit felling and removal of timber is considered a serious offence by the State as it result in the depletion of the scarce forest resources. Deforestation has an adverse impact on the environment. Therefore strong preventive and penal measures are taken to prevent such offences. For that reason in addition to punishing the offenders, tools, implements and vehicles used for the commission of the offence are forfeited. This has a deterrent effect on the offenders. If the registered owner is privy to the commission of the offence and the vehicle is released to the absolute owner, this effect is lost. Under the terms of the hire purchase or lease agreement the registered owner is under a duty to indemnify the absolute owner for the loss or damage caused to the vehicle. If the vehicle is returned to the absolute owner the registered owner is absolved of the liability. Further, if the agreement is terminated he will be liable only for the balance installments and other charges. This will remove the deterrent effect on the registered owners and encourage them to use vehicles subject to finance to commit offences.

Further, the Finance company is not without a remedy. When giving a vehicle on lease or hire, the company is aware of the risk when it hands over the full control and possession of the vehicle. Finance companies charge higher interest rates due to this risk factor and also obtain additional security by way of guarantors. Therefore, it could file a civil case to recover the value of the vehicle.

It is relevant to consider the implications of Section 433A of the Code of Criminal Procedure Act. This section refers to the Chapter dealing with the disposal of property pending trial and also after the conclusion of the case (Sections 425-433). Under this chapter when disposing property the Magistrate is not required to determine the ownership of the property. The Magistrate is required to deliver the property to the person who is entitled to possession of the property. Generally the property is released to the person from whose custody or possession the property was taken. The Registered owner if he was not privy to the commission of the offence on that basis he is entitled to possession of the vehicle. Section 433A changed this position when it stated that the absolute owner is ‘deemed to be the person entitled to possession of such vehicle’. In

view of section 433A if the Magistrate in his discretion pending trial decides to release the vehicle, the absolute owner and not the registered owner who is entitled to possession. Under Section 425 of the Code of Criminal Procedure Act, after the conclusion of the case if the vehicle is not confiscated, the vehicle should be released to the absolute owner and not to the registered owner or any other claimant. The absolute owner has a right to claim and be heard at a claim inquiry, but as of right could not get possession of the vehicle as it is subject to the discretion and findings of court.

It appears that the intention of the legislature is to give the possession of the vehicle to the absolute owner as it not prudent to release the vehicle to the registered owner when it is proved that the offence was committed whilst the vehicle was in the possession or custody of the registered owner. On the other hand the absolute owner after obtaining the possession of the vehicle could release the vehicle to the registered owner if the registered owner has not violated the terms and conditions of the agreement. Conversely if the registered owner is in breach of the agreement it could terminate the agreement and retain the vehicle.

Under a hire-purchase or lease agreement the absolute owner delivers the possession of the vehicle to the registered owner but retains the ownership and has a proprietary interest in the vehicle. It has a legitimate claim to it. Section 433A of the Code of Criminal Procedure Act recognizes this fact.

I am of the view that the learned magistrate heard the absolute owner and not being satisfied with the evidence confiscated the vehicle. Under section 433A of the Code of Criminal Procedure Act, the absolute owner though entitled to possession of the vehicle, it could obtain the possession of the vehicle only if the court decides to release the vehicle but not as of right .

I find that the order of the learned Magistrate confiscating the vehicle is in accordance with the law. Both the High Court and the Court of Appeal had affirmed the order. I affirm the order of the Court of Appeal.

Appeal dismissed. No costs.

Judge of the Supreme Court

Shiranee Tillakawardana, J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

SC.Appeal No.137/2010

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

SC.Appeal No.137/2010

In the matter of an application for an Order in the nature of a Writ of Certiorari under Article 140 of the Constitution.

International Dresses (Private) Limited,

No.27, Angulana Station Road,

Angulana,

Moratuwa.

Petitioner

Vs.

1. W.D.J.Seneviratne,

   Minister of Power and Energy,

   (Formerly Minister of Labour)

   493/1, T.B.Jayah Mawatha,

   Colombo 10.

2. Athauda Seneviratne,

   Minister of Labour,

   Labour Secretariat,

   Narahenpita,

   Colombo 5.

3. Secretary,
   Ministry of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.
4. Commissioner of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.
5. T. Piyasoma,
   No.77, Pannipitiya Road,
   Battaramulla.
6. S.R.Karunatillake,
   No.455, Chandrawanka Road,
   Pallimulla,
   Panadura.
7. M.H.Cyril,
   No.3/1, U.C.Quarters,
   Katubedda,
   Moratuwa.
8. Sudath Dissanayake,
   No.176, D.S.Wijesinghe Mawatha,
   (Mola Road) Katubedda,
   Moratuwa.

9. W.Hethuka Prabath Fernando,
No.351/5, , Station Road,
Angulana,
Moratuwa.

10. W.G.Wimalaratne,
No.7/3, Kanagaratne Place,
Laxapathiya,
Moratuwa.

11. P.H.L, A.De Silva
No.99, Dawatagahawatta,
Halpita,
Polgasowita.

12. W.Chandrasiri
No.52, Kandawala Road
Ratmalana.

13. Shelton Senaratne
No. 147/5, Station Road,
Angulana, Moratuwa.

14. A.D.Sunil Ranjith
No.188/B, Jayanthi Road,
Hapugoda, Kandana.

15. Shaul Hameed,
No.33/6, Station Road,
Angulana, Moratuwa.

16. H.K.Sanath, Jayaratne,
No.35, Arthur's Place,
Kaldemulla, Moratuwa.

17. H.T.H.Fernando
No.89,Galle Road,
Sarikkamulla, Moratuwa.

18. G.H Ranjith De Silva,
No.275, Galle Road, Dodanduwa.

19. H. Wasantha,
No. 188/2, Na Uyana,
Waskaduwa, Maha Waskaduwa.

20. R.K. Siripla,
Udukumbura, Ahangama,

21. T.G.Sarath Wickramaratne,
No.84/7 De Mel Road,
Laxapathiya, Moratuwa,

22. A.B.A.Sampath De Silva,
No.68, Rajamahavihara Road,
Pitakotte.

23. K.L.Rohana Perera,
No.6, Church Road,
Angulana, Moratuwa.

24. K.M.Ariyaratne,

    No.5, Arthur's Place,

    Angulana., Moratuwa.

25. Rohana Pushpakumara,

    No.204, Sunil Villa,

    Mahajana Mawatha,

    Angulana, Moratuwa.

26. Ravindra Kumara Rossiro,

    No.41, Uggalawatta,

    Bandaragama.

27. All Ceylon Commercial and Industrial Workers Union, No.457, Dr. Colvin R. De Silva Mawatha, Colombo 2.

Respondents

AND NOW

CA Application No.414/2007
SC (Spl.LA)No.142/2010
SC.Appeal No.137/2010

In the matter of an Appeal after the grant of Special Leave to Appeal in terms of Article 128(2)of of the Constitution of the Democratic Socialist Republic of Sri Lanka

International Dresses (Private) Limited,

No.27, Angulana Station Road,

Angulana,

Moratuwa.

Petitioner-Appellant

Vs.

1. W.D.J.Seneviratne,
   Minister of Power and Energy,
   Formerly Minister of Labour)
   493/1, T.B.Jayah Mawatha,
   Colombo 10.

2. Athauda Seneviratne,
   Minister of Justice,
   (Formerly Minister of Labour),
   Ministry of Justice,
   Colombo 12.

2A. Minister of Labour
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

3. Secretary,
   Ministry of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

4. Commissioner of Labour,
   Labour Secretariat,
   Narahenpita,
   Colombo 5.

5. T. Piyasoma,
   No.77, Pannipitiya Road,
   Battaramulla.
6. S.R.Karunatillake,
   No.455, Chandrawanka Road,
   Pallimulla,
   Panadura.
7. M.H.Cyril,
   No.3/1, U.C.Quarters,
   Katubedda, Moratuwa.
8. Sudath Dissanayake,
   No.176, D.S.Wijesinghe Mawatha,
   (Mala Road) Katubedda,
   Moratuwa.
9. W.Hethuka Prabath Fernando,
   No.361/5, , Station Road,
   Angulana,Moratuwa.
10. W.G.Wimalaratne,
    No.7/3, Kanagaratne Place,
    Laxapathiya,
    Moratuwa.
11. P.H.L, A. De Silva
    No.99, Dawatagahawatta,
    Halpita,Polgasowita.

12. W.Chandrasiri
No.52, Kandawala Road
Ratmalana.

13. Shelton Senaratne
No. 147/5, Station Road,
Angulana, Moratuwa.

14. A.D.Sunil Ranjith
No.188/B, Jayanthi Road,
Hapugoda, Kandana.

15. Shaul Hameed,
No.33/6, Station Road,
Angulana, Moratuwa.

16. H.K. Sanath Jayaratne,
No.35, Arthur's Place,
Kaldemulla, Moratuwa.

17. H.T.H.Fernando
No.89,Galle Road,
Sarikkamulla,
Moratuwa.

18. G.H Ranjith De Silva,
No.275, Galle Road, Dodanduwa.

19. H. Wasantha,
No. 188/2, Na Uyana,
Waskaduwa, Maha Waskaduwa.

20. R.K. Siripla,
Udukumbura, Ahangama,

21. T.G.Sarath Wickramaratne,
No.84/7 De Mel Road,
Laxapathiya, Moratuwa,

22. A.B.A.Sampath De Silva,
No.68, Rajamahavihara Road,
Pitakotte.

23. K.L.Rohana Perera,
No.6, Church Road,
Angulana,
Moratuwa.

24. K.M.Ariyaratne,
No.5, Arthur's Place,
Angulana.,
Moratuwa.

25. Rohana Pushpakumara,
No.204, Sunil Villa,
Mahajana Mawatha,
Angulana,
Moratuwa.

26. Ravindra Kumara Rossiro,
No.41, Uggalawatta,
Bandaragama.

27. All Ceylon Commercial and Industrial Workers Union, No.457,

Dr. Colvin R. De Silva Mawatha,

Colombo 2.

Respondents-Respondents

Before : **Hon. S. Tilakawardane, J.**

Hon. S.I.Imam, J.

Hon. P. Dep, PC, J.

Counsel : S.L.Gunasekera with Maithri Wickramasinghe instructed by Paul Ratnayake Associates for the Petitioner-Appellant.

Canishka G. Witharanana with Ms. Medha N. Gamage for the 6th to 26th Respondents-Respondents.

Argued on : 04.08.2011.

Written Submissions of the Petitioner-Appellant

tendered on: 18.11.2010 and 03.10.2011.

Decided on : 20.02.2013.

S.I.Imam, J.

The Petitioner-Appellant (henceforth sometimes referred to as the "Appellant") sought a Mandate in the nature of a Writ of Certiorari and thereby sought to quash the Award made by the Arbitrator the 5th Respondent-Respondent dated 10.01.2007 made under Section 18(1) of the Industrial Disputes Act in the Court of Appeal. The 1st Respondent-Respondent appointed the Arbitrator under Section 4(1)

of the Industrial Disputes Act. The Petitioner contended in the Court of Appeal that the main basis for such an application was that the aforesaid Award was made by the Arbitrator without arriving at a Judicial determination of the facts upon an analysis of all the evidence adduced which was in breach of Section 17 of the Industrial Disputes Act. The 5th Respondent-Respondent in his Award held that the termination of services of the 6th to 20th Respondents was unfair; that the services of the 21st to 26th Respondents had been terminated unjustly, and directed that the 6th to 26th Respondents be **re-instated in_service** together with **back wages** on 10.01.2007. The Arbitrator further directed that the heir of T.M.Karunadasa who died during the Arbitration be paid the benefits due to Karunadasa. On being aggrieved by the Award the Petitioner made an application by Writ of Certiorari to the Court of Appeal having sought to quash the Award which according to the Petitioner was Irrational and Ultra Vires the powers of the 5th Respondent. The Court of Appeal however **affirmed** the aforesaid **Award** on 28.06.2010 having dismissed the **Petitioners application.** It was also held in the **Award** that ".....the Arbitrator in considering the Evidence has observed that it appears that the parties have presented facts after exaggerating them in their favour". The Petitioner averred in the Court of Appeal that the Arbitrator (5th Respondent) **failed to**

consider whether the Petitioner should be given the **option** of paying the Workmen **Compensation** in lieu of Re-instatement.

On 07.10.2010 on Counsel for both the Petitioner and the Respondents being heard, this Court granted **Special Leave to Appeal** from the Judgment of the **Court of Appeal** dated **28.06.2010** from the questions set out in paragraph 31(b),(c) and (f) of the Petition dated 06.08.2010. Paragraphs (b),(c) and (f) read as follows.

31(b) Whether an observation by an Arbitration in an Award made upon a reference to Arbitration under Section 4(1) of the Industrial Disputes Act that the parties had presented facts after exaggerating them is sufficient to establish that the findings of the Arbitrator relate to and are supported by the evidence?

31(c) Whether the Court of Appeal erred in Law in failing to conclude that the said Award was irrational and/or contained Errors of Law on the face of the record by reason of the 5th Respondent failing to consider whether the Petitioner should be granted the option of paying the Workmen Compensation in lieu of Re-instatement and ordering Re-instatement without giving the Petitioner that option in the facts and circumstances of this Arbitration?

31(f) Whether the Court of Appeal erred in Law in failing to conclude that the 5th Respondent Arbitrator had failed to duly consider the Evidence before making an order?

The Petitioner (henceforth referred to as the "Appellant" in the Petition dated 06.08.2010 besides having sought

(a) **Special Leave to Appeal** from the Judgment of the Court of Appeal dated **28.06.2010** which was **granted** on **07.10.2010** by this Court, also sought to

(b) Set aside the aforesaid Judgment of the Court of Appeal dated 28.06.2010.

(c) Grant and issue an Order in the nature of **Writ of Certiorari** quashing the **Award** of the **5th Respondent** dated 10.01.2007 published in Gazette Extra Ordinary No.21/1487 dated 07.03.2008.

(d) Make order for costs; and

(e) Grant such other and further relief as to this Court shall seem meet to the Petitioner.

The Appellant in the statement before the Arbitrator claimed that the 13th Respondent-Respondent was suspended from service by initially having sent letter dated 24.04.1999(R2) having averred that the

13th Respondent on 23.04.99 entered the office of the Company Accountant at about 4 pm after liquor, shouted at the Executive Officers in obscene language, prevented the work in the Office from running smoothly and thus created a state of unrest. The 13th Respondent-Respondent by letter R2 was asked to show cause why Disciplinary action should not be taken against him. Consequent to the issue of R2 the **6th to 12th** and **14th to 20th Respondents** together with a number of other Employees stormed into the **main office** of the Factory and while behaving violently hurled abusive words at some Senior Executive Officers inclusive of the General Manager, Personnel Manager and aggressively sought that the letter of suspension served on the 13th Respondent-Respondent be immediately withdrawn. The Appellant contended that the aforesaid Employees allegedly caused pain of mind to the other Senior Executive Officers by threatening to cause physical harm to them, and having displayed aggression, obstructed the normal production from the Factory, which caused the work of the Factory to come to a halt.

The Appellant claimed that it was under the aforesaid circumstances that the services of the 6th to 12th and 14th to 20th Respondents were **suspended** from **27.04.1999.** Consequently the aforementioned Workmen allegedly **gathered outside** the Factory premises and prevented the majority of other Workmen from reporting to

work. It was submitted by the Appellant that a purported strike was averted on 19.5.1999 by the Mediation of the Commissioner of Labour (4th Respondent) with the Workmen having compromised to resume work on **28.05.1999,** and the suspended 14 Workmen having **agreed** to be subjected to **Disciplinary Proceedings** by the Appellant. Subsequently a formal **Charge Sheet dated 04.06.1999** was served on the 13th Respondent-Respondent, and identical **Charge Sheets** dated **07.06.1999** were served on the **6th to 12th** and **14th to 20th Respondents-Respondents,** the Charge Sheets having contained **Charges of Misconduct.** Two formal **Disciplinary Inquiries** were held into the charges against the 13th Respondent-Respondent, and **6th to 12th** and the **14th to 20th** Respondents-Respondents respectively by Mr. F.N.De Silva, Retired President of the Labour Tribunal, and the services of the **Workmen** found **guilty** were **terminated.** The **22nd to 26th Respondents-Respondents** having **failed** to report **for work** on **28.05.1999** were treated as having **vacated** their **employment.** The **21st Respondent-Respondent** too **failed to report** for **work** on **28.05.1999** without any intimation to the Appellant, and hence was treated as having **vacated** his **post.**

The 6th to 27th Respondents in their Statement before the Arbitrator (5th Respondent) was that the 27th Respondent Union having formed a **Branch** at the Appellant's Factory which comprised of over 40%

of the Appellants Workmen had intimated to the Appellant thereof by letter dated 09.03.99 which received no reply from the Appellant. The Assistant Commissioner of Labour fixed a Discussion for **28.04.99** on representations pertaining to this matter being brought to the Notice of the Labour Department. The aforesaid Respondents contended that the 6th, 7th, 8th, 10th, 14th, 17th and 26th Respondents on 23.04.99 (A4) requested through the Branch Union to partake in the aforesaid discussion on 28.04.99. As the 7 Workmen had been suspended on 27.04.99, the members of the 27th Respondent-Respondent Union commenced a **strike** postulating the **Re-Instatement** of the aforesaid Workmen. The Respondents claim that the Appellant did not **honour** the **Agreement** with the Commissioner of Labour (R47). The Respondents claimed that the Award of the Arbitrator was **not challenged** on the ground of the wrongful manner in which the Inquiry had been conducted and that there had been no allegation against the Arbitrator, the Arbitrator having given both parties ample opportunity to produce Oral and Documentary Evidence in support of their claims. It was further submitted by the Respondents that there had been a **proper Evaluation** of the **evidence** by the **Arbitrator**. The Respondents contended that the Award was given pertaining to **three sets** of **Employees,** namely:-

(1) The 6th to 12th Respondents whose services were terminated for their **alleged misconduct committed** on **26.04.1999**, subsequent to the Interdiction of the 13th Respondent.

(2) The termination of services of the 13th Respondent consequent to an incident of having abused and threatened the Accountant and several other Management Officers on 23.04.1999.

(3) The vacation of post of the 14th to 26th Respondents who vacated their post by **not reporting** for work on **28.05.1999** without any **intimation** to the **Appellant.**

The Respondents submitted that the Arbitrator had given exhaustive reasons for arriving at his conclusions regarding the Award and that there being no error on the face of the Record that the Arbitrator had evaluated the Evidence correctly. It was stated by the Respondents that the Arbitrator concluded that

(i) The Establishment of the Appellant was initially responsible for creating a dispute with the 13th Respondent on 23.04.99, when although the General Manager had approved the payment of the Advance Salary by the Accountant to the 13th Respondent there was a dispute regarding the same.

(ii) A contributory factor for the dispute was because the Management of the Appellant did not approve of the Respondents forming a branch of the "All Ceylon Commercial and Industrial Workers Union" Trade Union at the office of the Appellant.

(iii) The 6th to 12th Respondents were intentionally victimized for their involvement in a Trade Union affiliated to the 27th Respondent.

(iv) There was no evidence to support the position that the 14th to 25th Respondents vacated their respective Posts. The Arbitrator concluded that these Respondents had been victimized for participating in Trade Union Action which is a lawful weapon in the hands of Employees.

The Respondents averred that the responsibility of the Arbitrator acting under the provisions of the **Industrial Disputes Act** in making an Award was to decide on a **fair** and **Justifiable basis** which was **different** from the **standard** required on **Strict legal basis.** It is claimed by the Respondents that in this case the Arbitrator carefully scrutinized the alleged incidents pertaining to the behavior of the Respondents and the surrounding events that contributed to the alleged dispute which formed the cause of Action to this Application. The

Respondents submitted that the Arbitrator concluded that the conduct proved on the part of the Employees did not warrant a stern punishment like termination of their Employment. The Respondents submitted that on examination of the Award the Arbitrator ordered that the Workmen numbered 1 to 15 (6th to 20th Respondents) be Re-instated in service with Back wages and other allowances from **the date of termination** because their services had been terminated unreasonably.

The Appellant's contention was that the Arbitrator did not determine the issues nor considered the evidence led in respect of whether the 13th Respondent came into the Accountant's Office under the influence of liquor after consuming Alcohol and whether he abused the Personnel Manager or the General Manager and hence behaved in a manner unbecoming of an Executive. The Appellant further contended that the Arbitrator had failed to consider whether the Workmen who entered the Board Room on 26.04.99 threatened the Management.

The Arbitrator on a consideration of the Evidence had observed that the parties presented facts "upon exaggerating them in their favour". It was hence implied by the Appellant that the Arbitrator had considered the concerns of the Appellant, but rejected those allegations as not serious enough to terminate the services of the employees. The Appellant averred that the Arbitrator in his Award made order to re-instate the 22nd to 26th Respondents on the basis that the

termination of their services were on the basis that they had vacated post, but that there was no evidence to show that they possessed the required mental element to do so. The Appellant stated that the evidence revealed that there was a strike subsequent to the Interdiction of the 6th to 12th and 14th to 20th Respondents. Consequently the dispute was settled in the Department of Labour. In the terms of settlement the Union agreed to end the strike on 24.05.1999, and the Appellant agreed to let the Workmen return to work on 28.05.99 having conceded to take them back in batches over a period of one week.

The Hon. Judge of the Court of Appeal in his order dated 28.06.10 stated that this arrangement caused **confusion** with regard to the date of reporting. The Hon. Judge of the Court of Appeal by his aforesaid Order dated 28.06.10 held that the Arbitrator had **correctly concluded** that the said Employees had **no mental element** to **vacate post** and ordered **Re-instatement** with **Back wages.**

I have examined the **facts relevant** to the **dispute** between the **Appellant** and **Respondents,** the evidence led in this case, the results of the 2 Domestic Inquiries conducted by Mr. F.N.De Silva Retired President of the Labour Tribunal, the relevant law pertaining to this matter and the Order of the Hon. Judge of the Court of Appeal dated 28.06.10 who affirmed the Award of the Arbitrator. The Hon. Judge of the Court of Appeal concluded that "The Petitioner has failed to establish

any ground on which this Court could issue a **Writ of Certiorari** to **quash** the **Award**. Hence this Court **dismisses this Application** without costs."

In **Hayleys Ltd.,** V **De Silva 64 NLR P.130** , His Lordship H.W.R.Weerasooriya, J. held that " I have already had occasion to refer to section 24(1) of the Act under which one of the duties cast on an Industrial Court is to take such decision and make such Award as may appear to the Court **Just** and **Equitable.** I think that these provisions by necessary implication also **require an Industrial Court to consider and decide every material question involved in the dispute.....** referred to it by the Minister. **A failure on the part** of the **Industrial Court to consider** and **decide a question which the Statute requires the Court to decide would in my opinion be an Error of Law.** Moreover the error would be one due to a **Disregard of Statutory Provisions**. An Award of the Court which is **based on such an Error**, if apparent on the face of the record is **liable to be quashed** by an **order of Certiorari".**

In Municipal Council of Colombo Vs.Munasinghe 71 NLR P. 223 H.N.G. Fernando, CJ**. quashing** an Award of an Arbitrator by way of a Writ of Certiorari held as follows:-

> "I hold that where the Industrial Disputes Act confers on an Arbitrator the discretion to make an Award which is **Just and Equitable the Legislature did not intend to confer** on an **Arbitrator the freedom of the wild horse**. The Mandate which the Arbitrator in an Industrial Dispute holds under the Law requires him to make an Award which is Just and Equitable and not necessarily an Award which favours an Employee. **An Arbitrator holds no license from the Legislature to make any such Award as he may please, for nothing is Just and Equitable which is decided by whim or caprice or by the toss of a double headed coin"**

In Ceylon Transport Board V Ceylon Transport Workers Union 71 NLR P. 158, **Tennakoon, J.** (as he then was) having quoted section **31C(1) of the said Act** held as follows. "This section **must not be** read as giving a Labour Tribunal **a power to ignore the weight of evidence……."** on the vague and unsubstantial ground that it would be inequitable to do so. There is no Equity about a fact. The Tribunal **must decide all questions of fact solely on the facts of the particular case, solely on the Evidence before him,** and apart from any Extraneous considerations. In short in his approach to the evidence **he must act Judicially.** It is only after **he has so ascertained** the **facts** that he

enters **upon the next stage of his functions which is to make an order that is fair and equitable** having regard to **the facts so found".**

It is my view that on a consideration of the Award the Arbitrator (5th Respondent-Respondent) initially outlined some of the Evidence in brief when he analysed the Termination of services of the 6th to 20th Respondents-Respondents. The Arbitrator observed that "in considering the Evidence and Written Submissions of the two parties, it appears that they have presented facts **after exaggerating** them in a **manner favourable to them**. The evidence revealed that there were apparent minor clashes between the Employer and Employees as the Management of the Appellant were opposed to the formation of a Branch of the 27th Respondent-Respondent Union at it's Factory and obstructed it. It appeared that the **13th Respondent-Respondent** although an **Executive** was far more **acceptable** among the **Workmen than** the **other Executives**. The Accountant did **not pay,** the **Advance salary** to the **13th Respondent–Respondent** on **24.04.99**, although money had been brought for this purpose on the orders of the General Manager. Dharmasundera and the 13th Respondent-Respondent had a cross talk, which **only Dharmasundera** heard the **13th Respondent say "Sathosin Avith Inna Pakaya.**" On 26.04.99 a group of Workmen including the 6th to 12th and 14th to 20th Respondents-Respondents(Workmen number 1-7 and 9 to 15) had an animated Discussion regarding the **Suspension**

of the **13th Respondent-Respondent,** as a result of which they were taken to the Moratuwa Police, and **MC Moratuwa Case No.2287** instituted against them, consequent to which they were **Discharged by Court.** The services of the 15 Workmen were terminated consequent to a Domestic Inquiry conducted by Mr.F.N.De Silva. The Arbitrator however held that "According to the aforesaid facts I order that the Workmen numbered **1 to 15** in the reference be **re-instated** in service with **back wages** and **other allowances** from the **date** of **termination,** because their **services** have been **terminated unfairly".**

The finding of the Arbitrator (5th Respondent-Respondent) in respect of the 22nd to 26th Respondents-Respondents was as follows" These Workmen were treated as having vacated their employment because the factory was closed after a strike. The mental element of their **wanting to report for work** is extremely clear from the letters sent by them to the Company.

In Best Footwear (Pvt.) Ltd., V The Minister of Labour and others 1997(2)SLR P.137 The Court of Appeal Judge F.N.D.Jayasuriya, J.declared the legal position that a **strike is** the final weapon or remedy of a Workman, that accordingly the right to strike is a weapon available to a Workman and that **termination** because of a **strike is unjust.** His Lordship held that "Accordingly I order that the 6 Workmen whose

services were terminated by treating them as having vacated their employment be **re-instated** with **Back wages** and **all Allowances".**

In my view in this case the reasons for the Award given by the Arbitrator (5th Respondent-Respondent) had been arrived at by a careful analysis by the Arbitrator of the evidence led at the Inquiry, and the reasons for the tension between the Appellant and the existent Respondents. Consequent to the settlement between the two parties, the Employees found it difficult to report for their normal work, as only some employees were given their previous Jobs and others promised to be given their Jobs but the promise of the Appellant was not fulfilled. Moreover the factory was **closed** consequent to the strike which made it impossible for some Employees to report to work, as they had to report to work in batches.

In my view what triggered the ill feeling between the Appellant and Employees was that the 13th Respondent-Respondent although an Executive himself was not given the advance of the salary by the Accountant in spite of the General Manager having permitted it on 24.04.1999. As the 13th Respondent was popular among the Employees, the Employees expressed their solidarity with the 13th Respondent. There is no evidence to prove that the 13th Respondent was produced before a Doctor to prove that he was drunk at that time.

In my view the Award of the Arbitrator is consequent to a well considered Examination of the Evidence and the Law.

The Arbitrator had on **10.01.2007** ordered **Reinstatement of Workmen** with Back wages including Allowances commencing from 27.04.1999. On a consideration as to whether this Award is a **Just** and **Equitable** Order, the attendant circumstances of this case have been scrutinized by me. The evidence revealed that the workmen by their conduct created unrest in the company which disrupted the activities of the company. In my view although **termination of services of the workmen is not justified**, it would be pertinent to consider whether the Relief granted to the workmen was **Just** and **Equitable.** Apparently the Arbitrator had not considered the following factors in making the Award.

(a) Workmen whose services were terminated could be expected to mitigate their losses having sought alternative work or employment.

(b) The possibility of workmen being gainfully employed during this period.

(c) The company during this period did not have the benefit of their services.

Under these circumstances the granting of **Back wages with all allowances** and **other benefits** would in my view be unreasonable. I hence amend the Award by ordering **Reinstatement** with **Back wages**

only based on the Basic Salary. Neither did the Arbitrator nor The Hon. Judge of the Court of Appeal in his Judgment dated 28.06.2010 consider the alternative relief of compensation. This is however in my view not a ground to completely set aside the Award of the Arbitrator. There could be a situation where the Appellant would not able to Reinstate the workmen due to a closure of the company, lack of vacancies or for any valid reason. Hence it is my considered view that if the Appellant is **unable to Reinstate all or some of the workmen, Compensation** for a period of **10 years service based on Basic Salary per month in lieu** of Reinstatement should be granted, in view of the finding of the Arbitrator that termination was too severe a punishment. Clearly there was some culpability on the part of the workmen, although the culpability was not sufficient to warrant a dismissal or termination of their services.

It is my view that the heirs of Karunadasa who died during the Arbitration should be paid the compensation that would be due to Karunadasa which is the Basic Salary of Karunadasa for a period of 10 years. I answer the questions in paragraphs 31(b), (c) and (f) of the Petition in the negative.

I see no reason to issue a Writ of Certiorari quashing the Award dated 10.01.2007. I dismiss the Appeal without costs, and

affirm the Judgment of the Court of Appeal dated 28.06.2010 subject to the aforesaid variations.

JUDGE OF THE SUPREME COURT

S.Tilakawardane . J.

I agree.

JUDGE OF THE SUPREME COURT

Priyasath Dep, PC,I

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application for Special Leave to Appeal from a judgement of the Court of Appeal under Article 128 of the Constitution.

SC Appeal No. 158/2010
SC Special LA No. 165/10
CA Application No. (Writ) 653/08

1. Samastha Lanka Nidahas Grama Niladhari Sangamaya,
   No.10A, Nawagampura - Stage 2,
   Wallampitiya,
   Colombo 14.

2. Chandra Kayseen Jayasuriya, President,
   Samastha Lanka Nidahas Grama Niladhari Sangamaya,
   No.10A, Nawagampura - Stage 2,
   Wallampitiya, Colombo 14,
   residing at Ridiyagama Road,
   Galalethota, Ambalantota

3. R.M. Sirisena, Secretary
   Samastha Lanka Nidahas Grama Niladhari Sangamaya,
   No.10A, Nawagampura - Stage 2,
   Wallampitiya, Colombo 14,
   residing at Ihalawawa, Kiralogama

PETITIONERS – APPELLANTS

-VS-

1. D. Dissanayake
   Secretary,
   Public Administration and Ministry of Home Affairs,
   Torrington Square,
   Colombo 7.

2. Ms. P. Siriwardena
   Director General of Establishment,
   Ministry of Public Administration and Home Affairs,
   Torrington Square,
   Colombo 7.

RESPONDENTS - RESPONDENTS

BEFORE	**:**	S. Marsoof, PC, J P.A. Ratnayake, PC, J and C. Ekanayake J
COUNSEL	**:**	Dulindra Weerasuriya PC with Darshana Edirisinghe for the Petitioners - Appellants. Dr. Avanti Perera, SC for the Respondents - Respondents.
ARGUED ON	**:**	5.11.2012
WRITTEN SUBMISSIONS ON	**:**	5.12.2012
DECIDED ON	**:**	14.06.2013

SALEEM MARSOOF J.

The primary question that arises for determination in this appeal is whether the 1st Respondent-Respondent (hereinafter referred to as the "1st Respondent") had the authority to amend Public Administration Circular No.06/2006 dated 25th April 2006 (P5), which was issued by the 1st Respondent to implement a policy decision relating to the public service, by issuing the amending circular designated as Public Administration Circular No. 06/2006(1) dated 24th May 2006 (1R3).

It may be useful at the outset to mention that the 1st, 2nd and 3rd Petitioners - Appellants (hereinafter referred to as the "Appellants") are respectively, a trade union of Grama Niladharis, and its incumbent President and Secretary. The members of the 1st Appellant's trade union belong to the Grama Nildhari Service, which is an all-island service. The 1st Respondent is the Secretary to the Ministry of Public Administration and Home Affairs who is the appointing authority and the final disciplinary authority of all Grama Nildharis. The 2nd Respondent is the Director General of Establishment, who was responsible for formulating draft schemes for the recruitment, appointment and promotions of Grama Niladhari officers, subject to the oversight of the Cabinet of Ministers.

The Appellants filed an application seeking a writ of *mandamus* on the Respondents directing them to place Grama Niladharis - Class II on the Salary Code MN-1-2006, as laid down in Public Administration Circular No. 06/2006 dated 25th April 2006 (P5) titled 'Restructuring Of Public Service Salaries Based On Budget Proposals - 2006'. The said circular contains the revised salary structure formulated to give effect to the Budget Speech 2006, after its approval in Parliament. They have in this petition to the Court of Appeal submitted that they have been placed on a lower salary scale by Circular No. 06/2006(1) (1R3) issued by the 1st Respondent and the letter dated 6th November 2008(1R4) sent by the Secretary to the National Salaries and Cadres Commission, which sought to give effect to the said Circular.

The Court of Appeal, in the impugned judgement pronounced on 25th April 2006, had considered certain prior decisions of that court and proceeded to dismiss the application filed by the Appellants on the basis that it would not review policy decisions made by the Government. However, on 29th November 2010 when this Court granted special leave to appeal against the impugned judgement of the Court of Appeal, this Court confined the matters to be considered on appeal to the following substantial questions:-

1. Did the 1st Respondent have the authority to amend by 1R3, the Circular marked P5, which is allegedly a policy decision made by the Cabinet of Ministers?
2. If the answer to question (1) is in the negative, are the Appellants entitled to the salary scale set out in P5?

The Question of Vires

The first substantive question that has to be determined on appeal in this case is purely one of *vires,* and arises in the context of certain constitutional provisions which seek to distinguish between two categories of decisions that can be made by the executive arm of Government. The first of these are decisions relating to "the appointment, transfer, dismissal and disciplinary control" of public officers, which was vested in the Public Service Commission by Article 55(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka") as amended by the Seventeenth Amendment thereto, which was in force at the time of the pronouncement of the impugned judgement of the Court of Appeal. The second of these categories are decisions pertaining to policy, which in the context of the public service were exclusively vested in the Cabinet of Ministers by Article 55(4) of the Constitution of Sri Lanka, as amended by the Seventeenth Amendment. Since the Circular marked 1R3 was issued, and the letter marked 1R4 was sent, prior to the coming into force of the Eighteenth Amendment to the Constitution, the provisions of the said Amendment need not be considered in deciding this appeal.

There can be no doubt that the Cabinet of Ministers has the power to make important policy decisions relating to the public service. Article 55(4) of the Constitution of Sri Lanka provided that, subject to the other provisions of the Constitution, "the cabinet of Ministers shall provide for and determine all matters relating to public officers, including the formulation of schemes of recruitment and codes of conduct for public officers, the principles to be followed in making promotions and transfers, and the procedure for the exercise and the delegation of the powers of appointment, transfer, dismissal and disciplinary control of public officers". The Seventeenth Amendment to the Constitution, which was in force at the time the impugned judgement was pronounced, has replaced Article 55(4) with an even simpler and more precise provision, which enacts as follows:-

> "Subject to the provisions of the Constitution, the Cabinet of Ministers shall provide for and determine all matters of policy relating to public officers".

At the hearing of this appeal, learned President's Counsel for the Appellants submitted that the Circular bearing No. 06/2006 (P5) was made on the recommendations of the National Salaries and Cadres Commission, and once accepted and approved by the Cabinet of Ministers, it became a policy decision of the Government. He further submitted that while 1R3 is a Circular issued by the 1st Respondent with respect to matters of policy, such a circular could only be issued with the approval of the Cabinet of

Ministers, which has exclusive authority to set out the policy with respect to public officers. He contended that insofar as 1R3 is a circular issued by the 1st Respondent without the approval of the Cabinet of Ministers, it is a nullity, and hence the salary structure and scales set out in P5 cannot be varied by another inferior authority. For the same reason, he also contended that the letter dated 6th November 2008 sent by the Secretary to the National Salaries and Cadres Commission marked 1R4 is also of no force or avail in law. The essence of the Appellants' case is that 1R3 and 1R4 are invalid because, unlike P5, which had been issued by the Secretary to the Ministry of Public Administration "with the sanction of the Cabinet of Ministers", 1R3 and 1R4 did not have the sanction of the Cabinet of Ministers.

Learned State Counsel, responded to these submissions by pointing out that there is nothing in Circular No. 06/2006 (P5) which establishes that it had been approved by the Cabinet of Ministers, as it only states at its very commencement that "*The Government* has decided to implement a new salary structure prepared on a monthly basis given in Annexure I with effect from 01/01/2006 as stated in the Budget Speech 2006" (*Emphasis added*). Learned State Counsel stressed that the reference to "the Government" in P5 was not sufficient to establish that it had received the sanction of the Cabinet of Ministers, and submitted that in the absence of any specific statement in P5 or any external evidence to show that Circular P5 had received the sanction of the Cabinet of Ministers, there can be no legal requirement for amendments thereto, such as Circular 1R3, to be approved by the Cabinet of Ministers.

The Appellants who were seeking to persuade Court that Circular P5 had been sanctioned by the Cabinet of Ministers prior to it being issued, had not supported this position with any material produced with their petition and affidavits lodged in the Court of Appeal or in this Court, nor have the Respondents furnished with their affidavits any evidence of such approval. This Court only had the benefit of examining the Note to the Cabinet of Ministers captioned "Salaries and Other Incentives Proposed by the Budget of 2006" (2006 අයවැය මගින් යෝජනා කරණ ලද වැටුප් හා අනෙකුත් දිරිගැන්වීම්) (R1) bearing No. 06/0043/207/002 dated 4th January 2006 presented under the hand of the Hon. Minister of Finance and Planning (R1) and the relevant Cabinet Decision of the same date (R2) pertaining thereto. The latter document shows that the Note to the Cabinet was noted by the Cabinet of Ministers at its meeting of 4th January 2006. Paragraph 2.1 of the aforesaid Note to the Cabinet of Ministers (R1) provides as follows:-

> 2.1. රජයේ සේවකයින් සඳහා පහත සඳහන් ප්‍රතිලාභ හිමිවේ.
>
> - සියලුම රජයේ සේවකයින්ගේ වැටුප් ඉහල දැමේ.
> - රජයේ සේවයේ අවම මාසික වැටුප රු 11,630/- ක් වනු ඇත. ඒ අනුව රු 2,280/- ක මාසික වැඩිවීමක් හිමිවනු ඇත. එම සම්පූර්ණ වැටුප් වැඩිවීම් කොටස් දෙකකින් ලබා දේ. සම්පූර්ණ වැඩිවීමෙන් 50% ක් 2006.01.01 දින සිට ද ඉතිරිය 2007.01.01 දින සිට ද හිමිවේ. (වැටුප් වැඩිවන ආකාරය ඇමුණුම් 1 යටතේ දක්වා ඇත.) 2005 වර්ෂයේ ඇයවැය මගින් යෝජනා කරන ලදුව 2006 වර්ෂයේ ගෙවීමට නියමිතව තිබූ ඉතිරි ශේෂය ද මෙයට ඇතුලත් වේ.....

It is evident from the aforesaid Note to the Cabinet of Ministers that Circular P5 was the outcome of one of the salutary proposals contained in the Budget Speech - 2006, which was to fix a minimum salary scale of Rs. 11,630/- for the entire public service. It appears from this Note that the Budget Speech – 2006 only contained certain general proposals for the enhancement of salaries and emoluments applicable to the public sector, and the function of formulating the mundane details and suitably restructuring all public sector salary scales fell on the Ministry of Finance and Planning, which acted in consultation with other relevant Ministries and the National Council for Administration. Even what was placed before the Cabinet

of Ministers by the said Note and duly noted by the Cabinet of Ministers at its meeting of 4th January 2006, were some general formulations and not the detailed provisions of Circular P5. There is no material placed before Court, which clearly establish that the Circular P5, in the form in which it was issued by the 1st Respondent, was in fact placed before the Cabinet of Ministers or received its approval.

However, it is of particular significance to note that the aforesaid Note to the Cabinet expressly provided as follows in paragraph 7 thereof:-

> 07. මෙම වැටුප් වකුලේඛණය මගින් ආවරණය නොවන වෙනත් සේවක පිරිස් සම්බන්ධයෙන් වන ඉල්ලීම් සහ වැටුප් ක්‍රම තුලින් මතුවන වෙනත් ගැටලු වේනම් පරිපාලනය සඳහා වන ජාතික සභාව ඒ පිළිබඳව සලකා බලනු ඇත.

It would appear from the above quoted paragraph of the aforesaid Note to the Cabinet of Ministers (R1) that the executive arm of government, which had the responsibility of implementing the Budget Proposals – 2006, was obliged to refer any of the problems that could arise in the process of the implementation of the said proposals for the consideration of the National Council for Administration, which has since been replaced by the National Salaries and Cadres Commission. It is also evident from the letter dated 6th November 2008 (1R4) addressed to the 1st Respondent by the Secretary to the said Commission is a clarification issued to clarify certain matters that arose from the implementation of Public Administration Circular No. 06/2006(1) dated 24th May 2006 (1R3).

On the basis of the material placed before this Court, I am inclined to the view that neither the Circular dated 24th May 2006 (1R3) nor the clarification made by the National Salaries and Cadres Commission by the letter dated 6th November 2008 addressed to the 1st Respondent (1R4), purported to evolve or deal with matters of pure policy pertaining to the public service, and that they merely reflect action taken by the executive arm of government to implement the clear policy of restructuring public sector salary scales to give effect to the salutary proposal contained in the Budget Speech – 2006, which was to raise the minimum salary scale in the public sector to Rs. 11,630/- . In the result, I am of the opinion that substantive question (1) on which special leave to appeal had been granted in this case has to be answered in the affirmative.

Entitlement of the Petitioners to the Salary Scales set out in P1

By reason of the fact that I have answered the first substantive question that arose for decision in this appeal in the affirmative, the second substantive question on which special leave to appeal was granted by this Court need not be answered. Therefore, without going into the question in any depth, I would like to add that I see a formidable obstacle to the grant of any relief to the Appellants even if they were otherwise entitled to any relief, as in their prayer to the petition lodged by them in the Court of Appeal, they have not sought a mandate in the nature of *certiorari* to quash Public Administration Circular No. 06/2006(1) dated 24th May 2006 issued by the 1st Respondent (1R3) and the clarification made by the National Salaries and Cadres Commission by its letter dated 6th November 2008 addressed to the 1st Respondent (1R4).

It is trite law that no court will issue a mandate in the nature of writ of *certiorari* or *mandamus* where to do so would be vexatious or futile. See, *P.S. Bus Company Ltd., v Members and Secretary of Ceylon Transport Board* 61 NLR 491, Credit *Information Bureau of Sri Lanka v. Messrs Jafferjee & Jafferjee (Pvt)*

Ltd., 2005 (1) Sri LR 89. The writ of *mandamus* is issued to enforce a public duty, and the writ was sought in this case by the Appellants directing the Respondents to pay to them the salary scales set out in Public Administration Circular No.06/2006 dated 25th April 2006 (P5). However, I fail to see how the Appellants could have succeeded in their prayer for a mandate in the nature of *mandamus* without having 1R3, which is a purported amendment to P5, and 1R4, which is a clarification issued by the Salaries and Cadres Commission based on the amendment 1R3, quashed through *certiorari*, a relief which they have failed to pray for in the lower court.

In these circumstances, I am constrained to hold that in any event, substantive question (2) on which special leave to appeal had been granted to the Appellants has also to be answered against the Appellants, but this time in the negative.

Conclusions

For all these reasons, I am of the opinion that the judgement of the Court of Appeal should stand, and this appeal should stand dismissed. In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

P.A. RATNAYAKE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

C. EKANAYAKE, J.

I agree.

JUDGE OF THE SUPREME COURT

S.C. Appeal No. 161/2010

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

S.C. Appeal No. 161/2010
S.C. Spl. L.A. No. 186/2010
C.A. Application No. 691/2007 [Writ]

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

D.F.A. Kapugeekiyana,
No. 29, Halgahadeniya Road, Kalapaluwawa, Rajagiriya.
2nd Petitioner-Petitioner-Appellant

Vs.

1. Hon. Janaka Bandara Tennakone, Minister of Lands, Ministry of Lands, "Govijana Mandiraya", No. 80/5, Rajamalwatta Road, Battaramulla.
2. District Land Officer, Acquiring Officer, Divisional Secretariat, Kaduwela.
3. Urban Development Authority, Sethsiripaya, Battaramulla.
4. Sri Lanka Land Reclamation and Development Corporation, No. 3, Sri Jayewardenepura Mawatha, Welikada, Rajagiriya.
5. Inspector of General of Police, Police Headquarters, Colombo 1.

6. Hon. Attorney General,
Attorney General's Office,
Colombo 12.
Respondent-Respondent-Respondents

E.D. Kapugeekiyana,
No. 29,
Halgahadeniya Road,
Kalapaluwawa, Rajagiriya.
1st Petitioner-Respondent-Respondent

BEFORE : **TILAKAWARDANE. J.**
MARSOOF. P.C. J &
DEP.P.C. J

COUNSEL : Faiz Musthapha, P.C., with Faizer Marcar, Ashiq Hashim and Janaka Kroon instructed by W.B. Ekanayake for the 2nd Petitioner-Petitioner-Appellant.
Milinda Gunatilleke, D.S.G., for the Respondents.

ARGUED ON : 26.06.2013

DECIDED ON : 18.11.2013

TILAKAWARDANE. J.

The Petitioner- Appellant (hereinafter referred to as the Petitioner) has sought Leave to Appeal from the decision of the judgment of the Court of Appeal dated 23.08.2010 whereby

the Court of Appeal refused an application made by the Petitioner seeking a writ of certiorari, and in the alternative, a writ of mandamus. This Court granted Special Leave to Appeal on the following questions of law:

1. Whether the Court of Appeal erred in failing to consider the acquisition as ab initio void for the reason that no purpose was disclosed in the **Section 2** Notice warranting the acquisition.
2. Did the Learned Judges of the Court of Appeal err in law by upholding the acquisition on the basis that there was a supervening public purpose.
3. Did the Learned Judges of the Court of Appeal err on the facts by holding that the acquisition was warranted for the purpose of a subsequent public purpose
4. Did the Learned Judges of the Court of Appeal err in law by placing an unfair burden of proof upon the Petitioner, where there was no ground of urgency to vindicate the acquisition under the provisions of the Land Acquisition Act.

The land in question belonging to the Petitioner was acquired by the Ministry of Lands [hereinafter referred to as the Respondent] under the Land Acquisition Act. The acquisition had taken place under the provisions of **Section 38 (a)** of the Land Acquisition Act. A notice was issued under **Section 2** of the abovementioned Act by the District Land Officer and Acquiring Officer for the Colombo District upon the request of the Minister of Lands and Land Development. On the grounds of urgency an order was made on 02.01.1986, and on 08.01.1986 a Government Gazette was published and the Respondents took possession of the land.

The Petitioner challenged the acquisition by seeking two distinct reliefs from the Court of Appeal against the 1st Respondent. The first relief sought by the Petitioner included a writ of certiorari, quashing the order dated 02.01.1986 marked P5 in that Court, on the basis of failing to provide a clear and adequate 'public purpose' on the S. 2 Notice as per the requirements of the Act, failing to show an existing 'public purpose' at the time of the acquisition and failing to reveal grounds of urgency at the time of issuing an order under the provisions of **Section 38 (a)** of the Act. The Petitioner secondly, in the alternative, sought a

writ of mandamus, directing the Respondent to divest the said land on the basis that the land had not been utilized for any purpose nor have there been any improvements carried out on the land.

The Land Acquisition Act describes the steps that need to be followed when acquiring land; in terms of **Section 2 (1)**, the Minister decides and identifies the area and land that is needed for public purpose. Thereafter, as per **Section 4 (1)**, the Minister directs the Acquiring Officer to serve a notice on the owner and another notice to be exhibited in a conspicuous place on or near the land, thereby giving the owner, or any person who has an interest on the property, an opportunity to object to the acquisition. In the event an objection is made, as per **Section 4 (4)** of the Act, the Minister will carry out an inquiry and come to a final conclusion. The Minister's decision will be published in the Gazette and will also be exhibited on or near the land confirming and establishing the finality of the decision. This publication shall be construed as definite evidence of the land being required for a 'public purpose', as per **Section 5 (2)** of the Act, which notably states as follow: *"A declaration made under sub-section (1) in respect of any land or servitude shall be conclusive evidence that such land or servitude is needed for public purpose",* whilst **Section 7 (2) (c)** allows any person having an interest in the land to make a claim for compensation.

The Petitioner in this case asserts that, the notice issued by the Respondents merely states that the acquisition of the land is for 'public purpose'. The law pertaining to the issuance of notices is found in **Section 2(1)** and **(2)** of the **Land Acquisition Act** which reads as follows:

> *"(1) where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.*
>
> *(2) the notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that the land in that area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for*

that public purpose."

This Court is in agreement with Justice Mark Fernando's broadened illumination of **Section 2 (2)** of the Act in the case of **Manel Fernando and another V D.M Jayarathne, Minister of Agriculture and Lands**, where the following was established:

> *"The minister cannot order the issue of a Section 2 notice unless he has a public purpose in mind. Is there any valid reason why he should withhold this from the owners who may be affected?*
>
> *Section 2(2) requires the notice to state that one or more acts may be done in order to investigate the suitability of that land for that public purpose: obviously that public purpose cannot be an undisclosed one. This implies that the purpose must be disclosed. From a practical point of view, if an officer acting under Section 2(3)(f) does not know the public purpose, he cannot fulfill his duty of ascertaining whether any particular land is suitable for that purpose"*

It is not in dispute that lands are acquired under the provisions of the Land Acquisition Act for the benefit of the public. Yet, in the process of carrying out greater good for the public of the country, one must not unduly neglect the owner of the land. It would be overly harsh to forget the ties a landowner has to his property. Therefore, it is necessary for the Minister and/or any authority acquiring the land, to have a clear and distinct public purpose for which the acquisition is commissioned.

In the event a Minister or any Government official withholds such vital information from the landowner, it must be construed as exercising his powers negligently and unlawfully. Similarly, if the Minister or Government officials are not aware of the true public purpose of acquiring the land then the act of acquiring the property should be viewed through a lens of zealous concern by the Courts. Acquiring properties under deception and pretense or for a potential and nonexistent future public purpose will be unlawful. Importance and necessity in accordance with the provisions of this Act should be given to the existence of the knowledge

of the genuine public purpose the land would be put to use and to disclose such purpose to the landowner at the time of acquiring the property.

Having said that, it is apparent to this Court, after a thorough examination of all the documentation produced before us, that on 14th December 1989 (P8) the Petitioner, who by then had admittedly received notice of the acquisition, had only requested the appropriate compensation for the land without knowledge as to any illegality in the acquisition of the land. The objections made by the Petitioner were solely with regard to the value of the compensation. He did not avail himself of the first given opportunity to object to the acquisition but rather in the letter has, upon various grounds enumerated by him [such as the land being close to the main Koswatte Road, having access to electricity etc.], strongly recommended his land as the more suitable for acquisition. Although the Petitioner was summoned for an inquiry on 09.10.1990 to determine his claims for compensation, he was not granted compensation on the basis of lack of government funds. The Court of Appeal, on 11.10.2001 directed the State to process the Petitioner's claim and to make an award of compensation according to law. Therefore, it is not disputed that in terms of the said order the process for the award of compensation has been completed in terms of the Land Acquisition Act.

The Petitioner's willingness to surrender his property is evident from the contents of the same document, provided that a satisfactory amount of monies are paid to him as compensation. However, the Petitioner has not made any reference or raised any objections in his communications with the Respondent, with regard to the purported failure of the declaration and/or clarity of the public purpose for which the land was acquired.

This Court has further observed the document issued by the Divisional Secretary of Kaduwela dated 18.09.1998 which clearly states that the land is required for the public purpose of 'urban development'. This Court finds this purpose as a proportionately sufficient explanation for the acquiring of the land under the provisions of the Act. It is not contested that while the war on terrorism was ongoing it had been granted to be utilized for the construction of married

quarters for the families of the special task force.

Accordingly, it is the opinion of this Court that the original claim of the Petitioner was not based on the lack of a definite public purpose but generally set out. Nonetheless, it is this Courts view that the requisite public purpose was clearly clarified and informed by the Respondents to the Petitioner as specified in **Section 2** of the Act. Therefore, this Court agrees with the decision made by the Learned Judges of the Court of Appeal, and holds that there was an urgent supervening public purpose for acquiring the Petitioner's land.

The Petitioner further alleges that there was a lack of urgency warranting the acquisition. It is the Petitioner's claim that since the vesting order published in January 1986 and the possession of the land on 08.04.1986, the initial attempt of using the land was in 2002, when the land was handed over to the Special Task Force to build housing units confirmed by a letter issued by the Urban Development Authority dated 28.08.2002. It is vital that this Court identifies as to whether any development have been carried out since acquiring the Petitioner's land.

The intention of reclaiming land is to make the land suitable for a specific public purpose such as for agricultural development or for the purpose of urban development. Although the procedure and specifications may vary depending on the purpose for which the land is to be utilized, a number of steps need to be carried out on the land. These steps have been clearly identified and established in the guidelines entitled "Land Reclamation and Dredging", published by the **Institute for Construction Training and Development, Publication No: SCA/3/3**, such including:

> ***"Drainage Canal System***
>
> *Before commencing any work at a proposed reclamation site, a study should be done to determine the canals required to drain the run off from the area to be reclaimed as well as to drain the run off from its own catchment area…whilst the reclamation work is in progress sufficient drainage paths should be provided for storm water and on*

completion of the work the required canals, retention areas or lakes should be provided.

The areas to be reclaimed shall be as shown on the drawings. Reclamation shall be carried out with suitable material arising from the dredging operations and approved by the engineer or, if sufficient material is available from this source, the suitable material shall be obtained from approved borrows. All reclamation shall be carried out to the lines and levels shown on the drawings…"

"Filling for Urban Development

Where land is to be used for Urban Development, the surface layer 150mm thick shall be of material suitable for plant growth. This material shall be borrowed from areas approved by the Engineer".

This Court has carried out comprehensive examination of all the documentation provided before us and it is apparent that this acquired land is not mere marshy land or the paddy land it was at the time of acquiring the land; it has been developed in a manner where construction could commence. The photographic evidence tendered to us shows that construction has taken place in this land and it has been brought to our notice by the Counsel of the Respondent in his submissions, that construction was ceased due to the initiation of legal action by the Petitioner.

It is apparent that a large amount of work has been carried out on this land which facilitated the transformation of this acquired paddy land into a land which is ready for construction and development. The filling guidelines, as specified by the **Institute for Construction Training and Development** referred to above, states as follows:

"Fill material shall be obtained from borrow areas approved by the Engineer. The gravelly earth should consist of hard durable particles free from excess clay, vegetable matter or harmful materials.

The following test shall be carried out on samples taken from the proposed borrow site before and during the filling operation:

(i) In-situ moisture content
(ii) Atterbergs limits
(iii) Sieve analysis and hydrometer analysis
(iv) Proctor compaction

A uniform gradation of material is required to achieve a good compaction of the fill material. The percentage of gravel and sand so determined by sieve analysis and hydrometer analysis should be over 70%. Stones greater than 150mm in greatest dimension shall not be permitted in any part of the filling. Similarly any stones or rock which will impede the operation of tamping rollers shall be removed. All roots in the fill material shall be handpicked and removed out of the premises.
Before placing any fill the existing surface of areas to be filled shall be stripped of vegetation and other deleterious matters.
Water logged areas shall be dewatered and, as far as practicable, the surface stripped of all the vegetation and deleterious matter prior to placement of fill material. If in any area it is considered by the Engineer to be impracticable to dewater fully, the material used for filling such areas up to 160 mm above the water level shall be sand or gravel with not more than 15% passing N0.200 US sieve.
In areas where the terrain is clay or peat the material used for initial filling up to 300mm shall be sand or gravel with not more than 15% passing No 200 US sieve. However, the thickness of the initial fill layer shall be the minimum required for the movement of machinery. The material used for earth filling above the stripped ground or sand or gravel layer shall be gravelly or sandy materials from approved borrow areas.
Two important factors to be considered in filling from borrow is the drainage requirements and the sub-soil conditions. The material used for filling should have a

minimum dry density of 1.76 g/ml (110lb/ft) or as decided by the Engineer.

A filled site should have the following.

(i) A well compacted fill.

(ii) Adequate thickness of fill to avoid ground water and flood problems.

(iii) Adequate thickness below proposed foundation to take up the load.

(iv) Sufficient time for settlement leaving only tolerable limits.

(v) *Monitoring rate of settlement within acceptable limits."*

From the aforesaid guidelines it is evident that time, money and resources have been disbursed for the development of this land. It appears that sustained effort over a period of time is needed to fill marshy and paddy lands to convert them into lands suitable for construction. The matter of urgency has been demonstrated by the letter dated 21.03.2005 (R7) to the Petitioner from Special Task Force confirming that the land is best suited and is in immediate need for the construction of married quarters. The documentation submitted to court (R7 to R16) clearly discloses that the Urban Development Authority has further approved this and it was handed over through a cabinet decision for the building of the aforesaid married quarters.

Thus, it is this Court's observation that the property was not acquired for the purpose of water retention as alleged by the Petitioner. By their letter dated 25.06.1999, the Chairman of the Sri Lanka Land Reclamation and Development Board has further confirmed the same. However, this property was acquired for the public purpose of urban development and as such was ideally suited for the construction of married quarters and as a result the authorities have carried out extensive work on the land by filling the land and preparing it for housing development. Consequently, it is the belief of this Court that there appears to be an urgency as well as necessity to acquire the land and such does not constitute discrimination against the Petitioner and does not violate his rights. Indeed he himself has recommended and categorically stated in P8, that his land is eminently more suitable to be acquired than the lands that are adjacent to his land.

It is the Petitioner's claim that successively, he discovered that two lots neighboring to his property that had also been acquired at the same time as his property via the same vesting order, had been divested by the Minister of Lands by an order dated 10.06.2005 with a Government Gazette published on 13.06.2005 confirming the order under **Section 39 A** of the Act. Therefore, it was the Petitioner's position that since the land was acquired for the purpose of water retention and not for the purpose of building quarters, his land should also be divested in accordance with the provisions of **Section 39 A** of the Act as the land is not utilized for the public purpose it was acquired.

Section 39 of the Act has to be reviewed when ascertaining whether the Petitioner is entitled to the relief he claims for, the provisions of **Section 39** reads as follows:

"39 A. (1) Notwithstanding that by virtue of an Order under Section 38 (hereafter in this section referred to as a "vesting order") any land has vested absolutely in the State and actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of section 40, the Minister may, subject to subsection(2) by subsequent Order published in the Gazette (hereafter in this section referred to as a "divesting Order") divest the State of the land so vested by the aforesaid vesting Order.

(2)The Minister shall prior to making a divesting Order under subsection (1) satisfy himself that-

(a) no compensation has been paid under thus Act to any person or persons interested in the land in relation to which the said divesting Order is to be made;

(b) the said land has not been used for a public purpose after possession of such land has been taken by the State under the provision of paragraph (a) of section 40;

(c) no improvements to the said land have been effected after the Order for possession under paragraph (a) of section 40 had been made; and

(d) *the person or persons interested in the said land have consented in writing to take possession of such land immediately after divesting Order is published in the*

Gazette;"

The Petitioner contends that a Government Agent informed him that the said land has been acquired for the purpose of water retention, yet it is pertinent to point out that the no evidence whatsoever has been adduced by the Petitioner in order to satisfy this Court that the land was required for water retention and that the purpose so specified was subsequently altered by the Urban Development Authority.

This Court does not disagree with Justice Mark Fernando's dictum, in the case of **De Silva v Athukorale Minister of Lands Irrigation (1993)** *(1 SLR 283),* where he held that the true meaning of the amended Land Acquisition Act was to allow Ministers to restore the land to its original owner where the original reason for acquisition cannot be fulfilled. However, due to the lack of evidence by the Petitioner to support his claim that the land was acquired for water retention, this Court is unable to accept the Petitioner's purported reasons for the acquisition of the land by the Respondent. As a result, this Court accepts that the purpose of acquiring the Petitioners land was for 'Urban Development' as the land has been transformed and molded in a manner that is suitable for the construction of houses in accordance with the procedure set out in the **Institute for Construction Training and Development**. This Court also cannot, in view of the evidence placed before it, accept that the development of married quarters for the Officers of the Special Task Force was a new purpose that was introduced belatedly to obstruct relief being granted in this case.

It is the assessment of this Court that to grant a divesting order on behalf of the Petitioner as per **Section 39 A** of the Act, the four conditions set out in **Section 39 A (2)** must be satisfied. It is not in dispute that the Respondents have paid compensation to the Petitioner for acquiring his land and furthermore a considerable amount of improvements have been carried out on the land in preparation for building houses. Therefore, it would be unreasonable to divest the land.

Once again this Court is duty bound to follow the dictum held by Justice Mark Fernando, in

the case of **De Silva v Atukorale, Minister of Lands, Irrigation and Mahaweli Development and Another;** *"…it would be legitimate for the minister to decline to divest it there is some good reason-for instance, that there is a now a new public purpose for which the land is required. In such a case it would be unreasonable to divest the land, and then to proceed to acquire it again for such new supervening public purpose. Such a public purpose must be a real and present purpose, not a fancied purpose or one, which may become a reality only in the distant future".*

For the reasons aforesaid, the Petitioner's Application is dismissed. I also order costs in a sum of Rs 50,000/- to be paid by the Petitioner to the Respondent.

JUDGE OF THE SUPREME COURT.

MARSOOF. P.C. J

I agree.

JUDGE OF THE SUPREME COURT

DEP.P.C. 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 appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 165/2010

SC/HCCA/LA 23/2010
CP/HCCA/Kandy/315/2003
DC. Kandy Case No. 2448/RE

1. Seyed Shahabdeen Najimuddin
of No. 357, Peradeniya Road,
Kandy.

2. Pichchei Hadjiar Shahabdeen
of No. 357, Peradeniya Road,
Kandy.

Plaintiffs

Vs.

1. Thureiratnam Nageshwari nee Sunderalingam
of No. 307, Peradeniya Road,
Kandy.

2. K.W.G. Chandrani Mangalika
of No. 8/A, , Peradeniya Road,
Kandy.

3. Anthony Sandanam
of No. 8/A, Peradeniya Road,
Kandy.

4. W.M.W.B. Weerabahu
of No. 307, Peradeniya Road,
Kandy.

Defendants

And Between

4. W.M.W.B. Weerabahu
of No. 307, Peradeniya Road,
Kandy.

4th Defendant- Appellant

Vs.

1. Seyed Shahabdeen Najimuddin
of No. 357, Peradeniya Road,
Kandy.

2. Pichchei Hadjiar Shahabdeen
of No. 357, Peradeniya Road,
Kandy.

Deceased-Plaintiff-Respondents

1a. S.N. Fathima Rushana
1b. S.N. Mohamed Zawahir
1c. S.N. Fathima Rizmiya
1d. S.N. Fathima Shihara
1e. S.N. Mohamed Zahir
1f. S.N. Fathima Saffna
all of No. 12/5, Riverdale Road,
Anniwatte, Kandy.

Substituted-Plaintiff-Respondents

1. Thureiratnam Nageshwari nee
Sunderalingam
of No. 307, Peradeniya Road,
Kandy.

2. K.W.G. Chandrani Mangalika
of No. 8/A, , Peradeniya Road,
Kandy.

3. Anthony Sandanam
of No. 8/A, Peradeniya Road,
Kandy.

Defendant-Respondents

And Now Between

1a. S.N. Fathima Rushana
1b. S.N. Mohamed Zawahir
1c. S.N. Fathima Rizmiya
1d. S.N. Fathima Shihara
1e. S.N. Mohamed Zahir
1f. S.N. Fathima Saffna
all of No. 12/5, Riverdale Road,
Anniwatte, Kandy.

Substituted-Plaintiff-Respondents Petitioners

4. W.M.W.B. Weerabahu
of No. 307, Peradeniya Road,
Kandy.

4th Defendant- Appellant-Respondent

1. Thurairatnam Nageshwary nee Sunderalingam
of No. 307, Peradeniya Road,
Kandy.

2. K.W.G. Chandrani Mangalika
of No. 8/A, , Peradeniya Road,
Kandy.

3. Anthony Sandanam
of No. 8/A, Peradeniya Road,
Kandy.

Defendant-Respondent-Respondents

*** * * ***

SC. Appeal 165/2010

Before : **Marsoof, PC.J.**
Dep, PC. J. &
Wanasundera, PC,J.

Counsel : Ikram Mohamed PC. with M.S.A. Wadood , Nadeeka Galhena and Milhan Mohamed for Substituted- Plaintiff-Respondent-Appellants.

Lakshman Perera, PC. with Nadeeka Sudasinghe for 4th Defendant-Appellant-Respondent.

Argued On : **21.03.2013**

Decided On : **17 .07.2013**

*** * * ***

Wanasundera, PC.J.

This appeal was made by the substituted Plaintiff-Respondent-Appellants (hereinafter referred to as Appellants) from a judgment of the Civil Appellate High Court of the Central Province holden in Kandy dated 18.12.2009. Leave was granted by this Court on 19.11.2010. The matter to be considered is whether the High Court has erred in setting aside the judgment of the District Court dated 05.3.2003 which was in favour of the Plaintiffs granting relief to eject the Defendants from the valuable business premises on the ground of subletting without the prior written consent of the landlord.

The questions of law to be looked into are whether the High Court acted in excess of jurisdiction when it set aside the ex-parte judgment against the 1st, 2nd and 3rd Defendants in the District Court; whether the High Court erred in holding that the affidavit given by the 4th Defendant could not be used in evidence as it constituted heresay evidence and whether the High Court erred in disregarding the evidence placed by the Plaintiffs without any objection thereto taken by any other party at the trial.

In the District Court the Plaintiffs filed action on a contract of tenancy between the Plaintiffs and the 1st Defendant to eject him and the 2nd, 3rd and 4th Defendants, the position being that the 1st Defendant had sub-let to the 2nd Defendant and that the 3rd Defendant who is the husband of the 2nd Defendant, in turn, had sub-let it to the 4th Defendant.

At the trial the 2nd and 3rd Defendants filed answer admitting that they sub-let the premises to the 4th Defendant. The 1st Defendant also filed answer stating that she was the tenant of the Plaintiffs. Even though they filed answer at the trial, none of them appeared at the trial and an ex-parte judgment was entered against the 1st, 2nd and 3rd Defendants. The 4th Defendant also admitted in the answer that the 3rd Defendant sub-let the premises to him. The 4th Defendant's position was that later on he found out that the owner of the premises was the Natha Devale (the Kovil) and thereafter he paid rent to Natha Devale. The 4th Defendant requested the District Court to add Natha Devale as a Defendant and it was done by the District Court. The Plaintiffs came before the Court of Appeal making an application to revise that order dated 04.05.1998 and the Court of Appeal revised that order on 30.09.1999 directing the District Court to vacate the order of addition of Natha Devale as a party. The case proceeded to trial ex-parte against the 1st, 2nd and 3rd Defendants and inter partes against the 4th Defendant.

On behalf of the Plaintiffs, the 2nd Plaintiff gave evidence, he being the father of the 1st Plaintiff, the owner of the premises. The father acted at all times as the landlord on the authority given by the son. One more witness gave evidence on behalf of the Plaintiffs, ie. the record keeper of the primary Court of Kandy who produced the information in Primary Court case No. 52410/93. This Primary Court case was filed by the Kandy Police under Section 66(1) of Primary Court Act No. 44 of 1979 and the parties to that action were the 2nd, 3rd and 4th Defendants in the District Court case No.2448/RE. The information produced before the District Court by the Primary Court record keeper giving evidence, were affidavits and counter affidavits filed by the parties and the order

by the learned Primary Court Judge dated 23.2.1994. At the District Court trial the 4th Defendant did not give evidence or adduce any evidence at all for the defence.

The Learned District Court Judge delivered judgment on 05.03.2003 in favour of the Plaintiffs as prayed for in the plaint, ex-parte against the 1st , 2nd and 3rd Defendants and inter-partes against the 4th Defendant holding that the 1st Defendant has wrongfully sub-let the premises to the 2nd Defendant as per the affidavits of the 4th Defendant which were tendered in the Primary Court case No. 52410/93. The 4th Defendant had admitted that he had come into occupation of the premises on payment of rent to the 2nd and 3rd Defendants. The documents marked P1 to P13 have not been challenged by the 4th Defendant.

The 4th Defendant appealed against the judgment against him to the High Court of the Central Province and the High Court by its judgment dated 18.12.2009, not only set aside the judgment entered against the 4th Defendant but also set aside the ex-parte judgment against the 1st, 2nd and 3rd Defendants. The High Court giving reasons for the said judgment, held that the Plaintiffs have failed to prove the sub-letting through the evidence adduced on behalf of the Plaintiffs, and that the affidavits tendered by the 4th Defendant in the Primary Court action could not have been relied on, in law by the District Judge under Section 33 of the Evidence Ordinance. The High Court stressed quite wrongfully on two decisions of the Supreme Court, namely, *Perera Vs. Seneviratne (1991), 77 NLR 403 and Ratnaweera Vs. Nandawathie Fernando (1998) 2 SLR 299*. Both these cases explain what should be proved by the landlord to eject a tenant from the particular premises under Section 10 of the Rent Act if the cause pleaded for ejectment is sub-letting. In the instant case, sub-letting has been admitted.

I have considered the pleadings in the District Court case No. 2448/RE by all the parties. The Plaint was answered by all the four Defendants filing three separate answers. The 1st Defendant in her answer admitted that she was the tenant of the Plaintiffs. The 2nd and 3rd Defendants being husband and wife filed one answer and admitted that the 1st Defendant sub-let the premises to them and also that they sub-let the same premises to the 4th Defendant. The 4th Defendant in his answer states that the

3rd Defendant posed as the owner of the premises and gave possession of the place after taking money from the 4th Defendant and later on, as he came to know that the 3rd Defendant is not the owner and that it is the property of the Natha Devale and he is paying rent to Natha Devale. Yet, I note that this 4th Defendant never gave evidence to prove the matters pleaded in his answer. I further observe that at the commencement of the trial the admission by the 4th Defendant was recorded to the effect that the 4th Defendant entered the premises as a tenant under the 3rd Defendant. It is clear that the 1st, 2nd and 3rd defendants have categorically stated that the 1st Defendant was the tenant of the Plaintiff. The 2nd and 3rd Defendants got the place as sub-tenants and they in turn sub-let it to the 4th Defendant. I fail to see how the Learned High Court Judges in the Civil Appellate High Court could ever demand proof of what has been admitted by the parties. The 4th Defendant admits that he was placed there, for money given to the 3rd Defendant which means that he is a sub-lessee or a sub-tenant. The Plaintiff in any civil case does not need to prove what is admitted. Therefore I am of the view that the case law cited by the Learned High Court Judges do not apply to the instant case.

The Learned High Court Judges have set aside the ex-parte judgment given by the District Judge against the 1st, 2nd and 3rd Defendants. These three Defendants have not come forward to contest the sub-letting even after having filed answers because they cannot face a trial after admitting the sub-letting of the premises as it would be futile to do so. They accept the judgment against them and they never appealed. I hold that the Learned High Court Judges have very much erred when they set aside the ex-parte judgments. The evidence led at the trial does not have to be considered to see whether the premises was sub-let or not, when that fact is admitted by the 2nd and 3rd Defendants. In fact, it is the answer filed by the 2nd and 3rd Defendants which admits the sub-letting which was done by the 1st Defendant as well as further sub-letting which was done by the 2nd and 3rd Defendants to the 4th Defendant.

I am of the view that the evidence given by way of an affidavit or otherwise in any judicial proceeding is relevant as proof of the standing taken by any person if in the second case he tries to contradict the position that he took up in the first case. The

Learned High Court Judges have erred in rejecting the said affidavits and concluding that sub-letting was not proved.

I observe that the failure on the part of the 4th Defendant to adduce or give evidence for the defence in vital to his case. In *Edrick de Silva Vs, Chandradasa de Silva 70 NLR 169*, the failure of the Defendant to adduce evidence to contradict the evidence against him, adds a new factor in favour of the Plaintiff by way of an additional matter before the Court which the Court should take into account, namely that the evidence led by the Plaintiff is uncontradicted.

The Learned District Judge has analysed the evidence before Court and adjudged that the Plaintiffs have proven the case and given judgment accordingly in favour of the Plaintiffs. All the documents had been marked at the trial and read in evidence at the conclusion of the Plaintiff's case without the defence taking any objection thereto and as such, those documents constitute lawful evidence in the case. Documents P1 to P13 were read in evidence at the closing of the case before the District Court on 22.01.2002 and no objection was taken at that time to any document by the 4th Defendant. Thus the contents of the documents became evidence in the case. (as per judgments in *Sri Lanka Ports Authority and another VS. Jugolinja- Boal East (1981) 1 SLR 18 and Balapitiya Gunananda Thero Vs. Talalle Methananda Thero (1997) 2 SLR 101*).

In the circumstances I hold that the Learned High Court Judges have erred in setting aside the judgment of the District Court against the 1st, 2nd, 3rd and 4th Defendants. I set aside the judgment of the High Court dated 18.12.2009 and affirm the judgment of the Learned District Judge dated 05.03.2003 and grant the reliefs as prayed for by the Plaintiffs in their plaint with costs. I hold further that the Appellant is entitled to costs incurred in the Civil Appellate High Court as well as in the Supreme Court. I direct the Registrar of the Supreme Court to send the original brief to the District Judge of Kandy forthwith for the Appellants to get what is due to them in law which is long delayed.

Judge of the Supreme Court

Marsoof, PC.J.

I agree.

Judge of the Supreme Court

Dep, PC. J.

I agree

Judge of the Supreme Court

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

In the matter of an Application for Special Leave to Appeal from the Judgment of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution of Sri Lanka.

Mr M.R.M. Ramzeen,
Competent Authority,
Sri Lanka Ports Authority.
Colombo.

Complainant

S.C. Appeal 214/12
S.C.Spl. LA 19/12
CA/PHC/APN/158/06
HC (Rev.) 512/04
MC Fort Case No. 58439

Vs.

Morgan Engineering (Pvt) Ltd.,
No. 31A, Morgan Road,
Colombo 2.

Respondent

AND BETWEEN

Morgan Engineering (Pvt) Ltd.,
No. 31A, Morgan Road,
Colombo 2.

Respondent-Petitioner

Vs.

Mr. L.H.M.B.B. Herath,
Chief Manager Welfare and Industrial Relations,
Sri Lanka Ports Authority,
Colombo 01.

Complainant-Respondent

.

AND BETWEEN

Morgan Engineering (Pvt) Ltd.,
No. 31A, Morgan Road,
Colombo 2.

Respondent-Petitioner-Petitioner

Vs.

Mr. L.H.M.B.B. Herath,
Chief Manager Welfare and Industrial Relations,
Sri Lanka Ports Authority,
Colombo 01.

Complainant-Respondent-Respondent

AND NOW BETWEEN

Mr. L.H.M.B.B. Herath,
Chief Manager Welfare and Industrial Relations,
Sri Lanka Ports Authority,
Colombo 01.

Complainant-Respondent-Respondent-Petitioner

Vs.

Morgan Engineering (Pvt) Ltd.,
No. 31A, Morgan Road,
Colombo 2.

Respondent-Petitioner-Petitioner-Respondent

BEFORE : Mohan Pieris, P.C.,C.J.,
Sripavan, J.
Ratnayake, P.C.,J.

COUNSEL **:** Sanjeewa Jayawardene, P.C. With Sandamali Chandrasekera for the Complainant–Respondent- Respondent-Petitioner.
Johann Corera for the Respondent-Petitioner-Petitioner-Respondent

ARGUED ON : 13.05.2013

WRITTEN SUBMISSIONS FILED : By the Petitioner on - 28.05.13
By the Respondent on - 30.05.13

DECIDED ON : 27.06.2013

SRIPAVAN, J.

The Complainant-Respondent-Respondent-Petitioner(hereinafter referred to as the "Petitioner") sought, inter alia, to set aside the judgment of the Court of Appeal dated 10-01-12whereby the said Court set aside the judgment of the High Court of Colombo dated 26-09-06 which affirmed the Order of the Magistrate Court of Colombo dated 14-01-04.The Petitioner and the Respondent-Petitioner-Petitioner-

Respondent (hereinafter referred to as the "Respondent") conceded that the land which is the subject matter of the application is a "STATE LAND" falling within the ambit of the provisions of the State Lands (Recovery of Possession) Act No. 7 of 1979 as amended.

This Court granted Special Leave to Appeal on 03-12-12 on the following questions :-

(a) Has the Court of Appeal substantially erred by misinterpreting the provisions of the State Lands (Recovery of Possession) Act and its amendments and the specific definitions contained therein ?

(b) Can the document **X1** be classified as a lawful permit granted or any other written authority for the purposes of resisting an application for ejectment instituted under the State Lands (Recovery of Possession) Act ?

(c) Did the Court of Appeal err by failing to analyze the documents on record which amply demonstrate that the Respondent persistently neglected to execute a formal lease although distinctly called upon to do so?

(d) Did the Court of Appeal fall into substantial error when holding that there existed a monthly tenancy and the same constitutes a written authority given to the Respondent until such time the said authority is legally revoked ?

(e) Does the purported relationship that the Court of Appeal states was created between the parties, i.e., monthly tenancy, in any event, one that will suffice for the purposes of resisting an application for ejectment, given the clear and unambiguous provisions of the State Lands (Recovery of Possession) Act ?

(f) Has the Court of Appeal failed to appreciate the limited burden of a Competent Authority in any inquiry held in terms of Section 9 of the State Lands (Recovery of Possession) Act ?

(g) Assuming without conceding that there was any monthly tenancy countenanced by law, has the Court of Appeal substantially erred by failing to consider that in any event, if this were so, that prior to the institution of proceedings in the Magistrate's Court, there was ample evidence of the said "informal agreement" falling into abeyance as a result of the Respondent's repudiation and that even on this score, the Respondent was in unauthorized possession?

The State Lands (Recovery of Possession) Act (hereinafter referred to as the "Act") was initially enacted on 25-01-1979 in order to make provision for the recovery of possession of "State Lands" from persons in unauthorized possession or occupation of the said lands. Thus, it is

obvious that the intention of the legislature was to obtain an order of ejectment from the Magistrate's Court when the occupation or possession was unauthorized.

Section 9 of the said Act reads thus:-

> *(1) At such inquiry the person on whom summons under section 6 has been served shall not be entitled to contest any of the matters stated in the application under section 5 except that such person may establish that he is in possession or occupation of the land upon a valid permit or other written authority of the State granted accordance with any written law and that such permit or authority is in force and not revoked or otherwise rendered invalid.*
>
> *(2) It shall not be competent, to the Magistrate's Court to call for any evidence from the competent authority in support of the application under section 5. (*emphasis added)

Thus, one could see that a limitation has been placed on the scope and ambit of the inquiry before the Magistrate. The Magistrate can only satisfy him whether a valid permit or any other written authority of the State has been granted to the person on whom summons has been served.

If the language of the enactment is clear and unambiguous, it would not be legitimate for the Courts to add words by implication into the language. It is a settled law of interpretation that the words are to be

interpreted as they appear in the provision, simple and grammatical meaning is to be given to them, and nothing can be added or subtracted. The Courts must construe the words as they find it and cannot go outside the ambit of the section and speculate as to what the legislature intended. An interpretation of section 9 which defeats the intent and purpose for which it was enacted should be avoided.

His Lordship S.N. Silva, J. (as he then was) while examining the scope of the Act, in the case of *Ihalapathirana* vs. *Bulankulame,* Director-General,U.D.A.(1 S.L.R1988 at 416) made the following observations:-

> *The phrase "State Land" is defined in section 18 of the Act which as amended by Act No. 58 of 1981 includes "Land vested or owned by or under the control of", the U.D.A. It is conceded that the premises described in the quit notice "**P3**" is State Land within the meaning of this definition. It is also conceded that the Respondent is the appropriate Competent Authority in terms of the Act.*
>
> *The phrase "unauthorized possession or occupation" is defined in section 18 of the Act as amended by Act No. 29 of 1983 to mean the following :*
> *"every form of possession or occupation except possession or occupation upon a valid permit or other written authority of the State granted in accordance with any written law, and includes possession or occupation by encroachment upon State Land."*

*This definition is couched in wide terms so that, in every situation where a person is in possession or occupation of State Land, the possession or occupation is considered as unauthorised unless such possession or occupation is warranted by a permit or other written authority granted in accordance with any written law. Therefore, I am unable to accept the contention of the Counsel for the Petitioner that a land which is the subject matter of an agreement in the nature of the document marked "**P1**" comes outside the perspective of the State Lands (Recovery of Possession) Act.*

The rights and liabilities under the agreement could be the subject matter of a civil action instituted by either the U.D.A. or the petitioner. The mere fact that such a civil action is possible does not have the effect of placing the land described in the notice marked "P3", outside the purview of the State Lands (Recovery of Possession) Act. Indeed, in all instances where a person is in unauthorised occupation or possession of State Land such person could be ejected from the land in an appropriate civil action. The clear object of the State Lands (Recovery of Possession) Act is to secure possession of such land by an expeditious machinery without recourse to an ordinary civil action." (emphasis added)

Thus, it could be seen, that what was meant was to provide an expeditious method of recovery of "State Lands" without the State

being forced to go through a very cumbersome process of a protracted civil action and consequent appeals.

Learned President's Counsel for the Petitioner argued that the entire issue revolves around Section 9 of the Act and the inability of the Respondent to establish the existence of a valid permit or other written authority of the State granted in accordance with any written law which is in force and has not been revoked or otherwise rendered invalid. (emphasis added).

Counsel submitted that by using the phrase "..... in accordance with any written law" , the legislature has intentionally placed a premium on the mode and manner or any instrument of disposition by which, any land which is subject to the application of the said Act is alienated either on a temporary or permanent basis. The significance of the use of the words ".... in accordance with any written law" means that the alienation per se, ie, the manner and mode of the alienation itself must be one that is prescribed by law.

Learned President's Counsel drew the attention of Court to another significant use of the phrase "written law" as found in the Constitution itself. The 13th Amendment to the Constitution in Appendix II under the caption "Land and Land Settlement" provides as follows :-

"State Land shall continue to vest in the Republic and may be disposed of, in accordance with Article 33(d) and written law governing this matter". (emphasis added)

The Constitution in Article 170, defines the phrase "written law" as follows :-

"Written law" means any law and subordinate legislation and includes statutes made by a Provincial Council,Orders, Proclamations, Rules, by-laws and Regulations made or issued by any body or person having power or authority under any law to make or issue the same."

This clearly shows that in alienating "State Lands" the President of the Republic is mandatorily required to do so in terms of the law. Assistance can be taken for purposes of interpretation of the phrase "written law" as found in the Constitution which is the Supreme Law of the land. Whether it is the Constitution or the Act, the Courts must adopt a construction that will ensure the smooth and harmonious working of the Constitution or the Act as the case may be, considering the cause which induced the legislature in enacting it.

In the aforesaid background, I now proceed to consider the observation made by the Court of Appeal in the impugned judgment dated 10-01-12. The said judgment noted, inter alia, as follows:-

"*Having placed Morgan into possession of the State land, Ports Authority has clearly accepted by way of monthly rentals prior to*

initiating proceedings in the Magistrate's Court. By having acknowledged the receipt of monthly rentals, Ports Authority has in no uncertain terms issued written authority according to law to Morgan to be in possession of the subject matter as a tenant at common law until it is terminated according to law. The learned Counsel for the Ports Authority has submitted that a monthly tenancy or lease in terms of the common law is not accepted under section 9 and it is the availability of such defences that prompted the Legislature to bring in such a specific and clearly defined phrase in section 9, in order to exclude such defences.

I am not attracted by the above submissions as being the correct proposition of law, for the reason that the payment of rents evident by the written receipts read together with ***X2*** *and* ***X1*** *had in effect created a monthly tenancy by itself and constitute a written authority given to Morgan until such time the said authority is legally revoked." (emphasis added)*

The document marked **X2** dated 17.7.89 contemplates

(a) *the handing over of possession of the premises in question by the Field Officer.*

(b) *the payment of rent based on a valuation obtained by the Chief Valuer.*

(c) *the entry into a lease agreement containing the terms and conditions; and*

(d) *the payment of Rs. 3000/- and one month's rental in order to show the good faith.*

X1 is a document dated 1.8.1989 by which possession of the premises in question was handed over to Morgan by an employee of the Ports Authority on the undertaking that Morgan would enter into a lawful agreement as soon as possible with the Ports Authority.

It is common ground that no legally valid lease agreement was entered into by the Respondent with the Ports Authority despite several reminders. The crucial question to be decided is whether documents **X2** and **X1** constitute a written authority granted in accordance with any written law. Payments of monthly rentals and the acceptance of the same by the Ports Authority do not by any means amounts to "written authority granted in accordance with any written law"' The possession of the premises in question was handed over to Morgan subject to the condition that a lease agreement containing the terms and conditions of the Ports Authority pertaining to land leases would be entered into by the Respondent. However, the Respondent has failed to satisfy the said condition.

A monthly tenancy without a formal lease is not covered by Section 9 of the Act. It is also noted that the Respondent defaulted in the payment of rent and had commenced payment once the Quit Notice was issued.

Learned Counsel for the Respondent relied on the case of *Farook* Vs. *Urban Development Authority* (C.A. Appl. 357/89; C.A. Minutes of 21.08.96). The submission in this case was made on the basis that the

occupation of the Petitioner was with the written authority marked **P2** of the Respondent and that the letter marked **P4** was not a termination of the authority granted but was merely a letter of demand with a threat of legal action. The Court noted that there was no termination of the authority granted by the document marked **P2** either on the basis that the premises in question was required since development activities have commenced or on the basis that the Petitioner has failed to pay the rent determined by the relevant local authority. The Court therefore held that the document **P2** which constitutes a permit granted to the Petitioner with the two conditions remained valid. The Court further observed that a termination of authority granted by **P2** had to be specific and should be effective from a particular date.

The second case on which the leaned Counsel for the Respondent placed reliance was the case of *Mohamed* Vs. *Land Reform Commission & Another* (1996) 2 S.L.R. 124. The issue was whether the Petitioner had a permanent lease over the land or whether he was given a temporary lease. The objections filed on behalf of the Land Reform Commission expressly admitted the averments in the petition that there was a lease in respect of the said land between the Petitioner and the Land Reform Commission and that the Land Reform Commission had in fact accepted the rents from the Petitioner.

The aforesaid two cases were decided on the basis that there were either a permit or a written authority granted to the Petitioners in accordance with the written law. In the instant application, no lease

agreement was entered into between the Respondent and the Ports Authority in accordance with the written law. The two cases cited by the learned Counsel for the Respondent have no relevance to the issue in hand.

For the reasons stated above, I answer the questions on which special leave was granted as follows:-

(a) Yes.

(b) Document **X1** cannot be classified as a lawful permit or any other written authority granted in accordance with any written law.

(c) Yes.

(d) Yes.

(e) "Monthly tenancy" does not suffice for the purposes of resisting an application under the State Lands (Recovery of Possession) Act unless a tenancy agreement in accordance with any written law, is in force.

(f) Yes.

(g) In view of the answer given to (e) above, the question of considering an informal agreement does not arise unless a legally enforceable agreement entered into in accordance with any written law, is in force.

Accordingly, I set aside the judgment of the Court of Appeal dated 10-01-12 and affirm the judgment of the High Court of Colombo and the Magistrate's Court of Colombo dated 26-09-06 and 14-01-04

respectively. Considering the considerable period of time the Respondent had been in unauthorized possession or occupation of the premises without a valid permit or any other written authority granted in accordance with any written law, I direct the Respondent to pay a sum of Rs. 250,000/- (Rupees Two Hundred and Fifty Thousand only) as costs to the Petitioner.

JUDGE OF THE SUPREME COURT.

MOHAN PIERIS, P.C.

I agree.

CHIEF JUSTICE

RATNAYAKE, P.C., J

I agree.

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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 Section 5C. of the High Court of the Provinces (Special Provisions) Amendment) Act No.54 of 2006 read with Article 128 of the Constitution.

Nambukara Wakwellagamage
Sujatha Janaki
257/l, Kosgahahena,
Pannipitiya.

Plaintiff

S.C. Appeal No. 33A/2012
SC/HCCA/LA No.516/2011
WP/HCCA/COLOMBO No.119/2011-LA
D. C. COLOMBO No.DRE-011/2011

vs

1.Milani Nimeshika Kariyawasam,
No.19, Avissawella Road,
Kirulapona, Colombo 05.

2.Premadasa Kariyawasam,
No.19, Avissawella Road,
Kirulapona, Colombo 05.

3.Dayawathi Kariyawasam,
No.19, Avissawella Road,
Kirulapona, Colombo 05.

Defendants

AND BETWEEN

1.Milani Nimeshika Kariyawasam,
No.19, Avissawella Road,
Kirulapona, Colombo 05.

1st Defendant-Petitioner

vs

Nambukara Wakwellagamage
Sujatha Janaki
257/l, Kosgahahena,
Pannipitiya.

Plaintiff-Respondent

AND NOW BETWEEN

Premadasa Kariyawasam,
No.19, Avissawella Road,
K irulapona, Colombo 05.

Dayawathi Kariyawasam,
No.19, Avissawella Road,
Kirulapona, Colombo 05.

2nd & 3rd Defendant-Respondents

AND NOW BETWEEN

Milani Nimeshika Kariyawasam,
No.19, Avissawella Road,
Kirulapona, Colombo 05.

1st Defendant-Petitioner-Appellant

vs.

Nambukara Wakwellagamage
Sujatha Janaki
257/l, Kosgahahena,
Pannipitiya.

Plaintiff-Respondent-Respondent

Premadasa Kariyawasam,
No.19, Avissawella Road, K irulapona,
Colombo 05.

2nd Defendant-Respondent-Respondent

Dayawathi Kariyawasam,
No.19, Avissawella Road,

Kirulapona, Colombo 05.

Presently at

22/5/C, Nandimithra Place,
(Robert Drive), Colombo 06.

3rd Defendant-Respondent-Respondent.

Before	**Saleem Marsoof P C, J.** **Chandra Ekanayake, J.** **Sathyaa Hettige P C, J.**
Counsel	W.Dayaratne PC with R.Jayawardena for the 1st Defendant-Petitioner- Appellant Ali Sabri, PC with Kasun Premaratne and Nuwan Bopage for Plaintiff-Respondent - Respondent D.H.Siriwardena with Jayantha de Silva for the 2nd Defendant- Respondent-Respondent.
Argued on	21.12.2012 and 07.03.2013
Written Submissions tendered on	23.4.2012 AND 15.02.2013 (by the 1st Defendant-Petitioner -Appellant) 19.6.2012 (by the 2nd Defendant-Respondent-Respondent. 25.5.2012 (By the Plaintiff-Respondent-Respondent)
Decided on	01.10.2013.

Chandra Ekanayake, J.

The 1st Defendant-Petitioner-Appellant (hereinafter sometimes referred to as the 1st Defendant) by her petition dated 08.12.2011 (filed together with her affidavit) had sought inter alia, leave to appeal against the order of the High Court of Civil Appeal of Western Province (Holden in Colombo) dated 06. 12. 2011 (P20) in Application bearing No.WP/HCCA/Col/119 / 2011/LA, to set aside the said order and the order of the learned Additional District Judge dated 20.10.2011(P18) in D.C. Colombo case No.DRE-011/2011 and to order the learned Additional District Judge to dismiss the plaint of the Plaintiff-Respondent-Respondent (hereinafter sometimes referred to as the plaintiff), on the preliminary objections raised by her in sub paragraphs (a) to (c) and (e) of the said petition. Further by sub paragraph (d) of the prayer to the said petition the 1st Defendant-Appellant had sought to vacate the interim injunctions issued by the said order dated 20.10.2011 in terms of prayer 'ඉ 'and ' ඊ' of the plaint filed against her in the said D.C. Colombo case. The learned Judges of the High Court of Civil Appeal by the impugned order dated 06.12.2011 had refused leave to appeal against the order of the learned Additional District Judge dated 20.10.2011. This appeal has been preferred against the 2nd order of the High Court of Civil Appeal (P20).

The learned Additional District Judge by order dated 20.10.2011 (P18) had proceeded to issue interim injunctions as per sub paragraphs 'ඉ" and 'ඊ' of the prayer to the plaint dated 24.03.2011 [P14(e)]. In terms of the above sub- paragraphs of the prayer to the plaint the aforesaid 2 interim injunctions appear to be as follows:

ඉ: මෙහි පහත උපලේඛණයේ විස්තර කර ඇති දේපල තෙවන පාර්ශ්වයකට විකිණීමෙන් සහ/හෝ බදු දීමෙන් සහ/හෝ කුලියට දීමෙන් සහ/හෝ උකස් කිරීමෙන් සහ/හෝ වෙනත් තෙවන පාර්ශවයක් හැක්තියේ පිහිටුවීමෙන් සහ/හෝ එකි දේපල කෙරෙහි තවත් පාර්ශවයක් වෙත අයිතිවාසිකම් ඇති කරන්නාවූ කවර ආකාරයක හෝ ක්‍රියාවක් සිදු කිරීමෙන් සහ/හෝ එකි දේපලේ පවත්නා ස්වභාවය (Status quo)වෙනස් වන ආකාරයේ කවර හෝ ක්‍රියාවක් සිදු කිරීමෙන් වැත්තිකරුවන් ඇතුලු ඔවුන් මගින් සහ ඔවුන් යටතේ කටයුතු කරනු ලබන සේවක නියෝජිතාදී සියලුම දෙනා වලක්වන්නාවූ අතුරු ඉන්ජන්ෂන් තහනම් ආඥාවක් ලබා දෙන ලෙසත්.

උ: මෙහි පහත උපලේඛණයේ විස්තර කර ඇති දේපලේ අනවසරයෙන් රැඳි සිටිමින් පැමිණිලිකාරියගේ අයිතිය හබ කරන අතරතුර එකී දේපලෙන් වින්තිකරුවන් අයුතු ලෙස ප්‍රයෝජන ලබා ගැනීම වැලැක්වීම සඳහා එකී දේපලේ වින්තිකරුවන් ඇතුලු ඔවුන් මගින් සහ ඔවුන් යටතේ කටයුතු කරනු ලබන සේවක නියෝජිතාදි සියලුම දෙනා ව්‍යාපාරික කටයුතුවල නියැලීමෙන් සහ/හෝ එකී දේපලේ හුක්තියේ සිටිමින් ලාභ ප්‍රයෝජන උපයා ගැනීමෙන් වළක්වන්නාවූ වූ අතුරු ඉන්ජන්ෂන් නහනම් ආඥාවක් ලබා දෙන ලෙසත්".

By the petition filed in this Court dated 08.12.2011 the 1st Defendant-Appellant has sought to set aside the order of the learned Additional Judge dated 20.10.2011. When the above application was supported, this Court by its order dated 10.02.2012 had granted leave to appeal on the questions of law set out in sub paragraphs 36(d) and 36(g) of the said petition dated 08.12.2011. The aforementioned sub-paragraphs are reproduced below:

(d) Have their Lordships misdirected when they held that the 1st Defendant- Petitioner has sub-let the premises to the 2nd and 3rd Defendant-Respondents and thereby forfeited her tenancy when there is not a single document in proof of the said contention and furthermore, when the 1st Defendant-Petitioner has clearly stated at the Sec.18A Inquiry that the 2nd and 3rd Defendant-Respondents do not live under her?

g) Have their Lordships of the Civil Appellate High Court as well as the learned District Judge misdirected themselves by drawing the inference that the 1st Defendant-Petitioner has sub-let the premises to the 2nd and 3rd Defendant-Respondents in order to justify the issuing of interim injunctions against the 1st Defendant-Petitioner, when the said inference is against the weight of the documentary evidence annexed with the Plaintiff-Respondent's plaint in D.C.Colombo case No. DRE-011/2011?

The basis of the plaint filed in the District Court was that the plaintiff had become the owner of the subject matter on the deed of gift bearing No.603 dated 03.03.1971 and same had been given on a lease agreement to one Francis whereby he had become the lawful lessee of the subject matter. Even after the expiry of the said lease agreement the aforesaid Francis had continued to be the tenant. On the death of said Francis one of his sons by the name K.T.Dayananda had continued the business carried on by his father (Francis) and continued to be the tenant of the plaintiff. The said Dayananda too had died on or about 25.12.1995 and by a last will supposed to have been left by him prior to his death his tenancy had been transferred to the

1st defendant a minor at that time. Thus her first application had been made to the Rent Board through the executors of her dead father's last will. However, the 1st defendant subsequently had made another application to the Rent Board for a Certificate of Tenancy and had been successful and thereafter continued to be in the premises continuing with the bakery business of her dead father. The complaint of the plaintiff had been that the 1st defendant without informing her has put the 2nd and 3rd defendants into possession of the subject matter under her as subtenants and 2nd and 3rd defendants are continuing with their business activities in the subject matter. In the above premises, the plaintiff had moved the District Court to grant a declaration to the effect that the 1st defendant's tenancy came to an end due to operation of law and that the plaintiff is the rightful owner of the subject matter and the defendants be ejected from the aforesaid premises and interim injunctions as prayed for in sub paragraphs (ඉ) and (ඊ) of the prayer to the plaint.

The 1st defendant by his statement of objections whilst denying the averments in the plaint had moved for a dismissal of the application for interim injunctions. After inquiry the learned Additional District Judge by order dated 20.10.2011 (P18) had issued interim injunctions as prayed for. When this order was impugned in the Civil Appeal High Court by leave to appeal application bearing No.WP/HCCA/COL/119 /2011/LA, the learned High Court Judges by their order dated 06.12.2011 (P20) having refused leave to appeal had dismissed the application subject to costs. This is the order this appeal has been preferred from.

It is to be observed that in P20 the learned High Court Judges had proceeded to hold that as per the tenancy Certificate (P4) issued by the Rent Board in respect of the subject matter to wit - premises No.19, Avissawella Road, Kirulapone, the 1st defendant was the lawful tenant of the entire premises and the 2nd and 3rd defendants had come into occupation of 2 portions of the said premises under the 1st defendant. On the evidence that had been available before the Rent Board and also on a perusal of the available documentary evidence in this case, the 2nd and 3rd defendants appear to have come into occupation under the 1st defendant. The main basis of the

findings of the learned High Court Judges appears to be that when the 1st defendant's tenancy ended, the occupation of 2nd and 3rd defendants also becomes unlawful and as such the plaintiff' has successfully established a *prima facie* case in her favour.

I shall first advert to the preliminary objection raised by the 1st defendant in the District Court and also when the leave to appeal application bearing No.WP/HCCA/Col - LA -119/2011 was supported before the Civil Appeal High Court. It had been on the premise that this application could not have been maintained without a non-settlement certificate obtained under the provisions of Section 7(1) of the Mediation Boards Act No. 72 of 1988. The aforesaid section is reproduced below:

Section 7(1)

"Where a Panel has been appointed for a Mediation Board area, subject to the provisions of subsection (2) no proceeding in respect of any dispute arising wholly or partly within that area or an offence alleged to have been committed within that area shall be instituted in, or be entertained by any court of first instance if:-

(a) the dispute is in relation to movable or immovable property or a debt, damage or demand, which does not exceed twenty five thousand rupees in value; or

(b) the dispute gives rise to a cause of action in a court not being an action specified in the Third Schedule to this Act; or

(c) the offence is an offence specified in the Second Schedule to this Act,

unless the person instituting such action produces the certificate of non-settlemet referred to in seciton 12 or section 14(2):

"Provided however that where the relief prayed for in an action in respect of any such dispute includes a prayer for the grant of any provisional remedy under Part V of the Civil Procedure Code, or where a disputant to any dispute in respect of which an application has been made under section 6 subsequently inistitutes and action in any court in respect of that dispute including a prayer for a provisional remedy under Part V of the Civil

Procedure Code, the court may entertain and determine such action in so far as it relates only to the grant of such provisional remedy. After such determination, the court shall :-

(a) .....

(b) .....

(2) ....."

On a plain reading of the above section it is manifestly clear that if the relief prayed for in an action in respect of any dispute includes a prayer for the grant of any provisional remedy under Part V of the Civil Procedure Code, the Court may entertain and detemine such action in so far as it relates to the grant of such provisional remedy. In the case at hand the prayer includes a provisional remedy under Part V of the Civil Procedure Code. As such the conclusion of the High Court Judges to the effect that since there is an application for interim injunction matter could be proceeded with, in the absence of the certificate of non-settlement is correct.

A party who seeks an interim injunction as a rule, would be able to satisfy Court on three requirements viz;

(i) Has the plaintiff made out a *prima facie* case?

(ii) Does the balance of convenience lie in favour of the plaintiff?

(iii) Do the conduct and dealings of the parties justify the grant of the same. In other words do equitable considerations favour the grant of the same.

The line of authorities on interim injunctions would amply demonstrate that, first and foremost thing that should be satisfied by an applicant seeking an interim injunction is: "has the applicant made out a prima-facie case?" That is, it must appear from the plaint that the probabilities are such that plaintiff is entitled to a judgement in his favour.

In other words the plaintiff must show that a legal right of his is being infringed and that he will probably succeed in establishing his rights. A prima facie case - does not mean a case which is proved to the hilt but a case which can be said to be established if the evidence which is led in

support of the same were believed and accepted. In the case of Martin Burn Ltd., v. R.N.Banerjee, (AIR) 1958 SC 79 at 85: the Supreme Court of India (Bhagwati, J) had opted to outline the ambit and scope of connotation "prima-facie" case as follows:-

> "A prima facie case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. *While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."*

In ascertaining whether a plaintff was successful in establishing a *prima facie* case the pronouncement by Dalton, J. (at page 34) in the case of Jinadasa vs. Weerasinghe (31 NLR 33) would lend assistance. Per Dalton, J., whilst adopting the language of Cotton L.J. in Preston Vs. Luck (Supra) (1884) 24 CH.497:

> " In such a matter court should be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff are entitled to relief."

In this regard it would also be pertinent to consider the decision in F.D.Bandaranaike vs. State Film Corporation (1981 2 SLR 287) wherein the following principle of law was enunciated with regard to the sequential tests that should be applied in deciding whether or not to grant an interim injunction, namely:

- 'has the plaintiff made out a strong *prima facie* case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a question to be tried in relation to his legal rights and that the probabilities are that he will win.
- in whose favour is the balance of convenience,

- as the injunction is an equitable relief granted in the discretion of the Court do the conduct and dealings of the parties justify grant of the injunction.'

Further in the case of Gulam Hussain vs. Cohen (1995 2 SLR) per S.N.Silva,J. (P/CA), (as then he was) at page 370:

> "The matters to be considered in granting an interim injunction have been crystallized in several judgments of this Court and of Supreme Court. In the case of Bandaranaike vs. The State Film Corporation Soza J., summarized these matters as follows:
>
> In Sri Lanka we start off with a *prima facie* case that is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the Plaintiff should be certain to win. It is sufficient if the probabilities are he will win."

When considering whether an applicant for an interim injunction has passed the test of establishing a prima facie case, the Court should not embark upon a detailed and full investigation of the merits of the parties at this stage. But, it would suffice if the applicant could establish that probabilities are that he will win. In this regard assistance could also be derived from the decision in Dissanayake vs Agricultural and Industrial Corporation 1962 - 64NLR 283. Per H.N.G. Fernando J., (as he then was) in the above case at page 285:-

> " The proper question for decision upon an application for an interim injunction is 'whether there is a serious matter to be tried at the hearing' (Jinadasa vs.Weerasinghe[1]). If it appears from the pleadings already filed that such a matter does exist, the further question is whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued."

Perusal of the Additional District Judge's Order (P18) reveals that his conclusion was mainly based on the footing that it had been revealed even at the inquiry before the Rent Board that there had been no evidence even in 2004 to establish that the business was not carried on by the 1st defendant or any one on her behalf. By the document marked as A12 (which is same as P4) i.e. the order of the Rent Board of Colombo in application No. 27454, the applicant namely - M.N.Kariyawasam (present 1stdefendant) was issued a Tenancy Certificate bearing No.5753. The appeal preferred against this to the Rent Control Board of Review also had been dismissed as per P9. On the material that had been available the conclusion of the District Court is not erroneous. The subject matter appears to be the same and in my view the learned District Judge could not have arrived upon a finding different to that.

. Further it is to be observed that as per the Tenancy Certificate (p4) issued by the Rent Board, the premises were No.19 in its entirety. Thus it becomes amply clear that the tenant of premises No.19 was the 1st defendant. But 2nd and 3rd defendants who had come into possession of portions of the said premises bearing No.19 had disputed plaintiff's rights to the premises and further the 1st defendant does not appear to have offered any explanation at all as to how the 2nd and 3rd defenants came into possession of the premises of which 1st defendant was the sole tenant. In the above backdrop the conclusion of the learned District Judge to the effect that the 1st to 3rd defenants all were in unlawful and wrongful possession of the subject matter in violation of the provisions of the Rent Act appears to be correct.

Once the Applicant has established the existence of the *prima facie* case, then only the balance of conveneince has to be considered. Per Soza,J. In F.D.Bandaranayake vs. The State Film Corporation at p303 - “If a prima facie case has been made out we go on and consider where the balance of convenience lies”. In other words Court will have to weigh the comparative mischief and/or hardship which is likely to be caused to the applicant by refusal of the injunciton and whether it would be greater than the mischief which is likely to be caused to the opposite party by granting the same. Undoubtedly granting of interim injunctions is at the discretion of the Court. It being a discretionary remedy when granting or refusing same, discretion has to be exercised reasonably, judiciously and more particularly, on sound legal principles after weighing the conflicting probabilities of both parties. If the Court is of the opnion that the mischief which

would likely to be caused to the applicant by refusing the injunction is greater than the loss that is likely to be suffered by the opposite party in granting the same, the inevitable conclusion of the Court has to be that balance of convenience favours the applicant. Then the Court should proceed to grant the interim injunction. An examination of facts and circumstances in the case at hand would amply demonstrate that when the defendants are in wrongful possession violative of the provisions of the Rent Act, in the event of refusal of the injunction, the damage the plaintiff would suffer would be greater than the damage/mischief if any, that would be suffered by the defendants, in the event of granting the injunction. Thus balance of conveneice in this instance favours the grant of interim injunctions.

What arises for consideration next is, 'do the conduct and dealings of the parties justify the grant of the interim injunction?' In other words do equitable considerations favour the issuance of the injunction. Having considered the facts and circumstances of this case and the analysis of the learned District Judge I am inclined to take the view that conduct and dealings of the parties justify the grant of the interim injunctions.

Further it is observed that both the District Court and the Civil Appeal High Court had laid stress on the fact that when a tenant or a lessee becomes an unlawful possessor, he cannot be allowed to obtain the benefit of such wrongdoings. The learned High Court Judges too had relied on the principles of law enunciated in the two decisions , viz – Seelawathie Mellawa v. Millie Keerthiratna and Subramaniam vs Shabdeen. In the case of Seelawathie Mellawa V Millie . Keerthiratne 1982 1SLR - 1 SLR 384 it was observed by Victor Perera, J. (Wanasundera, J. and Wimalaratne, J. Agreeing) at P389 that :

> "An injunction is the normal way of stopping a wrongdoer from obtaining the benefit of such wrongdoing to the detriment of the aggrieved party"
>
> Further at page 391 – per Victor Perera, J. ;
>
> > "..... However , the District Judge had addressed his mind to the underlying principle that if a person in unlawful possession could not be ejected pending trial, he could still be restrained from taking any benefits arising out of such wrongful possession. Otherwise the Court would be a party to the preserving for the defendant-appellant a position of advantage

brought about by her own unlawful or wrongful conduct".

In the case of Subramaniam vs. Shabdeen (1984)1 Sri L R 48 also it was held as follows:

> "The plaintiff had established a strong prima facie case to his entitlement to carry on the business and the violation of his rights. It would not be just to confine the plaintiff to his remedy in damages. An interim injuction must be granted to stop the wrongdoer from obtaining the benefits arising from his own wrongful conduct. The application to dissolve the injunction therefore could not succeed".

Further at pg: 56 0f the same judgement Thambiah,J has observed that:-

> " There is this further principle that an injuctuion would issue to stop a wrongdoer from obtaining benefits arising out of his wrongful conduct.If a person in unlawful possession could not be ejected pending trial, he could still be restrained from taking any benefits arising out of such wronfgul possession, otherwise the Court would be a party to the preserving for such person a position of advantage brought about by his own unlawful or wrongful conduct (Victor Perera , J. In seelawathie Mallawa v. Millie Keerthiratne (5).

In the case at hand too when the defendants appear to be in wrongful possession of the subject matter they cannot be allowed to obtain the benefits of their wrong doings. The nature of the interim injunction sought by sub paragraph (c) of the prayer to the plaint is to restrain the defendants from obtaining any benefits from their wrongdoings. Therefore the District Judge was correct in granting the said injunction.

It is needless to stress the importance of the need to preserve status-quo. The primary purpose of granting intreim injunctions is to preserve the status quo of the subject matter in dispute until legal rights and conflicting claims of the parties are adjudicated or decided upon. The underlying object of granting temporary injunctions is to maintain and preserve *status quo* at

the time of institution of the proceedings and to prevent any change in it until the final determination of the suit. It is more in the nature of protective relief granted in favour of a party to prevent future possible injury.

Learned High Court Judges had based their conclusion on cogent reasons and had proceeded to refuse leave to appeal whilst affirming the District Judge's fidings. This appears to be correct and I see no reason to interfere with the same.

In view of the foregoing analysis I proceed to answer both questions of law on which leave to appeal was granted in the negative and this appeal is hereby dismissed. However no order is made with regard to costs of this appeal.

Judge of the Supreme Court

Saleem Marsoof P C, J.

I agree.

Judge of the Supreme Court.

Sathyaa Hettige PC, J.

I agree.

Judge of the Supreme Court.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matte of an Appeal under the provisions of Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter L VIII of Civil Procedure Code, from the Judgement of High Court of the Western Province delivered on 22nd March 2002 in Case No. H.C. Civil 150/98(1).

Master Feeds Limited,

14/2, Tower Building,

25, Station Road,

Colombo 04.

Defendant-Appellant

S.C. (CHC) No. 11/2002

Vs.

Case No. H.C. Civil 150/98(1)

People's Bank

No.75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 2.

Plaintiff-Respondent

Before : Hon. Amarathunga, J.

Hon. Ekanayake, J.

Hon. Priyasath Dep, PC J.

Counsel	:	K.M. Basheer Ahamed with U.M. Mawjooth for the Defendant-Appellant. S.A. Parathalingam, PC with J. Bodhinagoda for the Plaintiff-Respondent.
Argued on	:	29.08.2011
Decided on	:	05. 04.2013

Priyasath Dep, PC J

This appeal was filed by the Defendant against the judgment of the Commercial High Court of Western Province dated 22-03-2002 which gave judgment in favour of the Plaintiff as prayed for.

The Plaintiff is a banking corporation established under the People's Bank Act No 29 of 1961. The defendant is a registered company and a customer of the Bank and in the course of its business imports goods and raw material. The Defendant been unable to finance its imports applied and obtained finance facilities from the Plaintiff Bank.

The Plaintiff at the request of the Defendant issued three Irrevocable letters of credit to the defendant to facilitate its imports.

The first Letter of Credit dated 27-10-95 was issued under Documentary Credit No: Corp/95/00969 for US $30,600/-. (equivalent in Rs. 1,648,395/62)This Letter of Credit was issued to the Bank of Tokyo in favour of the beneficiary Sumitomo Corporation which is the exporter(seller). A deferred payment facility of 120 days was granted from the date of the Bill of Lading to the Defendant which expired on 17-01-96. The application for the irrevocable letter of Credit was marked as P1A and the Letter of Credit was marked as P2.

The defendant collected the documents related to the Letter of Credit send by the exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US $30,600/- payable to the Plaintiff Bank which

was marked as P3. Plaintiff marked the memorandum pertaining to the payment to the beneficiary's bank as P3A and the Statement of Account as P4.

The second Letter of Credit dated 5-7—95 was issued under Documentary Credit No: Corp/95/00647 by the Plaintiff for US $61,500/- (Rs 3,297,301/34) This letter of credit was issued to the Rabo Bank Nederlands (Singapore Branch) in favour of the beneficiary Intra Business Pvt, Ltd which is the exporter (seller).A deferred payment facility of 90 days was granted to the Defendant from the date of the Bill of Lading which expired on 4-10-95. The application for the Irrevocable Letter of Credit was marked as P5A and the Letter of Credit was marked as P6.

The defendant collected the documents related to the Letter of Credit send by the Exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper. At the time of accepting the documents defendant did not pay the amount due under the Letter of Credit instead executed a Bill of Exchange for US $61,106/- payable to the Plaintiff Bank which was marked as P7.

The third Letter of Credit dated 4-9-95 for US $30,360/- (Rs 1,634,886/=) was issued under Documentary Credit No: Corp/95/00821.This Letter of Credit was issued to the Bank of Tokyo in favour of the beneficiary Sumitomo Corporation who was the exporter(seller). A deferred payment facility of 120 days was granted to the defendant from the date of the Bill of Lading which expired on 16-11-95. The application for the Irrevocable Letter of Credit was marked as P10A and the Letter of Credit was marked as P11.

The defendant collected the documents related to the Letter of Credit send by the exporter's bank (seller's Bank) from the Plaintiff Bank and got the goods released from the shipper At the time of accepting the documents defendant did not pay the amount due under the letter of credit instead executed a Bill of Exchange for US $30,360/- payable to the Plaintiff Bank which was marked as P12.

The Defendant having collected the documents from the plaintiff and having obtained the release of the goods failed and neglected to pay monies due to the Plaintiff Bank contrary to the terms and conditions of the agreements relating to the issuing of Letters of Credit referred to above.

As the Defendant failed to pay the amounts due under three Letters of Credit, the Plaintiff Bank instituted this action against the Defendant. Plaint contains three causes of action based on these three Letters of Credit.

The Defendant in its answer admitted paragraphs 1,2 and 5 of the Plaint. The Defendant admitted that it is a customer of the plaintiff bank and was granted banking facilities. The Defendant denied the rest of the averments in the Plaint. In its answer the Defendant averred that the Plaint does not disclose a cause of action and in any event the Plaintiff's action is prescribed. Further, it was stated that the Plaintiff's claim is inflated and excessive and includes taxes, levies and interest that the plaintiff is not entitled to recover.

At the trial the defendant admitted the signatures on the documents annexed to the Plaint marked P1, P5 and P10 (the applications submitted by the Defendant to the Bank for the issuing of Letters of Credit) and P3, P8 and P12 (Bills of Exchange). At the trial Plaintiff raised issue numbers 1-13 and the defendant raised issue numbers 14-15.

The Defendant raised the following issues.

Issue No.14

Does the Plaint disclose a cause of action against the defendant?

Issue No. 15

Is the Plaintiff's claim prescribed ?

Plaintiff led the evidence of Withanage Don Dayananda, Senior Manager of the Plaintiff Bank to establish its case. In his evidence he stated that the Defendant on three different dates submitted three formal applications in respect of each Letter of Credit which were marked as P1,P5 and P10. The Plaintiff Bank accepted the applications and issued Letters of Credit marked P2, P6 and P11. The Defendant was given a deferred payment facility of 120 days from the Bill of Lading in respect of Letters of Credit marked P2 and P11. In respect of Letter of Credit marked P5A a deferred payment facility of 90 days from the Bill of Lading was granted to the Defendant. The Defendant collected relevant documents from the Plaintiff Bank which was sent by the beneficiary 's bank and got the goods released. At the time of collecting the documents the defendant did not pay the value of the goods to the Plaintiff and instead executed Bills of Exchange for the value of the goods. The Defendant after obtaining the goods did not pay the money due to the Bank. The Plaintiff Bank had paid the money due under the Letters of Credit to the beneficiary's bank and in proof submitted the bank memos marked P3a, P8a and P13send to the Defendant. As the defendant defaulted in paying the sum of money owing to the bank, the bank had charged the normal default interest

from the Defendant from the date of expiry of the deferred payment dates. The bank produced Statement of Accounts in respect of each transaction marked P4,P9, and P14.

The Plaintiff closed its case reading in evidence P1 – P14. The Defendant failed to discredit the evidence of the sole witness for the Plaintiff and did not challenge the documents produced in courts marked P1 – P14.

The Defendant did not call evidence nor produced documents. The Defendant took up the position that the Plaint does not disclose a cause of action. The Plaint which contained 58 paragraphs includes three causes of action. Each cause of action was described in detail and contains all necessary particulars and also referred to the relevant documents which were subsequently produced and proved at the trial. Therefore, the learned High Court judge correctly answered this issue in the negative.

The Defendant's second issue was that the action is prescribed and for that reason Plaintiff could not maintain this action. The evidence revealed that the Defendant made requests in writing followed by formal applications to obtain Letters of Credit. The Application contains the terms and conditions under which the facilities were granted. The Defendant signed the relevant documents and Plaintiff accepted the applications and granted the facility. Each transaction is evidenced by a written document. As these agreements are in writing in terms of the Prescription Ordinance action could be filed within six years of the date of default. These transactions had taken place in 1995 and the action was instituted in 1998. The relevant portion of Section 6 of the Prescription Ordinance reads as follows:

" No action shall be maintainable ..... upon any written promise, contract, bargain or agreement,.....unless such action shall be brought within six years from the date of the breach of such ..... written promise, contract, bargain, or agreement, or other written security....."

The plaintiff had filed this action well within time and the action is not prescribed. The learned High Court Judge correctly rejected the plea of prescription and answered the issue in the negative.

The Defendant had also taken up the position that the claims are inflated and excessive. The Defendant when applying for Letters of Credit accepted the terms and conditions in the application. The clause 4 of each application has the following condition

> "We undertake to reimburse any amounts disbursed or paid by you or your branches /agents under the credit or hereunder whether in negotiating draft or otherwise interest commission and all charges…"

The Plaintiff bank had produced Statements of Accounts marked P4, P9 and P14 giving the principal sum due under the Letters of Credit and the interest accruing from the date of default up to the time of institution of action. The Defendant when obtaining facilities agreed to pay the sum of money due under the Letters of Credit and the interests, BTT and the Defence levy.

The learned High Court Judge rejected the defences put forward by the defendant and answered the issues raised by the plaintiff in the affirmative and gave judgment in favour of the Plaintiff as prayed for.

Being aggrieved by the judgment of the High Court the Defendant preferred this appeal to the Supreme Court. The Petition of Appeal contains several grounds of appeal. However at the stage of the argument the defendant restricted the submissions to following two grounds:

1 Whether the Plaintiff-Respondent has proved that it paid and or disbursed monies under the said letters of Credit to the beneficiaries to recover the same from the Defendant-Appellant?

2. Whether the Plaintiff Respondent is entitled to recover interest at the rate of 34% per annum as claimed by it?

As regards to the first question it is the position of the Defendant that the Plaintiff is only entitled to reimbursement of monies paid by the Plaintiff to the beneficiaries under the Letters of Credit and that none of the documents produced by the Plaintiff showed that the Plaintiff had in fact paid monies to the beneficiary under the said Letters of Credit. The question that arises is whether the defendant took up this position at the trial. The defendant in its answer did not take up this position nor raised an issue . Further the Defendant did not cross examined the plaintiff's witness on this point. However after the recording of evidence and the conclusion of the respective cases in its written submission for the first time the defendant raised this matter.

In its written submissions the Defendant submitted that "the Plaintiff bank has not disbursed or paid to the beneficiaries the sums for which the application for Irrevocable Documentary Credit was made and Letters of Credit issued and there is no evidence whatsoever of such

payment or disbursement by the Plaintiff. It is respectfully submitted that the memos are not payments or proof that the Plaintiff Bank had paid the monies to the beneficiaries under the respective Letters of Credit."

The Plaintiff's witness while giving evidence stated that when Bank pays the amount due under the letter of Credit to the beneficiary's Bank it debits the customer's account and forward a memo to the customer. He testified that the Bank paid the beneficiary's Bank (seller's Bank) the monies due under Letters of Credit and thereafter debited the customer's account. Memos were send to the customer informing that the payments were made. The defendant did not challenge this evidence. If the defendant raised this point at the trial stage and demanded strict proof of payment ,the Plaintiff could have offered additional evidence to supplement or strengthen the evidence already led. The learned High Court Judge did not consider this matter as it was raised for the first time in the written submissions and acted solely on the evidence led at the trial.

It is appropriate at this stage to examine how payments are made under international sales of goods using Irrevocable Letters of Credit. The issuing bank at the request of the buyer undertakes to pay the beneficiary's bank (Seller's Bank) sum of money covered under the Letter of Credit upon receipt of documents relating to the letters of credit or on a future date agreed by the parties. Issuing Bank can withhold payment under Irrevocable Letter of Credit only if fraud was established. In this case beneficiary's bank duly submitted the documents under the Letters of Credit to the plaintiff bank. The plaintiff bank accepted the documents and handed over the documents to the defendant who obtained the release of the goods. In the circumstances the Plaintiff's Bank is liable to pay the amount due under the letter of credit to the beneficiary's bank. Similarly the Defendant is liable to pay the Plaintiff subject to deferred payment . If the Plaintiff bank did not pay the amount due or in other words dishonored the Letters of Credit the beneficiary's bank could claim the amount from the Plaintiff and also from the Defendant. There was no such claim by the beneficiary's Bank. This supports the Plaintiff's position that the money was duly paid to the beneficiaries Bank.

The Defendant Appellant next ground of appeal is that there is no basis to charge 34% interest on default payment. The agreement is silent on default interest rate. In such an instance Bank could adopt the normal default rate of interest. According to the Bank's witness, the Bank charged the rate of interest ordinarily charged from the defaulters in similar transactions. Defendant in its answer took up the position that the Plaintiff is not entitled to charge taxes, levies and interest but however failed to raise this matter as an issue. It is settled law that when issues are raised the pleadings will recede to background and the trial judge is required to decide on the issues.

The defendants both grounds of appeal involves question of facts not raised as issues at the trial stage and for that reason it is precluded from raising at the appeal stage. The principle laid down in of Candappa nee Bastian vs Ponnambalampillai reported in (1993) 1 Sri Lanka Law Reports pp185-190 which followed the cases 'The Tasmania'(1890) 15 App.Case 233 and Setha vs Weerakoon 49 NLR 225 is relevant to the facts of this case.

'A party cannot be permitted to present in appeal a case different from that presented in the trial court where matters of fact are involved which were not in issue at the trial such case not being one which raises a pure question of law'.

The questions of facts raised at the argument stage was not raised as issues at the trial stage. The learned High Court Judge correctly decided the case on the issues raised at the trial.

I hold that the judgment of the learned High Court Judge is in order and I see no reasons to interfere with the Judgment. Therefore I affirmed the judgment of the High Court.

Appeal dismissed.

Defendant- Appellant to pay Rs 100,00 as Costs of the appeal to the Plaintiff- Respondent.

Judge of the Supreme Court

Gamini Amaratunge J

I agree

Judge of the Supreme Court

Chandra Ekanayake J

I agree

Judge of the Supreme Court

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

In the matter of a final appeal from the Order of the Learned Commercial High Court Judge on 10.06.2003 in HC (Civil) Case No. 76/2001 (1).

Consolidated Steel Industries (Pvt) Limited,
No.3, Fredrica Mawatha, Colombo 06.
And also of No. 237/4, Hekitta Road, Wattala.

Defendant-Petitioner-Appellant

SC CHC Appeal No. 02/2004
HC Civil Case No. 76/2001 (1)

-VS-

People's Bank,
No.75, Sir Chittampalam A Gardiner Mawatha,
Colombo 02.

Plaintiff-Respondent-Respondent

BEFORE: Hon. Tilakawardene J,

Hon. Marsoof, P.C. J, and

Hon. Imam J

COUNSEL: Shantha Jayawardena with Duleeka Imbuldeniya for the Defendant-Petitioner-Appellant

Kushan D'Alwis P.C with Hiran Jayasuriya for the Plaintiff-Respondent-Respondent

Argued on: 30.03.2012

Decided on: 15.02.2013

SALEEM MARSOOF J:

In this appeal from the order of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing commercial matters (Commercial High Court) dated 10th June 2003, the only question that arises for decision is whether the said High Court had erred in refusing to set aside the *ex parte* judgment and decree entered by it against the Appellant on 31st August 2001. No question has been raised as regards the regularity of the appellate procedure followed in this case.

At the hearing before this Court, learned Counsel for the Appellant emphasized that the Appellant, Consolidated Steel Industries (Pvt) Ltd., was a limited liability company incorporated in Sri Lanka, and that the default in appearance on the part of the Appellant had been caused by the failure to comply with the provisions of the Civil Procedure Code Ordinance No. 12 of 1895, as subsequently amended, with respect to service of process on such corporate entities. He submitted that although the factual position was that summons had not been served on the Appellant company at all, in any event, the position taken up on behalf of the Respondent Bank that summons had in fact been served by the Fiscal at the factory of the Appellant situated at No. 237/4, Hekitta Road, Wattala on 27th April 2001 would not be of any avail, as in terms of Section 59(2)(a) of the Civil Procedure Code, where the defendant to any action is a corporate body, summons is required to be delivered at the registered office of such defendant, unless the court sanctions personal or substituted service.

Learned President's Counsel for the Respondent has submitted that there is strong and compelling evidence that the summons had been duly served on the Appellant, but the Appellant had failed to appear in court on the date fixed for trial. He further submitted that since it is the Appellant who has put forward the purported 'excuse' that its non-appearance on the date of trial was occasioned by the non-service of summons, the burden of proving the purported excuse was on the Appellant, and that the said burden has not been duly discharged. He has invited the attention of Court to Section 86(2) of the Civil Procedure Code, which clearly places the onus on the party at default to show that he or it "had reasonable grounds for such default". He has also cited the decision of this Court in *David Appuhamy v Yassasi Thero* (1987) 1 SLR 253, to the effect that "an *ex parte* order made in default of appearance of a party will not be vacated if the affected party fails to give a valid excuse for his default."

Section 59 of the Civil Procedure Code enacts as follows:-

> *(1) Summons shall ordinarily be served by registered post.*
> *(2) (a) In the case of a corporation or incorporate body summons may be delivered to the registered office or if there is no registered office, the principal place of business of such corporation or body.*
> *(b).....*
> *(c)…….*

Since no submissions were addressed to this Court with respect to Section 59(1) of the Civil Procedure Code, particularly in regard to the question as to whether that provision was complied with prior to service of summons through the Fiscal, it would suffice for the purposes of this appeal to consider the effect of Section 59(2)(a) of the said Code quoted above. Although learned President's Counsel has also referred us to Section 471 of the Civil Procedure Code which contains special provisions with respect to service of summons on a "company (or corporation) authorized to sue and be sued *in the name of an officer or of a trustee*" this is not such a case, and the section is of no relevance.

The phrase "registered office" that occurs in Section 59(2)(a) of the Civil Procedure Code has not been defined in that Code, but the concept of "registered office" is well known to company law. In *Bandaranike vs. Times of Ceylon Ltd.,* (1984) 1 SLR 178 at page 183, Neville Samarakoon CJ., (with whom Wanasundere J and Colin Thome J., concurred), referring to Section 91 of the Companies Ordinance No. 51 of 1938, which required every company to have a registered office and to give public notice of the situation of the registered office, observed that:-

> *A registered office gives the Company a domicile and residence. Service of summons at this office is equivalent to personal service on a person under section 59 of the Civil Procedure Code. One of the objects of section 91 is to safeguard the interests of the public. The law fixes the Company's habitat so that the process of law can reach it and the members of the public who have dealings with it can find it. The respondent has represented to the public that its registered office was at No. 3, Bristol Street, and if any member of the public acted on the faith of it the respondent cannot be heard to deny it.*

Similar provisions were included in the Companies Act No. 17 of 1982, and in the current Companies Act No. 7 of 2007, there are several provisions that relate to the registered office of a company, and in particular Section 9(1)(b) requires public notice be given of the registered address of a company. Part VII of the Act, which deals with "management and administration" commences with Section 113(1) which specifically provides that "Every company shall have a registered office in Sri Lanka to which all communications and notices may be addressed."

In this connection it is relevant to note that in the plaint filed by the Respondent Bank in the High Court of the Western Province holden in Colombo against the Appellant, the Appellant was described in paragraph 2 as "a company duly incorporated in terms of the laws of Sri Lanka with the ability to sue and be sued in its name and having its registered office and/or principal place of business at the abovementioned address". It is also significant to note that in the caption to the plaint, two addresses of the Appellant have been provided by the Respondent, namely, No.3, Fredrica Road, Colombo 6 and No. 237/4, Hekitta Road, Wattala, without specifying which of

them is alleged to be the registered office of the Appellant. This must be contrasted with paragraph 1(a) of the plaint in which the Respondent Bank is described as "a banking Corporation incorporated and/or duly established under the People's Bank Act No. 29 of 1961 as amended, with the ability to sue or be sued in its corporation name and having its principal place of business and/or *registered office* at the abovementioned address and having branches throughout Sri Lanka."

Such a comparison reveals that this is an action by one corporate body against another such body and that while the Respondent as plaintiff has named one single address for its "principal place of business and/or registered office", it has specified two addresses as the "principal place of business and/or registered office" of the defendant. Can it be said that the Respondent has complied with Section 40(c) of Civil Procedure Code which requires the plaint to contain particulars of "the name, description, and the place of residence of the defendant so far as the same can be ascertained"? I am of the opinion that as a responsible State Bank, the Respondent should have stated with greater precision which of those two addresses was the registered office of the Appellant, a fact which could easily have been verified, if there was any doubt in that regard, from the Registrar of Companies. I wish to add in passing that where the registered office of the defendant is not clearly set out in the plaint as in this case, quite apart from issues as to jurisdiction that could arise (See for instance, *The Bank of Chettinad Ltd. v Thambiah et al* 35 NLR 190, the court may in terms of Section 46(2)(a) of the Civil Procedure Code refuse to entertain the plaint and return the same for amendment with a direction to specify the registered office of the Appellant with clarity. Such a step would facilitate the process of serving summons at the correct address.

While in view of its default in appearance, the Appellant did not have the opportunity of filing an answer and clarifying where its registered office was situated, in the caption to the application made by the Appellant in terms of Section 86(2) of the Civil Procedure Code, reference is made only to the address of the Appellant at Fredrica Road, Colombo 6. Furthermore, the Managing Director of the Appellant, who testified at the inquiry held on 9th July 2002 in the Commercial High Court pursuant to the said application filed by the Appellant in terms of Section 86(2) of the Civil Procedure Code, has asserted that the registered office of the Appellant company was situated at No. 3 Fredrica Road, Colombo 6 and that summons had not been served at either address of the Appellant set out in the caption to the plaint. It is significant that no effort was made on behalf of the Respondent Bank to contradict the testimony of the Managing Director of the Appellant with respect to the address of the registered office of the Appellant company, and on the contrary, learned Counsel for the Bank proceeded to mark in cross-examination as PR1 and PR1(a), the office copy and original, respectively, of a letter dated 31st August 1991 sent by the Appellant to the Respondent which in its letterhead clearly sets out the Wattala address as that of the factory and the Colombo 6 address as that of the office of the Appellant company.

It is in these circumstances that it becomes vital for the purpose of this appeal to determine whether summons had in fact been delivered as mandated by Section 59(2)(a) of the Civil Procedure Code at the registered office of the Appellant. At the inquiry held under Section 86(2) of the Civil Procedure Code, apart from the Appellant's Managing Director, the Additional Registrar of the Commercial High Court, was called to give evidence on behalf of the Appellant. In his testimony, he produced the records in H.C. Civil Case No. 43/2001, H.C. Civil Case No. 91/2001 and H.C. Civil Case No. 146/2001, which were all actions at that time pending between the Respondent and the Appellant. He has testified by referring to fiscal reports filed in these cases that in all such cases summons had been served at the address of the factory of the Appellant situated at Wattala either on the Manager or the Accountant of the Appellant.

The only witness called on behalf of the Appellant at the said inquiry was the Fiscal Officer of the Commercial High Court holden in Colombo. He has testified that he did serve summons on the Appellant, and produced in evidence marked PR2, his fiscal report filed in the case, and marked PR3 and PR3(a) his diary notes, in regard to the service of summons. However, while in the fiscal report marked PR2, which consisted of an affidavit pertaining to the service of process, it is expressly stated that summons was delivered on the Manager of Consolidated Steel Industries (Pvt) Ltd at the address of the Appellant at No. 3 Fredrica Road, Colombo 6 on 27th April, 2001, in the notes made on the diary maintained by the Fiscal Officer, marked PR3 and PR3(a) it is stated that summons was delivered at the factory of the Appellant at No. 237/4, Hekitta Road, Wattala also on 27th April 2001. The Fiscal Officer confirmed in the course of his testimony in court that summons was not delivered at the Fredrica Road address on or about 27th April, 2001. He attempted to clarify in the course of his testimony that in fact summons was delivered on the Manager of the Appellant at the factory situated in Wattala, as the several attempts made by him to do so at the Fredrica Road address had failed as the said address was a residence and the gate was closed. He also sought to explain that he had not mentioned about those failed attempts in his diary due to lack of space, and that he later proceeded to the factory situated at Wattala where he succeeded in delivering summons on the Manager of the Appellant, which fact he noted in his diary. This is however, contrary to what has been reported to court by the relevant Fiscal Officer in his Fiscal Report, marked PR2, wherein he has affirmed to serving summons at the Fredrica Road address on 27th April, 2001.

It is clear from the foregoing that while it is manifest that summons was never delivered at the registered office of the Appellant, the testimony of the Fiscal Officer gives rise to considerable doubt in regard to the question whether summons was served on the Manager or some such officer of the Appellant at the factory premises in Wattala as contended by the Respondent. However, what a defendant who seeks to purge his or its default in appearance in terms of Section 86(2) of the Civil Procedure Code is required to satisfy court is that "he had reasonable grounds for such default", and in my opinion a company such as the Appellant is entitled to show for this purpose that its default was caused by the omission on the part of the Respondent to deliver summons at its registered office, which omission itself was occasioned by the failure of

the Respondent to set out clearly in the plaint the address of the registered office of the Appellant. It is not open to a leading State bank which parts with a large amount of money by way of loan to say that it was unaware of the address of the registered office of the borrower, which it knew or ought to know, was a limited liability company.

In this context, it may be of some relevance to refer to Section 60 (1) of the Civil Procedure Code which is quoted below:

> *The court shall, where it is reported that summons could not be effected by registered post or where the summons having been served and the defendant fails to appear, direct that the summons be served personally on the defendant by delivering or tendering to him the said summons through the Fiscal or the Grama Niladhari within whose division the defendant resides…..In the case of a corporation summons may be served personally by delivering or tendering it to the secretary or like officer or director.*

As learned Counsel for the Appellant has contended, while it is incumbent in terms of Section 59(2)(a) of the Civil Procedure Code for summons on a company or other corporate body to be delivered at its registered office, or where there is no such registered office, at its principal place of business, if the company or other corporate body fails to appear, personal service may thereafter be made, as directed by court as contemplated by Section 60(1) of the Code, by delivering or tendering summons to "the secretary or like officer or director" of such company or corporate body. In the instant case, it appears that a personal service as contemplated by Section 60(1) of the Civil Procedure Code has been attempted by the Fiscal without any direction of court as required by that section. When the Fiscal officer was questioned about this in cross-examination, the witness responded to this question as follows:-

> *Q: Witness, on whose instructions did you attempt to serve summons at No. 237/4, Hekitta Road, Wattala?*
>
> *A: I went to the first address given in the plaint to serve summons but summons could not be served because the gate was closed. Thereafter, I went to the second address.*

Indeed, delivery of summons as required by Section 59(2)(a) of the Civil Procedure Code, or personal service as contemplated by Section 60(1) of the said Code is necessary in such circumstances, to acquire jurisdiction over a corporate body. The grave dangers of failing to serve summons on a defendant were emphasized by Sharvananda, J. (with Ismail J and Weeraratne J concurring) in *Ittepana v Hemawathie* (1981) 1 SLR 476 at 484 in the following manner:-

> *Failure to serve summons is a failure which goes to the root of the jurisdiction of the Court to hear and determine the action against the defendant. It is only by service of summons on*

the defendant that the Court gets jurisdiction over the defendant. If a defendant is not served with summons or is otherwise notified of the proceedings against him, judgment entered against him in those circumstances is a nullity.

Learned President's Counsel for the Respondent has invited our attention to Section 61 of the Civil Procedure Code and Section 114 (d) of the Evidence Ordinance, but it must be said at the outset that Section 61 of the Code has no relevance of the facts of this case in which no question has been raised in regard to service of summons by registered post. Section 114(d) of the Evidence Ordinance provides that "the Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business in their relation to the facts of the particular case, that judicial and official acts have been regularly performed". In my opinion, the clear evidence of failure to comply with the imperative provisions of Section 59(2)(a) and 60(1) of the Civil Procedure Code are sufficient to displace the effect of the said presumption.

As P.R.P. Perera, J. (with whom Dr. Amarasinghe J. and Wejathunge J. concurred) in *L.M. Gladwin D. Mel v J. A.Neethasinghe* [1994] Vol. V Part II BALR 24 observed at page 25:-

The court has to be mindful of the fact that the objective of service of summons on a defendant is to give notice to party on whom it is served of a pending suit against him, so that he might be aware of an be able to resist such suit, if he wishes to do so. The court must therefore be perfectly satisfied that summons has been duly served on the defendant.

It is necessary to mention that the main thrust of the Appellant's case as presented in the Commercial High Court was that no summons had been served on the Appellant either at the address of its registered office or at the factory premises situated in Wattala. The Learned Judge of the Commercial High Court was not inclined to believe the evidence of the Managing Director of the Appellant that the business of the Appellant had been closed down in the year 1996, as there was clear evidence that the factory had been in operation even on 27th April 2001, on which day the Fiscal claimed that he had served summons on the Manager of the factory. However, in my view it is also necessary to consider the fact that the Appellant's registered office was situated at No. 3 Fredrica Road, Colombo 6, which position has not been denied or disputed by the Respondent, and the infirmities in the testimony of the Fiscal Officer in regard to the service of summons. It seems extremely unlikely that the Appellant company, which also had several other cases pending before the Commercial High Court, would have deliberately refrained from making an appearance, if it had in fact been served with summons, particularly because according to the *ex parte* judgment and decree, the amount sought to be recovered by the Respondent in the action is Rs.38,285,060.13, which along with interest at 30% per annum from the date of the plaint to the date of the judgment amounts to Rs. 52,173,730.84, subject to further legal interest till it is paid in full.

In all the circumstances of this case, I am satisfied that the Appellant has discharged the burden placed on it by Section 86(2) of the Civil Procedure Code, and I am of the view that the Appellant should not be deprived of the opportunity of making an appearance. In my opinion, the interests of justice will be best served if the Appellant is given the opportunity to purge its default to enable it to appear and defend the action filed against it by the Respondent.

I would therefore, allow the appeal and set aside the order dated 10th June 2003 and the *ex parte* judgment and decree dated 31st August 2001 of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing commercial matters (Commercial High Court), and direct the said court to permit the Appellant to file answer and defend the action instituted by the Respondent.

I do not make any order for costs in the circumstances of this case.

JUDGE OF THE SUPREME COURT

TILAKAWARDENE J

JUDGE OF THE SUPREME COURT

IMAM J

JUDGE OF THE SUPREME COURT

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

In the matter of an appeal from the Judgment of the High Court of the Western Province in the exercise of its Civil Jurisdiction in case No: CHC/113/08/MR dated 24th September 2010.

Lionair (Private) Limited,
Colombo Airport,
Ratmalana.

DEFENDANT-APPELLANT

SC CHC APPEAL No. 43/2010
HC Colombo No. 113/08 MR
Nature Money
Value 132, 523, 149/86

-Vs-

Ceylinco Leasing Corporation Limited.,
No. 97, Hyde Park Corner,
Colombo 02.

PLAINTIFF-RESPONDENT

BEFORE	**:**	Hon. N.G. Amaratunga J, Hon. S. Marsoof, P.C. J, and Hon. K. Sripavan J.
COUNSEL	**:**	Chandaka Jayasundere with Tharindu Rajakaruna for the Defendant-Appellant I.S. de Silva with D. Perera for the Plaintiff-Respondent
ARGUED ON	**:**	26.2.2013
WRITTEN SUBMISSIONS ON	**:**	26.3.2013
DECIDED ON	**:**	05.8.2013

SALEEM MARSOOF J:

This is an appeal against the decision of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing actions of a commercial nature (hereinafter referred to as the Commercial High Court) dated 24th September, 2010. By the said judgment, the Commercial High Court upheld the claim of the Plaintiff-Respondent, Ceylinco Leasing Corporation Ltd. (hereinafter sometimes referred to as "Ceylinco Leasing") for the aggregate sum of Rs. 132,523,149.86, allegedly due on 12 causes of action, each of which was pleaded as a separate loan granted by it to the Defendant-Appellant, Lionair (Pvt) Ltd. (hereinafter sometimes referred to as "Lionair") as prayed for in the plaint.

Ceylinco Leasing sued Lionair to recover outstanding payments on loans allegedly granted by it to Lionair. In its plaint dated 3rd April 2008, Ceylinco Leasing referred to a Strategic Alliance Agreement (P-1) dated 24th September 2003 entered between Ceylinco Capital Investment Co (Pvt) Ltd., (hereinafter referred to as "Ceylinco Capital"), Ceylinco Lionair (Pvt) Ltd., (hereinafter referred to as "Ceylinco-Lionair") and Lionair (Pvt) Ltd., to which Ceylinco Leasing was not a party. Ceylinco Leasing claimed that pursuant to the said

Strategic Alliance Agreement, it granted financial assistance to Lionair by way of 12 loans, the particulars of which it provided under 12 separate causes of action, and annexed to the plaint copies of 12 promissory notes, all issued by Lionair on separate dates in the year 2004, all of which were at the subsequent trial produced in evidence marked P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24. After Lionair filed its answer dated 28th August 2008, in which it admitted the aforesaid Strategic Alliance Agreement and explained that if any financial assistance was provided to it as contemplated by the said Agreement, such assistance was provided by Ceylinco Capital and not by Ceylinco Leasing. In the said answer, Lionair denied that any legal obligation or contractual liability exists between Ceylinco Leasing and Lionair, or that any cause of action had accrued as averred in the plaint.

The case went to trial on 2 admissions and 58 issues, the first 50 of which were raised on behalf of Ceylinco Leasing. Lionair raised issues 51 to 57, wherein it put in issue whether the aforesaid Strategic Alliance Agreement was a contract between Ceylinco Leasing and Lionair; whether the 12 promissory notes pleaded were enforceable in law; whether the said notes were issued for valuable consideration; whether the letters of demand marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25 were consistent with the law relating to bills of exchange; and whether the plaint and the documents annexed to it complied with the provisions of the Bills of Exchange Ordinance No. 25 of 1927, as subsequently amended. Ceylinco Leasing responded with 2 consequential issues 58(a) and 58(b), of which issue 58(a) raised the question whether since Ceylinco Leasing "has not instituted action based on the promissory notes, will the provisions of the Bills of Exchange Ordinance not apply to this case?"

The Evidence

The only witness to testify at the trial was the Assistant Managing Director of Ceylinco Leasing, Paththini Kuttige Meril Titus Nonis, whose evidence-in-chief was contained in an affidavit dated 17th March 2009. In his affidavit, he has referred to the Strategic Alliance Agreement (P-1) dated 24th September 2003 entered between Ceylinco Capital, Ceylinco Lionair and Lionair, and stated that at the request of Lionair, Ceylinco Leasing, which was a member of the "Ceylinco group of companies", agreed to provide financial facilities to Lionair, and accordingly, on 14th March 2004, it granted Lionair, at the latter's request, a loan of Rs. 7,865,000.00 taking as security a promissory note dated 14th March 2004 (P-2), which is reproduced below:

LIONAIR *P-2*

PROMISORY NOTE
RS. 7,865.000/- (Capital)

No. PN/12M/0303/019

Issued Date : 14th March, 2004
Due Date : On Demand

LIONAIR (PVT) LTD., of Asian Aviation Centre Colombo Airport Ratmalana, do promise to pay Ceylinco Leasing Corporation Ltd. of 283, R.A. De Mel Mawatha, Colombo-3, a sum of Rupees Seven Million Eight Hundred and Sixty Five Thousand plus interest computed at 20% p.a. only on Demand upon presentation and surrender of this note at our office.
Sgd./
For and on behalf of
LIONAIR (PVT) LTD.

Nonis further stated in the said affidavit that a demand for payment on the aforesaid promissory note was made by the letter of demand dated 22nd September 2006 (P-3) sent by Ceylinco Leasing to Lionair, which letter of demand is reproduced below:

CEYLINCO LEASING CORPORATION LIMITED *P-3*

22nd September 2006.
Lion Air (Pvt) Ltd
Asian Aviation Centre
Colombo Airport
Ratmalana.

Dear Sir,

We Ceylinco Leasing Corporation Limited, of No. 283, R.A. De Mel Mawatha, Colombo 03 state as follows:
On or about 14th March 2004 you signed and delivered to Ceylinco Leasing Corporation Limited a Promissory note bearing reference No. PN/12M/0303/019 for a sum of Rupees Seven Million Eight Hundred and Sixty Five Thousand (Rs. 7,865,000.00) together with interest thereon at the rate of 20% per annum from the date of the said promissory note to be payable on demand.

We hereby demand from you and you are hereby demanded for the payment to Ceylinco Leasing Corporation Limited of the aforesaid sum of Rupees Seven Million Eight Hundred and Sixty Five Thousand (Rs. 7,865,000.00) together with interest thereon at the rate of 20% per annum from the date thereof within a period of 14 days from the date of these presents.

Yours faithfully,
Sgd./
CEYLINCO LEASING CORPORATION LIMITED

Nonis stated in his affidavit that as on 20th February 2008, a sum of Rs. 14,062,189.04 was due from Lionair on the said loan, and as Lionair had failed and neglected to pay the said sum of money or part thereof, a cause of action accrued to Ceylinco Leasing to recover the said sum of money from Lionair with further legal interest. Nonis, has set out in the said affidavit, in a similar manner, the particulars of all sums of money allegedly granted as loan by Ceylinco Leasing to Lionair, which it was alleged constituted the remaining 11 causes of action on the basis of which the action was instituted for the recovery of an aggregate sum of Rs. 132,523,149.86 with legal interest thereon. Nonis has annexed to the said affidavit all promissory notes issued by Lionair marked P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24, which were similar except for the dates and the amounts, and all letters of demand issued by Ceylinco Leasing dated 22nd September 2006 and marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25, which only differed in regard to the amount demanded.

The affidavit of Nonis was received in evidence and treated as the examination-in-chief of the witness, who was present in court and testified on 12th June 2009. The learned Judge of the Commercial High Court permitted the leading of further evidence by way of examination-in-chief, after which he was cross-examined by learned Counsel for Lionair, which cross-examination was continued on 16th September 2009, and thereafter re-examined by learned Counsel for Ceylinco Leasing on the same day. It is significant to note that during his cross-examination, Nonis was pressed to clarify what the underlying transactions based

on which the promissory notes were issued, and whether it was a contract in writing or an unwritten contract, and he responded by saying that he was unaware of the details which are known only to the legal division of Ceylinco Leasing, but he had always insisted on a request letter for granting a loan. He was then asked why he was not producing a single of those request letters, whereupon he produced, with the permission of court, a request letter dated 5th December 2003 (P-27). The said request letter marked P-27 is reproduced below:-

LIONAIR *P-27*

To : Executive Director – CLCL

From : Chairman – Lionair (Pvt) Ltd.

Subject : Payment in advance – Rs. 2.4 M

Date : 05/12/2003

I kindly request to arrange an advance payment of Rs. 2.4M at the rate of 20% interest until June 2004 where Purchase Agreement of Lionair aircraft to be scheduled to take place.

Promissory Note and Letter of Guarantee is enclosed herewith.
Sgd./
Kumar Arichandran Rutnam

Nonis also produced in evidence marked P-28, a loan schedule showing the breakdown of the aforesaid sum of 132,523,149.86 alleged to be outstanding on all these transactions, which is reproduced below:

P-28

PN No.	Period			Rate	Bal. Rs.	Bal. As at 20/02/2008 Rs.	Days	Interest as at 20/02/09
	From	To						
PN/12M/0303/019	14.Mar.04	20.Feb.08	ON DEMAND	20.00%	7,865,000.00	7,865,000.00	1438	6,197,189.04
PN/12M/0303/020	25.Mar.04	20.Feb.08	ON DEMAND	20.00%	7,865,000.00	7,865,000.00	1427	6,149,783.56
PN/12M/0303/021	30.Mar.04	20.Feb.08	ON DEMAND	20.00%	3,025,000.00	3,025,000.00	1422	2,357,013.70
PN/12M/0303/026	25.Apr.04	20.Feb.08	ON DEMAND	20.00%	3,025,000.00	3,025,000.00	1396	2,313,917.81
PN/12M/0303/027	10.May.04	20.Feb.08	ON DEMAND	20.00%	1,573,000.00	1,573,000.00	1381	1,190,308.49
PN/12M/0303/030	11.Jun.04	20.Feb.08	ON DEMAND	20.00%	14,520,000.00	14,520,000.00	1349	10,732,865.75
PN/12M/0303/022	26.Mar.04	20.Feb.08	ON DEMAND	20.00%	4,620,000.00	4,620,000.00	1326	3,609,928.77
PN/12M/0303/023	29.Mar.04	20.Feb.08	ON DEMAND	20.00%	10,291,667.00	10,291,667.00	1423	8,024,680.63
PN/12M/0303/024	06.Apr.04	20.Feb.08	ON DEMAND	20.00%	10,291,667.00	10,291,667.00	1215	7,979,566.47
PN/12M/0303/028	25.May.04	20.Feb.08	ON DEMAND	20.00%	4,400,000.00	4,400,000.00	1366	3,293,369.86
PN/12M/0303/029	05.Jun.04	20.Feb.08	ON DEMAND	20.00%	2,640,000.00	2,640,000.00	1355	1,960,109.59
PN/12M/0303/031	15.Jun.04	20.Feb.08	ON DEMAND	20.00%	4,950,000.00	4,950,000.00	1345	3,648,082.19
Total					**75,066,334.00**	**75,066,334.00**		**57,456,815.86**

At the end of the testimony of Nonis, the learned Judge of the Commercial High Court granted a further date for Ceylinco Leasing to call its other witnesses, but on 3rd March 2010 Ceylinco Leasing intimated to court that it was not intended to call any further witnesses to testify on its behalf, and closed its case reading in evidence the documents marked P-1 to P28. Learned Counsel for Lionair then indicated that he will not call any evidence on behalf of Lionair.

The Judgment of the Commercial High Court

The learned Judge of the Commercial High Court pronounced his judgment on 24th September 2010, whereby he answered all issues in the case in favour of Ceylinco Leasing, and held that Ceylinco Leasing has proved its case on a balance of probabilities. He awarded Ceylinco Leasing relief as prayed for in the plaint.

In arriving at his conclusion, the learned High Court Judge, very rightly, treated the Strategic Alliance Agreement (P-1) as a part of the background facts, but noted in particular that as stated in the recitals at the commencement of the said Agreement, Ceylinco Capital had agreed to be the strategic partner of Lionair, and had agreed in clause 1(d) of the said Agreement to "facilitate or provide assistance in procuring the necessary financial resources for the day to day operations of Lionair". He was, of course, conscious of the fact that the party before court is Ceylinco Leasing and not Ceylinco Capital, but considered that the existence of the Strategic Alliance Agreement with Ceylinco Capital would not only explain the conduct of Lionair, but also the conduct of Ceylinco Leasing with respect to the transactions of loan, which were in issue in the case.

From the judgment of the Commercial High Court, it is abundantly clear that the court rightly characterised the action as a regular action to recover outstanding amounts on 12 loans, and not as one in which certain promissory notes were put in suit. The promissory notes were regarded as constituting evidence of the underlying loan transactions in connection with which, the said notes had been tendered as security, and the fact that 2 Directors of Lionair had signed the said notes was treated as an additional piece of evidence that established the existence of the loan transactions and tended to tilt the scale in favour of Ceylinco Leasing. The following passage from page 4 of the judgment constitutes, in my opinion, the essential reasoning of the Commercial High Court:-

> නඩුවේ පිළිගැනිම්වල දී මෙකී පොරොන්දු නෝට්ටු විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරු දෙදෙනෙකු අත්සන් කර ඇති බව ද පිළිගෙන ඇත. මෙම කරුණු අභියෝගයට ලක් කරමින් විත්තිකාර පාර්ෂවය සාක්ෂි කියා පෑමක් නැත. විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරු අත්සන් කර, පොරොන්දු නෝට්ටු දීම තුළින් පැමිණිල්ල කියා පාන ලෙස ණය සැපයූ බවටත් ඒ සඳහා පොරොන්දු නෝට්ටු දුන් බවටත් වැඩි බරින් පිලිගත හැකිය. එසේ නොවන්නට පොරොන්දු නෝට්ටු සඳහා විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරුන් අත්සන් කරතැයි සිතිය නොහැක. එකී පොරොන්දු නෝට්ටු අගනා ප්‍රතිඥාවක් මුල්කර ගෙන නොදුන් ඒවා වී නම්, සාක්ෂි කැඳවා එය පැහැදිම විත්තියේ වගකීමකි. විත්තිය එසේ කර නැත. ඒ අනුව පැමිණිල්ලේ සඳහන් ලෙස නඩු නිමිති 12ට අදාළව ණය මුදල් දුන් බවත් එය සුරැකීමට පොරොන්දු නෝට්ටු ලබාගත් බවත් වැඩි බරින් පිළිගත හැකි බව පෙනී යයි. එකී පොරොන්දු නෝට්ටුවල ලබා දෙන ණය මුදලට අදාළ පොළිය ද සටහන් කර ඇත. එවැනි පොළියක් සඳහා එකගතාවයක් නොවී නම්, විත්තිකාර සමාගමේ අධ්‍යක්ෂකවරුන් එකී පොරොන්දු නෝට්ටු වලට අත්සන් කරතැයි සිතිය නොහැක. විත්තිය සාක්ෂි කැඳවා එයට වෙනස් තත්ත්වයක් පෙන්වා සිටින්නේ නැත. ඒ අනුව පැමිණිල්ලේ දක්වා ඇති ඒ ඒ නඩු නිමිත්ත යටතේ හිමි මුදලට දක්වන පොළි සඳහා ද පැමිණිල්ල හා විත්තිය අතර එකගතාවයක් වූ බව වැඩි බරින් තීරණය කළ හැක.

The Commercial High Court has also considered the question as to whether payment was demanded from Lionair prior to filing action. Court took note of the fact that all letters of demand produced in evidence marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25 demanding payment within 14 days, were sent on the same date, namely 22nd September 2006, and considered the causes of action to have accrued on the expiry of 14 days from 22nd September 2006. Court also concluded that since the action was filed within 3 years from the accrual of the causes of action, no question of prescription arose, and took note of the fact that learned Counsel for Lionair had indicated in his written submissions that he would not pursue that line of defence.

Submissions of Counsel on Appeal

It was common ground that the action from which this appeal arises is simply a regular action for the recovery of money outstanding on 12 loans with interest thereon and not an action by way of summary procedure instituted in terms of Section 703 of the Civil Procedure Code. Hence, as learned Counsel for Ceylinco Leasing has submitted, it is not necessity to establish that the procedures laid down in the Bills of

Exchange Ordinance such as presentment of the promissory notes for payment and / or issuing notice of dishonour have been complied with.

Learned Counsel for Lionair, has submitted at the hearing before this Court that though Ceylinco Leasing had, in its plaint, pleaded that it has advanced to Lionair 12 separate sums of money by way of loan in pursuance of a Strategic Alliance Agreement (P-1) dated 24th September 2003, Ceylinco Leasing was not a party to the said Agreement and therefore it has no relevance with respect to the alleged causes of action said to be disclosed in the plaint. He has also submitted that all the 12 causes of action set out in the plaint, were based on 12 promissory notes which were alleged to have been provided as security for prepayment of 12 loans. He pointed out that the evidence led by Ceylinco Leasing did not establish the existence or the terms of the alleged loan transactions, and that the respective letters of demand sent on behalf of Ceylinco Leasing to Lionair were entirely based on the promissory notes without any reference to any loan transactions. He has stressed that no party suing on transactions of loan could hope to succeed without proving the terms of the loan, in particular, the duration of the loan and agreed rate of interest, and the fact the repayment of the loan had been demanded, if in particular the loan was not for a fixed term.

Learned Counsel has further submitted that the only witness called on behalf of Ceylinco Leasing, Paththini Kuttige Meril Titus Nonis, knew nothing about the existence or otherwise of any underlying transaction of loan apart from the 12 promissory notes, and invited the attention of Court to the following passage of his testimony (page 175 of the brief) which shows that he had believed that the action was in fact instituted to put the said promissory notes in suit:-

ප්‍ර: මෙම නඩුවේ පැමිණිලිකාර සමාගම විත්තිකරුට එරෙහිව නඩු පවරා ඇත්තේ පොරොන්දු, නෝට්ටු මතද?

(අධිකරණයෙන්:-

ප්‍ර: තමාගේ නඩු නිමිති පදනම් කරගෙන තිබෙන්නේ පොරොන්දු, නෝට්ටු මතද?

උ: පොරොන්දු, නෝට්ටු මත.

ප්‍ර: වෙනත් කිසිම ගිවිසුමක් මත නොවේ, මේ නඩුව පදනම් වී තිබෙන්නේ, පිළිගන්නවාද? පොරොන්දු, නෝට්ටුට අමතරව පැමිණිලිකාර සමාගම හා විත්තිකාර සමාගම අතර වෙනත් ගිවිසුමක් තිබුණාද?

උ: පොරොන්දු, නෝට්ටු මත.

ප්‍ර: ඒ හැර වෙනත් ගිවිසුමක් මත නොවේ?

උ: නැහැ.

ප්‍ර: ඔබගේ දිවුරුම් ප්‍රකාශයේ පැ.1 ලෙස ලකුණු කර ඇති උපාය මාර්ගික එකගතා ගිවිසුමට පැමිණිලිකාර සමාගම පාර්ශවකරුවෙක් නොවේ?

උ: නැහැ.

In these circumstances, learned Counsel for Lionair has emphasized that the learned High Court Judge has erred in law in failing to consider whether there was sufficient evidence in support of the case of Ceylinco Leasing. In particular, he submitted that the learned Judge has erred in law in failing to consider the fact that Ceylinco Leasing had not even proved its allegation that any money had been lent to Lionair. He stressed that it is wholly untenable that Ceylinco Leasing, which is a well known and established company would have lent money to Lionair, without any acknowledgement of receipt or record of the said sum whatsoever, and that the failure of Ceylinco Leasing to produce any such proof should have been taken into consideration by the learned High Court Judge. He further submitted that the learned High Court Judge fell

into grave error in inferring from the available evidence that on a balance of probabilities 12 transactions of loan existed and in assuming that they were on the same terms as those set out in the 12 promissory notes annexed to the plaint, particularly in the light of the above-quoted testimony of Nonis.

Learned Counsel for Lionair further submitted that the assumption of the learned High Court Judge that a demand made on the promissory notes could also be considered to be a demand made on the agreement was altogether contrary to law. Learned Counsel has in this context referred us to the decision of this Court in *Seylan Bank Limited v. Intertrade Garments (Private) Limited* [2005] 1 SLR 80 where it was held that the cause of action in cases where money is payable on demand, arise only when the demand is made, and submitted that Ceylinco Leasing has failed to establish that any cause of action has arisen on the basis of loan as it has not furnished any evidence that the repayment of any of the loans (apart of the amounts of any of the promissory notes) was demanded and refused. Learned Counsel for Lionair has also referred us to the decision of the Court of Appeal in *L.B. Finance Ltd v. Manchanayake* [2000] 2 SLR 142, and submitted that, on a parity of reasoning, a demand on a promissory note issued as security cannot be deemed to be a demand on the underlying loan transaction.

Learned Counsel for Lionair has stressed that for the learned High Court Judge to arrive at the findings that he did, there should have been proper and cogent evidence presented by Ceylinco Leasing to that effect. He submitted that in the absence of such evidence, the learned High Court Judge could not have arrived at the above findings even on the basis of a balance of probabilities. He also invited the attention of Court to Section 114 of the Evidence Ordinance read together with illustration (f) thereof, which allows a court to presume that "the evidence which would be and is not produced would if produced be unfavourable to the person who withholds it." In conclusion, he submitted that the learned High Court Judge erred in law in holding that Ceylinco Leasings had proved its case on a balance of probabilities, without fully considering the implications of Ceylinco Leasing's failure to produce evidence which, having regard to the natural course of business would have been available to it.

Learned Counsel for Ceylinco Leasing responded to these submissions by emphasising that the case of Ceylinco Leasing from the date of pleading remained unchanged, that the monies sought to be recovered were due on 12 loans granted to Lionair, and the promissory notes marked P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24 were tendered only to establish that the underlying loan transactions were to the same tenor as evidenced by the said promissory notes. He submitted that at the commencement of the trial, issues were raised by Ceylinco Leasing on the same basis, namely that the Ceylinco Leasing lent and advanced to Lionair 12 distinct sums of money, and that the said loans were secured by the said promissory notes. He submitted further that it was in order to dispel any doubt in this regard that issue 58 (a) was suggested by Counsel for Ceylinco Leasing, raising the question as to whether the provisions of Bills of Exchange Ordinance would apply to this case given that Ceylinco Leasing "has not instituted this action based on the promissory notes", which question was answered by the learned High Court Judge in its favour. He emphasised that this case was instituted as an action by way of regular procedure and not by way of summary procedure, for recovering the moneys lent and not to put the promissory notes in suit.

Referring to the evidence led in the case, learned Counsel for Ceylinco Leasing conceded that as pointed out by learned Counsel for Lionair, witness Nonis had, in the course of his testimony at page 175 of the brief, erroneously stated that the action was instituted on the basis of promissory notes, but he invited the attention of Court to the subsequent proceedings appearing at pages 186 and 187 of the brief, wherein the witness had sought to correct himself. He pointed out that in his testimony, Nonis has clarified that he was not personally aware of the basis on which the action had been instituted, and stressed that Nonis had stated that he only knew that monies were advanced by Ceylinco Leasing to Lionair and that this is

evidenced by the promissory notes that had been issued by Lionair as security for repayment of the loans. He also submitted that witness Nonis has stated in evidence that he was not aware whether there was a written contract or not, and was only aware that certain amounts of money had been advanced to Lionair after obtaining the promissory notes. He submitted that the totality of the evidence clearly established that the action was based on unwritten contracts of loan entered between Ceylinco Leasing and Lionair.

Adverting to the wording of the letters of demand marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25, learned Counsel for Ceylinco Leasing submitted that it is not the format of the said letters of demand that should determine whether the action was filed on the basis of the promissory notes or not, and submitted that it is clear from the pleadings and the issues in the case that the action was instituted on the basis of money lent and advanced and that the promissory notes in question were only evidence of the loan transactions. Learned Counsel for Ceylinco Leasing submitted further that as the learned Judge of the High Court had determined, there was no evidence of any loan agreement in writing between the parties but only evidence of oral agreements to grant the loans sought to be recovered.

Learned Counsel for Ceylinco Leasing submitted that the learned Judge of the High Court has carefully considered in his judgement all matters which had been raised by the Counsel for Lionair, and has also carefully analysed the evidence and come to a finding of fact that the promissory notes were relevant only as proof of the existence of the loans and their terms. He relied on decisions in *Fradd v. Brown & Co. Ltd.* 18 NLR 382 (SC) 20 NLR 282 (PC), *Abdul Sathar v. Bogtstra* 54 NLR 102 (PC), *Alwis v. Piyasena Fernando* (1993) 1 SLR 119 (SC) for the proposition that an appellate court will not interfere with the findings of fact arrived at by a trial judge, unless the finding is perverse and not supported by evidence, and submitted that Lionair has not been able to demonstrate that the findings of the Commercial High Court are perverse or unreasonable. He emphasised that a fairly large sum of money had been advanced, and not only has Lionair failed to deny the receipt of such loans, but it has also not thought it fit to give any evidence to controvert the evidence adduced on behalf of Ceylinco Leasing. In these circumstances, he submitted that the appeal should be dismissed with costs.

Pleading and Proving the Essential Elements of Loans

This appeal raises questions regarding the essential elements of recoverable loans, in particular how they should be pleaded and proved. Roman-Dutch law which governs such loans, *simpliciter*, contemplate two broad types of loans, namely, loans for use (*commodatum*) and loan for consumption such as loan of money (*mutuum*). This case concerns the latter category of loan, which is defined by Wille's *Principle of South African Law*, (9th Edition by Francois du Bois) Chapter 31, pages 948-949 as a "contract in terms of which one person ('the lender') agrees to deliver something, or things that can be consumed by use to another person ('the borrower') *for a certain period of time* or to achieve a particular purpose with the intention that the borrower become the owner." Walter Perera in his work, *The Laws of Ceylon* (2nd Edition) at page 619, describes such a loan as "a contract whereby one of the parties gives over or delivers to the other property or dominion of a certain sum of money, or quantity of things which perish by use, the latter binding himself to return as much of the same kind or species."

It is an essential characteristic of such a loan that the borrower is bound subsequently to return to the lender, in the case of money lent, a sum of money equal to that lent, or, in the case of other fungibles, objects of the same kind, quality and quantity. The terms of the contract, in particular the duration of the loan and the agreed interest, if any, are therefore of paramount importance. Walter Perera, in his *The Laws of Ceylon* at page 619, observes that the contract of "*mutuum* is contracted not only by express words, but also tacitly by implication; so that when there is a doubt, *mutuum* is considered to have been contracted from the mere fact that mention has been made of money received." He also cites *Censura Forensis* 1.4.4.4

for the proposition that "where a large sum of money has been given to any one without mention being made of the reason, *the presumption in case of doubt is that it has given on loan for consumption*".

As regards the borrower's duty to return whatever is borrowed, Wille (*supra*) page 950, notes citing Grotius 3.10.6; Van der Keessel 3.10.6; Voet 12.1.19 that the borrower "must return the equivalent *at the time agreed on.* If no such time has been fixed, the borrower is not bound to return the equivalent immediately, but *only on expiration of a reasonable period in the circumstances, after notice*". K. Balasingham, in his *Institutes of the Laws of Ceylon*, Volume 2, Part 1 at page 287 citing the same authorities as does Wille, observes that from this contact, "which is unilateral or only on one side, arises an action to the lender or his heirs against the borrower or his heirs to return a like sum of money, or quantity of the thing lent and of the same quality, and *this after the expiration of the time limited by the contract*, or if no time has been fixed then after a reasonable time to be determined by the judge."

From the above, it becomes obvious that the plaintiff in any action for recovery of loan has to establish clearly the terms of the loan, particularly its duration, and if no specific period of time is agreed upon for the return of the money or other thing loaned, that a reasonable time has elapsed after the advance of the loan, and a notice has been issued to the borrower demanding the return of the loan. With regard to interest, unless the rate of interest is expressly or by implication agreed upon by the parties, the lender is entitled to the return of only the sum of money or the quantity of other thing lent in the same quality. Particulars of all these terms have to be pleaded and proved. The failure to set out particulars of the cause of action or causes of action sued upon might give rise to difficulties in framing necessary issues of fact or even result in the dismissal of the action (*Narendra v. Seylan Bank Limited* [2003] 2 SLR 1).

As already noted, In the action from which this appeal arose, Ceylinco Leasing has sought to recover certain sums of money allegedly advanced as loan to Lionair, and the promissory notes marked in evidence tend to corroborate the testimony of Nonis that such moneys were in fact received by Lionair. Ceylinco Leasing has also led in evidence the letters of demand issued demanding payment of the money specified in each of the promissory notes. It is this form of letter of demand that probably prompted Lionair to characterise the action as one on promissory notes, and to contend that since certain imperative provisions of the Bills of Exchange Ordinance had not been complied with, and since there is no evidence of the terms of the loans or separate letters of demand claiming the return of the money advanced as loan, the action should have been dismissed by the Commercial High Court.

In this connection, the subsequent clarifications made by witness Paththini Kuttige Meril Titus Nonis in the proceedings at pages 186 to 187 of the brief, extracts from which are reproduced below, are of great relevance:

ප්‍ර: ගිය දින ප්‍රශ්න කළා මෙම නඩුව ඔබගේ පැමිණිලිකාර සමාගම විසින් ගොනු කරන ලද්දේ කුමන පදනමක් මතද කියා. එවිට ඔබ කිවා විශේෂිතවම මෙම නඩුව ගොනුකර ඇත්තේ පොරොන්දු, නෝට්ටු මත කියා. පිළිගන්නවාද?

උ: මට මේ නිවැරදි කිරීම් කිරීමට ඉල්ලා සිටිනවා. මොන පදනම යටතේ ගොනු කර තිබෙනවාද කියා දන්නේ නැහැ. ගියවර මම සාක්ෂි දුන්නේ ඒ ගැන දැනීමක් නැතිව. මම තාමත් දන්නේ නැහැ හරියට මේ දෙකේ වෙනස මොන පදනමක් මතද, මේ නඩුව ගොනුකර තිබෙන්නේ කියා. මම දන්නේ සල්ලි දී තිබෙන්නේ සෙලින්කෝ ලීසිං සමාගම ලයන් එයාර් සමාගමට. ඒ අනුව පොරොන්දු, නෝට්ටු ඒ සමාගමෙන් ලැබී තිබෙනවා.

ප්‍ර: ඔබ මේ ගරු අධිකරණයට දිවුරුම් ප්‍රකාශ මගින් හෝ වාචික සාක්ෂි මගින් කොතනක හෝ ඔප්පුකර තිබෙනවාද යම්කිසි මුදලක් විත්තිකාර සමාගමට ලබා දී තිබෙනවා කියා?

උ: ඔව්.

ප්‍ර: මොනවායින්ද ඔප්පු කර තිබෙන්නේ?

උ: සෙලින්කෝ ලිසිං සමාගමට සල්ලි දුන් ප්‍රමාණයට ඒකට සාක්ෂියක් වශයෙන් ප්‍රෙමිසිරි නෝට්ටු ලයන් එයාර් සමාගමෙන් ලබාගෙන තිබෙනවා.

ප්‍ර: එවිට පැමිණිලිකාර සමාගම විසින් කුමන පදනමක් මතද සල්ලි ටික දුන්නා කියන්නේ, ලිඛිත ගිවිසුමක් තිබුනාද? වාචික ගිවිසුමක් තිබුනාද? අර්පන ලිපියක් තිබුනාද?

උ: මම දන්නේ නැහැ ඒ සම්බන්ධව මොන වගේ ගිවිසුමක් තිබුනාද නැද්ද කියලා. අධ්‍යක්ෂ මණ්ඩලයක් දුන් උපදෙස් මත මෙම සල්ලි ලයන් එයාර් සමාගමට ලබා දුන්නා. එවිට පිළිගැනීමක් හැටියට ලබා දුන්නා.

ප්‍ර: සුරැකුමක් හැටියට නොවෙයි, පිළිගැනීමක් හැටියට?

උ: රික්වෙස්ට් ලෙටර්ස් ඉල්ලා තිබෙනවා මේ සල්ලි ලබා දෙන්න.

ප්‍ර: තමන් දිවුරුම් ප්‍රකාශ ඉදිරිපත් කර තිබෙනවා? ඔය කියන රික්වෙස්ට් ලෙටර්ස්?

උ: මම හිතන්නේ නැතිව ඇති.

ප්‍ර: මම ඔබට යෝජනා කරනවා කිසිඳු එකක් ඉදිරිපත් කර නැහැ කියා. දැනට ඔබ විසින් මෙම අධිකරණයේ සාක්ෂි වශයෙන් ඉදිරිපත් කර තිබෙන පැ.1 කියන ලේඛණය සහ ඉතිරි ලේඛණ පොරොන්දු, නෝට්ටු සහ ඒ මත ඔබ කියනවා කියන ඒන්තරවාසි තමයි ඉදිරිපත් කර තිබෙන්නේ?

උ: ඔව්.

(අධිකරණයෙන්:-

මෙය හරස් ප්‍රශ්ණ වලින් මතුවන ලේඛනයක් බැවින් එය ලකුණු කිරීමට ඉඩ දෙමි.

ලයන් එයාර් සමාගම විසින් 2003.12.05 වන දින විත්තිකරු විසින් පැමිණිලිකාර සමාගමට ඉදිරිපත් කර ඇති මුදල් ඉල්ලා ඇති ලේඛනය පැ.27 වශයෙන් ලකුණු කරනවා. දෙමිලියන භාර ලක්ෂයක මුදලක් ඉල්ලා තිබෙනවා.

It appears from these extracts that witness Nonis has very clearly stated in evidence that the fact that the loans as pleaded were in fact advanced to Lionair is evidenced by the promissory notes issued by Lionair, which were for the identical amounts as the loans. When questioned whether the loan transaction was in writing, and if so what documents were involved, Nonis stated that request letters were obtained from Lionair prior to the grant of the loans, but he was not certain whether copies of those request letters were in fact tendered with his affidavit. When learned Counsel for Lionair insisted that such request letters should have been tendered, the witness moved to produce a request letter dated 5th December 2003, and the learned High Court Judge permitted to be marked in evidence as P-27 despite the fact that it was not listed, presumably in terms of Section 175(2) of the Civil Procedure Code. This document reveals that the Chairman of Lionair did request an advance payment of Rs. 2.4 million at the rate of 20% interest from the Executive Director of Ceylinco Leasing, and also that with the said letter of request, a promissory note and a letter of guarantee was tendered.

Although no additional information regarding this particular loan has been furnished to Court and the amount of the loan requested by P-27, namely Rs. 2,400,000.00, does not tally with any of the alleged loans for the recovery of which the action was filed, it clearly cuts across the case of Lionair that it did not have any loan transaction with Ceylinco Leasing, as in terms of the Strategic Alliance Agreement (P-1) dated 24th September 2003 it looked exclusively to Ceylinco Capital for financial assistance. This then, along with the

failure on the part of Lionair to call any evidence to counter the case presented by Ceylinco Leasing, makes it more probable that witness Nonis was truthful both in his affidavit and his testimony in court in regard to the grant of the loans sued upon.

It is significant that witness Nonis has testified that simultaneously with the grant of the said loans, promissory notes produced in evidence as P-2, P-4, P-6, P-8, P-10, P12, P-14, P-16, P-18, P-20, P-22 and P-24 were issued by Lionair under the hand of two directors of the said company, and that the terms of the loan and the promissory note were identical. It is also clear from the affidavit and testimony of Nonis that, the loan was repayable when demanded and that the agreed rate of interest was 20 per cent, and that the said promissory notes embody in full the terms of each such contract of loan. In these circumstances, in my opinion, there is no necessity to call in aid the presumption adverted to by Walter Perera on the authority of *Censura Forensis* 1.4.4.4, nor is there any need, in these circumstances, to adduce any further evidence of the terms of the contract, nor can such evidence be led in view of Section 91 of the Evidence Ordinance, No. 14 of 1895, as subsequently amended.

An important matter that needs to be considered is whether the Roman Dutch law principles enunciated above should give way to the provisions of the Bills of Exchange Ordinance and the rules of the common law of England which may become relevant in terms of Section 98(2) of the said Ordinance. Fortunately, there is a great deal of commonality between the Roman Dutch law, which is our residuary law, and the principles of English common law in this regard, and the latter principles are not only consistent with Roman Dutch law but also accord with common sense.

A crucial question that arises in this context is whether a lender, as in this case, who sues to recover certain loans granted by him in respect of which the borrower has executed promissory notes as well, can sue on the original consideration if the promissory notes cannot be proved or enforced. Although we have not been referred to any Sri Lankan decisions that deal with the question, it is noteworthy that the question was addressed in *In re Romer and Haslam* (1893) 2 Q.B. 286 at page 296 by Lord Esher M.R. (with Bowen LJ and Kerr LJ, concurring) in the following manner:

> It is perfectly well-known law, which is acted upon in every form of mercantile business, that the giving of a negotiable security by a debtor to his creditor operates as a conditional payment only, and not as a satisfaction of the debt, unless the parties agree so to treat it. *Such a conditional payment is liable to be defeated on non-payment of the negotiable instrument at maturity*, and it is surprising that there can be at the present day any doubt as to the business result of such a transaction.(*Emphasis added*)

An illustrative case in which the facts were very similar to the one at hand, is the decision of a Full Bench of the High Court of Rangoon in *Maung Chit and Anr. v Roshan N.M.A Kareem Oomer & Co.* AIR 1934 Rangoon 389. In this case, which was an action for the recovery of sums of Rs. 300 and Rs. 100 given as loan, and the evidence showed that on each occasion when the loan was made, the borrower executed a promissory note payable on demand for the amount of the loan and interest thereon at 3 per cent *per mensem*. The lender sought to recover the amount due on the promissory notes or in the alternative a like sum for money lent. At the trial, the learned Judge found that the promissory notes were not duly stamped, and therefore were inadmissible in evidence under the Indian Stamp Act (2 of 1899, &. 35). A decree was passed in favour of the lender on the alternative claim for the amount of the loans without interest, and pursuant to a revision application filed by the borrower, the Full Bench of the Rangoon High Court had to consider the following question: “When a creditor sues on a claim for money in respect of which the debtor has executed a promissory note, under what circumstances can the creditor sue for the original consideration if the promissory note cannot be proved?”

Page CJ (with Baguley J, Sen J, Leach J, and Dunkley J concurring) in dismissing the revision application, observed in paragraphs 4 of the judgment that from the English and Indian authorities the legal position is clearly as follows:-

> It is *prima facie* to be presumed (although the presumption is rebuttable) that the parties to the loan transaction have agreed that the promissory note or other negotiable instrument given and taken in such circumstances shall be treated as conditional payment of the loan; the cause of action on the original consideration for money lent being suspended during the currency of the negotiable instrument, and if and so long as the rights of the parties under the instrument subsist and are enforceable; but *the cause of action to recover the amount of the debt revives if the negotiable instrument is dishonoured or the rights thereunder are not enforceable.* On the other hand the cause of action on the original consideration is extinguished when the amount due under the negotiable instrument is paid or if the lender by negotiating the instrument or by laches or otherwise has made the bill his own, and thus must be regarded as having accepted the negotiable instrument in accord and satisfaction of the borrower's liability on the original consideration.(*Emphasis added*)

The legal position would be different if a promissory note or other negotiable instrument is given by the borrower to the lender as the sole consideration for the loan, or if the promissory note or other negotiable instrument is accepted as an accord and satisfaction of the original debt. In such a situation, the lender is restricted to his rights under the negotiable instrument, by which he must stand or fall, in the one case the note or bill is itself the original consideration, and in the other the original debt has been, liquidated by the acceptance of the negotiable instrument. *See, Goddard & Son v. Q'Brien* (1882) 9 Q.B.D. 37, *Day v. McLea* (1889) 22 Q.B.D. 610. It is clear from the evidence that the action from which this appeal arose is one which falls on the other side of the line, as there is nothing to suggest that the promissory notes were considered by the parities as the sole consideration for the loans, and the general presumption in these cases is to the contrary. In my view, the learned High Court Judge did not err in concluding that in this state of facts and the law, Ceylinco Leasing was entitled to sue Lionair on the loans, despite the simultaneous issue by Lionair of the promissory notes, which in fact embodied the terms of the contracts of loan.

Finally, it has to be considered whether the letters of demand marked P-3, P-5, P-7, P-9, P-11, P13, P-15, P-17, P-19, P-21, P-23 and P-25 which were all based on the corresponding promissory notes, and make no mention of the underlying contracts of loan, are adequate to perfect the causes of action on which the action has been filed. Witness Nonis has stated in his affidavit and testified to the effect that the loans in question were all payable on demand, but apart from the aforesaid letters of demand, was unable to produce any evidence of any notice requiring the repayment of the loans in question.

In this context, it is necessary to emphasise that even though the provisions of the Bills of Exchange Ordinance and the principles of the English common law, may have applied to the action had it been instituted based on the promissory notes, as the action from which this appeal arises was filed to recover money advanced as loan, which is clearly governed by the principles of Roman Dutch law as the residuary law of Sri Lanka, the question as to whether all essential ingredients of the action have been established has to be decided by reference to that law. In regard to the question whether the Roman Dutch law requires a demand to be made by the lender prior to filing action to recover the item loaned, Wille's *Principle of South African Law*, (9th Edition by Francois du Bois) Chapter 31, page 950, citing Grotius 3.10.6; Van der Keessel 3.10.6; Voet 12.1.19 clarifies that the borrower is bound to "return the equivalent *at the time agreed on*", but if there be no express or implied agreement as regards the duration of the loan, "the borrower is not bound to return the equivalent immediately, but *only on expiration of a reasonable period in the circumstances, after notice*". Balasingham's *Institutes of the Laws of Ceylon*, Volume 2, Part 1 at page 287 does not even insist on a notice being issued, and states that if no time has been fixed for the return of the loan, then the action may be instituted "after a reasonable time to be determined by the judge."

In my opinion, the aforesaid letters of demand, which required Lionair to pay Ceylinco Leasing the sum of money specified in the relevant promissory notes "together with interest thereon at the rate of 20% per annum from the date thereof within a period of 14 days from the date of these presents" may reasonably be construed as notice to return the money lent, it being in evidence that the promissory notes in question were executed simultaneously with the grant of the loans. I also hold that the action was instituted after the expiry of a reasonable period from the date of the said letters of demand, and that the learned Judge of the Commercial High Court was fully justified in holding in favour of Ceylinco Leasing.

Conclusion

For the foregoing reasons, I have no hesitation in affirming the judgment of the High Court dated 24th September, 2010, and dismissing the appeal filed by Lionair (Private) Limited. In all the circumstances of this case, I hold that Lionair (Private) Limited shall pay Ceylinco Leasing Corporation Limited the costs of this appeal fixed at Rs. 100,000.00.

JUDGE OF THE SUPREME COURT

N.G. AMARATUNGA J

JUDGE OF THE SUPREME COURT

K. SRIPAVAN J

JUDGE OF THE SUPREME COURT

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

In the matter of an application under and in terms of Article 126 read with Article 17 of the Constitution.

Ediriweera Arukpatabandige Sugath Rohan Jayasuriya,
194/2, Polgahawelena,
Debarawewa, Tissamaharama.

SC (FR) Application No.43/2008 **Petitioner**

Vs.

1. Police Constable
Manikkaratnam,
Police Station,
Tissamaharama.

2. Constable 63623,
Police Station,
Tissamaharama.

3 Police Constable 52736
Chandimal,
Motor Traffic Unit,
Police Station,
Tissamaharama.

4. Officer in Charge,
Police Station,
Tissamaharama.

5. The Inspector General of Police,
Police Headquarters,
Colombo 1.

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

Respondents

BEFORE : **TILAKAWARDANE, J.**
MARSOOF, PC, J. &
SRIPAVAN, J.

COUNSEL : Ms. Ermiza Tegal for the Petitioner.

Upul Kumarapperuma with Ms. Kaushalya Perera instructed by K. Upendra Gunasekera for the 1st - 3rd Respondents.

Ms. Lakmali Karunanayake, SSC, for the 6th Respondent.

ARGUED ON : 02.09.2013.

DECIDED ON : 18.11.2013.

Tilakawardane, J.

The Petitioner instituted the Fundamental Rights application before this Court on 01. 02. 2008 seeking relief against the 1st, 2nd, 3rd and 4th Respondents and/or the State for the alleged infringement of his Fundamental Rights guaranteed by Articles 11, 12(1) and 13(1) of the Constitution. At the hearing, the Counsel for the Petitioner confined his arguments to Article 11 and Article 13 of the Constitution.

In the petition dated 01. 02. 2008, the Petitioner prays for a Declaration that the 1st, 2nd and 3rd Respondents and/or the State have acted in violation of the Petitioner's Fundamental Rights guaranteed to him under Article 11 of the Constitution, constituting torture or cruel or degrading treatment when he was assaulted by the1st, 2nd Respondent, and the 3rd Respondent Police officers, who were attached to the Tissamaharama Police Station in the District of Hambantota.

Describing the incident further, the Petitioner alleged that on 29. 12.2007, he was accosted outside a boutique in the area and assaulted twice by the 1st Respondent on the side of the head, the 2nd Respondent is alleged to have dealt a blow to his head with his gun, while the 3rd Respondent, who arrived at the scene in a police jeep after being summoned by the 1st Respondent, allegedly assaulted the Petitioner subsequent to which he became unconscious.

The version of the Respondents on the other hand was that the incident took place at a Road Block near the Debarawewa junction and that the Petitioner was riding a motorcycle towards the town when the 1st and 2nd Respondents signalled him to stop. The Petitioner at the time was drunk and had fallen off the bike, and when being questioned he attempted to escape, had fallen off the bike twice and injured himself before he was apprehended. When searched the 1st Respondent discovered two packets of heroin inside the wallet of the Petitioner. He had been taken into custody as he was drunk and in possession of heroin.

In ascertaining whether this behaviour is in contravention of Article 11, this Court has followed the following judgements that indicate the degree of proof necessary. In **Channa Peris and Other vs. Attorney General and Others (1994)** *(1 SLR 01),* **Amerasinghe J** held that in considering whether Article 11 has been violated, three general observations apply:

I. "The acts or conduct complained of must be qualitatively of a kind that a Court may take cognizance of. Where it is not so, the Court will not declare that Article 11 has been violated.
II. Torture, cruel, inhuman or degrading treatment or punishment may take many forms, psychological and physical.
III. Having regard to the nature and gravity of the issue, *a high degree of certainty is required before the balance of probability might be said to tilt in favour of a petitioner endeavouring to discharge his burden of proving that he was subjected to torture or to cruel, inhuman or degrading treatment."*

The necessity for such a high degree of proof is re-affirmed in **Nadasena vs. Chandradasa Officer in Charge Police Station Hiniduma and Others (2006)** *(1 SLR 207)* where it was held that:

> "*…it would be necessary for the Petitioner to prove his petition by way of medical evidence and/or by way of affidavits and for such purpose, it would be essential for the Petitioner to bring forward such documents with a high degree of certainty for the purpose of discharging his burden."*

In evaluating the evidence on this matter the court is mindful of the need for concise, cogent and strong evidence that is required to prove a case such as this. Where two versions are presented the Court notes the importance of the Petitioner's complaint of torture being corroborated by medical evidence, **Namasivayam v Gunawardena (1989)** *(1 S.L.R. 394)*; in order for the Court to accept it.

The Medico-Legal Examination Report [Form No. 643/07] obtained from the Main Hospital in Tissamaharama (marked "IR 7"), where the Petitioner was initially examined when taken by the Police, records that at the time of examination, the Petitioner was drunk, his breath was smelling of alcohol and he had suffered a non-grievous injury to the right side of the head . The same Medico-Legal Examination Form and the consequent Medico-Legal Report, also issued at the time the Petitioner was examined initially, both record a statement from the Petitioner where he admitted to having received the injury as a result of an accident when he fell off his bike due to his drunken state. It is noteworthy that this was recorded almost immediately after he was taken into custody, and this version recorded by the Medical Officer contemporaneously corroborates the version of the Police Officers.

Contrary to his statement to the Medical Officer at the time contained in the Medico-Legal Report issued initially, the Petitioner after a week or so, when he was examined by another Medical Officer attached to the Hambantota Hospital, almost 8 days after the alleged incident, recorded in the Medico-Legal Report of 08.01.2008 that the injuries were sustained due to an assault by the 1st, 2nd and 3rd Respondents, though details mentioned in the affidavit of the Petitioner have not been recorded.

This Report also clearly indicates that the Petitioner complained of reduced hearing and vision in the left ear and left eye respectively. These ailments do not coincide with the evidence submitted with the petition marked “P4a” and “P4b” which indicate clearly that the non-grievous injury was sustained on the right side of the head. Furthermore, upon conducting several tests, the JMO concluded that sight and vision were normal indicating a possible fabrication (as was suggested by the Counsel for the Respondents) of ailments in order to support his contention of alleged torture and/or cruel degrading treatment. The counsel for the Respondents contended that such a false allegation had been made in order to compromise the charges filed against the petitioner for being in possession of heroin.

In ascertaining whether the injuries sustained were caused due to an assault or due to a fall, this Court takes into account the initial Medico-Legal Reports where the Petitioner was recorded to have suffered from upper lip and scalp lacerations, small injuries on the forehead as well as small scratches on his arms and legs, while these injuries, in particular the lacerations and scratches, are more likely to have been caused by a fall. Furthermore, this account of injuries sustained is corroborated by the In Entry marked “IR 8” recorded by the Police where the injury to the right side of head, lacerations on forehead and scratches on arms and legs were documented. In this context it is important to note that the state of the bike, as stated in the information book extract marked “IR 8” contemporaneously records that the bike has dent marks on the body, a dent near the oil tank as well as a misplaced side mirror and shattered signal lights, which are more indicative of the fact that the Petitioner is likely to have fallen, with the bike, to the ground.

This Court has carefully perused the differing versions of the Petitioner’s accounts of how the narrative unfolded and noted discrepancies with regard to the events stated in the Petition and his admissions made in the Medico-Legal Report in Tissamaharama as inconsistent with the Medico-Legal Report issued by the Hambantota Base Hospital. The resolution of this issue before the Court is, therefore, dependent upon the truth in the allegations made by the Petitioner which have been denied by the Respondents. This Court refers to the case of **Soogrim v**

Trinidad and Tobago (1993) *(Communication No. 362/1989)*, where the United Nations Human Rights Committee accepted an allegation of ill-treatment in the form of a beating but rejected a series of other similar allegations on the ground that there was insufficient evidence. The Committee held that, in this instance, it was a case of the complainant's word against that of the detaining authorities and the burden which lay on the complainant has not been discharged. The Court feels that this high burden is warranted as confirmed by the case of **G. Jeganathan v Attorney General (1982)** *(1 SLR 294)* where it was held that if public officers are accused of violating the provisions of Article 11, the allegations must be 'strictly proved' for, if they are so proven, they will carry 'serious consequences' for such officers.

The Court notes the difficulties in proving the allegations of torture or ill-treatment as laid out by Sharvananda J in **Velmurugu v A.G. (1981)** *(1 SLR 406).* However, it is imperative that these difficulties are measured against the medical evidence that has been submitted. In this regard, this Court makes reference to the case of **Channa Peris and Other vs. Attorney General and Others (1994)** *(1 SLR 01)* where although the Supreme Court was conscious of the difficulties in the proof of allegations of torture it was held that the treatment meted out did not amount to inhuman or degrading treatment and the lack of medical corroborating evidence was cited as grounds for so deciding.

Therefore, this Court finds that in the absence of conclusive medical evidence that indicate an infliction of torture, or cruel, inhuman or degrading treatment or punishment due to the injuries sustained being, most likely, caused by a fall rather than an assault [which is consistent with the medical evidence that indicate minor lacerations and a non-grievous injury], a declaration of the violation of Article 11 of the Constitution cannot be warranted as the fact of torture or any other form of treatment falling within Article 11 cannot be conclusively and strictly proven and the burden on the Petitioner has not been sufficiently discharged.

This Court's decision in declining to make a declaration of the violation of Article 11 due to insufficient medical [and other] evidence is consistent with domestic cases such as **Kapugeekiyana v Hettiarachchi (1984)** *(2 SLR 153)* and international

cases including **Grant v Jamaica (1994)** *(Communication No. 353/1988)* where the United Nations Human Rights Committee rejected the allegation of ill-treatment in the absence of supporting medical evidence, **Fillastre (On Behalf of Fillastre and Bizouarn) v Bolivia (1991)** *(Communication No. 336/1988)* and as well as **Soogrim v Trinidad and Tobago (1993)** *(Communication No. 362/1989)* mentioned above.

Furthermore, in **Tomasi v France (1992)** *(15 EHRR 1),* the Applicant claimed that he had been subjected to inhuman treatment while in Police custody and this alleged assault was corroborated by medical evidence leading to a declaration by the Court that the Applicant's rights had been violated. The Court also feels that the police has discharged the burden placed upon them to satisfactorily explain how the injuries were caused while the Petitioner was in their custody with supporting documents wherever necessary.

The next issue that requires the consideration of this Court is, whether there was a violation of the Fundamental Right guaranteed to the Petitioner by Article 13 of the Constitution. ***Article 13 (1)*** *reads as follows:*

> *"No person shall be arrested except according to procedure established by law. Any person arrested shall be informed of the reason for his arrest."*

The manner in which the arrest of a suspect can be made is indicated in the *Code of Criminal Procedure Act No. 15 of 1979* wherein **Section 32(1) (a)** and **32(1) (b)** reads that

Any peace officer may without an order from a Magistrate and without a warrant arrest-

a) *any person who in his presence commits any breach of the peace;*
b) *any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;*

Thus, this Court notes that **Section 32(1) (b)** has been adhered to as the Petitioner had been driving under the influence of alcohol, as confirmed by the Medico-Legal

Report of Tissamaharama marked “1R 7”, and was in possession of two packets of heroin thereby constituting *credible information being received* by the 1st and 2nd Respondent of the genuine commission of a cognizable offence.

In ascertaining, thus, whether the Petitioner was arrested in contravention to the above procedure of law, this Court makes reference to the Affidavits submitted by the 1st and 2nd Respondents as well as the Arrest Note marked “IR 6” which indicate that the Petitioner was informed that he was being arrested for the possession of heroin.

The Petitioner has disputed this assertion and also claimed that he was not in possession of heroin at the time of arrest but that it was produced with him before the Learned Magistrate as fabricated evidence. The Counsel for the Petitioner has further attempted to substantiate this claim by providing to this Court the Case Record bearing No. 85945 pending against the Petitioner in the Magistrate’s Court of Tissamaharama for possession of two packets of heroine, where the Petitioner was discharged in accordance with Section 188 of the Code of Criminal Procedure. However, this Court notes that a discharge does not amount to an acquittal as such an acquittal will only take place provided the discharge is consistent with ***Section 188(3)*** which reads:

> “*If the order of discharge referred to in subsection (2) has been made for the second time in respect of the same offence, such order of discharge shall amount to an acquittal.”*

In light of the Petitioner not being acquitted but only discharged, as well as the statement made, signed and dated by him in the presence of the Police where he admits that he was in possession of two packets of heroin he had purchased them for a friend, the reliability of the Petitioner’s claim is in doubt.

Therefore, the Court sees sufficient cause to rely on the strength of the evidence provided by the 1st and 2nd Respondent i.e. the Arrest Note marked “IR 6” that clearly indicate the reasons for Arrest dated 29.12.2007 at 23.00 and determine that the 1st and 2nd Respondent have adhered to an established procedure of law and have informed the Petitioner the reasons for arrest at the time of arrest.

The credibility of the Petitioner has also been an issue raised in this Court. In considering this issue, the Court notes the admissions and clarifications made in the Petitioner's Counter Affidavit. The Petitioner insisted that he was taken to the Debarawewa Hospital subsequent to the assault whereas he later admitted to having been taken to the Police Station in Tissamaharama prior to obtaining treatment for the head injury. Further, the Petitioner asserted that he had one prior conviction only whereas, subsequently he admitted to four previous convictions relating to the possession of Cannabis and illegal liquor, records of which were marked "IR 1", "IR 2" and "IR 3" in evidence.

Therefore as the Petitioner has a history of substance abuse, and the police witnesses had not attended court due to being on special official duty the court does not see evidence of fabrication of evidence The differing versions of events and the subsequent admissions made, cast serious doubt upon the credibility of the Petitioner in accepting these events as true and shows that he was a person who had earlier been convicted of substance abuse.

According to the reasons given above, this Court does not find a contravention of the fundamental rights guaranteed to the Petitioner by Articles 11 and 13(1). The application is dismissed. No costs.

Judge of the Supreme Court

Marsoof, PC, J.

I agree.

Judge of the Supreme Court

Sripavan, J.

I agree.

Judge of the Supreme Court

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

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

SC. FR. No. 138/2013

1. Akuretiyage Onethra Amavindi
   Through her father

2. Akuretiyage Mahesh Kumar Lanka
   No. 6, Thotupala Lane,
   Poramba,
   Amabalangoda.

Petitioners

Vs.

1. M.G.O.P. Panditharatne
   Principal,
   Dharmashoka Vidyalaya,
   Ambalangoda.

2. T. Matheesha Deeptha De Silva

3. H.D.U. Chandima

4. W. Chandana Sisira

5. Sumith Petthawadu

   All members of the Interview Board
   (on admission to year 1 – 2013)
   Dharmashoka Vidyalaya,
   Ambalangoda

6. Wasantha Siriwardhena

7. A.W. Sriyani Chandrika

8. M. Anura De Silva

9. M. Janaka Wimalasuriya

   All members of the Appeal Board
   (on admission to year 1 – 2013),
   Dharmashoka Vidyalaya,
   Ambalangoda.

10. S.M.S.R. De Silva
    Through his mother
    K.K.A. Krishanthi
    No. 12, Watarauma Road,
    Enderamulla,
    Amabalangoda.

11. Hon. Bandula Gunawardena
    Minister of Education,
    Ministry of Education,
    Isurupaya,
    Battaramulla.

12. Gotabhaya Jayaratne
    Secretary,
    Ministry of Education,
    Isurupaya,
    Battaramulla.

13. Director- National Schools,
    Ministry of Education,
    Isurupaya,
    Battaramulla.

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

Respondents.

* * * * * *

SC. FR. No. 138/2013

Before	:	Tilakawardane, J. Marsoof, PC. J. & Wanasundera, PC,J.
Counsel	:	Athula Perera with Chathurani de Silva for Petitioners. S. Rajaratnam, DSG. for Respondents.
Argued On	:	08.11.2013
Written Submissions filed	:	By the Petitioners on 20.11.2013 By the Respondents on 20.11.2013.
Decided On	:	18.12.2013

* * * * *

Wanasundera, PC.J.

The Petitioners in this case complain that the fundamental rights guaranteed to them under Article 12(1) of the Constitution have been violated by one or more of the Respondents when they did not admit the 1st Petitioner to Grade 1 of Dharmashoka Vidyalaya, Ambalangoda.

The 2nd Petitioner is the father of the 1st Petitioner child who was not admitted to Grade 1 in January 2013. The application made to the school for admission of the 1st Petitioner was done under the category of "children of parents who are past pupils of the school". Admissions to school are governed by Circulars issued by the Ministry of Education and notifications issued in that regard from time to time. Applications are prepared in conformity with the specific application forms issued under the notifications. When the Petitioners applied for admission to Grade 1, they were called for an interview held by the Interview Board comprising of 1st to 5th Respondents. When the child did

not get admission, the Petitioners appealed to the Appeal Board comprising of 6th to 9th Respondents.

At the hearing of this case on behalf of the Petitioner, it was argued that the marks given to the Petitioners under the past pupils category as mentioned in '1R1', the mark sheet which was produced to Court by the 1st Respondent, contained marks given wrongfully under the category '3 ඵෑ(1)' and category '4 ඵෑ'. I observe that in '1R1', '3 ඵෑ(1)' the 2nd Petitioner being a member of the Badminton Team has been given 1 mark for the same; the 2nd Petitioner being the captain of the Volleyball Team has been given 2 marks for the same; the 2nd Petitioner being a member of the Athletic Team has been given 1 mark for the same; all adding up to 4 marks. The Petitioner's claim is that it should be 5 marks. They contest that in the Senior Volley Ball Team the 2nd Petitioner was a member and that he should get 1 mark for that position, as well as the 2nd Petitioner being the captain of the Junior Volley Ball Team the 2nd Petitioner should get 2 marks, adding the same to 3 marks which would bring the total marks under '3 ඵෑ(1)' to 5 marks. I observe that the Interview Board is directed by the notification issued by the Ministry that the position in one sport will be taken into account only once. Therefore the 2nd Petitioner has been given 2 marks for being the captain of the Junior Volleyball Team and in the same sport he cannot be given 1 more mark for having been a member of the Senior Volleyball Team. It is justifiable to consider the higher position and give marks undermining the lower position in the same sport. It is not done arbitrarily but done according to the rules which applied to all others who faced the interview. I therefore conclude that 4 marks at the interview given under '3 ඵෑ(1)' is correct.

The next contention of the Petitioners is that under category '4 ඵෑ' the 2nd Petitioner has been given 1 mark each, taking into account the qualifications of 1 year Technical College Course, and another 6 months Technical College Course which deserves 1 more mark and the addition should be 2 marks under '4 ඵෑ'. In this instance also, I observe that for the one year course 1 mark should be given and the half year course 0.5 marks should be given according to the specific marking scheme given under each category in each cage of the marking sheet. I therefore conclude that only 1.5 marks

should be given to the 2nd Petitioner in this regard. Therefore the total number of marks that the 2nd Petitioner has acquired adds up to 52.5 marks.

According to Clause 6.2/i-iv of Circular No. 18 of 2011 the Petitioners have been given only 52 marks. But I am of the opinion that they should be given 52.5 marks. The Petitioners are not entitled to 54 marks as they claim. Under the past pupils category only 25% of the total intake of students for Grade 1 is filled. I have noticed with regret that the marks indicated in the mark sheet '1R1' has not been done neatly. Yet the total number of marks adds up to only 52.5 and as such does not fulfill the requirement of reaching the cut-off mark of 54.

As such I dismiss the application without costs. However, at the hearing on behalf of the Respondents it was submitted that the 1st Petitioner is placed as No. 6 in the waiting list for admission to Grade 1 in the year 2013. I direct that the 1st Petitioner be placed in the correct placement on the waiting list taking into account the number of marks which should have been awarded to the 1st Petitioner as 52.5.

Judge of the Supreme Court

Tilakawardane, J.

I agree.

Judge of the Supreme Court

Marsoof, PC. J.

I agree.

Judge of the Supreme Court

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

In the matter of an application under and in terms of Articles 17 & 126 of the Constitution of the Republic.

SC. FR. Application No. 231/2012

1. Mani Nuwan Jayawardana

2. T.W.N. Priyanga

3. Oshadha Randika Jayawardana (minor)

   The Petitioners of 55/2T-37,Maitland Place, Colombo 07.

Petitioners

Vs.

1. D.M.D. Dissanayaka, Principal,
   D.S. Senanayake College,
   Gregory's Road, Colombo 07.

2. Mayura Samarasinghe (Secretary)

3. Mr. Prince

   1st to 3rd Respondents of the Interview Board (on admission to Year 1, 2012),
   D.S. Senanayake College,
   Gregory's Road, Colombo 07.

4. Ranjith Jayasundara (President)

5. Mr. Prince

   4th & 5th Respondents of the Appeal Board (on admission to Year 1, 2012),
   D.S. Senanayake College,
   Gregory's Road, Colombo 07.

6. Director- National Schools,
   Ministry of Education,
   "Isurupaya", Pelawatte,
   Battaramulla.

7. S.M.G. Jayaratne, Secretary
   Ministry of Education,
   "Isurupaya", Pelawatte,
   Battaramulla.

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

Respondents

* * * * * *

Before : Marsoof, PC. J.
Sripavan, J. &
Wanasundera, PC,J.

Counsel : Senura Abeywardane for Petitioners.
Ms. Viveka Siriwardane, SSC. for Respondents.

Argued On : 30.10.2013

Written Submissions filed : By the Petitioner on 06.12.2013
By the Respondents on 14.11.2013

Decided On : 18.12 .2013

* * * * *

Wanasundera, PC.J.

The Petitioners are the parents of a minor child and the minor child himself. They have come before this Court alleging that the fundamental right guaranteed to them under

Article 12(1) of the Constitution of the Democratic Socialist Republic Sri Lanka have been violated by the Respondents.

Article 12(1) stipulates that all persons are equal before the law and are entitled to the equal protection of the law.

At the stage of hearing of this case, the main argument was that the 3rd Petitioner, the minor child was not admitted to D.S. Senanayake College on account of the Petitioners' residence being situated on the State Land. This state of affairs was described as "unlawful occupation of state land" by the interview board that selected entrants to grade 1 of the school in 2012, in terms of Circular No. 2011/18 dated 11.5.2011.

The 1st Petitioner, the father of the child has affirmed in his affidavit that 30 years ago he was born in the same residence that they are living at present. The 1st Respondent has along with his objections dated 2nd July 2013 filed a copy of the Birth Certificate of the 1st Petitioner, the father of the child, which was produced at the interview for admission of the child marked as 1R2B, and states that the address in that Birth Certificate is not the same as that averred in the petition. However, I note that in cage 9 of the said Birth Certificate, the address of the informant, the father of the 1st Petitioner is mentioned, as Maitland Lane, Colombo 7. The number of the house is not legible but the place is the same as at present. I am of the view that the 1st Petitioner's Birth Certificate is proof of the fact that he was living in Maitland Place, Colombo 7 from his birth. His marriage certificate dated 28.10.2005 and the 3rd Petitioner child's Birth Certificate also show that the family has been living at 55/2, Maitland Place, Colombo 7. The other documents such as electoral lists and electricity bills confirm the fact that the parents of the child have been living continuously at 55/2, Maitland Place, Colombo 7.

Clause 6.1 of the Circular No. 2011/18 stipulates that 50 marks would be awarded to a child who is a resident in the feeder area of the school. The record of marks given at the interview to the Petitioners was produced by the Respondents marked 1R3 and the fact that 78 marks was awarded at the interview to the 3rd Petitioner is recorded and signed by all the members of the interview board as well as the father of the child, the 1st Petitioner having accepted the marks. Thereafter for no reason indicated by the

Respondents to the Petitioners, the child's name was not included in the temporary list of children to be admitted to Grade 1 in 2012. Admittedly other children who were awarded below 78 marks have got selected. This fact is confirmed by 1R4 which shows the list to be admitted. The only reason given by the Respondents as put forward only at the hearing of this application is that, the occupants of the residence were in "unlawful occupation of state land".

I believe that if the word "resident" in the circular is to be interpreted as 'lawfully resident' as submitted by the Learned Senior State Counsel, children belonging to the poorer segment of society, living in State Land for a very long period will be deprived of education. Circulars are not made for particular cases but for the society in general. The object of every Court is to do justice within the circular. The word "lawfully" does not appear in the circular; It is an interpretation suggested to Court by the Learned Senior State Counsel on behalf of the school. It is my considered view that respect must be paid to the language used in the circular, and the traditions and usages which have given meaning to that language. Article 126 of the Constitution too imposes a duty to make an order which is just and equitable. It is not for this Court to decide on whether those who are permanently living within the feeder area are occupying their houses lawfully or not. In the instant case the Petitioners are occupying State Land. This is not the only family in Maitland Place in occupation of State Land. In fact the electoral lists show a large number of residencies in 55/2, Maitland Place. All of them are occupying State Land. If the authorities have failed and neglected to evict them from State Land for a long period, it may be that they have been occupying the land for over one third of a century or so, which by itself could confer dominium over land. Whether such person can be evicted or not is a different matter altogether. The fact is that they are 'resident' within the feeder area of the school, and have not been evicted for an extremely long period of time. Are the children in these families to be deprived of their right to education? I am of the opinion that residency in the circular should not be interpreted as lawful or unlawful because it is not a subject matter for the interview board. If the fact that they are resident within the area for the relevant period is proved, then the child should be admitted under Clause 6.1 and given marks accordingly. The interview board has correctly done so giving 78 marks, as explicitly shown in 1R3 which

the Respondents have filed in Court but later decided not to admit the child on the ground of unlawful occupation of State Land. The Respondents at no time informed the Petitioners of this reason until this application was filed. The 1st and the 2nd Petitioners have been prevented from admitting the 3rd Petitioner to D.S. Senanayake Vidyalaya by reason of arbitrary and unreasonable conduct by the Respondents which violates the fundamental rights of the Petitioners guaranteed in terms of Article 12(1) of the Constitution.

I therefore direct that the 3rd Petitioner, Oshadha Randika Jayawardana, who is the child of the 1st and 2nd Petitioners should be admitted to Grade 3 of the D.S. Senanayake Vidyalaya at the beginning of the year 2014. The Petitioners shall be entitled to Rs. 30,000/(Thirty Thousand Rupees) as costs payable by the State.

Judge of the Supreme Court

Marsoof, PC.J.

I agree.

Judge of the Supreme Court

Sripavan, J.

I agree

Judge of the Supreme Court

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

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

SC (FR) Application No. 278/2008

1. Malalage Chaminda Tissa Peiris,
   601/72/14, Thammanakulama,
   Anuradhapura. (now deceased)

PETITIONER

1A. Malalage Gunadasa Peiris,
No. 41/9, Wijaya Mawatha,
Isurupura,
Anuradhapura,

SUBSTITUTED - PETITIONER

-Vs-

1. Mr. Hettigedara Weerakoon,
   Inspector of Police,
   Police Station, Anuradhapura.

2. T.D.M.S. Nishanka,
   Police Officer in Charge (Traffic),
   Police Station, Anuradhapura.

3. Mr. Hettiarachchi,
   Inspector of Police,
   Police Station, Anuradhapura.

4. Mr. Withana,
   Sub-Inspector of Police,
   Police Station, Anuradhapura.

5. Mr. P.M. Wijeratne,
   Officer in Charge,
   Police Station, Anuradhapura.

6. Mr. Sarath Prema,
   Head Quarters Inspector of Police,
   Police Station, Anuradhapura.

7. Jayantha Wickramaratne,
   Inspector General of Police,
   Police Head Quarters,
   Colombo 01.

8. Hon. Attorney General,
Attorney General's Department,
Colombo 02.

RESPONDENTS

BEFORE	:	Hon. S. Marsoof PC, J, Hon. C. Ekanayake J, and Hon. E. Wanasundera PC, J
COUNSEL	:	Sandamal Rajapaksha for the Substituted-Petitioner. Saliya Pieris for the 1st and 5th Respondents. Chula Bandara for the 2nd, 3rd, 4th and 6th Respondents. A. Navavi, Senior State Counsel, for 7th and 8th Respondents.
ARGUED ON	:	19.06.2013
WRITTEN SUBMISSIONS ON	:	10.07.2013
DECIDED ON	:	25.10.2013

SALEEM MARSOOF J:

The only question that arises for decision in this order is whether the substitution of Malalage Gunadasa Peiris in place of the deceased original Petitioner to this fundamental rights application, which was effected by this Court on 27th July 2012 in terms of Rule 38 of the Supreme Court Rules 1990, is valid in law.

Rule 38 provides as follows:-

> 38. Where at any time after the lodging of an application for……an application under Article 126 ……, the record becomes defective by reason of the death or change of status of a party to the proceedings, the Supreme Court may, on application in that behalf made by any person interested, or *ex mero motu*, require such……..the Petitioner……. to place before the Court sufficient materials to establish who is the proper person to be substituted or entered on the record in place of, or in addition to, the party who has died or undergone a change of status;
>
> Provided that where the party who has died or undergone a change of status is the Petitioner……, the Court may require …… any party to place such material before the Court.
>
> The Court shall thereafter determine who shall be substituted or added, and the name of such person shall thereupon be substituted, or added, and entered on the record as aforesaid. Nothing hereinbefore contained shall prevent the Supreme Court itself *ex mero motu,* where it thinks necessary, from directing the substitution or addition of the person who appears to the Court to be the proper person therefore.

The factual background

The original Petitioner to this application, Malalage Chaminda Tissa Peiris had invoked the jurisdiction of this Court seeking relief for the alleged violation of his fundamental rights guaranteed by Article 11, 13(1) and 13(2) of the Constitution, alleging in his petition dated 15th July 2008 *inter alia* that, on or about 23rd March 2008, he was arrested by certain police officers attached to the Anuradhapura Police Station, who tortured

him while in police custody, resulting in severe injuries. On 17th September 2008, this Court granted leave to proceed only with respect to the alleged violation of Article 11 of the Constitution, which provides that no person "shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment".

Although after the filing of objections and counter-affidavits, the case was fixed for hearing on 8th July 2009, hearing had to be postponed several times for various reasons. On 3rd August 2011, when the case was taken up for hearing, learned State Counsel who appeared for the Inspector General of Police and the Attorney General (7th and 8th Respondents) informed Court that a decision had been taken by the Attorney General to indict the Petitioner, and that the indictment was dispatched to the High Court of Anuradhapura in March 2011. There was also some indication that an out of court settlement of the application before court was in contemplation. Hearing was therefore postponed to be mentioned on 14th September 2011. On that date the case was re-fixed to be mentioned on 13th December 2011.

On 13th December 2011, when the case was mentioned, learned State Counsel who appeared for Attorney General, moved for further time to consider whether the "indictment forwarded to the High Court should be recalled". When on 17th January 2011 the case was mentioned again, learned Counsel for the Petitioner brought to the notice of Court that the Petitioner has died, and that he would seek instructions from the family of the deceased Petitioner as regards the continuation of the application. Thereafter, on 16th February 2012, learned Counsel for the Petitioner informed Court that he has instructions to pursue the matter, and time was granted by Court for the filing of substitution papers. Since substitution papers were not ready, on 20th March 2012, further time was granted by Court till 6th June 2012 for the filing of substitution papers, which were eventually filed on 30th May 2012.

When the case came up for support for substitution on 6th June 2012, learned Counsel for the 2nd to 4th, 6th and 7th Respondents indicated that they had not received copies of the application filed on 30th May 2012 for substitution, and learned Counsel for the 1st and 5th Respondents stated that he was furnished with the substitution papers only that morning. In any event, learned Counsel for the applicant for substitution, Malalage Gunadasa Peiris sought the permission of Court to amend the application for substitution already filed in Court, for which permission was granted by Court. The case was re-fixed for support for substitution on 27th June 2012. On 20th June 2012, a motion was filed on behalf of the applicant for substitution, Malalage Gunadasa Peiris, seeking permission to supplement the Petition dated 30th May 2012 with three more affidavits marked respectively X1 to X3 from the mother and two brothers of the deceased Petitioner stating that they had no objection to the said Mallage Gunadasa Peiries being substituted in place of the deceased Petitioner.

In those circumstances, on 27th July 2012, this Court considered the application of the said Malalage Gunadasa Peiris seeking his substitution in place of the deceased original Petitioner Malalage Chaminda Thissa Peiris, and allowed the said application. Thereafter, the case was re-fixed for hearing for 15th January 2013, on which date the application could not be reached, and hearing was re-fixed for 19th June 2013. On 19th June 2013 when this matter was taken up for hearing before this Court, learned Counsel for the 1st, 2nd, 3rd, 4th, 5th and 6th Respondents stated that the Respondents had reserved the right to take up an objection to the substitution of the Substituted Petitioner in place of the deceased Petitioner at the time when the said substitution was effected by Court. Although there was no indication in the minutes of this Court dated 27th July 2012 relating to the order by which the aforesaid substitution was allowed, the learned Counsel for the Substituted Petitioner stated that his recollection was that the Court had indicated that the objection to substitution would be taken up at the hearing of this application and that he is ready to meet such objection.

The Submissions of learned Counsel

Learned Counsel for the 2nd, 3rd, 4th and 6th Respondents has in the course of his submissions on the question of the lawfulness or otherwise of the substitution already effected by Court, stressed that the said

substitution was not valid in law. He submitted that Rule 38 is procedural in nature and sets out the procedure for effecting substitution, but cannot be invoked when the cause of action does not survive. He pointed out that as leave to proceed had been granted in this case only with respect to an alleged violation of Article 11 of the Constitution, which is a fundamental right of a personal nature which does not survive after the death of the person whose fundamental right was allegedly violated, Rule 38 had no application. He further submitted that a fundamental right to life cannot be implied from Article 11 of the Constitution, and even if it did, the right to life was not infringed in this case as there is no evidence which would causally link the death of the original Petitioner to the torture or cruel, inhuman or degrading punishment that had been meted out to him while he was in police custody. He stressed that the causal link had been severed by a voluntary act of the Petitioner, when he committed suicide more than 4 years after the alleged violation of Article 11. He contended that in those circumstances, the Substituted Petitioner lacked *locus standi* to continue with the application filed by his deceased son.

While the learned Counsel of the 1st and 5th Respondents associated himself with the submissions of the learned Counsel for the 2nd, 3rd, 4th and 6th Respondents, Learned Senior State Counsel stated that he would not wish to go into the technical issues but would highlight the fact that serious injuries resulted from the torture alleged to have been caused to the original Petitioner.

Learned Counsel for the Substituted Petitioner submitted that the right to life is capable of being implied from not only Article 11 but from the other articles of the Constitution which guarantee, for instance, the freedom from arbitrary arrest, detention and punishment (Article 13), and further submitted that the medical reports filed of record reveal the extensive and very serious injuries inflicted on the Petitioner while being held under custody. He emphasized that the Petitioner was youthful and unmarried at the time of the violation of his fundamental rights, and that his untimely death has indirectly affected the life of the Substituted Petitioner, who was his elderly father who depended on his earnings. He submitted that while this circumstance alone was sufficient to confer on the Substituted Petitioner the *locus standi* to continue with the application filed by the Petitioner, in any event the death of the Petitioner had occurred long after *litis contestatio*, which in an application of this nature takes place on the closure of pleadings.

The Right to Life and Locus Standi

Learned Counsel for the Substituted Petitioner, the 2nd, 3rd, 4th and 6th Respondents as well as the learned State Counsel have referred us to the decisions of this Court in *Somawathie v Weerasinghe and Others* (1990) 2 SLR 121 and *Shriyani Silva v Iddamalgoda, Officer in Charge, Police Station Payagala and Others* (2003) 1 SLR 14, which dealt with *locus standi* in the context of the right to life. *Somawathie v Weerasinghe and Others, supra,* was a case in which a wife complained to this Court of the infringement of the fundamental rights of her husband guaranteed by Articles 11 and 13 of the Constitution. The complaint in that case was clearly not based on the violation of the Petitioner's own rights, and it was based on the violation of the rights of her husband. Amarasinghe J (with whom Bandaranayaka J concurred) in interpreting Article 126(2) of the Constitution, which expressly provided that any person alleging any infringement of his fundamental or language rights by executive or administrative action, may by himself or by an Attorney-at-Law on his behalf, apply to the Supreme Court by way of petition for relief or redress in respect of such infringement, observed at page 124 of the judgment that,

> "Where, as in the Article before us, the words are in themselves precise and unambiguous and there is no absurdity, repugnance or inconsistency with the rest of the Constitution, the words themselves do best declare that intention. No more can be necessary than to expound those words in their plain, natural, ordinary, grammatical and literal sense……Construed in this way, Article 126(2) confers a recognized position only upon the person whose fundamental rights are alleged to have been violated and upon an attorney-at-law acting on behalf of such a person. *No other person has a right to apply to the Supreme Court for relief or redress in respect of the alleged infringement of fundamental rights.*

> The petitioner is neither the person whose fundamental rights are alleged to have been infringed nor the attorney-at-law of such a person. Therefore the petitioner has no *locus standi* to make this application."(*emphasis added*)

Kulatunga J., in a forceful dissent, took a contrary view, and observed at page 132 of his judgment that, "in circumstances of grave stress or incapacity, particularly where torture resulting in personal injury is alleged to have been committed, next-of-kin such as a parent or the spouse may be the only persons able to apply to this Court in the absence of an Attorney-at-Law who is prepared to act as a Petitioner; and if such application is also supported by an affidavit of the detenu either accompanying the petition or filed subsequently which would make it possible to regard it as being virtually the application of the detenu himself this Court may entertain such application notwithstanding the failure to effect literal compliance with the requirements of Article 126(2)." Justice Kulatunga, in the course of his judgment, highlighted the fact that though the Petitioner in the case was the wife of the victim, and an affidavit of the husband affirmed to while he was in custody had been annexed to the Petitioner's own affidavit filed with the petition. He also considered with sympathy the security situation that prevailed in the special circumstances of this case which resulted in the petition being filed after the expiry of the mandatory period of one month, which delay he was willing to excuse.

The facts on which *Shriyani Silva v Iddamalgoda, Officer in Charge, Police Station Payagala and Others, supra,* came up for decision were different from those of *Somawathie v Weerasinghe and Others, supra,* in that unlike in *Shriyani Silva*, the person whose fundamental rights guaranteed by Article 11, 13(2) and 17 of the Constitution had alleged to have been violated, had died while he was in remand prison, and the petition was filed by his widow. In this case, there was sufficient evidence to show that the death of the deceased had occurred due to the injuries inflicted on him while in police and remand custody, and Bandaranayake J (with whom S.N. Silva CJ concurred) was prepared to apply the maxim *ubi jus ibi remedium,* meaning there is no right without a remedy, in interpreting Article 126(2) broadly to imply *locus standi*. While Edussuriya J dissented from the majority decision of Court, her ladyship took pains to explain at page 21 of her judgment the basis of the majority decision, in the following words:-

> ".....Chapter III of our Constitution, which deals with the fundamental rights, guarantees a person, *inter alia,* freedom from torture and from arbitrary arrest and detention (Articles 11, 13(1) and 13(2) of the Constitution). Consequently, the deceased detainee, who was arrested, detained and allegedly tortured, and who met with his death subsequently, had acquired a right under the Constitution to seek redress from this Court for the alleged violation of his fundamental rights. It could never be contended that the right ceased and would become ineffective due to the intervention of the death of the person, especially in circumstances where the death in itself is the consequence of injuries that constitute the infringement. If such an interpretation is not given it would result in a preposterous situation in which a person who is tortured and survives could vindicate his rights in proceedings before this Court, but if the torture is so intensive that it results in death, the right cannot be vindicated in proceedings before this Court. In my view a strict literal construction should not be resorted to where it produces such an absurd result. Law, in my view, should be interpreted to give effect to the right and to suppress the mischief. Hence, *when there is a causal link between the death of a person and the process, which constitutes the infringement of such person's fundamental rights, anyone having a legitimate interest could prosecute that right in a proceeding instituted in terms of Article 126(2) of the Constitution.* There would be no objection *in limine* to the wife of the deceased instituting proceedings in the circumstances of this case."(*emphasis added*)

There could be little doubt that the decision in *Shriyani Silva v Iddamalgoda, Officer in Charge, Police Station Payagala and Others, supra,* has no application to the facts and circumstances of this case, in the absence of any evidence to establish that the death of the original Petitioner, Malalage Chaminda Tissa Peiris, resulted from the alleged torture to which he was subjected to while in police custody. His death occurred more than

4 years later, long after he was released from custody, and was for all appearances occasioned by his own voluntary act of suicide, which is a *novus actus interveniens*, meaning "an intervenient act" that would sever any pre-existing causal link.

Relevance of litis contestatio

In these circumstances, learned Counsel for the Substituted Petitioner has submitted that insofar as the death of the original Petitioner occurred long after *litis contestatio* meaning "the stage when the case is ready for hearing", the Substituted Petitioner has *locus standi* to continue with the petition. For this purpose, he relies on paragraph 10 of the petition filed by the Substituted Petitioner dated 30th May 2012 wherein he has expressly averred that since the case has reached the *litis contestatio* stage Court has jurisdiction under Article 126 of the Constitution to substitute the Substituted Petitioner "in the room of the deceased Petitioner".

As against this learned Counsel for the 2nd, 3rd, 4th and 6th Respondents have relied on the personal nature of the application made by the Petitioner in this Court in terms of Article 17 read with Article 126 of the Constitution, and contended that in relation to such applications as much as actions for damages for defamation and other injuries (libel, slander, invasions of privacy etc), which are all based on causes bearing a personal flavor, the maxim *actio personalis moritur cum persona,* meaning "the action or suit dies with the person", would apply to prevent continuation of the litigation after the death of the applicant, petitioner or the plaintiff. The principle embodied in the maxim had its origin in Roman-Dutch law, and may be illustrated by decisions such as *Fernando v Livera* 29 NLR 246 (SC), *Podisingho v Jayatu* 30 NLR 169(SC), *Vangadasalam v Karuppan* 79 Vol II NLR 150 (SC), *Jayasooriya v Samaranayake* (1982) 2 SLR 460 (CA), *Atapattu v People's Bank* (1997) 1 SLR 208 (SC), *Leelawathie v Manel Ratnayake* (1998) 3 SLR 349 (SC), *Stella Perera & Others v Margret Silva* (2002) 1 SLR 169 (SC) and *John Fernando & Attorney General v Satarasinghe* (2002) 2 SLR 113 (CA). In *Podisingho v Jayatu* 30 NLR 169 at 171, Drieberg J (with whom Fisher CJ agreed) explained the ambit of the maxim in the following terms:

> "Under the Roman-Dutch law, in the case of delicts of this sort which fell under the *Lex Aquilia,* the right of action does not, as in the case of the action of injury [*actio injuriarum*], lapse on the death of the person injured before *litis contestatio,* but enures to the benefit of his heirs, and they can sue the wrongdoer to recover what is known as 'patrimonial loss'."

It is clear from the above that in proceedings of a personal nature to which category a fundamental rights application such as the present would belong, which would come to an end upon the death of the Petitioner, reaching the stage of *litis contestatio* becomes crucial, as such proceedings would not lapse after reaching that stage. However, we have not been referred to by learned Counsel for any pronouncement of this Court in regard to the point at which *litis contestatio* is reached in fundamental rights proceedings. In my view, the following illuminating explanation provided by Woodrenton CJ in *Muheeth v Nadarajapilla* 19 NLR 461 at 462, can shed light on the question:

> "An action became litigious, if it was *in rem*, as soon as the summons containing the cause of action was served on the defendants; if it was in *personam,* on *litis contestatio,* which appears to synchronize with the joinder of issue or the close of the pleadings."

In *Atapattu v People's Bank* (1997) 1 SLR 208 at 218 M.D.H Fernando J elaborating on these principles observed that, *litis contestatio* in the modern law is deemed to take place at the moment the pleadings are closed, and its effect "is to freeze the plaintiff's rights as at that moment, and thus, in the event of his dying before the action is heard, to confer upon his executor all the rights which he himself would have had if he had lived."

Accordingly, it is necessary to examine whether the stage of *litis contestatio* had been reached in the case at the stage the original Petitioner committed suicide. After leave to proceed was granted in this case on 16th August 2008, the objections of the 2nd, 3rd, 4th and 6th Respondents were filed on 26th January 2009 and the objections of the 1st and 5th Respondents were filed on 17th February 2009. No affidavits were filed by the 7th Respondent (Inspector General of Police). The Petitioner filed his counter-affidavits on 30th June 2009 ahead of the scheduled date of hearing, which was 8th July 2009, but as already noted, the case had not been taken up for hearing until the point of time at which the original Petitioner committed suicide. In my opinion, to cut a pathetic story short, pleadings closed on 30th June 2009 when the counter-affidavits were filed. It is noteworthy that the petition of the Substituted Petitioner seeking his substitution was the only pleading filed after that date.

In the aforesaid circumstances, and for the foregoing reasons, I am of the opinion that the right vested in the deceased original Petitioner in terms of Articles 17 read with Article 126 of the Constitution to seek relief from this Court for the alleged violation of his fundamental rights guaranteed by Article 11 of the Constitution, survive after his death and may be pursued by his heirs who are represented by the Substituted Petitioner.

Conclusions

This Court has already allowed the substitution of the Substituted Petitioner in the room of the deceased original Petitioner subject to objections. Accordingly, while overruling the objections taken up at the hearing against the said substitution and upholding the validity thereof, I proceed to examine the suitability of the Substituted Petitioner to be so substituted.

It is evident from the Certificate of Birth marked P2 and annexed to the Petition and affidavit of the Substituted Petitioner Malalage Gunadasa Peiris dated 30th May 2012, that he was the father of the original Petitioner, and it is further evident from the Certificate of Death, a copy of which marked P1 was annexed to the said Petition and affidavit, that the cause of death of the original Petitioner was “suicide by hanging”. It is also apparent from the said Certificate of Death that the original Petitioner was 34 years old and unmarried at the time of his death which occurred on 31st December 2011. The Substituted Petitioner Malalage Gunadasa Peiris, had solemnly declared in his affidavit that he is a fit and proper person to be substituted in place of his deceased son to prosecute the application filed by him in this Court, which fact is conceded in the affidavits marked respectively X1 to X3 affirmed to by the mother and two brothers of the deceased original Petitioner produced with the motion dated 20th June 2012, in which affidavits they also state that they had no objection to the said Mallage Gunadasa Peiries being substituted in place of the deceased original Petitioner.

Accordingly, I make order upholding the substitution that was effected by this Court on 27th July 2012, and further order that this case be resumed before the same Bench on a convenient early date to be fixed by Court.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE J

JUDGE OF THE SUPREME COURT

EVA WANASUNDERA PC J

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 17 read with Article 126 of the constitution

1. Ven. Walahahangunawewa
   Dhammarathana Thero
   Rajamaha Viharaya
   Mihintale.

2. Ven. Mihintale Seelarathane
   Rajamaha Viharaya
   Mihintale.

Petitioners

Vs.

SC FR No. 313/09

1. Sanjeewa Mahanama
   Officer-in-Charge
   Police Station
   Mihintale.

2. Chandana WeerarathnaWaduge
   Kandy Road,Mihintale.

3. Inspector General of Police
   Police Head Quarters
   Colombo 01.

4. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

Respondents

Before : Marsoof, P.C, J.
Ekanayake, J. &
Dep, P.C. J.

Counsel : J.C. Weliamuna with Pulasthi Hewamanne for Petitioners
Lakmali Karunanayake, SSC for AG.

Argued on : 09.11.2011

Written Submissions
Tendered on : 30. 11 2011 -Petitioners

Decided on : 03- 07-2013

Priyasath Dep, PC, J

The Petitioners in this application alleged that their fundamental rights guaranteed under Articles 12(1), 13(1) and 13(2) of the Constitution were violated by the Respondents. This Court granted leave to proceed under article 13 (1) of the Constitution.

The 1st Respondent is the Officer in Charge of the Police Station, Mihintale. The 2nd Respondent is the person who made a complaint to the Police against the Petitioners. The 3rd Respondent is the Inspector General of Police and the 4th Respondent is the Attorney General.

The 1st Petitioner is the Viharadhikari of the Mihintale Rajamaha Viharaya. He had been a bhikku for a long period of time prior to his appointment as Viharadhikari. The 2nd Petitioner is a samanera bhikku and at the time of the incident was 19 years of age and has been a samanera bhikku for the past 8 years.

The Petitioners state that on 12.03.2009 at about 4.00 p.m. approximately 100 pilgrims from Cambodia visited the temple to follow religious observances. The 1st Petitioner was in the main office with the person who is in charge of finances and three others who were engaged in issuing tickets to the Cambodian pilgrims. The 2nd Petitioner was at that time sweeping the temple grounds at the Ambathala Maluwa (Mango Tree Terrace) which is approximately 75- 100 meters away from the main office. At that time several guides who accompanied the pilgrims were waiting near the Meda Maduwa (Middle Hall) till the pilgrims complete their religious observances. The 2nd Petitioner had observed the 2nd Respondent Chandana Weerarathna Waduge and Susantha Kapilaratne meddling with the bags of the pilgrims who were engaged in religious observances. The 2nd Petitioner approached them and questioned them as to what they were doing. These two persons abused him and pushed him aside and he fell on the ground. Then the 2nd Respondent pulled out a spray can and tried to spray some substance on his face which he believed to be a toxic substance. The 2nd Petitioner used the eckle broom and struck a blow to defend him. Then the 2nd Respondent and the other person quickly descended from the Meda Maluwa abusing him and thereafter left the temple premises. The 2nd Petitioner had gone in search of the 1st Petitioner and met him at the main office and narrated the incident.

The following day that is on 13.03.2009 a Police officer came to the temple and informed the 1st Petitioner that there was a complaint against the 1st and the 2nd Petitioners made by the 2nd Respondent who was hospitalized and requested them to appear at the Police Station to make a statement. The 1st Petitioner informed the police officer that he was not involved in the incident but he will send the 2nd Petitioner to make a statement. The police officers then left the premises. On 14.03. 2009 two police officers came to the temple and met the 1st Petitioner and requested the Petitioner to

accompany them to the police station to get a statement recorded. The 1st Petitioner informed the police officers that he was not a party to the alleged incident. At that time the 2nd Petitioner was not at the temple premises. Thereafter the police officer contacted some senior officer over the phone and obtained instructions. At about 9.00 a.m. about 15 police officers came in a police truck and entered the Meda Maluwa. The police officers were armed. The sub-inspector in- charge wanted the 1st Petitioner to come to the Police Station. The 1st Petitioner had informed the Sub-Inspector that he is willing to make a statement to the police without going to the Police Station. He had informed the police officer that he had previously made a statement to the Magistrate in MC Anuradapura 2357/8 implicating senior police officers and certain politicians in relation to the attack and destruction of the house and property belonging to Dr. Raja Johnpulle and due to that fact some police officers are ill-disposed towards him.

The 1st Petitioner states that due to the insistence of the police officer he was able to contact the 2nd Petitioner who was in the premises and decided to send the 2nd Petitioner to the Police Station. At about 12.00 noon the 2nd Petitioner accompanied by an Attorney-at-Law went to the Police station to make a statement. At about 12.30 the Attorney-at-Law informed him that the 1st Respondent the officer in-charge of the police station had told him that the 1st and the 2nd Petitioners are required to be present at the police station only for the purpose of recording their statements. They could leave after the recording of the statements. Thereafter the 1st Petitioner went to the police station and entered the office of the 1st Respondent where both the 2nd Petitioner and the Attorney-at-Law were present. To his utter surprise 1st Respondent ordered an officer in plain clothes to arrest and detain them. The Attorney-at-Law then inquired from the 1st Respondent as to why they were arrested to which the 1st Respondent did not respond and detained the Petitioners. The Attorney-at-Law had inquired from the 1st Respondent whether police bail could be given. However this was refused

After the arrest, statements were recorded from 1st and 2nd Petitioners. The 2nd Petitioner's statement revealed that the 1st Petitioner was not involved in the incident and he acted on his own to defend himself to prevent the 2nd Respondent's possible attack on him by using a spray can which he believed it to contain toxic substance. If his version is correct the 2nd Petitioner had acted in defence of his person and thereby no offence was committed by him.

The 1st Petitioner in his statement had stated that he has no knowledge of the incident as he was at the main office at the time of the alleged incident. The Petitioners state that at about 2.30 p.m. they were taken to the Acting Magistrate's residence by two police officers. The Petitioners were produced before the Acting Magistrate and they were remanded till 18.03.2009(Wednesday) as the police objected to granting of bail. The Petitioners state that they verily believe that they were arrested on a Saturday and produced before an Acting Magistrate to get them remanded till 18.03.2009 which is the day the cases from Mihintale Police Station are taken up in the Magistrate Court of Anuradhapura. However, consequent to a motion filed on their behalf the case was called on 16.03.2009 (Monday) before the Permanent Magistrate who granted bail after hearing the submissions made by parties. Witness Kapilaratne who was with the 2nd Respondent at the time of the incident submitted an affidavit to the court affirming that the 1st Petitioner was not involved in the incident and that the police have incorrectly recorded

in his statement that the 1st Petitioner was also involved. He submitted that though he signed the statement it was not read over to him by the police. The Petitioners alleged that their fundamental rights guaranteed under Article 12, 13(1) and 13(2) were violated.

The 1st Respondent, the officer in charge of the Mihintale Police Station filed objections and along with the objections had annexed the IB extracts and the initial B reports filed in this case. Other Respondents did not file objections. Although the 2nd Respondent was hospitalized the medical reports were not tendered along with the objections. The fact that the 2nd Respondent was hospitalized was a fact that influenced the Acting Magistrate to remand the Petitioners. The medical reports are relevant for the determination of this case. An adverse inference could be drawn against the Respondents due to their failure to produce the medical reports

The 1st Respondent in his objections affirmed that the 2nd Respondent in his statement has stated that the 2nd Petitioner attacked him with a club as a result he fell on the ground and the 1st Petitioner kicked him on the abdomen. The 2nd Respondent was admitted to the Mihintale hospital. He justified the arrest and detention of the Petitioners.

The 1st Petitioner filed a counter affidavit controverting the version given by the 1st Respondent. He reiterated that the 2nd Respondent was never subject to an attack as alleged and there is no medical evidence whatsoever to suggest that there were any injuries due to the purported attack. He further stated that consequent to a complaint made by him to the Human Rights Commission an inquiry was held and the Commission found that the 1st Respondent is guilty of violating the fundamental rights of the 1st Petitioner guaranteed under article 12(1) and 13 (1) of the Constitution. The 1st Respondent was ordered to pay Rs 10,000/= to the 1st Petitioner as compensation. Report of the Human Rights Commission was produced as P8.

The question that arises is whether arrest and detention of the Petitioners are in accordance with the procedure established by law. In other words whether it was in accordance with provisions of the Code of Criminal Procedure Act No. 15 of 1979. The Petitioners alleged that the arrest and detention was made arbitrarily, mala-fide and for collateral purpose. As this arrest and detention was made without a warrant it is necessary to examine section 32(1) of the Code of Criminal Procedure Act which empowers a police officer to arrest a person without a warrant. Relevant section of the Criminal Procedure Code reads thus :

"32(1) Any peace officer may without an order from a Magistrate and without a warrant arrest any person –

(a) who in his presence commit any breach of the peace

This sub section permits a peace officer to arrest a person without a complaint or receiving of information. This is due to the reason that the police officer had seen the commission of the offence and he has first hand information regarding the commission of the offence. This is the only section that permits a peace officer to arrest a person

without a complaint or receipt of information. This subsection is not relevant to this application.

The relevant subsection of section 32(1) which is applicable to this application reads as follows:

> "Who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned;"

In order to arrest a person under this subsection there should be a reasonable complaint, credible information or a reasonable suspicion. Mere fact of receiving a complaint or information does not permit a peace officer to arrest a person. Police Officer upon receipt of a complaint or information is required to commence investigations and ascertain whether the complaint is a reasonable complaint, the information is credible or the suspicion is reasonable before proceeding to arrest a person.

In Muttusamy vs Kannangara (1951) 52NLR 324 it was held that ' A peace officer is not entitle to arrest a person on suspicion under 32 (1) (b) of the Criminal Procedure Code, except on grounds which justify the entertainment of a reasonable suspicion'.

In Corea Vs The Queen (55NLR457) it was held that "the arrest must be made upon reasonable ground of suspicion.. There must be circumstances objectively regarded- the subjective satisfaction of the officer making the arrest is not enough….."

This principle equally applies to complaints and information. The fact that a complaint was made is not itself a ground to arrest a person. Anyone can falsely implicate another person. Peace officer should be satisfied that it is a reasonable complaint.

In this case the Police commenced investigations consequent to a complaint made on 12-3-2009 by Chandana Waduge a site guide in Mihintale area. The question is whether it is a reasonable complaint or not. He implicated both Petitioners. Thereafter on 14-3-2009 the Petitioners appears at the police station and made statements. The 1st Petitioner denied that he was involved in the incident and that he was elsewhere. (a plea of an alibi)The 2nd Petitioner stated that he acted in self defence and has given the names of several persons who were present at the time of the incident. If he had acted in self defence, there is no offence committed by him. According to section 89 of the Penal Code 'Nothing is an offence which is done in the exercise of the right of private defence'. In the light of the statements made by the Petitioners serious doubts will be cast on the complaint made by the 2nd Respondent. In the circumstances further investigations are required to verify the version given by 2nd Respondent. The Police have to ascertain the credibility of the complaint and the information received before rushing to arrest and produce the Petitioners in court. On the contrary police produced the Petitioners before the Acting Magistrate and moved for the remand of the Petitioners. The report filed by the police stated that the Petitioners had committed offences under section 314 and 316 of the Penal Code. In the report it was stated that the complainant was hospitalized without

informing the nature of injuries. Complainant was admitted to the hospital on the 12 th and the Petitioners were produced on the 14th. Police had sufficient time to find out the condition of the 2nd Respondent. It may be that the Complainant was feigning illness or got himself admitted to make matters worse for the petitioners.

The next question that arises is as to why the 1st respondent did not consider granting police bail. The alleged offences are bailable offences and included in the category of cases that should be referred to the Mediation Board. Further the 1st Respondent should have considered the fact that the Petitioners are not persons of criminal disposition and there are no grounds to believe that they will abscond or there is a likelihood of committing further offences or interfere with the witnesses.

It appears that the virtual complainant (2nd Respondent) is a person of criminal disposition. He is a suspect in the arson case.1st Petitioner had implicated him in that case. Due to this reason he has a motive to falsely implicate the 1st Petitioner. The Officer in Charge (1st Respondent) should have considered these facts before effecting the arrest.

The Acting Magistrate and the 1st Respondent had disregarded the provisions of the Bail Act No 30 of 1997. Section 2 of the Bail Act states that 'Subject to the exceptions as herein after provided for in this Act, the guiding principle in the implementation of the provisions of this act shall be that the grant of bail shall be regarded as the rule and the refusal to grant bail as the exception.'

Granting of bail is the guiding principle of the Bail Act. If this principle is followed it could avoid incarceration of suspects pending trial unless the gravity of the offence or the other circumstances warrants the remanding of suspects. This will reduce the congestion in remand prisons. It is the intention of the legislature to minimize the pre-trial detention of suspects.

Section 6 of the Bail Act states that a police officer inquiring into a bailable offence shall not be required to forward the suspect under its custody but instead release the person on a written undertaking and order the suspect to appear before the magistrate on a given date. Only exception been the public reaction to the offence under investigation likely to give rise to a breach of the peace. This section is meant to prevent unnecessary hardships faced by the persons suspected or accused of committing trivial offences and also to save time and expense involved in producing suspects before the nearest magistrate.

It appears from the facts of this case and from the sequence of events the motive of the 1st Respondent is to arrest and produced Petitioners before the Magistrate and get them remanded. This is apparent from the application made to the Magistrate. In the report filed on 14-3-2009 when producing the Petitioners the 1st Respondent moved the Acting Magistrate to remand the Petitioners till 18-3-2009 and also to direct the prison Authorities to produce the suspects on that date. OIC had virtually dictated the order and the Acting Magistrate had allowed the application. The Acting Magistrate had failed to exercise his discretion in a judicial manner. He had failed to give reasons for refusal of bail under section 16 of the Bail Act.

It is regrettable to mention that though the Bail Act was passed in 1997, the police as a rule continue to produce suspects in the Magistrate Court in bailable offences and move for the remand of the suspects and there are numerous instances where Magistrates without considering the facts and circumstances of the cases had remanded the suspects contrary to the guiding principle of the Bail Act.

The crucial issue in this case is whether it is lawful for the 1st Respondent to arrest the Petitioner without conducting further investigations and verifying their version. The conduct of the 1st Respondent and the sequence of events establish that instead of objectively deciding whether the complaint was a reasonable complaint or not, the 1st Respondent arrested and produced the Petitioners in court and got them remanded. It is apparent that the remanding of the suspects was the main object of the 1st Respondent.

In Corea vs. The Queen (supra), the suspect in that case changed his mind to accompany the police to the police station. This annoyed the inspector who ordered the suspect to be arrested in order to "teach him a lesson". It was held that the arrest or attempted arrest in the particular circumstances was illegal.

In Muttusamy vs Kannangara (supra), Gratiaen J said "I have pointed out, that the actions of police officers who seek to search private homes or to arrest private citizens without a warrant should be jealously scrutinized by their senior officers and above all by the courts".

I hold that the arrest and detention of the Petitioners in these particular circumstances is a violation of their fundamental rights guaranteed under Article 13 (1) of the Constitution.

The Human Rights Commission also inquired into the complaint made by the 1st Petitioner and found the 1st Respondent guilty of violating the fundamental rights of the 1st Petitioner and the 1st Respondent was ordered to pay Rs 10,000/= as compensation.

I order the 1st Respondent to pay Rs 25,000/= each to the Petitioners as compensation.

Judge of the Supreme Court

Justice Saleem Marsoof, P.C. J.
I agree

Judge of the Supreme Court

Justice Chandra Ekanayake, J.
I agree

Judge of the Supreme Court

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

SC. FR. Application No. 478/2009

In the matter of an application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Srivaratharajan Pirashanthan
No. 11, Ramakrishna Gardens,
Colombo – 06.

Petitioner

-Vs.-

1. University of Peradeniya,
   Peradeniya.

2. Prof. H. Abeygunawardena
   Vice Chancellor, (Chairman of the Council)
   University of Peradeniya,
   Peradeniya.

3. Prof. A. Wickremasinghe
   Deputy Vice Chancellor, (Chairman of the Council)
   University of Peradeniya,
   Peradeniya.

4. Prof. P.W.M.B.B. Marambe
   Deen, Faculty of Agriculture
   (Member of the Council),
   University of Peradeniya,
   Peradeniya.

5. Prof. K.T. Silva
   Deen, Faculty of Arts
   (Member of the Council),
   University of Peradeniya,
   Peradeniya.

6. Dr. E.A.P.D. Amaratunge
Deen, Faculty of Sciences,
(Member of the Council),
University of Peradeniya,
Peradeniya.

7. Prof. S.B.S. Abayakoon
Deen, Faculty of Engineering,
(Member of the Council),
University of Peradeniya,
Peradeniya.

8. Prof. W.I. Amarasinghe
Deen, Faculty of Medicine,
(Member of the Council),
University of Peradeniya,
Peradeniya.

9. Prof. S.H.P.P. Karunaratne
Deen, Faculty of Science,
(Member of the Council),
University of Peradeniya,
Peradeniya.

10. Prof. P. Abenayake
Deen, Faculty of Veterinary Medicine and Animal Science,
(Member of the Council),
University of Peradeniya,
Peradeniya.

11. Prof. Malkanthi Chandrasekera
Senate Representative,
(Member of the Council),
University of Peradeniya,
Peradeniya.

12. Dr. S.D. Pathirana
Senate Representative,
(Member of the Council),
University of Peradeniya,
Peradeniya.

13. Prof. J. M. Gunadasa
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

14. Mr. W.L.L. Perera
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

15. Mr. K.A.U.I. Kumarapperuma
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

16. Mr. W.M. Jayawardena
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

17. Dr. H.M. Mauroof
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

18. Mr. D. Mathi Yugarajah
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

19. Mr. Mohan Samaranayake
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

20. Dr. Kapila Gunawardena
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

21. Prof. K. Tennakoon
Council Member, (appointed by the UGC)
University of Peradeniya,
Peradeniya.

22. Mr. P. Rathees
Teacher,
St. Anne's Tamil Mahavidyalaya,
Wankalai, Mannar.

23. Mr. S. Sutharshan
C/o, Mrs. R. Susila,
456/F, Eariyagama,
Peradeniya.

24. Ms. R. Sarmiladevi
Kumara Kanda Estate,
18th Mile Post, Deltota Road,
Galaha, Kandy.

25. Ms. S. Vijitha
No. 4-5/2, 55th Lane,
Colombo – 06.

26. Mrs. Lareena
122/A, Kalalpitiya,
Ukkuwela, Matale.

27. University Grants Commission
No. 20, Ward Place,
Colombo – 07.

28. Dr. T. Manoharan
(a member of the Interview Board)
Head Department of Tamil,
University of Peradeniya,
Peradeniya.

29. Prof. M.A. Nuhman
(a member of the Interview Board)
Department of Tamil,
University of Peradeniya,
Peradeniya.

30. Hon. Attorney General
Attorney General's Department,
Hulftsdorp Street, Colombo – 12.

Respondents

SC.FR. No. 478/2009

BEFORE : Tilakawardane, J.
Hettige, PC., J. &
Wanasundera, PC., J.

COUNSEL : A.R. Surendran, PC., with N. Kandeepan and Jude Dinesh for the Petitioner.
S. Mandaleswaran with Tharani Ganeshananthan for the 23rd Respondent.

Rajiv Goonetillake, SSC., for the 1st - 20th , 27th and 30th Respondents.

ARGUED ON : 03.10.2012

WRITTEN SUBMISSIONS TENDERED BY THE PETITIONER ON: 07.11.2012

WRITTEN SUBMISSIONS TENDERED BY THE RESPONDENTS ON: 07.11.2012 & 22.11.2012

DECIDED ON : 13.02.2013

* * * * * *

Wanasundera, PC., J.

Leave to Proceed was granted by this Court on 01.10.2009 for an alleged violation of Article 12(1) of the Constitution and relief was granted in terms of prayer (f) restraining the 1st - 21st , 27th and 30th Respondents from appointing the 23rd Respondent to the post of Lecturer (Probationary)/Senior Lecturer Grade II/I in the Department of Tamil, Faculty of Arts in the 1st Respondent University until the final determination of this application.

At the outset of the argument, Counsel conceded that in terms of the advertisement, that the University of Peradeniya had advertised on 12.08.2008 for the applicants, to the vacancy calling for the post of Lecturer (Probationary)/Senior Lecturer Grade II/I in the Department of Tamil, Faculty of Arts.

Mr. Rajiv Goonetilleke, Senior State Counsel conceded that this advertisement sought to fill the vacancy in view of the exigency of the University which needed a Tamil Lecturer for the Faculty of Arts. The qualifications for the recruitment under the Scheme of Recruitment of Academic Staff has been produced by the 2nd Respondent and marked as 1R4.

It is also admitted that both the Petitioner and the 23rd Respondent had the basic qualifications set out in 1R4 for the Post of Lecturer (Probationary) (Non-Medical/Dental). Additionally, Counsel appearing for the Petitioner argued that, at that time, he was even qualified for the post of Senior Lecturer Grade II in terms of the qualification that has been set out in paragraphs 6(1) and 2(i) or (ii) and 3 of the Scheme of Recruitment for the Academic Staff issued by the University Grants Commission Circular No. 721 dated 21st November, 1997 (1R4 – pages 169 - k and 169 - l)

It is to be noted that whereas both the Petitioner and the contesting 23rd Respondent had the qualifications to be admitted as Lecturer [Probationary), only the Petitioner was qualified to be admitted as a Senior Lecturer. This point was contested by the 7th Respondent who filed an affidavit and produced the Summary of the Selection Proceedings for the Post of Senior Lecturer Grade II/I and the Summary of the Selection Proceedings for the Post of Lecturer (Probationary) marked as 1R1 dated 15.06.2009. (bearing 2 pages)

It has been endorsed at the bottom of these documents of pages 1 and 2 of 1R1 and reference has been made to the Petitioner as candidate No. 1, stating that "He did not possess the required experience to be considered ....." and therefore the Petitioner was unsuitable. It is pertinent to note that the affidavit filed in this Court by the 7th Respondent contended that though the Petitioner was employed as a temporary Lecturer for the period of 19th June 2001

to 15th May 2003, that the attendance of the Petitioner during this period was unsatisfactory. This is not reflected in the assessment contained in the document of 2 pages marked as 1R1.

It appears that in this case, the main issue is whether the Petitioner had acquired 06 years of experience which was a threshold requirement for the appointment in terms of the Scheme of Recruitment.

In the argument, it was conceded that from the date of the advertisement in the News Papers on 12.08.2008, it would appear that the Petitioner was six or seven days short on the requirement of 6 years experience. In terms of the same advertisement, P-13, the parties had the right to apply on or before 17th September 2008, and therefore by that date, the Petitioner had indeed completed the required 06 years experience. It is therefore important to note that the Petitioner had in terms of the facts disclosed to this Court by way of the pleadings of the affidavit and the arguments, been suitably qualified and had higher marks than the 23rd Respondent and he, therefore should have been appointed to the post of Lecturer (Probationary)/Senior Lecturer Grade II/I in the Department of Tamil (Faculty of Arts) in the 1st Respondent University.

In the light of the facts, this Court is able to hold the non-selection of the Petitioner for the post of Lecturer (Probationary)/Senior Lecturer Grade II/I in the Department of Tamil in the 1st Respondent University, specially, in view of the fact that he was more qualified than the 23rd Respondent who had been selected qualifies under infringement in the fundamental equality guaranteed by Article 12(1) of the Constitution.

Accordingly, this Court makes a declaration that the actions of the 3rd , 5th , 13th , 28th and the 29th Respondents (members of the interview Board) in selecting the 23rd Respondent for recommendation to the post of Lecturer (Probationary)/Senior Lecturer Grade II/I in the Department of Tamil in the 1st Respondent University are in infringement and/or imminent infringement of the fundamental rights of the Petitioner guaranteed by Article 12(1) of the Constitution.

This Court also makes a declaration that the Petitioner is entitled to be considered for

appointment to the post of Lecturer (Probationary)/Senior Lecturer Grade II/I in the Department of Tamil in the 1st Respondent University.

This Court accordingly grants relief as above on the application as prayed for. This Court makes no order on costs.

JUDGE OF THE SUPREME COURT

Tilakawardane, J.

I agree.

JUDGE OF THE SUPREME COURT

Hettige, PC., J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an application under Article 126 of the Constitution for relief and redress in respect of the violation of the fundamental right under Article 12 (1) of the Constitution.

H.R.S. Dharmasiri,
No.25/2, Galapitamada Road,
Avissawella.

PETITIONER

SC FR APPLICATION No. 414/2010

-Vs-

1. Provincial Director of Health Services of the Sabaragamuwa Province, Office of the Provincial Director of Health Services, No. 75, Dharamapala Mawatha, Ratnapura.

2. Deputy Provincial Director of the Health Services (Finance) of the Sabaragamuwa Province, Office of the Provincial Director of Health Services, No. 75, Dharamapala Mawatha, Ratnapura.

3. Governor of the Sabaragamuwa Province, Office of the Governor of the Sabaragamuwa Province, Ratnapura.

4. Chief Secretary of the Sabaragamuwa Province, Office of the Chief Secretary of the Sabaragamuwa Province, Ratnapura.

5. The Secretary to the Ministry of Health of the Sabaragamuwa Province, Office of the Secretary to the Ministry of Health of the Sabaragamuwa Province, Ratnapura.

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

RESPONDENTS

BEFORE : Hon. N.G Amaratunga J,
Hon. S. Marsoof, P.C., J, and
Hon. S. E. Wanasundera, P.C., J.

COUNSEL : Dr. Sunil Cooray for the Petitioners
Viraj Dayaratne, DSG for the Respondents

ARGUED ON : 27.02.2013

DECIDED ON : 05.08.2013

SALEEM MARSOOF J:

In this application filed by the Petitioner against the Provincial Health Authorities of Sabaragamuwa Province, the Petitioner has alleged that his fundamental rights to equality guaranteed by Article 12 (1) of the Constitution of Sri Lanka has been violated by the 1st and /or 2nd and /or 5th Respondents. This Court granted leave to proceed to the Petitioners against the said Respondents for the alleged violation of his fundamental right to equality. The Petitioner has stated in his petition filed in this Court that he had tendered for the supply of certain food items for the year 2010 to certain hospitals including the Karawanella Base Hospital and the Kithulgala District Hospital, coming within the Sabaragamuwa Province. According to him, the tender conditions were contained in the Tender marked P2 and in the Instructions to Bidders and Additional Conditions marked P3. He further alleges in paragraph 2 of his petition that tenders closed on 4th November 2009 at 10 am, and that his separate tenders with respect to the Karawanella Base Hospital and the Kithulgala District Hospital "contained the lowest in price in respect of most food items". In paragraph 3 of his petition he has alleged that he was requested to attend a discussion with the 2nd Respondent on or about 18th December 2009, which he duly attended, but at the said discussion he was asked to supply most of the food items for which he had tendered at the prices specified by the prices committee, which were much lower than the prices quoted by him.

It is the position of the Petitioner that he had at the said discussion informed the 2nd Respondent that he "was unable to supply the food items specified by the prices committee", which position he reiterated in his letters dated 22nd December 2009 (P4 and P5) addressed to the 1st Respondent with respect to the said two hospitals. The Petitioner has stated in the petition that by his letter dated 24th December 2009 (P6 and P7) he informed the 3rd Respondent, Governor of the Sabaragamuwa Province, and the 4th Respondent, Chief Secretary of the said Province, of his inability to supply the food items at prices lower than those tendered for by him, and specially that he cannot agree to supply the food at the prices determined by the prices committee.

Dr. Sunil Cooray, who appeared for the Petitioner at the hearing before this Court, has submitted that the grievance of the Petitioner, stems from the conditional acceptance of the tenders by the 1st and the 2nd Respondents as evidenced by the 1st Respondent's letter dated 28th December 2009 marked P8 and P9, and the insistence of the 1st and the 2nd Respondents that the Petitioner should commence supplying food items at the prices specified by the Prices Committee from 1st January 2010, despite the position clearly and consistently taken up by the Petitioner that it is uneconomical and impossible for him to do so. Dr. Cooray further submitted that when the Petitioner refused to sign the Agreements and commence the supply of items to either of the aforesaid hospitals, by the letters dated 01st April 2010 marked P10 and P11, the 1st Respondent informed the Petitioner that the latter's failure to supply the food items was unsatisfactory, and that if the Petitioner wished to have a favourable change of prices he should first supply the food items at the prices determined by the Prices Committee, and then request for a price revision. He was also informed that unless the Petitioner attends the office of the 1st Respondent and signs the Agreements for the supply of the food items to the said two hospitals on or before 19th April 2010, the tender will be awarded to the second lowest tenderer and the Petitioner's refundable deposits will be forfeited to the State. The Petitioner was also warned

that an adverse decision will be taken in respect of the Petitioner for causing inconvenience to the Department of Health Services when the said Department calls for tenders in the future.

It was the contention of Dr. Cooray that the aforesaid conduct of 1st and/or 2nd and /or 5th Respondents, and in particular their conditional acceptance of the tenders of the Petitioner for the supply of food items to the Karawanella Base Hospital and the Kithulgala District Hospital at the prices quoted by the Petitioner for the year 2010, was a violation of tender procedure. He further submitted that the subsequent action taken by them to black list the Petitioner which deprived him of the opportunity of participating in the tender process with respect to any of the hospitals coming within the Sabaragamuwa Province in subsequent years, has resulted in the violation of the Petitioner's fundamental rights to equality and has caused him irreparable loss.

Mr. Viraj Dayaratne, Deputy Solicitor General, who appeared for the Respondents, has submitted that there has been no violation of tender procedure or the Petitioner's fundamental right to equality, and relied heavily on the Instructions to Tenderers and Additional Conditions, marked P3, clause (5) of which provided as follows:

> ඔබ විසින් ඉදිරිපත් කරනු ලබන මිළ ගණන් වර්තමාන වෙළඳපලේ මිළ ගණන් හා සසඳා බැලීමේදී අසාමාන්‍ය ලෙස මිළ වැඩිවීම හෝ අඩුවීම නොවනසේ මිළ ගණන් ඉදිරිපත් කළ යුතුය. එවැනි අසාමාන්‍ය මිළ වෙනස්කම් තිබේ නම් දෙපාර්තමේන්තු මිළ කමිටුවේ නිර්දේශයන්ට අනුකූලව මිළ සංශෝධනය කිරීමට ඔබ එකඟවිය යුතු වේ. සෑම ආහාර වර්ගයක් සඳහාම මිළක් සඳහන් කළ යුතු අතර, නොමිලයේ යන්න සඳහන් කිරීම ලංසුව ප්‍රතික්ෂේප කිරීමට හේතුවක් වේ.

When translated into English, the above quoted clause requires that when submitting tenders, the prices quoted should not be unusually higher or lower than the current market price of each item to be supplied, and that if there is any unusual variations in price for any quoted item, the tenderer should agree to amend the price of any such item according to the recommendation of the Departmental Prices Committee. He pointed out that the said clause made it mandatory for a price to be quoted for every item, and quoting no price for an item or stating that it is supplied free, would justify the rejection of the tender.

In this connection, Mr. Dayaratne invited the attention of Court to the affidavit of the 1st Respondent Dr. Kapila Bimal Kannangara, who was at the relevant time the Provincial Director of Health Services for the Sabaragamuwa Province, wherein it is specifically stated that although the tender submitted by the Petitioner was the lowest according to the total value, the prices quoted by the Petitioner for some of the food items were unusually higher than the prices recommended by the Prices Committee of the Department of Health Services in respect of such food items. Mr. Dayaratne submitted that this was in violation of the above quoted clause (3) of the Instructions to Tenderers and Additional Conditions, marked P3. He submitted that at the discussion held on 18th December 2009, the Petitioner was informed that the prices he had quoted for some of the food items were unusually higher than current market prices for the relevant items, and brought to his attention the need to supply those food items at the prices recommended by the Prices Committee in keeping with the undertaking contained in paragraph 5 of the Special Instructions issued to all tenderers. He explained that the Petitioner's tenders for the Karawanella Base Hospital and the Kitulgala District Hospital were accepted by the 1st Respondent's letters dated 28th December 2009 marked respectively P8 and P9, and that from paragraph 02 of the said letters it is clear that the acceptance of the said tenders was expressly subject to the amendment of the prices of certain items of food to accord with the maximum prices quoted for those items by the Departmental Prices Committee.

Mr. Dayaratne has stressed that since the Petitioner had failed to comply with the request to sign the Agreements and commence supply of food items to the said Hospitals even by the end of March 2010, by the letters dated 1st April 2010, the 1st Respondent had requested him to commence supply, and had also warned the Petitioner that if he fails to do so, the tender will be awarded to the second lowest tenderer for the two hospitals, and the Bid Bonds given by the Petitioner will be forfeited. However, since the second lowest tenderer too was not in a position to commence food supplies to the two hospitals and the Department of Health Services was not able to find a suitable person to supply food item to them in spite of calling for fresh tenders in the middle of the year 2010, the Department was compelled to purchase the items from co-operative societies at a higher price resulting in inconvenience and loss to the Government. Mr. Dayaratne submitted that at all times the Respondents had acted reasonably and in good faith, and had no malice towards the Petitioner. He specifically emphasised that for the year 2011, the wife of the Petitioner Mrs. G.S.M. Abeywardena had submitted a Bid and she has been selected at the successful Bidder.

In the circumstances, on the basis of the available material, there does not appear to be any violation of the Petitioner's fundamental right to equality enshrined in Article 12(1) of the Constitution. The procedure adopted by the Respondents is in accord with clause (05) of the Instructions to Tenderers and Additional Conditions, marked P3, by which the Petitioner is bound, and it is clearly stated in paragraph 02 of the letters dated 28th December 2009 marked P8 and P9 that the acceptance of the tenders is subject to the amendment of the tendered prices of items of food that are found to be unusually higher that the market price to accord with the maximum prices quoted for those items by the Departmental Prices Committee. This Court does not have before it any material to examine whether the prices specified by the Prices Committee of the Department of Health Services for the Sabaragamuwa Province with respect to the two hospitals which were attached in schedules to the letter marked P8 were reasonable. I also note that the actual prices tendered by the Petitioner with respect to the two hospitals are also not before Court as the purported Tender marked P2 is in a blank form. Court is not even in a position to compare the prices tendered by the Petitioner with the prices specified by the Departmental Prices Committee details of which are attached to P8 and P9, to make any finding as regards the degree of variation between the tendered and specified rates.

In all these circumstances, the application of the Petitioner alleging the infringement of his fundamental rights to equality has to be dismissed. I would not make any order for costs.

JUDGE OF THE SUPREME COURT

N.G. AMARATUNGA, J.

I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

1. Amura Deshapriya Alles,
No. 83/A, Kajugahawatta, Gothatuwa,
Angoda.

2. Gamunu Thissa Lankathillaka Vithanage,
"Sandakalum" Galathara,
Mawanella.

PETITIONERS

SC FR Application No. 448/2009

-VS-

1. Road Passenger Services Authority of the Western Province,
No. 59 Robert Gunawardena Mawatha,
Battaramulla; and 15 others, all of the said Road Passenger Services Authority of the Western Province;

17. H.K.Asoka Wickckramanayake,
No.16/1, Giridara, Kapugoda;

18. P.L.R.P.C Wijewarnasooriya,
Samagi Mawatha,
off Fathima Mawatha,
Kalamulla,
Kalutara;

19. Hon. Attorney General,
Attorney Generals Department,
Colombo 12.

RESPONDENTS

BEFORE: Hon. Marsoof, PC, J

Hon. Sripavan, J and

Hon. Imam, J

COUNSEL:	Canishka Witharana for the Petitioners.
	Kaplia Liyanagamage for 1st, 3rd, 10th, 11th, 12th, 13th, 14th and 15th Respondents.
	Chandarana Wijesuriya, for the 17th and 18th Respondents.
	Ashan Fernando, State Counsel, for the 19th Respondent.
ARGUED ON:	6.3.2012
SETTLEMENT CONSIDERED ON:	21.5.2012, 11.6.2012 and 15.6.2012
WRITTEN SUBMISSIONS ON:	19.07.2012
DECIDED ON:	22.02.2013

SALEEM MARSOOF J:

When this case was taken up for hearing on 6th March, 2012, a preliminary objection was taken up by the learned Counsel for the 17th and 18th Respondents, to the effect that the Petitioners cannot have and maintain this application for the reason that it is time-barred as far as the 17th and the 18th Respondents are concerned, who are essential parties to this case. No previous notice of this preliminary objection had been given by or on behalf of the 17th and 18th Respondents to any of the other parties, and admittedly there is no mention of it in the objections filed by the said Respondents, who had also not filed any written submissions prior to this application being taken up for hearing.

Having heard learned Counsel for the 17th and 18th Respondents and the other learned Counsel on the preliminary objection, since all other parties including the Petitioner had been taken by surprise by the said preliminary objection, Court directed all learned Counsel to make their submissions on the merits of the case as well, and permitted learned Counsel to file any written submissions on all the matters arising in this case including the preliminary objection within one month's time. Judgment was reserved by Court, but since it was of the view that the parties should seek to resolve this matter through some administrative redress, a formula which was suggested by Court, order was made that the case is to be mentioned on 21st May 2012 in order to ascertain whether the matter has been administratively resolved. The case was mentioned on the said date and one subsequent date when learned Counsel indicated that they required further time to consider administrative redress, and on 15th June 2012, when they finally informed Court that no such relief had been agreed upon, and since no written submissions had been filed by the parties, a further period of one month was granted for the filing of written submissions.

The Time Bar

Extensive written submissions have been filed by the learned Counsel for the 17th and 18th Respondents and other learned Counsel traversing various aspects of the preliminary objection taken up on behalf of the 17th and 18th Respondents, but it is in my view sufficient to mention that the Petitioners have stated in their petition and affidavits that they became aware of the alleged violation of their fundamental rights only on 10th February 2009 and they promptly preferred a complaint to the Human Rights Commission of Sri Lanka on 19th February 2009.

It is clear from the decisions of this Court including the decision in *De Silva v Wickramarathne and Others* (2011) 2 BLR 360 that while time begins to run when the infringement takes place, but when the Petitioners became aware of the alleged infringement of their fundamental rights only on a subsequent date, time would begin to run only when "both infringement and knowledge exists." It is admitted that even when the Petitioners invoked the jurisdiction of this Court in terms of Article 126 of the Constitution on 8th June 2009, the said complaint was pending before the said Commission, which made its recommendations as provided in the Human Rights Commission of Sri Lanka Act No. 21 of 1996 on 30th November 2009 (X4). It is expressly provided in Section 13(1) of the said Human Rights Commission of Sri Lanka Act that-

> *Where a complaint is made by an aggrieved party in terms of section 14, to the Commission, within one month of the alleged infringement or imminent infringement of a fundamental right by executive or administrative action, the period within which the inquiry into such complaint is pending before the Commission, shall not be taken into account in computing the period of one month within which an application may be made to the Supreme Court by such person in terms of Article 126(2) of the Constitution.*

In *Romesh Corray v L.A.S. Jayalath, SI, and 6 others* (2008) Part II B.L.R. 169, this Court has considered and applied the provisions of Section 13(1) of the Human Rights Commission of Sri Lanka Act, and held that in those circumstances the time-bar would not apply as time would not run during the pendency of proceedings before that Commission. However, leaned Counsel for the 17th and 18th Respondents has contended strenuously that the principle enunciated in that decision would not apply to the instant case *inter-alia* as the Petitioners have not filed a copy of the said complaint to the Human Rights Commission or any other document in this Court to show when their alleged complaint was made to the Human Rights Commission and what their complaint was. He pointed out that the Petitioners have only filed the recommendations of the Human Rights Commission on a complaint made by them, but this document does not reveal the exact date of the complaint to the said Commission, or whether the 17th and 18th Respondents were mentioned in the said complaint. Learned Counsel for the Petitioner has responded to the said contention with the submission that in terms of the Human Rights Commission of Sri Lanka Act, it was only necessary to give details of the alleged violation of fundamental rights and the name or names of those who are alleged to have committed such violation, there being no requirement that the names of those who benefitted from such violation such as the 17th and 18th Respondent should be named.

However, in view of the admitted fact that the preliminary objection relating to time-bar was taken up for the first time only on the date of hearing of this case, namely on 6th March 2012, there being no prior notice of it either in the statement of objections filed by the 17th and 18th Respondents or through any motion filed in Court with notice to all parties or their learned Counsel that such a preliminary objection would be taken, no written submissions having been filed by learned Counsel for the17th and 18th Respondents prior to that date, this Court has to consider once again the decision in *Romesh Corray v L.A.S. Jayalath, SI, and 6 others* 2008 Part II B.L.R. 169, in which the identical position prevailed. In that case, this Court was at pains to refer to Rules 30(4), 45(6), 45(7) and 45(8) of Part IV of the Supreme Court Rules of 1990, all of which occur in Part II of the Supreme Court Rules.

Rule 45(6) of the Supreme Court Rules of 1990 reads as follows:

> *Each respondent may file counter-affidavits within fourteen days of the receipt of such notice, with notice to the petitioner and the other respondents. The petitioner may in like manner file a counter-affidavit, within seven days, replying to the allegation of fact contained in any Respondent's affidavit.*

This provision has direct relevance to the submission of learned Counsel for the 17th and 18th Respondents that the Petitioners have not filed with their petition or counter affidavit, a copy of their complaint to the Human Rights Commission or any other document in this Court to show when their alleged complaint was made to the Human Rights Commission and what their complaint was. However, it is important to remember that the 17th and 18th Respondents had disclosed their preliminary objection relating to time-bar in their statement of objections, the Petitioners would have been put on notice of this position and would obviously have been compelled to file all documentation relating to their complaint to the Human Rights Commission with their counter-affidavits so as to assist them in meeting the factual issues that could arise from the time-bar. In my opinion, it is not open to the 17th and 18th Respondent to take issue to the paucity of information pertaining to the exact date of the filing of their complaint to the Human Rights Commission and the contents of the said complaint, when they themselves had failed to give any prior notice of their preliminary objection based on time-bar.

Furthermore, in the case of *Romesh Cooray*, this Court also referred to Rule 45(7) of the Supreme Court Rules 1990, which provides as follows:-

> *The petitioner and the respondent shall file their written submissions at least one week before the date fixed for the hearing of the application, with notice to every other party.*

Court also made reference to Rule 45(8) of the aforesaid Supreme Court Rules, which expressly provided that,

> *The provisions of Part 11 of these rules shall apply, mutatis mutandis, to applications under Article 126.*

Rule 30(4) of the aforesaid Supreme Court Rules specifically deals with the contents of the written submissions of the Respondents and states that, the submissions of the Respondent shall

contain as concisely as possible a statement of facts whether, and if not to what extent, the Respondent agrees with the statement of facts as set out by the Petitioner in his petition or written submissions, referring to the evidence, both oral and documentary, and the questions of law or the matters which are in issue in the case. Rules 30(6) and 30(7) specify time limits for the filing of written submissions, which when interpreted mutatis mutandis to a fundamental rights application would mean that the Petitioner shall file his written submissions within 6 weeks of the date of grant of leave to proceed, and the Respondent shall follow suit 6 weeks after he receives notice of the written submissions of the Petitioner, unless Court specifies a shorter period of time for filing of written submissions when granting leave to proceed. It is important to note that Rule 30(7) provides that:

> *Where the appellant has failed to lodge his submissions as required by sub-rule (6), the respondent shall lodge his submissions within twelve weeks of the grant of special leave to appeal, or leave to appeal, as the case may be, giving notice in like manner.*

In a fundamental rights application, this would mean that even where the Petitioner (as in this case) has failed to file his written submissions in terms of Rule 30(6), the Respondent has to file his written submissions within twelve weeks from the date of grant of leave to proceed.

After carefully considering the provisions of the aforesaid Rules, Dr. Shirani A Bandaranayake, J. (as she then was) has observed in *Romesh Corray v L.A.S. Jayalath, SI, and 6 others* 2008 Part II B.L.R. 169, at page 172 as follows:-

> *Accordingly on a consideration of the aforementioned Rules, it is evident that a preliminary objection should be raised at the time the objections are filed and/or should be referred to in the written submissions that has to be tendered in terms of the Rules. The objective of this procedure is quite easy to comprehend. The whole purpose of objections and written submissions is to place their case by both parties before Court prior to the hearing and when the Petitioner's objections are taken along with the objections and/or written submissions filed by the Respondents prior to the hearing, it would not come as a surprise either to the affected parties or to Court and the applications could be heard without prejudice to any one's rights. Therefore, as correctly pointed out by the learned President's Counsel for the Petitioner, the earliest opportunity the 6th Respondent had of raising the aforementioned preliminary objection was at the time of filing his objections and written submissions in terms of the Supreme Court Rule 1990; as the objections and/or the written submissions should have contained any statement of fact and/or issue of law that the 6th Respondent intended to raise at the hearing. Admittedly, the 6th Respondent had not raised the preliminary objection on the ground of the application being filed out of time either in his objections or in the written submissions. In the circumstances, it is apparent that there is no merit in the objection raised by the 6th Respondent.*

I am in respectful agreement with the above observation of Court, and am of the opinion that there is no merit in the preliminary objection taken up by learned Counsel for the 17th and 18th Respondents, and must necessarily be overruled.

Alleged Violation of the Petitioners' Fundamental Right to Equality

In this case, leave to proceed has been granted by this Court on 15th March 2010 for the alleged violation by the Respondents (other than the 19th Respondent) of the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution, which simply provides that "all persons are equal before the law and are entitled to the equal protection of the law."

The main grievance of the Petitioners is that they were employees of the said 1st Respondent Road Passenger Services Authority of the Western Province, where the 1st Petitioner was holding the post of Road Inspector-Grade 6 and the 2nd Petitioner as Road Inspector-Grade 5.

Admittedly, by an internal circular bearing No. 65 dated 6th September 2007, applications were called from internal applicants of the said 1st Respondent Authority for the post of Assistant Manager (Transport) Grade 4, to which post the Petitioners state that they were qualified to apply under category (c) (ii) of the relevant scheme of the promotions. The Petitioners submitted their applications for the said post on 14th September 2007 and 7th September 2007 respectively, and an interview which was earlier fixed for 28th February 2008 was postponed for reasons unknown to the Petitioners, and finally held on 8th May 2008 which date was duly informed to the Petitioners in writing by letters marked P16A, P16 and P17 respectively.

The Petitioners have averred in their petition and their affidavits that on or about 3rd December 2008 the Petitioners were verbally informed to be present at the Head Office at 10.00 am on 4th December 2008. They attended the Head Office the next day in the expectation that they would receive their promotions, for which they had waited anxiously. However, to their surprise, they found that an interview panel consisting of the 2nd, 14th and 15th Respondents and two others were interviewing persons for the same post and they were compelled to participate in it. The Petitioners state that on or about 10th February, the Petitioners became aware that only the 17th and the 18th Respondents were selected for the said post. Their appointments were ante-dated to the 19th January 2009 (P19 and P20). To the further surprise of the Petitioners the said appointment letters, copies of which they obtained with difficulty, refer to a purported interview that had been held on 27th November 2008. The Petitioners have stated that they were not informed and also not aware of any such interview held on that date. According to the Petitioners, there was neither an announcement of cancellation of the previous interview before holding of the second interview nor an opportunity granted for the applicants to prepare for the second interview. Learned Counsel for the Petitioners state that although the 1st Respondent has filed objections in this case it has not tendered to Court the marking sheet of the two interviews that the Petitioners faced on 8th May 2008 and on 4th December 2008, and curiously enough a copy of the mark sheet of the second of these interviews has been tendered to Court by the 17th and 18th Respondents, who had no right to have access to this mark sheet.

Learned Counsel for the 17th and 18th Respondents have submitted that the Petitioners have not challenged the decisions to cancel the interview held on 8th May 2008 and to hold a fresh interview with the participation of a representative from the Chief Ministry and the Petitioners, without any protest, have faced the interview held on 4th December 2008.

It is significant to note that the Petitioners have clearly alleged in their affidavits that they have come to know from very reliable sources that two Petitioners had obtained the highest marks at the interview held on 8th May 2008, the mark sheet relating to which has not been tendered to Court by any of the Respondents. The Respondents have taken up the position that marks were not finalised at this interview as the members of the panel of interview were not unanimous about the persons to be selected. However, this position has been contradicted by the 1st Respondent Authority, which has in its observations to the Human Rights Commission marked X1, categorically admitted that the Petitioners had obtained the highest marks at the interview held on 8th May 2008, and stated that the interview panel did not have unanimity in regard to the question as to whether in view of the fact that there were certain disciplinary investigations contemplated against the Petitioners, they should be appointed to the post. However, the Respondents have not in the objections filed in this Court taken this position, nor have they given any particulars regarding the contemplated disciplinary investigations.

In these circumstances we are inclined to the opinion that the interview held on 4th December 2008 was not held in any transparent or regular manner, and that in the state of the material placed before this Court there are many reasons to disbelieve the contents of the affidavits filed on behalf of the Respondents in this case. I am therefore of the opinion that in all the circumstances of this case the purported interview held on 4th December 2008 should be declared invalid.

I accordingly make order declaring that the fundamental rights of the Petitioners guaranteed by Article 12(1) of the Constitution have been violated by the Respondents, and quash the purported appointments of the 17th and 18th Respondents to the post of Assistant Manager (Transport) Grade 4, contained in the letters marked P19 and P20. I would also make order directing the 1st Respondent to hold proper interviews for the post of Assistant Manager (Transport) Grade 4 and to make appointments as expeditiously as possible. I am not inclined to grant compensation or any of the other reliefs prayed for by the Petitioners.

In all the circumstances of this case I do not make any order for costs.

JUDGE OF THE SUPREME COURT

SRIPAVAN J
I agree

JUDGE OF THE SUPREME COURT

IMAM J
I agree

JUDGE OF THE SUPREME COURT

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

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

1. Dharmakeerthi Ranathungage Gamini Senadheera, Hathpokuna, Polpitigama.

2. Madduma Patabendige Vidura, No. 15, Dharmaraja Mawatha, Issadeen Town, Matara.

3. Wanigasinghe Arachchige Ajith Senarathne, "Wasana, Araliya Mawatha, Puwakdandawa, Beliatta.

4. Kutti Pathira Amila Indrajith Pathirana, Heenmulla, Dharga Town

5. Abdul Asis Badar Niza, 4/82, Aluth Ala Road, Pinarawa, Badulla.

6. Pannipitiya Arachchige Sunil, 422, Government Servants Scheme, New Town, Polonnaruwa.

7. Konara Mudiyanselage Karunaratne, Panwewa, Balalla.

8. Mestiyage Don Badra Namali Gunatilake, 338/1, Bopatta Road, Gothatuwa, Angoda.

9. Aluthge Dona Padma Priyanthi, 346/A, Kuruppuhena, Malamulla,\ Panadura.

10. Heiyanthuduwage Suneetha Ratnayake, 199, Koswatta, Kalapaluwawa Road, Thalangama North.

11. Serasingha Mudiyanselage Janaka Kumara Serasingha, Pugalla Road, Kalugamuwa, Kurunegala.

12. Gamaralage Champika, 34, Meegastenna, Yatiyantota.

13. Agra Nanda Kumara Walawage, No. 8A, Sarasavi Garden, Nawala Road, Nugegoda.

14. Hiruwalage Chandrawathi Menike, 218, Polagena Mawatha, Rendapola, Dodangoda.

15. Kurukulasuriya Tharanga Fernando, 127/12, Linton Estate, Palathota, Kalutara South.

16. Danansuriya Arachchilage Kamal Dammika Kumara, 596A, Iriyagolla Road, Pahathgama, Hanwella.

17. Wickremasinghe Arachchige Saliya Wijaya Wickremasinghe, 108/2, Old Road, Pannipitiya.

18. Ansley Anuruddha Liyanage, 246/2, Kendaliyaddapaluwa, Ganemulla.

19. Halahapperumage Wimal Jayasiri Fonseka, 109/E, Bopitiya, Pamunugama.

20. Aparekkage Siril Ananda Perera, 281/6, 6th Lane, Pamunuwa Road, Maharagama.

21. Warakagoda Withanage Kokila Devi, Sriyani, 158, New Road, Palathota, Kalutara South.

22. Maduwe Gurusingha Anuradha Nishamani Silva, 126/2,Kitulawila Road, Kiriwaththuduwa.

23. Nalini Sunil Shantha, 257, Morawatta, Ruwanwella.

24. Munasinghe Arachchige Nirmala Geethanjalee, 11/5, Arliya Uyana, Depanama, Pannipitiya.

Petitioners

S.C.F.R. Application 620/10

Vs.

1. Commissioner General of Labour, Labour Secretariat, P.O. Box 575, Colombo 5.

2. Labour Commissioner(Administration), Labour Secretariat, Narahenpita, Colombo 5.

3. Secretary, Ministry of Labour Relations and Productiivity Promotions, Labour Secretariat, Narahenpita, Colombo 5.

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

Respondents

BEFORE : Sripavan. J.,
Ekanayake, J.
Dep. P.C., J.

COUNSEL : M.U.M. Ali Sabry, P.C., with Kasun Premarathna and Lasantha Thiranagama for the Petitioners.

Rajiv Goonetillake, S.S.C. For the 1st - 4th Respondents.

ARGUED ON : 27.02.2013

WRITTEN SUBMISSIONS FILED : By the Petitioner on 15.03.2013
By the Respondent on 27.03.2013

DECIDED ON : 07.05.2013

SRIPAVAN, J.

The Petitioners are presently holding the post of Labour Officer, Grade II in the Department of Labour with effect from 01.07.2010. The Petitioners state that this application relates to the relevant date of the appointment given to them as Labour Officers, Grade II wherein they contend that the said appointments shall be backdated with retrospective effect from 18.02.2008. Thus, the scope of this application as pointed out by the Petitioners is whether the impugned date of appointment, namely, 01.07.2010 be ante-dated to 18.02.2008. In fact, in Paragraph (d) of the prayer to the Petition dated 10.11.2010 the Petitioners seek an order to have their appointments backdated to 01.02.2008 with a two year grace period to complete the Efficiency Bar Examinations.

Leave to proceed was granted by this Court on 24.01.2012 for the alleged violation of Article 12(1) of the Constitution, even though the

Petitioners contended that their appointments made in terms of the Gazette Notification 1473 dated 24.11.2006 violated Articles 12(1) and 14(1) of the Constitution.

In terms of the aforesaid Gazette Notification, applications for the post of Labour Officer, Grade II was called by the 1st Respondent to fill 50% of the vacancies by Limited Competitive Examination and the balance 50% by way of an Open Competitive Examination. The Petitioners contended that successful candidates under the Open Competitive Examination were appointed to the post of Labour Officer, Grade II with effect from 18.02.2008, whereas the Petitioners who were selected based on the Limited Competitive Examination were appointed to the same post with effect from 01.07.2010.

The First Respondent in his objections, inter alia, has taken up the position that antedating the appointments of the Petitioners are not possible for the following reasons:-

a. the candidates who sat for the Limited Competitive Examination are not similarly circumstanced with the candidates who sat for the Open Competitive Examination.

b. the appointment of the initial set of selected candidates under the Limited Competitive Examination were delayed in view of a stay order granted in S.C.F.R. Application 462/08 filed by some of the non-selected candidates.

c. that Rule 31 of the Procedural Rule, issued by the Public Service Commission and published in the Gazette (Extra-Ordinary) No. 1589/30 dated 20.02.2009 does not provide for antedating of appointments.

The modes of Examination as set out in the Gazette Notification 1473 dated 24.11.2006 is as follows:-

(a) ***Open Competitive Examination***

(I) Aptitude Question Paper 100 Marks- 1 hour)

(This is a Question Paper designed to test the knowledge in Language and Numerals. Logical capacity and ability in decision making 50 Objective type questions will be included in it.)

(a) Essay and Precis Question Paper (100 Marks)
(This will be a Question Paper of 3 hours designed to test the knowledge of the candidates in current news, and important local and foreign political economic and social changes and knowledge on Labour Organisations and the Labour Charter)

(b) ***Limited Competitive Examination***

(I) Aptitude Question Paper (100 Marks)
(Question Paper of the type mentioned under 1 of (a) above.

(II) Question paper on Labour Laws (100 marks)
(This is a 3 hour question paper designed to test the knowledge on Labour Laws based on the following Acts)

1. *The Wages Boards Ordinance No. 27 of 1941.*

2. *The Shops and Office Act (Regularization of Employment and Remuneration) No. 19 of 1954.*
3. *The Industrial Disputes Act No. 41 of 1950.*
4. *The Employees' Provident Fund Act, No. 15 of 1958.*
5. *The Termination of Employment (Special Provisions) Act, No. 45 of 1971.*
6. *The Payment of Gratuities Act, No. 12 of 1983. "*

The Educational and other qualifications as stipulated in the said Gazette Notification is as follows:-

Educational and other qualifications:-

Candidates who appear for the Examination should

(I) be of excellent character and physically sound

(ii) be Citizens of Sri Lanka

(iii) ***Qualifications for Open Competitive Examination***

(a) A degree from a recognized University; OR

(b) Professional Qualifications to be engaged in legal profession.

(iv) Qualifications for the Limited Competitive Examination

(a) Confirmed in Government Service or in the Local Government Service or in the Clerical and Allied grade or Government Management Assistant Service who has completed 10 years' Service on or prior to the closing date of applications; OR

(b) Confirmed in Government Service or in the Local Government Service or Allied Grade or Government Management Assistant Service who has completed 5

years' service on or prior to the closing date and possesses a degree from a recognized University.

Article 12(1) of the Constitution which deals with right to equality reads thus :

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

The right to equality means that among equals, the law should be equal and should be equally administered, thereby the like should be treated alike. Accordingly, the crux of the matter in issue is whether the candidates selected through the Open Competitive Examination were similarly circumstanced as that of the candidates selected based on the Limited Competitive Examination.

Admittedly, the educational qualifications required for the Open Competitive Examination is different from that of the Limited Competitive Examination. Although the candidates under the Open and Limited Competitive Examinations sat for the common IQ Test Paper, the candidates under the Open Competitive Examination sat for General Knowledge Paper whereas the candidates under the Limited Competitive Stream sat for the Labour Law Paper. Thus, the Scheme of Recruitment is different to each other. I therefore hold that candidates under the Open Competitive Examination and the candidates under the Limited Competitive Examination are not clubbed

together for purposes of appointment to the post of Labour Officer, Grade II.

Learned Counsel for the Petitioners relied on the case of *Ramupillai* Vs. *Festus Perera, Minister of Public Administration, Provincial Councils & Home Affairs* (1991) 1S.L.R. p.11 and argued that the State is free to decide upon the sources from which either admission to educational institutions or recruitments to the Public Service are to be made. Accordingly, Counsel submitted that the State could take into consideration the overall needs and matters of national interest and policy.

In Ramupillai's case, the issue of clubbing together arose in the promotion of Customs Officers. Whilst holding that promotions based upon ethnic quotas would be violative of the right to equality. Ranasinghe, C.J. At page 26 made the following observations:

> "*A consideration of the facts and circumstances of the two decisions of this Court, referred to above, and the principles laid down in the Indian cases, referred therein, and also in the case of State of Kerala* vs. *Thomas (supra) it is clear : that the State is free to decide upon the sources from which either admissions to educational institutions or recruitments to the Public Service are to be made that for such purpose the State could take into consideration the over-all needs and matters of national interest and policy: that once such selections are made those taken in from such sources are integrated into one common class: that* ***thereafter such appointees are "clubbed" together*** *into a*

common stream of service and ***cannot thereafter be treated differently*** *for purposes of promotion by referring to the consideration that they were recruited from different sources: that their genetic blemishes disappear once they are integrated into a common class and cannot be revived so as to make equals unequals once again: that there should be no further classification amongst them, except upon certain acceptable criteria such as educational qualifications."* (emphasis added)

Accordingly, State is free to decide the sources from which recruitments to the Public Service are to be made. The sources could be recruitment based on Open Competitive Examination as well as the Limited Competitive Examination. Once selections are made, they cannot thereafter be treated differently for purposes of their future promotions; that their genetic blemishes disappear once they are integrated into a common class known as Labour Officer, Grade II.

The other case, namely, *Perera* vs. *University Grants Commission,* F R D Vol. I, page 103 relied on by the learned Counsel for the Petitioners has no application to the case in hand. In *Perera's* case, two sets of students having followed two different syllabi for the Advanced Level Examination were to be considered for placement in the Universities. However, the present application does not affect the number of vacancies as the Scheme of Recruitment is very clear that 50% of the vacancies be filled by the Open Competitive Examination and the balance by the Limited Competitive Examination. While the two

Examinations did not affect the number of vacancies, both were different in nature and conducted at two different time periods, except the I.Q. Test Paper.

It is also observed that Clause 1:9 of Chapter II of the Establishments Code provides that the effective date of appointment or promotion is the date specified in the letter of appointment or the date on which the Officer first assumes the duties in his new post whichever is later, subject to Clause 1:10.

Clause 1:11 further provides that ante-dating will not in any case be allowed, if the substantive appointment is made on the results of a competitive examination. Rule 31 of the Procedural Rules of the Public Service Commission mandates that no appointment for whatever reason, shall be ante-dated.

Learned Counsel for the Petitioners conceded that the Labour Law Examination Paper consisted questions outside the scope of the Scheme envisaged by the Gazette, resulting in a re-examination being held to candidates under the Limited Competitive Stream. The re-examination for the Limited Competitive candidates was held on 12th August 2007. In view of certain fundamental rights applications filed by the candidates who sat the Limited Competitive Examination, the selection process came to a halt. The Supreme Court Applications were concluded on 03.11.2009, and a re-interview of some of the candidates was held between 21st and 23rd of April 2010. The results were released

thereafter and the Petitioners were appointed to the post of Labour Officer Grade II with effect from 01.07.2010.

I do not therefore see any irregularities or arbitrariness in the selection process. The vacancies have been filled in terms of the Scheme of Recruitment published in the Gazette. For the reasons stated, I hold that the Petitioners who sat for the Limited Competitive Examination cannot be clubbed together with those who sat for the Open Competitive Examination. However, once appointments are made to the post of Labour Officer Grade II, their genetic blemishes disappear and all those who have been integrated into the said Grade be treated equally. The Petitioners have not been successful in establishing that their fundamental right guaranteed in terms of Article 12(1) of the Constitution had been violated. This application is accordingly dismissed.

I make no order as to costs.

JUDGE OF THE SUPREME COURT.

EKANAYAKE, J.
I agree.

JUDGE OF THE SUPREME COURT.

DEP, P.C., 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 to the Supreme Court under and in terms of Section 5 (c) 1 of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

Illangakoon Mudiyanselage
Gnanathilaka Illangakoon,
Bulupitiya, Uhumeeya,
Kurunegala.

Plaintiff-Respondent-Petitioner

S.C.H.C. C.A. L.A. 277/11
C.P/HC/CA/15/2009
D.C. Matale Case No. 3773/L.

Vs.

Anula Kumarihamy
Lenawela,
Lenawela

Defendant-Appellant- Respondent

BEFORE : K. Sripavan, J.
S. Hettige, P.C.,J.
P. Dep, P.C., J.

COUNSEL **:** S.K. Sangakkara for the Plaintiff-Respondent-Petitioner
Riad Ameen for the Defendant-Appellant-Respondent

ARGUED ON : 21.01.2013

WRITTEN SUBMISSIONS
FILED : By the Plaintiff on 05th February 2013
By the Defendant on 12th February 2013

DECIDED ON : 05.04.2013

SRIPAVAN, J.

The Plaintiff-Respondent- Petitioner (hereinafter referred to as the "Plaintiff") being dissatisfied with the judgment pronounced by the High Court established by Article 154P of the Constitution preferred a leave to appeal application dated 21.07.11 to this Court to have the said judgment set aside on various grounds set out in paragraph 12 of the Petition of Appeal.

When the said leave to appeal application was taken up for support, the Learned Counsel for the Defendant-Appellant-Respondent (hereinafter referred to as the "Defendant") took up a preliminary objection to the maintainability of the application on the basis that the Plaintiff has failed to comply with the mandatory requirements set out in Rules 28(2) and / or 28(5) of the Supreme Court Rules, 1990 and therefore the application filed by the Plaintiff should be dismissed in limine.

The Plaintiff filed his Plaint dated 21.04.86 in the District Court naming the following four Defendants :

Illangakone Mudiyanselage Gnanathilaka Illangakone

Plaintiff

Vs.

1. Kalinga Seneviratne Kumarasinghe Bandaranayake Mudiyanse Ralahamilage William Bandara Lenawala,
2. Kalinga Seneviratne Kumarasinghe Bandaranayake Mudiyanse Ralahamilage Thilakaratne Bandara Lenawala
3. Anula Kumarihamy Lenawala
4. Hetitiarachchige Don Lootus Leelartne

Defendants

When this application came up for hearing before this Court on 25.05.2012, Learned Counsel for the third Defendant informed Court that he would be taking up a preliminary objection that the leave to appeal application should be rejected in limine for failure to make the necessary parties as Defendants. The inquiry into the preliminary objection was fixed for 18.09.2012. However, on 07.09.2012, the written submissions of the Plaintiff was filed and he took up the following matters, moving that the preliminary objections be rejected.

1. Paragraph (2) -

   The first and the second defendants died after filing the answers, but before the trial and their legal representatives were substituted as 1A and 2A Defendants.

2. Paragraph (3) -

On the date of the trial the second and the third Defendants were alive. Only the 3rd Defendant appeared at the trial; the Court ordered ex-parte trial against all the other Defendants and entered judgment against the 3rd Defendant.

3. Paragraph 4 -

Before the appeal was heard by the High Court and after the ex-parte decree was served on the 4th Defendant H.D.L. Leelaratne, he met the Plaintiff and requested him to execute Deed No. 264 dated 19th January 2011 in order to avoid ejectment from the portion he occupied pertaining to the decree in the case.

4. Paragraph 6 -

As the Court had already ordered ex-parte trial against the 4th Defendant H.D.L. Leelaratne and no final judgment has been entered against him he will not be bound by the Order of this Court. Thus, there was no need to make the 4th Defendant as a party respondent to this leave to appeal application.

5. Paragraph 7(a)

The Provincial High Court failed to issue any notice on the substituted Defendants thereby deprived their rights to be present at the hearing and to exercise their rights under Section 772 of the Court Procedure Code.

6. Paragraph 7(b)

The judgment of the Provincial High Court does not bind the substituted Defendants and the Defendants who have died.

It is on the abovementioned basis the Plaintiff submitted that except Anula Kumarihamy Lenawala, others had not been made parties in the appeal preferred to the Supreme Court.

The petition of appeal dated 21.07.11 filed in this Court did not contain any of the matters now referred to in the written submissions . Rule 28(2) mandatorily requires that the appeal should contain, inter alia, a plain and concise statement of the facts and the grounds of objection to the judgment appealed against. The Plaintiff has now produced Deed No. 264 dated 19th January 2011 and other evidence of fact for the first time along with the written submissions. The aforesaid Deed was not even produced in evidence before the District Court. The position now taken up in the written submissions of the Plaintiff is irrelevant and cannot be considered at this stage. It is also noted that the written submission filed is teamed with mistakes and irregularities. While in paragraph 2, the Plaintiff states that the second Defendant died after filing the answer, in paragraph 3, he states that the second Defendant was alive, on the date of the trial.

Learned Counsel for the Defendant argued that in the application for leave to appeal, only the Plaintiff and the Defendant were made parties whereas the proceedings before the High Court indicate the following three more parties as Defendants-Defendants:

2. Kalinga Seneviratne Kumarasinghe Bandaranayake
   Mudiyanse Ralahamilage William Bandara Lenawala,

Udupihilla, Matale.

2. Kalinga Seneviratne Kumarasinghe Bandaranayake Mudiyanse Ralahamilage Thilakaratne Bandara Lenawala, Lenawala.

3. Hettiarachchige Don Lootus Leelaratne, No. 28, Siyambalagastenna Road, Kandy.

Thus, Counsel submitted that the application for leave to appeal has excluded the aforesaid Defendants-Defendants in its title thereby violating Rule 28(2) and/or Rule 28(5) of the Supreme Court Rules, 1990.

Learned Counsel for the Plaintiff on the other hand submitted that no Rules have been enacted under Article 136 of the Constitution in respect of matters relating to leave to appeal from a High Court established by Article 154P of the Constitution to the Supreme Court and that Rule 28(2) did not specify any requirements as to how a leave to appeal application be drafted when invoking the appellate jurisdiction of the Supreme Court. It is on this basis Counsel contended that the preliminary objection raised by the Learned Counsel for Defendant regarding the application of Supreme Court Rules, 1990 cannot be accepted.

The Plaintiff has filed this application seeking leave to appeal from the judgment of the High Court of the Province in terms of Section 5C of the High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006, which reads as follows :-

"5c (1) *An appeal shall lie directly to the Supreme Court from any judgment, decree or order pronounced or entered by a High Court established by Article 154P of the Constitution in the exercise of its jurisdiction granted by section 5a of this Act, with leave of the Supreme Court first had and obtained. The leave requested for shall be granted by the Supreme Court where in its opinion the matter involves a substantial question of law or is a matter fit for review by such Court.*

(2) The Supreme Court may exercise all or any of the powers granted to it by paragraph (2) of Article 127 of the Constitution, in regard to any appeal made to the Supreme Court under subsection (1) of this section.

It may be relevant to note that in the case of *L.A. Sudath Rohana and another* Vs. *Mohamed Cassim Mohammed Zeena* S.C.H.C. C.A. L.A. No. 111/2010 (S.C. Minutes of 14.07.2010) this Court had the occasion to consider the mode of preparing appeals and applications for leave to appeal to the Supreme Court. In this judgment Justice (Dr.) Shirani A. Bandaranayake (as she then was) observed the difference in language between Article 128(2) of the Constitution which refers to "special leave to appeal" and Section 5c(1) of the High Court of the Provinces (Special Provisions) amendment Act No. 54 of 2006 which refers to the "leave of the Supreme Court First had and obtained" and after subjecting the Supreme Court Rules, 1990 to a close critical examination noted that :-

"*Part I of the Supreme Court Rules, 1990 refers to three types of appeals which are dealt with by the Supreme Court, viz., special leave to appeal, leave to appeal and other appeals. Whilst applications for special leave to appeal are from the judgments of the Court of Appeal, the leave to appeal applications referred to in the Supreme Court Rules are instances, where the Court of Appeal had granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal, where the Court had decided that it involves a substantial question of law. The other appeals referred to in Section c of Part I of the Supreme Court Rules are described in Rule 28(1) which is as follows :-*

"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 <u>*or any other Court or tribunal"*</u> *(emphasis added)*

The High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and High Court of the Provinces (Special Provisions) Amendment Act No. 54 of 2006 do not contain any provisions contrary to Rule 28(1) of the Supreme Court Rules, 1990 thus enabling the fact that Section C of Part I of the Supreme Court Rules, which deals with other appeals to the Supreme Court, should apply to the appeals from the High Courts of the Provinces".

In the case of *Jamburegoda Gamage Lakshman Jinadasa* vs. *Pilitthu Wasana Gallage Pathma Hemamali and others* S.C. H.C. C.A. L.A. No. 99/2008 (S.C. Minutes of 8.11.2010), the Supreme re-iterated that

an application for leave to appeal from the judgment of the High Court of the Province , would fall within Section C of Part I and not Section A of Part I of the Supreme Court Rules.

It is therefore incorrect 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.

Since the preliminary objection is based on Rule 28(2) of the Supreme Court Rules, 1990, the said Rule is reproduced below for convenience.

> 28(2)*"Every such appeal shall be upon a petition in that behalf lodged at the Registry by the appellant, containing a plain and concise statement of the facts and the grounds of objection to the order, judgment, decree or sentence appealed against, set forth in consecutively numbered paragraphs, and specifying the relief claimed. Such petition shall be type-written, printed or lithographed on suitable paper, with a margin on the left side, and shall contain the full title and number of the proceedings in the Court of Appeal or such other Court or tribunal,* ***and*** *the full title of the appeal. Such appeal shall be allotted a number by the Registrar.."(*emphasis added)

Learned Counsel for the Defendant contended that the requirement of "full title" referred to in Rule 28(2) is unique only for Section C of Part I of the Supreme Court Rules, 1990 relating to "Other Appeals", and must be complied with. He argued that Rule 28(2) requires the

"full title" of the Court below has to be mandatorily set out in the petition of appeal..

It is therefore evident that the words "full title" necessarily has to include all the persons cited as parties in the proceedings below. It is not disputed that before the District Court and the High Court there were three other parties apart from the Plaintiff and the Defendant. Admittedly, the petition of appeal does not contain the "full title" of the Court below and the failure to set out the "full title" is a fatal irregularity and this application be dismissed on that ground alone for no-compliance with the mandatory rule of this Court. Counsel also relied on Rule 28(5) of the Supreme Court Rules, 1990 which reads as follows:

> 28(5) "*In every such petition of appeal and notice of appeal, there shall be named as Defendants, all parties in whose favour the judgment or order complained against was delivered or adversely to whom such appeal is preferred, or whose interests may be adversely affected by the success of the appeal, and the names and present addresses of the appellant and the Defendants shall be set out in full.*"

It was submitted that if only Rule 28(5) were in existence, then the Plaintiff is not obliged to set out the "full title" and instead the Plaintiff had to only comply with the said Rule 28(5). Since this appeal falls within the category of "Other Appeals" the combined effect of both Rule 28(2) and Rule 28(5) is that the requirement of "full title" must be

complied with and be supplemented by other parties required to be added under Rule 28(5).

In the case of *Ibrahim* Vs. *Nadarajah* (1991) 1 S.L.R. 131 , this Court held that the failure to comply with the requirements of Rules 4 and 28 of the Supreme Court Rules 1978 is necessarily fatal. Rule 4 of the Supreme Court Rules, 1978 reads thus:

> "*4. Every application Special leave to appeal shall name as respondent, in the case of a criminal cause or matter the party or parties whether complainant or accused in whose favour the judgment complained against was delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal, and in the case of a civil cause or matter, the party or parties in whose favour the judgment complained against has been delivered or adversely to whom the application is preferred or whose interest may be adversely affected by the success of the appeal, and shall set out `in full the address of such respondents."*

One could therefore see that the wordings in Rule 4 of the Supreme Court Rules, 1978 are almost identical to Rule 28(5) of the Supreme Court Rules, 1990.

"Where there is non-compliance with a mandatory rule, serious consideration should be given for such non-compliance as such non-compliance would lead to serious erosion of well established Court procedures followed by our Courts throughout several decades." - per

Dr. Shirani Bandaranayake, J. (as she then was) in the case of *Attanayake* vs. *Commissioner General of Election & Others* (S.C. Minute of 21.07.11) .

The case of *De Silva* vs. *Wettamuny (2005)* 3 S.L.R. 251 decided by the Court of Appeal and relied upon by the Learned Counsel for the Plaintiff is based on an objection of non-compliance of the provisions contained in Rule 3(d) of the Court of Appeal (Appellate Procedure) Rules 1990. The facts in *De Silva's* case are different from the facts of the application in hand, which deals with an application for leave to appeal from the High Court of the Province, to the Supreme Court, the relevant applicable rules being the Supreme Court Rules 1990.

It is also observed that the Plaintiff in Paragraph (b) of the Prayer to the Petition seeks to set aside the judgment of the Court of Appeal when in fact no judgment was delivered by the Court of Appeal but by the High Court of the Central Province Holden in Kandy. In Paragraph 12(i) of the petition too the Plaintiff puts in issue the determination of the judgment by the Court of Appeal. The prayer to the petition does not contain a request for the grant of leave to appeal in the first instance in compliance with Section 5(c) of Act No. 54 of 2006. I must emphasize that when accepting any professional matter from a client, it shall be the duty of any Attorney-at-Law to exercise his skill with due diligence in drafting the necessary papers with due regard to his duty to Court and to the client.

On a consideration of all the material placed before the Court and for the reasons set out above, I uphold the preliminary objection raised by the Learned Counsel for the Defendant and dismiss the Plaintiff's application for leave to appeal for non-compliance with Rule 28(2) of the Supreme Court Rules, 1990. The defects I have pointed out in the prayer to the petition too dis-entitles the Plaintiff to obtain any relief from this Court.

I make no order as to costs.

Judge of the Supreme Court

S. HETTIGE, P.C.,J.

I agree.

Judge of the Supreme Court

P. DEP, P.C., J.

I agree.

Judge of the Supreme Court

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

In the matter of an Application under ` the provisions of the Companies Act No. 07 of 2007.

1. Kamkaru Sevana,
10/1, Attidiya Road
Ratmalana.

2. M.D.M. Senarathne
No. 255/5B/1, Saman Mawatha,
Nedimala, Dehiwala.

3. Mala Dassanayake,
43,Punsarawatte, Bettegama,
Panadura.

4. K. Illangakoon,
133/3, 6th Lane,
Uyana, Moratuwa.

5. Sunil Gajasinghe,
35, Goluma Pokuna Mawatha,
Bolawalana, Negombo.

6. Sanet Dikkumbura , No. 99,
Sri Gnanalankara Mawatha,
Kalubowila, Dehiwala

7. Ranjith Liyanage
28, Araliya Mawatha,
Sirimal Uyana,
Ratmalana.

8. M. Sunitha Perera,
Agamethi Mawatha,
Bandaragama.

Petitioners

Vs.

1. Kingsly Perera,
10/1, Attidiya Road,
Ratmalana.

2. Upali Gunarathne
59/1, Main Road, Attidiya,
Ratmalana.

3. Nirmalan Daas
267/25, Galle Road,
Colombo 03.

4. Lakshman Kumara Meragalla
213/21, Balika Niwasa Road,
Rukmale, Pannipitiya.

Respondents

AND NOW

In the matter of a Leave to Appeal in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Articles 127 and 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Kamkaru Sevana,
10/1, Attidiya Road
Ratmalana.

2. M.D.M. Senarathne
No. 255/5B/1, Saman Mawatha,
Nedimala, Dehiwala.

3. Mala Dassanayake,
43, Punsarawatte, Bettegama,
Panadura.

4. K. Illangakoon
133/3, 6th Lane,
Uyana, Moratuwa.

5. Sunil Gajasinghe,
35, Goluma Pokuna Mawatha,
Bolawalana, Negombo.

6. Sanet Dikkumbura
No. 99, Sri Gnanalankara
Mawatha, Kalubowila,
Dehiwala

7. Ranjith Liyanage
28, Araliya Mawatha,
Sirimal Uyana, Ratmalana.

8. M. Sunitha Perera,
Agamethi Mawatha,
Bandaragama.

Petitioners-Petitioners

S.C.H.C. L.A. 86/12

Vs.

HC/Civil 17/12/Co

1 Kingsly Perera,
10/1, Attidiya Road,
Ratmalana.

2. Upali Gunarathne
59/1, Main Road, Attidiya,
Ratmalana.

3. Nirmalan Daas, 267/25,
Galle Road, Colombo 03.

4. Lakshman Kumara Meragalla
213/21, Balika Niwasa Road,
Rukmale, Pannipitiya.

Respondents-Respondents

BEFORE : Marsoof, P.C., J.,
Sripavan, J.
Wanasundera, P.C.,J.

COUNSEL : Kuvera De Zoysa.P.C. With Sabry Haleemdeen for the Petitioners-Petitioners.

M.U.M. Ali Sabry, P.C., with Erusha Khalidasa for the Respondents-Respondents.

ARGUED ON : 06.02.2013

WRITTEN SUBMISSIONS FILED : By the Petitioners on 28.02.2013
By the Respondents on 28.02.2013

DECIDED ON : 17.05.2013

SRIPAVAN, J.

The Petitioners-Petitioners (hereinafter referred to as the "Petitioners") acting in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Articles 127 and 128 of the Constitution sought, inter alia, Leave to Appeal to the Supreme

Court from an Order dated 16.07.2012 made by the Commercial High Court of Colombo in case bearing No. H.C. (Civil) 17/2012/CO. It is not in dispute that the Commercial High Court by its Order dated 16.07.2012 refused to grant the interim relief sought in terms of paragraphs(vii) and (viii) of the prayers to the Petition.

When this matter was taken up for support, the learned President's Counsel for the Respondents-Respondents (hereinafter referred to as the "Respondents") took up a preliminary objection to the maintainability of the application on the basis that the Petitioners' application is out of time in view of the provisions of Sections 5(2) and (6) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

I reproduce below Sections 5 and 6 of the said Act for purposes of convenience:

> "*5. (1) Any person who is dissatisfied with any judgment pronounced by a High Court established by Article 154P of the Constitution, in the exercise of its jurisdiction under section 2, in any action, proceeding or matter to which such person is a party may prefer an appeal to the Supreme Court against such judgment, for any error in fact or in law.*
>
> *(2) Any person who is dissatisfied with any order made by a High Court established by Article 154P*

of the Constitution, in the exercise of its jurisdiction under section 2 in the course of any action, proceeding or matter to which such person is, or seeks to be, a party, may prefer an appeal to the Supreme Court against such Order for the correction of any error in fact or in law, with the leave of the Supreme Court first had and obtained.

(3) In this section, the expressions "judgment" and order" shall have the same meanings respectively, as in section 754(5) of the Civil Procedure Code (Chapter 101).

6. Every appeal to the Supreme Court, and every application for leave to appeal under section 5 ***shall be made*** *as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code (Chapter 101)."(emphasis added)*

A careful reading of the said two sections clearly show how an appeal to the Supreme Court be made from a judgment pronounced and an Order made by the High Court in the course of an action. Thus, if an interim Order is made by the High Court, the Petitioners have to file a leave to appeal application to this Court to have the said Order set aside. The said leave to appeal application shall be made as nearly as may be in accordance with the procedure prescribed by Chapter LVIII of the Civil Procedure Code, in terms of Section 6. The following Sections in Chapter LVIII of the Civil Procedure Code specify the procedure to be adopted in preparing such an appeal.

754(2) Any person who shall be dissatisfied with any order made by any original Court ***in the course of any civil action , proceeding or matter*** *to which he is , or seeks to be a party, may prefer an appeal to the Court of Appeal against such order for the correction of any error in fact in law, with the leave of the Court of Appeal first had and obtained. (emphasis added)*

757. (1) Every application for leave to appeal against an order of Court ***made in the course of any civil action, proceeding or matter*** *shall be made by petition duly stamped, addressed to the Court of Appeal and signed by the party aggrieved or his registered attorney. Such petition shall be supported by affidavit, and shall contain the particulars required by section 758, and shall be presented to the Court of Appeal by the party appellant or his registered attorney* ***within a period of fourteen days from the date when the order appealed against was pronounced,*** *exclusive of the day of that date itself, and of the day when the application is presented and of Sundays and public holidays, and the Court of Appeal shall receive it and deal with it as hereinafter provided and if such conditions are not fulfilled the Court of Appeal shall reject it. The appellant shall along with such petition, tender as many copies as may be required for service on the respondents.(emphasis added)*

(2) Upon an application for leave to appeal being filed, in the Registry of the Court of Appeal, the Registrar shall number

such application and shall forthwith send notice of such application by registered post, to each of the respondents named therein, together with copies of the petition, affidavit and annexures, if any. The notice shall state that the respondent shall be heard in opposition to the application on the date to be specified in such notice. An application for leave to appeal may include a prayer for a stay order, interim injunction or other relief.

Learned Counsel for the Petitioners sought to argue that the wording in Section 6 which states "as nearly as may be" is a clear manifestation of the intention of the legislature not to require strict compliance with the provisions contained in Chapter LVIII of the Civil Procedure Code. Counsel further contended that Act No. 10 of 1996 did not specify the time limit within which a leave to appeal application should be preferred to the Supreme Court. I would like to reproduce a passage from the judgment of *Bandaranayake, J.* (as she then was) in the case of *George Stuart & Co. Ltd.* Vs. *Lankem Tea & Rubber Plantations Ltd.* (2004) 1 S.L.R. 246 at 254 -

"*.... if the contention of the petitioner is upheld, there is no time limit for an application for leave to appeal to be lodged, then such an application could even be made after 10 years from the date of the order of the High Court, ... I wish to add further that such a situation would lead to an absurdity in that, the party who was successful in the High Court in the action for the enforcement of the award, will have to wait for an unknown*

period not knowing whether there would be a leave to appeal application made by the other party to the Supreme Court...."

When an interpretation leads to absurdity the word "may" is construed as imperative depending upon the context. Thus, Act No. 10 of 1996 in Section 6 provides the procedure for appeal to the Supreme Court and when enacted for public good and for the advancement of justice an expression which appear to belong to the permissive language like "may" must be construed to have a compulsory force.

It is no doubt true that the rule of interpretation permits the interpretation of the word "may" in certain context as "shall" and vice versa, namely, permit the interpretation of "shall" as "may". In this context, it may be relevant to consider the decision of this Court in *Haji Omar* vs. *Wickramasinghe & Others* (2001) 3 S.L.R. 61, which arose from an application for leave to appeal under Sections 5(2) and 6 of the High Court of the Province (Special Provisions) Act No. 10 of 1996. When the Petitioner moved for notice on the Respondents, the Court observed that an application for leave to appeal to the Supreme Court shall be made as nearly as practicable in the manner provided by Chapter LVIII of the Civil Procedure Code and held that the procedure set out in Section 757(2) was applicable to the application. Accordingly, M.D.H. Fernando, J. directed the Registrar of the Supreme Court to take steps in terms of Section 757(2) of the Civil Procedure Code in applications of this nature.

Hence, I cannot agree with the learned Counsel for the Petitioner that the wording in Section 6 of Act No. 10 of 1996 is merely directory and not mandatory.

Learned Counsel for the Petitioners further contended that since Act No. 10 of 1996 did not stipulate a time limit within which a leave to appeal application is to be made, the leave to appeal application could be made within a reasonable time, namely within a period of 42 days, as decided by this Court in a long line of cases under Section 5c of Act No. 54 of 2006. I must state that the Petitioners themselves invoked the jurisdiction of the Provincial High Court of the Western Province Holden in Colombo as the matter involved proceedings under the Companies Act.

In fact, in paragraph (1) of the petition filed in the said High Court, the Petitioners state as follows: -

> "*The Petitioners state that this Honourable Court is vested with exclusive jurisdiction to hear and determine this matter under in terms of the provisions of the Companies Act No. 7 of 2007."*

Having invoked the jurisdiction of the High Court, in terms of Section 2 of Act No. 10 of 1996, the petitioners must follow the appeal procedure laid down in the said Act. It is undoubtedly good law that where a Statute creates a right and gives a specific remedy, a party seeking to enforce the right might resort to that remedy and not to others. The Petitioners, if not satisfied with an interim order designed

to provide provisional relief until the substantive relief is decided at the trial, have the right to prefer an application for leave to appeal against such order as provided in Sections 5(2) and (6) of Act No. 10 of 1996. Such an application for leave to appeal should have been lodged by the Petitioners within a period of 14 days as stated in Section 757(1) of the Civil Procedure Code. Admittedly, this application has been filed by Petition dated 24.08.2012 (almost 38 days after the impugned order was made) to challenge the interim order made by the High Court on 16.07.2012.

I therefore hold that the Petitioners' application was filed long after the expiry of the period of time stipulated in Section 757(1) of the Civil Procedure Code. The Preliminary Objection raised by the learned Counsel for the Respondents is entitled to succeed. The application is accordingly, dismissed.

I make no order as to costs.

JUDGE OF THE SUPREME COURT

MARSOOF, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

WANASUNDERA, P.C., 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 the exercise of the inherent powers of the Supreme Court, as the highest and final Superior Court of Record under and in terms of Article 118 read with Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Wakachiku Construction Co. Ltd., of No. 23-18, 2-Chome, Shimomeguro-ku, Tokyo 153-0064, Japan and having its Colombo Liaison Office at # 250-3rd Floor, Apartment #6, Liberty Plaza, R.A. De Mel Mawatha, Colombo 3, Sri Lanka.

Petitioner

S.C. Misc. 01/2011 Vs.

Road Development Authority,
Sethsiripaya
Battaramulla

Respondent

Before Saleem Marsoof, P.C., J.

K. Sripavan, J.

S.I. Imam, J.

Counsel :K. Kanag-Isvaran P.C. With S. Kanag-Isvaran for the Petitioner.
A.H.M.D. Nawaz D.S.G. For the Respondent.

Argued on : 06.02.2012

Written Submissions
Filed : By the Petitioner on 28.03.2012.
By the Respondent on 16.04.2012

Decided on : 06.02.2013

SRIPAVAN, J.

The Petitioner by its Petition dated 21st April 2011, inter alia, moved Court to exercise its inherent jurisdiction to set aside the Order of the High Court dated 11th March 2011 and to declare that the said High Court did not have jurisdiction to have entertained proceedings in H.C. (ARB) No. 2404/2010 instituted by the Respondent.

The facts relating to this application are briefly as follows:-
The Petitioner is a foreign construction company which was engaged in construction work for the Respondent Authority. When disputes arose during the course of the works, the Petitioner referred the said disputes first to the Engineer and then to the Adjudicator in terms of the provisions of Clause 19.1 to 19.3 of the Conditions of Contract. Being dissatisfied with the decision of the Adjudicator, the Petitioner thereafter referred the said disputes to arbitration by its letter dated 10th December 2009 in terms of Clause 19.5. The Petitioner in its letter nominated the following three Arbitrators in accordance with Clause 19.5 and requested the Respondent to select one of them to serve as an Arbitrator within the stipulated time of 21 days.

1. Mr. Daniel Atkinson, FICE, FCI Arb
2. Mr. David Loosemore, FICE, MCI Arb

3. Mr. Neville Tait, FICE, FCI Arb

The Respondent by its letter dated 18th December 2009 refused to comply with the request made by the Petitioner and made a counter request to name Sri Lankan Arbitrators for consideration. In response thereto, the Petitioner by its letter dated 21st December 2009 urged the Respondent to select one Arbitrator from the list submitted by letter dated 10th December 2009 within the contractually stipulated period of 21 days and informed that the failure on the part of the Respondent to do so would result in the Petitioner itself selecting one of them to be the sole Arbitrator in terms of Clause 19.5.

The Respondent, however, by its letter dated 28th December 2009 advised the Petitioner that the decision conveyed by its letter dated 18th December 2009 remained unchanged. Thus, the Respondent rejected the three names nominated by the Petitioner in toto. As the Respondent failed to select the sole Arbitrator, within the stipulated period, the Petitioner, with notice to the Respondent duly appointed Mr. J. Neville Tait as per Clause 19.5 of the Conditions of Contract. By letter dated 15th June 2010, Mr. J. Neville Tait accepted the appointment and forwarded a "Draft Arbitration Procedure for Comment" by both the Petitioner and the Respondent.

Though the Petitioner by letter dated 28th June 2010 made certain comments on the conduct of the Arbitration proceedings as set out in the "Draft Procedure", no comments or suggestions were made by the Respondent to the sole Arbitrator.

It is in this backdrop, the Respondent purported to invoke the jurisdiction of the High Court under Section 7 [Part III of the Arbitration Act No. 11 of 1995 (hereinafter referred to as the "Act"] and pleaded, inter alia, that the Petitioner had unilaterally appointed an Arbitrator in violation of it's

contractual obligations and the provisions of the Act, that a situation contemplated under Section 7(3)(b) of the said Act had arisen, and that the High Court was required to appoint a suitable Arbitrator from a list submitted by the Respondent thereby reversing and nullifying the contractually agreed procedure for the appointment of Arbitrators.

Section 7(3)(b) of the Act provides that, "*Where under an appointment procedure agreed upon by the parties, the parties or the Arbitrators, are unable to reach an agreement required of them under such procedure, any party may apply to the High Court to take necessary measures towards the appointment of the Arbitrator or Arbitrators*".

The Respondent urged the following grounds before the High Court for refusing to select a sole Arbitrator from the three Arbitrators nominated by the Petitioner in terms of Clause 19.5 of the Contract :-

> (a) The nominated Arbitrators are foreign nationals residing outside the country and would be extremely expensive as Colombo is the place of Arbitration;
>
> (b) The Contract is based on ICTAD general conditions and the nominated Arbitrators do not show any experience in ICTAD conditions and any other law of Sri Lanka. The Contract provides that the applicable law is the law of the Democratic Socialist Republic of Sri Lanka.

The Petitioner, in its Statement of Objections, inter alia, brought to the attention of the Learned High Court Judge that the High Court was devoid of

jurisdiction to hear and determine the matters raised in the Respondent's purported Petition for the following reasons, namely:-

(a) that the purported Petition filed by the Respondent was not one which was contemplated under and in terms of Section 7 of the Arbitration Act, No. 11 of 1995.

(b) that Section 7(1) of the said Act provides that the parties shall be free to agree on a procedure for appointing the Arbitrators.

(c) that sub-section (2) of Section 7, authorizes the Court to appoint an Arbitrator/Arbitrators, only where the parties have not agreed as to a procedure for appointing an Arbitrator;

(d) that in the instant case parties have, in fact, mutually agreed, in the Conditions of Contract on a procedure for the appointment of an Arbitrator in terms of Clause 19.5 thereof and that fact was common ground between the parties.

(e) that Clause 19.5 provided as follows:

"Any doubt, difference, dispute, controversy or claim arising, out of or in connection with or touching or concerning the execution or maintenance of the works in this contract, or on the interpretation thereof or on the rights, duties, obligations, or liabilities of any of the parties thereto or on the operation, breach, termination, abandonment, foreclosure or invalidity thereof, shall be finally settled by arbitration after written notice by either party to the Contract to the other for a decision to a sole arbitrator to be appointed as hereinafter provided.

The party desiring arbitration shall nominate three arbitrators out of which one to be nominated by other party within 21 Days of the receipt of the said request. If the other party does not nominate one to serve as Arbitrator within the stipulated period the party calling for arbitration shall nominate one of the three and inform the other party accordingly.
The arbitration shall be conducted in accordance with Arbitration Act No. 11 of 1995....."

The High Court by its order dated 11th March 2011 concluded, inter alia, that the procedure adopted by the Petitioner to appoint Mr. J. Neville Tait who is one of the three arbitrators is contrary to Clause 19.5 of the Agreement; that the said act of appointment has been done without authority; that there seems to be no agreement between the Petitioner and the Respondent regarding the appointment of arbitrators; that in such a situation the High Court has the power to appoint a suitable arbitrator under Section 7(4)(sic) of the Act. Accordingly, the High Court appointed Mr. Walter Ladduwahetty as the Arbitrator under Section 7 (4) (sic) of the Arbitration Ordinance(sic).

Learned President's Counsel for the Petitioner submitted that the order of the High Court has shattered and rendered nugatory the legitimate expectation of the legislature and of all parties, local and foreign, who had hitherto believed and /or had been made to believe by the decisions of the Supreme Court, the treatises of jurists and learned writers on the subject, that in Sri Lanka under the Act "parties are free to select an Arbitrator of any nationality, gender or professional qualifications"
(emphasis added)

There is force in the submissions of the Learned President's Counsel. In fact, in the case of *Merchant Bank if Sri Lanka Ltd.* vs. *D.V.D.A. Tillekeratne* (2001) B.A.L.R. 71 this Court held that "party autonomy is a fundamental principle of Arbitration Law and this is given effect to by the legislation in Section 7(1) of the Arbitration Act".

The predicament in which the Petitioner is placed is that it is unable to challenge the Order of the High Court as no appeal or revision lies in respect of any order, judgment or decree of the High Court in terms of Section 37(1) except from an order, judgment or decree of the High Court under PART VII of the Act. (emphasis added).

In terms of Section 26 too there is no right of challenge to the orders of the arbitral tribunal until after an award has been made by the Arbitrator or Arbitrators.

It is in this background, as the legislature did not provide for a challenge to decisions of the High Court under Section 7, the Petitioner invoked the inherent jurisdiction of this Court on the basis that the Supreme Court is the highest and final Superior Court of Record under Article 118 read with Article 105(3) of the Constitution with an unlimited, independent and separate basis of jurisdiction, to protect and fulfill the judicial function of administering justice, in the absence of any express statutory provisions.

Learned President's Counsel relied on Halsbury's Laws of England (4th Edition) 1982, Vol 37 at page 23 which describes the inherent jurisdiction of Court as follows:-

> "*In sum, it may be said that the inherent jurisdiction of Court is virile and viable doctrine and has been defined as being the reserve or fund of powers, which the Court may draw up as necessary whenever it is*

just or equitable to do so, in particular, to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."

It would be a matter for determination by the Court in each individual case whether the circumstances of the case make out the necessity to exercise the inherent power and make it incumbent on the Court to exercise that power to do justice between the parties. Hence, the inherent power of the Court has to be exercised carefully and with caution and only where such exercise is justified considering the facts of the case, which saddens the co nscience of the Court.

A seven judge bench of the Supreme Court in *Ganeshanathan* vs. Vivienne *Gunawardene* (1984) 1 S.L.R. 319 took the view that the Supreme Court, as the Superior Court of Record has inherent powers to make corrections to meet the ends of justice, the exercise of which would depend on the facts of each case. (emphasis added) Samarakoon, C.J. At page 329 observed as follows:-

"*As a Superior Court of record there is no doubt that it has inherent powers to make corrections to meet the ends of justice. In Mohamed v. Annamalai Chettiar the Court used its inherent powers to free an insolvent from arrest pending the decision of his appeal to the Privy Council although there was no statutory authority for such an Order. Costs have been awarded to a successful party from the inception of the Supreme Court using its inherent power – Karuppannan v. Commissioner for Registration of Indian and Pakistani Residents. Inherent powers have been used to correct*

errors which were demonstrably and manifestly wrong and it was necessary in the interests of justice to put matters right . Decisions made per incuriam have been corrected."

The cases cited above clearly demonstrate that inherent power implies by its very nature a power which cannot be expressed in terms but which must reside in a Court for achieving the higher and the main purpose of a Court, namely, the purpose of doing justice in a cause before it and for seeing that the act of the Court does no injury or harm to any of the suitors. Circumstances requiring the use of such a power cannot be foreseen. The legislature enacts provisions to meet the circumstances that can be foreseen and once provision has been made in the Statute, the occasion to invoke inherent power in that circumstance practically vanishes. Thus, when the Statue provides a method so as to meet a contingency in a particular manner, any other method thought of by the Court cannot then be said to be a method which would advance the interest of justice. It is in this sense, that no occasion for the exercise of any inherent power arises when the statute expressly provides for what is to be done in that situation. The remedy provided by the statute may not be an efficacious one. It may even lack the necessities to grant quick relief. However, it is well settled and accepted as axiomatic that justice be administered in accordance with the law of the land. It may be pertinent to quote the observation of Martensz, J. in *Alice Kotalawela* vs, *W.H. Perera and another* (1937) 1 CLJ 58.

"Justice must be done according to law. If hardship results from the law in force the remedy must be effected by legislation. There would be chaos if a judge was entitled to create a procedure to meet exigencies of every case in which he considers the law would work

injustice."

This means, if all the powers which will be necessary to secure the ends of justice exists at some point and such existence is recognized by the statute, inherent power of a Court cannot be invoked disregarding express statutory provision. A similar view was expressed by Garvin S.P.J. In *Mohamed* vs. *Annamalai Chettiar* (1932 Ceylon Law Recorder – Vol XII 228 at 229 in the following words :

> "*No Court may disregard the law of the land or purport in any given case, to ignore its provisions. Where a matter has been specifically dealt with or provided for by law there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a Court of its inherent power can arise."*

Learned President's Counsel argued that the legislature did not provide for a challenge to the decision of the High Court made under Section 7 of the Act, which has placed the Petitioner into peril most unreasonably. However, an award once pronounced by an Arbitrator can be challenged on one of the specific grounds set out in Section 32 of the Act which includes "the composition of the arbitral tribunal not in accordance with the agreement of parties or was not in accordance with the provisions of the Act."

Even in the case of *Merchant Bank of Sri Lanka Ltd.* vs. *Tillekeratne* relied on by the Learned President's Counsel, the Petitioner invoked the jurisdiction of the Court after the award has been made by the Arbitrator. As rightly submitted by the learned Deputy Solicitor General, the Act provides a sufficient remedy to the petitioner enabling it to apply to the High Court to set aside the arbitral award on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of parties, Thus, the Act

gives the Petitioner an express provision to invoke the jurisdiction of the High Court in a particular manner once an award is made and the party seeking to enforce the right must resort to that remedy and not to others. It cannot be the duty of any Court to exercise its inherent powers when it plainly appears that, in doing so, the Court would be using a jurisdiction which the legislature has forbidden it to exercise. Any lacuna in the law is to be dealt with by the legislature if it causes any inconvenience or hardship to a litigant.

It is therefore unnecessary to emphasize that the ambit and scope of the Court's power to interpose its inherent authority cannot be invoked in regard to matters which are sufficiently covered by a specific provision of the Act, namely, Section 32 thereof.

For the reasons set out above, this Court refuses to exercise its inherent jurisdiction and dismisses this application, however, in all the circumstances without costs.

JUDGE OF THE SUPREME COURT

MARSOOF, J.,

I agree.

JUDGE OF THE SUPREME COURT.

IMAM, J.

I agree.

JUDGE OF THE SUPREME COURT.

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No. 2 of 1978, against Mr. D. S. Bodhinagoda, Attorney-at-Law of the Supreme Court.

Mr. D. M. A. Jeewananda Dissanayake,
No. 12K Ruben Perera Mawatha,
Boralesgasmuwa.

COMPLAINANT

Vs.

S.C. Rule No. 01/2010

Mr. D.S. Bodhinagoda,
Attorney-at-Law,
No. 30/1 Wethara,
Polgasowita.

RESPONDENT

BEFORE : Thilakawardane, J
Imam, J
Dep, PC, J &

COUNSEL : Ms. Viveka Siriwardane De Silva SSC for the Hon. Attorney Genaral.
Rohan Sahabandu for the Bar Association.
Complainant appears in person.
Respondent appers in person.

Rule dated 04.11.2010 was issued under the hand of the Registrar of the Supreme Court on the Respondent Attorney-at-Law (herein after referred to as the Respondent) to show cause why he should not be suspended from practice or be removed from office of Attorney-at-Law of the Supreme Court in terms of Section 42(2) of the Judicature Act No. 2 of 1978 for deceit and/or malpractice and thereby conducting himself in a manner unworthy of an Attorney-at-Law.

This Rule is a sequel to two preliminary inquiries conducted by two panels of the Bar Association of Sri Lanka (BASL) against the Respondent. At the conclusion of the said inquiries, the respective panels had unanimously recommended that the Respondent be reported to the Supreme Court for necessary action.

On 17.12.2010, the Rule was read out to the Respondent in open court to which he pleaded not guilty and moved for time to show cause. The matter was thereafter fixed for inquiry.

The Attorney General appeared in support of the Rule. The Bar Association was represented by Mr. Rohan Sahabandu,PC and the Respondent appeared in person.

In ***Daniel v. Chandradeva*** [1994]2 SLR 1 , which explicitly considered the standard of proof in inquiries relating to a Rule under Section 42(2) of the Judicature Act, it was held as follows:

> *"Where the conduct of an attorney is in question in disciplinary proceedings, it requires as a matter of common sense and worldly wisdom the careful weighing of testimony, the close examination of facts proved as a basis of inference and a comfortable satisfaction that a just and correct decision has been reached. The importance and gravity of asking an attorney to show cause makes it impossible for the Court to be satisfied of the truth of an allegation without the exercise of caution and unless the proofs survive a careful scrutiny.* ***Proof beyond reasonable doubt is not necessary, but something more than a balancing of the scales is necessary to enable the Court to have the desired feeling of comfortable satisfaction****. A very high standard of proof is required where there are allegations involving a suggestion of criminality, deceit or moral turpitude." – per Amerasinghe, J.*

In terms of the charges preferred against the Respondent Attorney on the allegation of professional misconduct, as it involved an element of deceit and moral turpitude this court has examined the evidence on the basis as to whether the charges have been established on a high standard of proof and not on a mere balance of probabilities.

The Rule containing the charges levelled against the Respondent reads as follows:

"TO THE RESPONDENT ABOVENAMED

Whereas a complaint has been made to His Lordship the Chief Justice by Mr. D.M.A.J. Dissanayake (herein after referred to the "complainant") of No. 12, Ruben Perera Mawatha, Boralesgamuwa supported by an affidavit dated 04th January 2007 alleging deceit and malpractice on your part;

AND WHEREAS, the said complaint made by the said complainant disclose that,

(a) You were retained to execute a Deed of Transfer by Anura S. Hewawasam.

(b) The Deed, numbered 975, has thus been executed and attested by you on 5th May 2006 whereby, the land morefully described in the Schedule had been transferred to Eranga Lanka Jayasekera.

(c) You, in the attestation clause had specifically stated that the executant was known to you and further that the witness-Prasanna L. Jayasekera and Vimal Hewapathirana had declared to you that the executant of the said Deed No. 975 was known to them.

(d) You, had then proceeded to place your official seal in certifying and attesting the said Deed No.975.

(e) You, were retained to execute a Deed of Transfer by Eranga Lanka Jayasekera.

(f) The Deed numbered 998, had thus been executed and attested by you on 5th July 2006 whereby, the land morefully described in the Schedule had been transferred to Dissanayake Mudiyanselage Anura Jeewanda Dissanayake for consideration of Rs. 1,000,000/=.

(g) You, in the attestation clause had specifically stated that the executant was known to you and further that the witnesses-Senanayake Liyanage Don Kulasiri and Vimal Hewapathirana had declared to you that the executant of the said Deed No. 998 was known to them.

(h) You, had then proceeded to place your official seal in certifying and attesting the said Deed No. 998.

(i) You, had prior to executing the aforementioned instrument had informed Dissanayake Mudiyanselage Anura Jeewanda Dissanayake that you had searched the Registers in the Land Registry for the purpose of ascertaining the state of the title in regard to the said land and that the title was in order.

(j) It now transpires that Deeds bearing No. s 975 and 998 had been prepared in a fraudulent manner.

(k) It now transpires that the lawful owner of the land described in the Schedules of the said Deeds- Anura S. Hewawasam had never sold the said land and upon being informed of it has lodged a complaint to that effect.

(l) Furthermore, though you had agreed on 8th September 2007, at the inquiry held by a panel appointed by the Bar Association of Sri Lanka, to pay Rs. 300,000/= on or before 31st December 2007 and the balance amount in monthly instalments, you have failed to act as per the settlement.

(m) You, as a Notary had failed to act in accordance with the provisions of the Notaries Ordinance, in particular section 31 of the said Ordinance.

AND WHEREAS, the aforesaid complaint made by the said complainant discloses that you have, by reason of the aforesaid acts of misconduct, committed:

(a) Deceit and or malpractice within the ambit of Section 42(2) of the Judicature Act (read with Rule 79 of the Supreme Court Rules of 1978) which renders you unfit to remain as an Attorney-at-Law.

(b) By reason of the aforesaid act you have conducted yourself in a manner which would reasonably be regarded as disgraceful or dishonourable of Attorneys-at-Law of good repute and competency and have thus committed a breach of Rule No. 60 of the Supreme Court (Conduct of and Etiquette of Attorneys-at-Law) Rules of 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka and;

(c) By reason of the aforesaid acts and conduct, you have conducted yourself in a manner unworthy of an Attorney-at-Law and have thus committed a breach of Rule No. 61 of the said Rules

AND WHEREAS, this Court is of the view that proceeding against you for suspension or removal from the office of Attorney-at-Law should be taken under section 42(2) of the Judicature Act No. 2 of 1978 read with the Supreme Court (Conduct of and Etiquette of Attorneys-at-Law) Rules of 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

THESE ARE THEREFORE to command you in terms of section 42(3) of the Judicature Act No. 2 of 1978 to appear in person before this court at Hulftsdorp. Colombo 12, Sri Lanka, on this 17th Day of December 2010 at 10.00 a.m. in the forenoon and show cause as to why you should not be suspended from practice or be removed from the office of Attorney-at-Law of the Supreme Court of the Democratic Socialist Republic of Sri Lanka, in terms of Section 42(2) of the Judicature Act and it is ordered that this Rule be served on you through the Fiscal of the District Court of Homagama."

In terms of Rule 79(5) of the Supreme Court Rules 1978, a list of witnesses and documents was annexed to the Rule issued against the Respondent which was subsequently amended by an amended list of witnesses and documents filed by way of a motion dated 13th December 2011 which was served on the Respondent.

The Respondent was entitled to file a list of witnesses and documents in terms of Rule 80(3), if he intended to rely on evidence but the Respondent chose not to do so.

The Respondent did not rely on any evidence on his behalf nor did he give evidence at the inquiry although he informed court at the commencement of the inquiry that he had cause to show.

It is to be noted that the Respondent was afforded an opportunity to provide explanations prior to the issuance of the Rule against him and availing himself of the opportunity so granted to him, the Respondent had tendered explanations by letter dated 03.05.2007 (P21B) and affidavit dated 30.06.2008 (P21C) to the Registrar of the Supreme Court. The Respondent did not deny the attestation of the two fraudulent Deeds bearing Nos. 975 and 998. He had merely denied the charges in the complaint made against him but did not even attempt to justify his conduct. The Respondent states that he has made good the loss suffered by the complainant by transferring a land belonging to his daughter to the Complainant and by payment of monies at various stages to the complainant. The Respondent counter claimed that the complaint against him was fraught with malice.

It is pertinent to note that the said explanations have been duly considered by the Disciplinary Committees of the BASL during the preliminary inquiries prior to taking a decision to report the Respondent to the Supreme Court for necessary action.

Two preliminary inquiries had been conducted by the BASL against the Respondent as described below:

At the first inquiry under Ref No. PPC/1657 (original record marked P20) by the Panel "D" of the BASL comprising:

(a) Mr. Sarath Jayawardena AAL (Chairman)
(b) Mr. Owen De Mel, AAL (Member)
(c) Mr. G.S.J. Widanapathirana, AAL (Member)

This inquiry had been initiated after a complaint had been lodged by the complainant to the BASL at the same time that he lodged an identical complaint with His Lordship the Chief Justice. The BASL has referred the complaint to its panel "D". Both the Complainant and the Respondent had been present at the said inquiry and there had been a settlement on

08.09.2007 where the Respondent had agreed to make a payment of Rs. 10 lakhs to the complainant as follows:

The Respondent had agreed to pay the complainant a sum of Rs. 300,000/-on or before 31.12.2007. Thereafter Rs. 10,000/- per month on or before 25th of each month until the full claim of Rs. 10 lakhs is settledd. In the event the Respondent defaults in the said payments the matter was to be referred back to the BASL. Both the Complainant and the Respondent had signed the said settlement.

Subsequently the complainant has informed the BASL that the Respondent had not complied with the settlement agreed upon and no monies had been paid to the complainant as per the settlement. The panel "D" having noted that the Respondent has deliberately violated the conditions of the agreement had decided that the Respondent should be reported to the Supreme Court for necessary action.

At the 2nd Inquiry was held under Ref No. P/10/2007 (original record marked P21) by a Disciplinary Committee of the BASL comprising:

(a) Mr. Nihal Fernando, PC (Chairman)
(b) Mr. T.G. Gooneratne, AAL (Member
(c) Mrs. J.M. Coswatte AAL (Member)

This inquiry has been initiated on a direction by His Lordship the Chief Justice for a preliminary inquiry to be held in terms of Section 43(1) of the Judicature Act on a complaint made by the complainant by way of an affidavit dated 04.01.2007 (P 10) containing allegations of misconduct against the Respondent.

Although the Respondent had been noticed to appear before the said committee on 02.10.2008 by the Registrar of the Supreme Court and the said notice had not been returned, the Respondent had been absent and unrepresented and he had not given any reasons for his absence. The Panel having noted that the Respondent had been present at the inquiry on 31.05.2008 and represented by Counsel, and that the Respondent had tendered his observations by way of an affidavit dated 30.06.2008 (P21C) together with documents annexed marked V1-V4, continued with the inquiry in the absence of the Respondent.
The Complainant who was present had brought to the panel's notice the 1st inquiry referred to above.

The Disciplinary Committee has noted the following at the inquiry as reflected in the original record (P21):

"The main charge against the Respondent is that the Respondent AAL has acted for the buyer as well as the seller of a certain allotment of land which was purchased by the complainant as the buyer. ……."

Having considered the material before it, the panel had concluded that the Respondent has breached the code of ethics governing the conduct of Attorneys-at-Law and in those circumstances decided to report the Respondent to His Lordship the Chief Justice for appropriate action.

At the trial the complainant D.M.A.J. Dissanayake testified that he had made a complaint to His Lordship the Chief Justice by way of an affidavit dated 04.01.2007 (P 10) against the Respondent.He had responded to an advertisement in the Silumina newspaper dated 05.03.2006 (P 11) about lands being sold in exchange for cars or vans in good condition and made inquiries by telephone on the number given in the advertisement. A land in Boralesgamuwa which is 20.5 perches in extent was shown to the complainant by a person by the name of Eranga Lanka Jayasekera who claimed to be a Doctor and the owner of the said land in question. Since the complainant showed interest in purchasing it and inquired about the title to the said land, Eranga Lanka Jayasekera had informed the complainant that he can verify the title of the said land from a lawyer by the name of D.S. Bodhinagoda (Respondent) who handles legal matters for his family and that the said Eranga Lanka Jayasekera had introduced him to the Respondent. During the course of the complainant's evidence he identified the Respondent as the lawyer who was introduced to him as D.S. Bodhinagoda. The Respondent had confirmed that the land in question belongs to Eranga Lanka Jayasekera and that the latter has clear title to the said land and that all the relevant Deeds are in his custody.

He had believed the Respondent since the Respondent is an Attorney-at-Law and also because the Respondent has been an acting Magistrate of the Kesbewa Magistrate's Court .He had requested the Respondent to carry out a title search in respect of the land in question and that the Respondent had informed him that the Respondent had carried out a title search and he had confirmed that there is clear title for the last 70 years.The complainant and Eranga Lanka Jayasekera, the purported seller had agreed that the said land will be exchanged for two vehicles belonging to the complainant and cash for the balance. The complainant had signed an agreement dated 11.03.2006 (P12) at the Respondent's office agreeing to exchange two vehicles belonging to him and in addition to pay a sum of Rs. 250,000/= and the purported seller also had signed an agreement (P13) at the same time agreeing to exchange his land with the complainant for the said vehicles and the said sum of money.The

Respondent had placed his seal and signed and certified these two agreements (P12 and P13). The Deed of Transfer No. 998 (P 2) in respect of the land in question had been executed at the Respondent's office between Eranga Lanka Jayasekera as the purported seller and the complainant as the buyer and the Respondent has attested the said Deed by signing and placing his seal thereto.

The Respondent had charged a sum of Rs. 58,000/= to execute and attest the Deed of Transfer No. 998 (P2) including the stamp fees in proof of which the Respondent had issued a receipt dated 12.06.2006 (P14). Although the Respondent had undertaken to register the Deed No. 998 he had failed to do so despite constant reminders by the complainant. The Respondent had on one occasion informed the complainant that Eranga Lanka Jayasekera had been taken into custody by the Mt. Lavinia Police for selling lands on forged deeds and upon hearing this complainant had proceeded to the Mt. Lavinia Police Station and found the person whom he knew as Eranga Lanka Jayasekera in the police cell. The complainant had thereafter proceeded directly to the Respondent's office and the Respondent had handed over the original of the Deed No. 998 to the Complainant to get it registered in the Land Registry.

The complainant also handed over the Deed No. 998 to the Land Registry of Mt. Lavinia to register the same, the officials of the Land Registry of Mt. Lavinia had alerted the complainant that there is no prior registration in respect of the land in question although several prior registrations had been incorporated by the Respondent in the Deed No. 998. Upon making inquiries from the residents of the neighbouring lands, it had transpired that the legal owner of the land in question is one Anura S. Hewawasam and not Eranga Lanka Jayasekera.

The complainant had thereupon with great difficulty located the said Anura S. Hewawasam who had confirmed that the land in question was owned by him.When the complainant informed the Respondent that the legal owner of the land in question is not Eranga Lanka Jayasekera but Anura S. Hewawasam, the Respondent had agreed to give a title report to the complainant and accordingly a title report dated 31.10.2006 (P15) prepared and signed by the Respondent depicting that Anura S. Hewawasam had sold the land in question to Eranga Lanka Jayasekera who in turn had sold it to the complainant had been given by the Respondent to the Complainant. The Complainant had also requested from the Respondent a copy of the Title Deed of the previous owner from whom Eranga Lanka Jayasekera had derived title and the Respondent had produced a copy of the Deed No. 975 (P8) which had also been attested by the Respondent just two months prior to the execution of the Deed No. 998 (P2).

The Complainant had thereafter complained to His Lordship the Chief Justice, the Bar Association of Sri Lanka, the Legal Aid Commission, the Land Registry against the Respondent.

The Complainant had also lodged a complaint with the Panadura Branch of the Legal Aid Commission and the Respondent had been summoned to the Commission. At the Commission the Respondent had admitted to executing the two Deeds bearing Nos. 998 and 975 and had promised to pay Rs. 10 lakhs to the complainant which sum of money was the value stated in the Deed No. 998 as paid by the complainant for the purchase of the land in question. The Respondent had signed an agreement dated 29.05.2007 (P16) on a stamp promising to pay Rs. 10 lakhs to the Complainant.

Prior to signing and handing over the agreement P16, the Respondent had also given a promissory note dated 20.05.2007 (P17) promising to pay Rs. 10 lakhs to the Complainant. Despite the agreement to pay the Complainant Rs. 10 lakhs, the Respondent failed and neglected to do so. The Complainant had visited the Respondent and requested for the said sum of money on more than 30 occasions but to no avail. On the complaint lodged with the BASL by the complainant, the BASL had conducted a preliminary inquiry against the Respondent under reference No. PPC/1657.Even at the inquiry conducted by the BASL under the above reference, the Respondent had undertaken to pay a sum of Rs. 10 lakhs to the complainant by paying a sum of Rs. 3 lakhs initially and thereafter the balance in monthly instalments of Rs. 10,000/-.

Since the Respondent did not pay the money as so undertaken the Complainant lodged a second complaint to His Lordship the Chief Justice by way of an affidavit dated 08.04.2008 (P18).

As there was no immediate response a third complaint also had been lodged to His Lordship the Chief Justice by way of an affidavit dated 12.10.2008 (P19). A second preliminary inquiry had been conducted by the BASL Disciplinary Committee headed by Mr. Nihal Fernando PC.Due to the Complainant constantly visiting the Respondent at his office and at his home requesting for the said sum of money promised by the Respondent, the Respondent had got his daughter to transfer 8 perches of land in Siyambalagoda to the Complainant worth approximately 4 lakhs but depicted in the Deed as valuing Rs. 1 Lakh in order to prevent the complainant from pursuing legal action in the courts

The complainant specifically stated that he was motivated to purchase the land in question because of the assurance given by the Respondent that the title of Eranga Lanka Jayasekera the purported seller was good and that he would never have purchased the land in question if not for

the said assurance of the Respondent and that he believed the Respondent and he placed his trust in the Respondent as he was a lawyer and the Respondent has breached the trust he placed in the Respondent by what the Respondent did to him.

On a subsequent date the complainant had purchased 10 perches of the land in question from the legal owner Anura S. Hewawasam paying a sum of Rs.15 lakhs to the legal owner and that he had to re-purchase the land for the second time since Eranga Lanka Jayasekera who originally transferred the land to the complainant did not have lawful title to the land in question. The complainant has suffered a loss of approximately Rs. 33 lakhs altogether as a result of the above.

It was suggested in cross examination that the complainant has received more than Rs. 10 lakhs from time to time from the Respondent including the value of the land in Siyambalagoda, which the complainant vehemently denied. However, in re-examination the complainant clarified that altogether the maximum amount of money which has been received by him is Rs. 5 lakhs and that it was hardly enough to make good the loss he suffered of approximately Rs. 33 lakhs.

Anura S Hewawasam who was the real owner of the land was also called and corroborated the testimony of the complainant on all the material aspects. This witness stated that he was the owner of the land described in the schedule to the Deed No 975 (P8) which is the land in question and he had the title deed to the said land in question. He categorically stated that he never executed a Deed of Transfer of the land in question by the Deed No. 975 and that he never sold the said land to Eranga Lanka Jayasekera and therefore his name has been falsely entered in the said Deed No. 975 as the seller.
That the entry in the said Deed No. 975 that Anura S. Hewawasam has placed his signature on to this and two other instruments of the same tenor on 05.05.2006 at Polgasowita was a false entry. On his evidence it was clear that since the signature appearing on the said Deed No. 975 as that of Anura S. Hewawasam was not his signature, the signature had been forged. He also clarified that the portion of the attestation by the Respondent as the Notary in the said Deed No. 975 to the effect that the Seller Anura S. Hewawasam was known to him who signed illegibly in English in the presence of the aforesaid witnesses on the 5th day of May 2006 was a false attestation as he had never been to the office of the Respondent. He further stated that that he got to know from the complainant that the land in question belonging to him had been sold by way of a fraudulent Deed attested by the Respondent and he had been taken to meet the Respondent and had subsequently sold 10 perches of the land in question to the Complainant by a different Deed.

C. S. Dahanayake, Assistant Document Officer, Land Registrar (Mt. Lavinia) was also summoned and he explained the procedure that The Deed No. 998 specifies several prior registrations i.e. M 490/52, was followed in registering deeds in the Land Registry .He explained the steps taken to register Deeds bearing Nos. 998 and 975.Deed No. 998 had been handed over on 14.08.2006 to the Land Registry and Day Book No. 37790 had been assigned to it and the said Deed had been registered on 14.08.2006 in the Land Register in Volume M 2971/54M 259/281, M 307/243, M 462/48 and M 200/106.Therefore the relevant registers depicted as prior registrations had been examined and it had been found that the land described in the schedule to the Deed No. 998 has no relevance to the lands registered under the prior registrations given in the Deed. Therefore Deed No. 998 (P2) had been registered in a fresh volume and fresh folio. He further testified that Deed No. 975 (P8) has been handed over on 12.09.2006 to the Land Registry and Day Book no. 43675 had been assigned to it and the said Deed has been registered on 12.09.2006 in the Land Register in Volume M 2981/161.The prior registrations given in Deed No. 975 also had no relevance to the land described in the schedule to the said Deed and therefore there was an error in the prior registrations specified in both Deeds bearing Nos. 998 and 975. Although Deed No. 975 ought to have been registered prior to Deed No. 998, what has been registered first is Deed No. 998 and Deed No. 975 has been registered later which was improper. Had the Deed No. 975 been registered first as it ought to have been done, the said registration should have been incorporated in Deed No. 998 by the relevant Notary since the buyer in Deed No. 975 is the seller in Deed No. 998. Hence he confirmed that both Deeds bearing Nos 998 and 975 have not been registered by the Respondent Attorney in the proper sequence and that the prior registrations therein were erroneous.

Madurappulige Saleen, Management Assistant, Land Registry (Homagama**)**

This witness was called to give evidence pertaining to the monthly lists that had to be submitted by the Respondent to the Land Registry Homagama along with the duplicates of the Deeds attested by the Respondent. In his testimony he stated that the Respondent came within the Notarial jurisdiction of the Homagama Land Registry and therefore the Respondent was duty bound to submit monthly lists to the said Registry along with the duplicates of the Deeds attested by him during the course of every month on or before the 15th day of the following month. The Respondent's name was registered as a Notary coming within the jurisdiction of the Land Registry Homagama and his office address is given as Wethara, Polgasowita. And that the Respondent has been

registered as a Notary coming within its jurisdiction since 12.06.2003 to date. .As an example it was stated that since the Deed No 998 (P2) which had been attested on 05.07.2006 by the Respondent, its duplicate ought to have been submitted to the Land Registry Homagama on or before 15th August 2006. But the Respondent had failed to submit the duplicate of the said Deed on or before the relevant date .He also confirmed that since the Deed No. 975 (P8) which has been attested on 05.05.2006 by the Respondent, its duplicate ought to have been submitted to the Land Registry Homagama on or before 15th June 2006. But the Respondent had failed to submit the duplicate of the said Deed on or before the relevant date. .He stated that whether a duplicate has been tendered to the Land Registry can be verified from the Notarial Check Book wherein all the duplicate deeds that have been tendered are entered. Upon perusing the relevant Notarial Check Book, the witness confirmed that the Respondent has not tendered any duplicates of deeds attested by him in the month of July 2006 and August 2006. For the month of June 2006 a monthly list has been submitted by the Respondent incorporating 3 Deeds i.e. 995, 996 and 997 and therefore Deed No. 975 has been left out by the Respondent from the monthly list he submitted in June 2006. Apart from the aforesaid 3 deeds 995, 996 and 997, the Respondent has not tendered any duplicates of Deeds for the year 2006 nor has he submitted nil lists. It was clarified from the witness as to the procedure to be adopted when a notary does not attest any deed for a particular month and the witness stated that even if no deed is attested by a notary in a particular month, he is duty bound to submit a "Nil List" to the Land Registry stating that no deed has been attested by him during the relevant month. The Respondent has not submitted even a nil list for the months of July 2006 and August 2006

D. T. De Silva Lokubogahawatte, Administrative Secretary, BASL was only a formal witness whose evidence was led in order the mark the Original Record (P20) of the preliminary inquiry by the Panel "D" of the BASL under reference No. PPC/1657 against D.S. Bodhinagoda, the Respondent.

It is noteworthy that the Respondent did not lead evidence, but in his written submissions claimed that no monetary loss was suffered. He led no evidence on this matter at the trial. He has baldly denied that any monetary loss was suffered by the complainant by a bald statement in his written submissions. Had this evidence been given he could have been cross examined and the truth or falsity of these statements could be ascertained by the Court. The Respondent instead chose not to call evidence nor give evidence in this case. The Court has considered the

transfer of the land and the mitigating factors regarding the pecuniary loss caused to the complainant. The Judicature Act No. 2 of 1978 sets out the law governing Rules. Section 42(2) of the said Act empowers the Supreme Court to suspend from practice or remove from office every Attorney-at-Law who shall be guilty of any deceit, malpractice, crime or offence after an inquiry.

The Rule issued against the Respondent embodies charges of malpractice and/or deceit , ***In Re Arthenayake, Attorney-at-Law*** [1987] 1 SLR 314, it was held that

> *"The question of law is whether the acts which the respondent has committed amount to a malpractice within the ambit of Section 42(2) of the Judicature Act……*
>
> *…….Without endeavouring to embark on a precise definition of the word malpractice in section 42(2) of the Judicature Act, it is my view that to warrant the exercise of the disciplinary powers of this court on the ground that an attorney is guilty of malpractice the professional misconduct complained of must be of such a character as, in the opinion of this court, could fairly and reasonably be regarded as being improper or deplorable or reprehensible when judged in relation to the accepted standards of professional propriety and competence." per Athukorale, J.*

The testimony of all the witnesses was clear and cogent and remained unassailed even under cross examination. It is noteworthy that the Respondent did not show cause at this inquiry and no evidence was led on his behalf despite the opportunity granted to him.

Therefore it has been established by evidence that the complaint of the Complainant is well founded and that the Respondent has mislead the complainant and deceived him regarding the title to the land in question and proceeded to attest two fraudulent Deeds bearing No.s 998 and 975. Even the title report given to the Complainant by the Respondent is a false title report.

The intention of deceiving the Complaint can be clearly attributed to the Respondent by the facts that the Respondent attested two fraudulent Deeds and handed over a false title report and also by the fact that the Respondent failed to submit the duplicates of the said fraudulent deeds to the Land Registry of Homagama as required in terms of the Notaries Ordinance. The conduct of the Respondent amounts to malpractice and deceit within the meaning of Section 42(2) of the Judicature Act No. 2 of 1978.

The Respondent, after having attested fraudulent deeds and thereby causing grave financial loss to the complainant, has deliberately failed to honour even the settlement he agreed to before the BASL. Therefore it is

abundantly clear that the Respondent has made a promise without intending to honour it which also tantamount to dishonourable conduct unworthy of an Attorney-at-law.

From the evidence adduced particularly the evidence of the Complainant, the representative of the Land Registry of Mt. Lavinia and the representative of the Land Registry Homagama, it is amply clear that the Respondent has failed to observe the Rules to be observed by Notaries as stipulated in Section 31 of the Notaries Ordinance No. 1 of 1907 as amended. The specific Rules that the Respondent has failed to observe which are pertinent to this matter are the Rules pertaining to the search of the Registers in the land registry before executing deeds affecting lands [Subsection (17)(a) and (17)(b)], insertion of correct date of execution of the deed [Subsection 18], attestation (Subsection 20) and transmission of duplicates of deeds to the Registrar of Lands [Subsection 26 (a) and 26(b)]which are reproduced below:

Notaries Ordinance Section 31 subsections:

> *17(a)- "Before any deed or instrument (other than a will or codicil) affecting any interest in land or other immovable property is drawn by him, he shall search or cause to be searched the registers in the land registry to ascertain the state of the title in regard to such land and whether any prior deed affecting any interest in such land has been registered."*
>
> *17)(b)- "If any such prior deed has been registered, he shall write in ink at the head of the deed the number of the register volume and the page of the folio in which the registration of such prior deed has been entered*
>
> *Provided that if the parties to the transaction authorize the notary in writing to dispense with the search, the search shall not be compulsory, but he shall before the deed or instrument is tendered for registration write at the head thereof the reference to the previous registration, if any."*
>
> *18-"He shall correctly insert in letters in every deed or instrument executed before him the day, month, and year on which and the place where the same is executed, and shall sign the same."*
>
> *20-"He shall without delay duly attest every deed or instrument which shall be executed or acknowledged before him, and shall sign and seal such attestation….."*
>
> *26(a)-" He shall deliver or transmit to the Registrar of Lands of the district in which he resides the following documents, so that they shall reach the registrar on or before the 15th day of every month, namely, the duplicate of every deed or instrument(except wills or codicils) executed or acknowledged before or attested by him during the preceding month, together with a list in duplicate (monthly list), signed by him, of all such deeds or instruments…."*

26(b)- "if no deed or instrument has been executed before any notary in any month, the notary shall, unless he is absent from Sri Lanka, furnish a nil list for that month on or before the 15th day of the following month.

On a consideration of the totality of the evidence and documents produced at this inquiry, the acts of malpractice and deceit by the Respondent have been established by overwhelming evidence. Applying the standard of proof required in inquiries of this nature the Respondent is found guilty of the charges levelled against him in the Rule and hold that the Respondent committed acts which amount to malpractice and/or deceit within the ambit of Section 42(2) of the Judicature Act.
.

Considering the nature of the malpractice and deceit committed by the Respondent the legal profession has been brought into disrepute. The Respondent's conduct is plainly dishonourable and disgraceful and certainly unworthy of an Attorney-at-Law. Hence the Respondent has breached Rules 60 and 61 of the Supreme Court (Conduct of Etiquette for Attorneys-at-Law) Rules 1988.

In deciding what course of action should be taken against the Respondent the court is mindful of the case of ***In Re Srilal Herath [1987] 1SLR*** **57 which held that:**

"The question that the Court has to ask itself is whether a person who has been found guilty of misappropriation of a client's money and has aggravated his offence by his refusal to make good that amount despite repeated requests, can be safely entrusted with the interests of unsuspecting clients who may have recourse to him. There can be no two answers to this question. Hence there is one course open to us, namely to strike off the Respondent from the Roll"- Per Kulatunga J.

In terms of the above evidence adduced including the documents placed before Court there is proof that the Respondent is guilty of malpractice and deceit within the ambit of Section 42(2) of the Judicature Act (read with Rule 79 of the Supreme Court Rules of 1978) which renders the Respondent unfit to remain as an Attorney-at-Law, and this Court accordingly removes him from the role of Attorney-at-law and the Registrar of the Supreme Court to remove his name from the role of Attorney.

.....	.....	.....
Justice Thilakawardane 20-02-2013	Justice Imam 20-02-2013	Justice Dep 20-02-2013

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

In the matter of a Rule in terms of Section 42(2) of the Judicature Act No 02 of 1978, against,

Nimal Jayasiri Weerasekara,
Attorney - at - Law of the Supreme Court

RESPONDENT

Secretary,
Bar Association of Sri Lanka,
Colombo 12.

SC RULE 03/2011

COMPLAINANT

-VS-

Mr. Nimal Jayasiri Weerasekara,
Attorney – at – Law,
No. 21 A, Cooray Mawatha,
Moragasmulla,
Rajagiriya.

RESPONDENT

BEFORE : S. Marsoof, PC, J

P.A. Ratnayake, PC, J and

C. Ekanayake, J

COUNSEL : Rohan Sahabandu, PC, for the Bar Association of Sri Lanka

Ms. M.N.B. Fernando, Deputy Solicitor General for the Attorney General

G.R.D. Obeysekara for the Respondent.

INQUIRY DATES : 2.12.2012, 17.2.2012, 24.5.2012, 5.11.2012, 18.3.2013, 14.5.2013.

DECIDED ON : 28.6.2013

SALEEM MARSOOF J.

Rule dated 21st September 2011 was issued on the Respondent Attorney-at-Law (herein after referred to as the Respondent) to show cause why he should not be suspended from practice or be removed from office of Attorney-at-Law of the Supreme Court in terms of Section 42(2) of the Judicature Act No. 2 of 1978. This was a sequel to the conviction of the Respondent by the High Court of Colombo in case No. 2998/06 on four chargers relating to the preparation of four fraudulent deeds and the forgery of the signatures of Mahavidanalage Munidasa Charles Ferdinando, the then Chairman of the Board of Directors of the National Housing Development Authority (NHDA) and Liyanage Don Raja Gladis Samarasundara, who was at the relevant times a Member of the said Authority, and the imposition by the said Court on the Respondent on 23rd May 2008 of a sentence of 2 years rigorous imprisonment suspended for 5 years and a fine of Rs.2,000/-, with a default sentence of 6 months imprisonment, in respect of each of the said charges.

Upon the Director of the Criminal Investigation Department intimating the aforesaid particulars to the Secretary of the Bar Association of Sri Lanka (BASL) by his letter dated 22nd August 2008, the Ethics Committee of the Bar Association of Sri Lanka (BASL), recommended to the Executive Committee of the said Association to refer the matter to this Court for appropriate action, and by the letter of the Secretary of the said Association dated 12th January 2009 address to the Registrar of this Court, this Court was informed that the Executive Committee of the Bar Association had unanimously approved the said recommendation.

Thereafter, on a direction of His Lordship the Chief Justice, the Registrar of this Court, by a letter dated 17th August 2010, called from the Registrar of the High Court of Colombo, the record of the Colombo High Court in the aforesaid case No. 2998/06, and the Registrar of the High Court by his letter dated 29th November 2010, informed this Court that the record in the said case cannot be traced in the Record Room of the said Court, and that every effort is being made to trace the same. On 20th January 2011, the relevant High Court judge also intimated to the Judicial Service Commission that the record in the case could not be traced after extensive search in the Record Room of the said Court. This resulted in tremendous delay in the drafting and issue of the Rule.

The Rule dated 21st September 2011, served on the Respondent, in the exercise of the disciplinary powers conferred on this Court by virtue of Section 42(2) of the Judicature Act, reads as follows:

> WHEREAS the Director, Criminal Investigation Department by letter dated 22nd August 2008 has notified the Bar Association of Sri Lanka that Nimal Jayasiri Weerasekara Attorney-at-Law of No. 21A, Cooray Mawatha, Moragasmulla, Rajagiriya had been found guilty by the High Court of Colombo in Case No. 2298/06 and had been sentenced;

AND WHEREAS the said letter further discloses, that the charge is in respect of forgery and preparation of fraudulent deeds and that on or about 03rd May 2008 you pleaded guilty to all four charges and was sentenced to 2 years Rigorous Imprisonment suspended for 5 years respectively on all the four charges and also fine in a sum of Rs. 2,000/- each on all four charges aggregating to a sum of Rs. 8,000/-, and in default of the payment of the fine, to 6 months imprisonment respectively on all four charges, aggregating to a period of 24 months imprisonment.

AND WHEREAS in view of the serious nature of your conduct as an Attorney-at-Law and the sentence imposed by the High Court of Colombo, the Ethics Committee of the Bar Association recommended to the Executive Committee of the Bar Association, and the said Executive Committee, unanimously approved the recommendation of the Ethics Committee to refer this matter to the Supreme Court to take appropriate necessary action against you;

AND WHEREAS your conduct discloses

(a) That you being an Attorney-at-Law have conducted yourself in a manner which is reasonably regarded as disgraceful or dishonourable by Attorneys-at-Law of good repute and competency which renders you unfit to remain an Attorney-at-Law;
(b) That you being an Attorney-at-law has conducted yourself in a manner which is inexcusable and which is regarded as deplorable by your fellows in the profession;
(c) That you being an Attorney-at-Law has conducted yourself in a manner unworthy of an Attorney-at-Law.

AND WHEREAS, you have by reason of the aforesaid acts and misconduct, committed

(a) malpractice within the ambit of Section 42(2) of the Judicature Act No. 2 of 1978, which renders you unfit to remain as an Attorney-at-Law;
(b) deceit within the ambit of Section 42(2) of the Judicature Act No. 2 of 1978, which renders you unfit to remain as an Attorney-at-Law;
(c) a crime and an offence within the ambit of Section 42(2) of the Judicature Act No. 2 of 1978, which renders you unfit to remain as an Attorney-at-Law;
(d) acted in breach of Rule 60 and 61 of the Supreme court (Conduct of and Etiquette for Attorney-at-Law) Rules 1988 made under Article 136 of the Constitution of the Democratic Socialist Republic of Sri Lanka, and thereby conducted yourself in a manner which would be reasonably regarded as disgraceful and dishonourable by Attorneys-at-Law of good repute and competence, and which renders you unfit to remain as an Attorney-at-Law, and also that your conduct in inexcusable and regarded as deplorable by your fellows in the profession and that your conduct is unworthy of an Attorney-at-Law.

Accompanying the Rule was a list of witnesses and documents.

In response to the Rule issued on him, the Respondent appeared in court on 5th October 2011, and moved for a date to plead thereto, and the matter was fixed to be mentioned on 2nd November 2011. When the case was so mentioned on 2nd November 2011, the Respondent appeared in Court, represented by Counsel and pleaded guilty to the Rule. On that occasion, Mr. Obeysekara who appeared for the Respondent moved that the matter be fixed for inquiry to enable Senior Counsel to make submissions in mitigation of sentence. Court accordingly fixed the case for inquiry to 2nd December 2012, but in view of the seriousness of the Rule, made order forthwith suspending the Respondent from practicing as an Attorney-at-law and as Notary Public.

When the Rule was taken up for inquiry on 2nd December 2012, it transpired that there was a dearth of information in regard to the nature of the offences for which the Respondent had been convicted, and since the material available to Court was insufficient even for the purpose of considering the question of sentence to be imposed on the Respondent, the inquiry was postponed to 17th December 2012, to enable the following steps to be taken by the Registrar of this Court:-

1. Notice the Registrar of the High Court of Colombo to produce in this Court the original record in High Court of Colombo case No. 2998/06. If the said record cannot be traced, he should also commence a formal inquiry as to how this record has disappeared or has become untraceable;

2. Notice Director, of the Criminal Investigations Department (CID) to furnish to this Court all material pertaining to the criminal investigations which have been conducted apparently under his file bearing No. 461/00/CM, which led to the Respondent being prosecuted; and

3. Keep in his safe custody the said record and files once they are tendered to him, and make same available on the next date on which this case will be resumed.

The Registrar of the High Court of Colombo appeared in Court on 17th December 2011, and he informed Court that a formal inquiry was conducted regarding the loss or misplacement of the record in High Court of Colombo case No. 2998/06, but that he has not been able to trace the record in the said case. He also informed Court that he had to write to the Director of the Criminal Investigation Department (CID), to obtain a copy of the order of the High Court dated 23rd May 2008 by which the Respondent was sentenced.

In these circumstances, Court inquired from the learned Counsel for the Respondent as to whether he is in a position to furnish copies of the proceedings in, and orders made by, the High Court in the said case, and he informed Court that he is not in a position to do so, as the copy of the brief was not available with the learned Counsel who appeared for the Respondent in the High Court. He also states that the Respondent has not maintained or kept copies of the proceedings and orders of the High Court in the relevant case. Since the Director CID had not responded to the direction issued by this Court to furnish a report in regard to the investigation that was carried out by the CID that led to the prosecution of the Respondent in the High Court case, the inquiry was re-fixed to be resumed on 24th May 2012, and the Director of the CID was directed to furnish a report along with all relevant statements recorded in the course of the investigation and any

copies of the proceedings in the High Court of Colombo in case No. 2998/06. The Director CID was requested to be present in Court on the next date and to furnish all such material directly to court.

On 24th May 2012, the case could not be resumed as the Bench was not properly constituted, and the case was re-fixed to be resumed on 5th November, 2012. However, even by that date no report had been furnished by the Director, CID, who however had in compliance with the order made by Court on 17th December 2011, detailed an Assistant Superintendent of Police attached to the Criminal Investigations Department, Gnandra Shani Abeysekara to appear in Court with the original files maintained by his Department pertaining to the matter. The said officer, indicated that the following documents that may be relevant for the determination of this Rule are available in the said files:-

1. First complaint made by the National Housing Authority (NHDA) dated 21st July 1999 and the statements made to the CID by the then Chairman NHDA dated 19th August 1999;
2. The statement made to the CID by the Respondent dated 18th January 2001 by the Respondent;
3. The report of the Examiner of Questioned Documents dated 9th September 2003 made in response to an order of the relevant Magistrate in MC Colombo B2550/1/00, with respect to which the Attorney General's reference is CR 1/116/2005.
4. Deed No. 976 dated 7/9/1998.
5. Deed No. 1096 dated 1/2/1999.
6. Deed No. 1093 dated 1/2/1999.
7. Deed No. 1094 dated 1/2/1999 all executed by the Respondent as Notary Public.

Court directed the Director CID to furnish seven certified copies each of the said documents to the Registrar of Court within one month, and also directed him to ensure that the integrity of the file or files maintained by the CID with respect to this case will not be affected in the process of photocopying and that all the said files will be kept in safe custody and produced in Court on the next date of hearing. Court also directed that WIP, Dinesha Eranthi Fernando and ASP, Piyasena Ampawila, who had been responsible for the investigation of this case to be present in Court on the next date of inquiry, ready to testify, if so required by Court.

The Registrar of this Court was directed that upon receipt of the certified copies of the aforesaid documents to have one copy of all documents inserted into the original docket and the other 3 copies included in the respective Judge's Briefs. The Registrar was also directed to retain 3 further sets of copies of the relevant documents which may be handed over to learned Deputy Solicitor General Mrs. M.N.B. Fernando, Mr. Rohan Sahabandu P.C., who appears for the Bar Association of Sri Lanka and Mr. Obeysekara who appears for the Respondent, who will call over at the Registry to receive the same. Learned Counsel for the Respondent did not have any objection to the aforesaid procedure being adopted for the purpose of obtaining the necessary certified copies from the CID, who also indicated that he is instructed that the Respondent has no objection to the admission of certified copies of the aforesaid documents as evidence. The inquiry was thereafter re-fixed to be resumed on 18th March 2013.

The inquiry could not be resumed on 18th March 2013 as the Bench was not properly constituted, and ASP, Priyasen Ampawila, who was present in Court as previously directed, informed Court that Dinesha Eranthi Fernando, who had conducted the investigations under his supervision, is now overseas, but he was willing to testify, if so required. Learned Counsel for the Respondent stated that he has been furnished by the Registrar of this Court, certified copies of the aforesaid documents. He also stated that he does not have any objections to the reception in evidence of the said documents. The inquiry was re-fixed to be resumed on 14th May 2013.

On 14th May 2013, when the inquiry was resumed, Court indicated that since the certified copies of documents furnished by the Director CID have been admitted by learned Counsel for the Respondent without objection, it was not necessary to hear any further evidence. Learned Counsel for the Respondent thereafter addressed Court for mitigation of sentence. He stressed the fact that the Respondent had been convicted by the High Court on him pleading guilty, and that even before this Court he has not contested the Rule, but only wished to place certain submissions with respect to the sentence to be imposed by Court. He submitted that the Respondent had been admitted and enrolled as an Attorney at law of the Supreme Court of Sri Lanka on 3rd November 1989, and had been in practice as a legal practitioner for little over 23 years. He also submitted that he had been practising as a Notary Public since 11th July 1990, and had his notarial office initially at No. 7 Belmont Street, Colombo 12, and since 1992 at No. 34/1/1 of the Lawyers' Offices Complex, St. Sebastian Hill, Colombo 12. Mr. Rohan Sahabandu P.C, who represented the Bar Association of Sri Lanka and learned Deputy Solicitor General were also heard in regard to the sentence.

Before considering the sentence, it is necessary to examine the evidence in regard to the nature of the offences for which the Respondent pleaded guilty in the High Court of Colombo in case No. 2998/06 and was sentenced, since the Rule issued by this Court is primarily based on the said conviction and sentence. Although it is clear that the Respondent had been indicted for offences relating to forgery and the preparation of four fraudulent deeds, certified copies of which have been made available to Court by the Director of the Criminal Investigation Department (CID), since neither the Attorney-General, the Registrar of the High Court of Colombo nor the Director of the CID could furnish to Court a copy of the indictment, it is not clear as to exactly how the four charges for which the Respondent had pleaded guilty, had been formulated. All that we have are the first complaint made by the then Chairman of the National Housing Development Authority, the statement made by the Respondent to the CID, the relevant fraudulent deeds on which the signatures of the Chairman and a Director of the National Housing Development Authority were allegedly forged, and the report of the Examiner of Questioned Documents dated 9th September 2003 relating to the genuineness of the questioned signatures on the deeds, which he had compared with certain samples of signatures made available to him.

However, it appears from the said deeds bearing No. 976 dated 7.7.1998 and Nos. 1096, 1093 and 1094 dated 1.2.1999, that they were purportedly executed jointly by the National Housing Development Authority as First Named Vendor, and Dublee Holdings Lanka (Pvt) Ltd., as Second Named Vendor, for the purpose of conveying title to and transferring possession of certain houses constructed by the Second Named Vendor on certain sub-lots of Plan No. 163 dated 4th August 1987 and made by D.K.Dayaratne, Licensed Surveyor, belonging to the First Named Vendor and

which formed part of Lot 1 of Preliminary Plan No. CO 6988 situated in Kadiranawatta in Model Farm Road, Mattakkuliya, as contemplated by a Developers Agreement entered between the said two Vendors, to specific vendees named in the said deeds, who had agreed to purchase the same. The Respondent was the Notary Public before whom the aforesaid deeds were purportedly executed, and in the attestation clauses at the end of the said deeds, he has certified *inter alia*, that the Common Seal of the said National Housing Development Authority (NHDA), which was the First Named Vendor, was affixed to the deeds in his presence, and in attestation whereof, the same was signed by the said Mahavidanalage Munidasa Charles Ferdinando (mis-spelt in all the said deeds as "Fernando" in the attestation clauses thereof) and Liyanage Don Raja Gladis Samarasundera, both of whom were not known to him, in the presence of two witnesses both of whom were known to him "in the presence of one another, all being present together at the same time at the National Housing Building, Sir Chittampala A Gardiner Mawatha, Colombo 2 on the dates specified in the said deeds.

It is significant that the Common Seal of the National Housing Authority (NHDA) is conspicuous by its absence in every one of the aforesaid deeds, despite the Respondent's certification therein that the said Seal was affixed to the deeds in his presence, and was authenticated by the signatures of the then Chairman of NHDA, Mahavidanalage Munidasa Charles Ferdinando and Director of NHDA, Liyanage Don Raja Gladis Samarasundera, in the presence of two other witnesses, Muttetuwage Jothipala Perera and Ervyn Pathiraja both of 34-1/1, Lawyers' Office Complex, St. Sebastian Hill, Colombo 12, which address is the same as the address of the notarial office of the Respondent. It is material to note that in his first complaint to the Police dated 19th August 1999, Ferdinando has categorically denied the execution of the aforesaid deeds, and also contested the genuineness of his purported signatures and those of the other signatory, Samarasundera, and the fact that they have all been forged is established beyond any doubt by the report of the Examiner of Questioned Documents (EQD) C.D. Kalupahana, dated 9th September 2003 which reveals that while the purported signatures of the aforesaid signatories on deed No. 976 dated 7th July 1998 have been made using tracings and are "mere drawings and not signatures at all", the purported signatures of the aforesaid signatories on the other three deeds are not of the aforesaid Ferdinando and Samarasundera.

The explanation offered in this regard by the Respondent in his statement dated 18th Janunary 2001 is that he had been the notary who had executed more than sixty deeds of a similar nature on the instructions of Dublee Holdings Lanka (Pvt) Ltd., and that the then Chairman of the said company, Anthony Fernando, had taken over the questioned deeds after they were prepared by the Respondent, ostensibly for the purpose of obtaining the signatures of Ferdinando and Samarasundera, whom he claimed to know personally. However, if this was the case, the conduct of the Respondent not only was in total disregard of the professional duties of the Respondent and in violation of the provisions of the Notaries Ordinance No. 1 of 1907, as subsequently amended, particularly the strict requirements of Section 31(12) of the said Ordinance wherein it is essential that the common seal of any statutory body should be placed on the documents, and attested by two officers of the relevant corporate body, in the presence of two other witnesses who should also be present at the same time and place. Furthermore, in his first complaint of the Chairman of NHDA, Mahavidanalage Munidasa Charles Ferdinando dated 19th August 1999, it is alleged that on the dates the aforesaid deeds were allegedly executed, certain payments were still

outstanding from the Second Named Signatory thereto, namely Dublee Holdings Lanka (Pvt) Ltd., and that in those circumstances, the National Housing Authority (NHDA) would not have executed those deeds unless those dues were first settled, gave rise to the possibility that the Respondent, by failing to comply with the provisions of the Notaries Ordinance might have facilitated the perpetration of a fraud by the officials of the said company on the National Housing Authority.

While the aforesaid circumstances should be taken into consideration in determining the sentence to be imposed on the Respondent, it is also material to take into consideration the fact that this Court could not obtain from the relevant High Court the necessary documentary evidence relating to his conviction by the High Court of Colombo in case No. 2998/06, which material it was fortunate to obtain from the Director of CID. In fact, it has been reported that the original record of the said case had gone missing and could not be traced, and even the formal inquiry conducted by the Registrar of the High Court on the directions of this Court did not produce any results. Learned Deputy Solicitor General who appeared for the Attorney General in this Rule has submitted to Court that the original file maintain in the Attorney General's Department bearing No. CR 1 116/2005 has also disappeared, and all endeavours made to trace the same have failed. The Respondent has also informed Court that he too does not have any documents pertaining to the aforesaid High Court case, nor is the same available with the Counsel who appeared for him in the High Court. This Court had to enlist the assistance of the Director CID for the purpose of obtaining certified copies of a few of the material documents pertaining to the case.

All this give rise to serious doubts as to whether the Respondent himself had any hand in the disappearance of the High Court record and the original file maintained by the Attorney General's Department. The fact that the Respondent, who was convicted of serious offences and was subjected to a suspended sentence, did not have with him important documents relating to his conviction and sentence, does not portray him as a person who can be trusted with the professional responsibilities and obligations of an Attorney-at-law and Notary Public, or as a person of high integrity. It is unimaginable that the original records and files maintained by the High Court of Colombo and the Attorney General's Department, which are the primary institutions involved in law enforcement, could be made to disappear so easily.

In this connection, it is also significant to note that the Respondent, who had pleaded guilty to serious charges in the High Court, which included allegations of forgery and fraud, had got away with a particularly light sentence. These offences were extremely serious, given that the Respondent was a practicing Attorney-at-Law and Notary Public, but only a suspended sentence of imprisonment was imposed on him, along with a very nominal fine, with respect to the charges of which he was convicted. Further, the High Court had failed to keep the Bar Association of Sri Lanka as well as the Supreme Court informed of the conviction and sentencing of the Respondent for these crimes involving professional misconduct. Although the Respondent ultimately pleaded guilty to the Rule issued on him, it is also necessary to take into consideration the fact that had the Director CID not intimated to the Bar Association of Sri Lanka about the conviction and sentencing of the Respondent, the Rule would never have been issued, and without the positive assistance of the Director CID, the Rule would have become unsustainable. I therefore take this opportunity to thank the Director and other officers of the Criminal Investigation Department in regard to the manner in which they came forward to assist Court in this solemn task.

Taking into consideration all these factors including the fact that the Respondent has, on his own plea, been found guilty of malpractice, deceit and a crime within the ambit of Section 42(2) of the Judicature Act No. 2 of 1978 in the discharge of his professional duties, while breaching Rule 60 and 61 of the Supreme Court (Conduct of and Etiquette for Attorney-at-Law) Rules 1988, and has been acting in clear violation of certain principles enshrined in the Notaries Ordinance No. 1 of 1907, as subsequently amended, particularly Section 30(12) and Section 39 thereof, and also taking into consideration the submissions made by the learned Counsel for the Respondent in mitigation of sentence, in the light of the principles relating to sentencing embodied in the decisions of this Court, most of which have been considered in the decision of this Court in *In Re Arthenayake, Attorney-at-law,* (1987) 1 SLR 314, and more recent decisions of this Court such as *D.M.A. Jeewanananda Dissanayake v. D.S. Bodhinagoda, Attorney-at-law* SC Rule 01/2010 SC Minutes dated 20.2.2013, I make order suspending the Respondent from practicing his profession as an Attorney-at-law for a period of eight years with effect from 2nd November, 2011 (date of his first suspension in regard to this complaint). In terms of Section 19(2) of the Notaries Ordinance, as subsequently amended, the Respondent shall be disqualified from practicing as a Notary Public during the said period of suspension.

The Registrar of this Court shall forthwith despatch to the Registrar-General a copy of this order, and the Registrar-General is hereby required to take steps to give effect to the suspension of the Respondent as contemplated by Section 19(2) of the Notaries Ordinance, as subsequently amended.

In all the circumstances of this case, I would not make an order for costs.

JUDGE OF THE SUPREME COURT

P.A. RATNAYAKE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

C. EKANAYAKE J.

I agree.

JUDGE OF THE SUPREME COURT

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

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

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

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

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

Vs.

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

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

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

instructed by Athula de Silva.

ARGUED ON : 08.11.2013

DECIDED ON : 12.11.2013

TILAKAWARDANE. J.

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

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

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

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

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

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

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

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

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

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

> "*No Appeal shall lie against any order of ejectment made by a Magistrate under subsection (1)".*

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

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

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

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

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

punitive costs is justified.

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

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

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

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

against the institution of such multiple Applications in the future.

JUDGE OF THE SUPREME COURT.

SRIPAVAN. J

I agree.

JUDGE OF THE SUPREME COURT

WANASUNDERA.P.C. J

I agree.

JUDGE OF THE SUPREME COURT

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

In the matter of an Application for Special Leave to Appeal to the Supreme Court in terms of Article 128 of the Constitution.

Mr. A.M. Ratnayake
G 4/2, Railway Bungalow,
Bungalow Road,
Ratmanala
Presently at
No 101/2, adjoining to the temple
Panadura

PETITIONER-PETITIONER

SC SPL LA No. 173/2011

CA Writ No. 277/2011

VS

1. Administrative Appeals Tribunal,
No.5, Dudly Senanayake Mawatha,
Colombo 08.

2. Justice N.E. Dissanayake,
Chairman,
Administrative Appeals Tribunal,
No.5, Dudly Senanayake Mawatha,
Colombo 08.

3. Justice Andrew Somawansa,
Member,
Administrative Appeals Tribunal,
No.5, Dudly Senanayake Mawatha,
Colombo 08.

4. Mr. E. T. A. Balasingham
Member,
Administrative Appeals Tribunal,
No.5, Dudly Senanayake Mawatha,
Colombo 08.

5. Vidyajothi Dr. Dayasiri Fernando
Chairman,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita.

6. Mr. Palitha M. Kumarasinghe P.C.
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita.

7. Mrs. Sirimjavo A. Wijeratna
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita.

8. Mr. S.C. Mannapperuma,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita

9. Mr. Ananda Seneviratne
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita

10. Mr. N.H. Pathirana,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita

11. Mr. S. Thillandarajah,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita

12. Mr. M.D.W. Ariyawansa,
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita

13. Mr. A. Mohamed Nahiya
Member,
Public Service Commission,
No. 177, Nawala Road,
Narahenpita

14. Secretary,
Public Service Commission,
11th Floor, West Tower,
World Trade Centre,
Colombo 01.

15. General Manager Railways,
Railways Headquarters,
Colombo 10.

16. Inquiring Officer
Public Service Commission,
Administrative Appeals Tribunal
No. 5, Dudley Senanayake Mawatha
Colombo 08.

17. Secretary,
Ministry of Transport (Railways)
D.R. Wijayawardena Mawatha,
Maradana,
Colombo 08.
18. Hon. Attorney General
Attorney – General's Department,
Colombo 12.

RESPONDENT–RESPONDENT

19. Mr. Edmond Jayasooriya,
Member,
Administrative Appeals Tribunal
No. 5, Dudley Senanayake Mawatha
Colombo 08.

ADDED RESPONDENT–RESPONDENT

BEFORE: Hon. Marsoof, PC, J,

Hon. Ratnayake, and

Hon. Imam J

COUNSEL:	S.N. Vijithsingh with B.N. Thamboo for the Petitioner Suren Gnanaraj, SC for the 5th – 15th, 17th and 18th Respondents
ARGUED ON:	20.06.2012
WRITTEN SUBMISSIONS ON:	18.08.2012
DECIDED ON:	22.02.2013

SALEEM MARSOOF J:

When this application for special leave to appeal filed in this Court in terms of the Article 128 of the Constitution against the decision of the Court of Appeal dated 2nd August 2011 was taken up for support on 22nd June 2012, the case had to be re-fixed for support on an application by the learned Counsel for the Petitioner-Petitioner (hereinafter referred to as the Petitioner). However, learned State Counsel who appeared for the 5th – 15th, 17th and 18th Respondents indicated to Court and learned Counsel for the Petitioner that he would take up a preliminary objection to the maintainability of this application for special leave to appeal on the ground that it is precluded by the provisions of Article 61A of the Constitution, and both learned Counsel moved for time to file written submissions on that question. After the filing of the written submissions, the matter was taken up for further oral submissions before this Bench. It has to be stated at the outset that the preliminary objection taken up by learned State Counsel was confined to Article 61A of the Constitution and was not based on the ouster clause contained in Section 8 (2) of the Administrative Appeals Tribunal Act No.4 of 2002.

This application for special leave to appeal has been filed against the decision of the Court of Appeal dated 2nd August 2011 by which that court refused to issue notice in an application for writs of *certiorari* and *mandamus* filed by the Petitioner in that court, with respect to an order of the Administrative Appeals Tribunal (sometimes hereafter referred to as AAT) dated 22nd February 20011 (P8). In paragraph 14 of the application filed by him in the Court of Appeal as well as in paragraph 21(i) of the application filed in this Court seeking special leave to appeal, the Petitioner has challenged the validity of the said order of AAT.

Article 61A of the Constitution, which was introduced by the Seventeenth Amendment to the Constitution of Sri Lanka, provides as follows:-

> *Subject to the provisions of paragraphs (I), (2), (3), (4) and (5) of Article 126, no court or tribunal shall have power or jurisdiction to inquire into, or pronounce upon or in any manner call in question any order or decision made by the Commission, a Committee, or*

any public officer, in pursuance of any power or duty conferred or imposed on such Commission, or delegated to a Committee or public officer, under this Chapter or under any other law.

On the face of it, the above quoted provision of the Constitution, which constitutes a Constitutional ouster of jurisdiction, does not apply to the impugned decision of AAT, it being specifically confined in its application to the orders or decisions of the Public Services Commission, a Committee or any public officer made in pursuance of any power or duty conferred or imposed on such Commission, or delegated to such Committee or public officer under the relevant Chapter of the Constitution. There is no corresponding provision in the Constitution, which seeks to oust the jurisdiction of the Court of Appeal under Article 140 of the Constitution in regard to a decision of AAT. The Administrative Appeals Tribunal (AAT) was established in terms of Article 59 (1) of the Constitution, and its powers and procedures have been further elaborated in the Administrative Appeals Tribunal Act No.4 of 2002, which contained in Section 8 (2) thereof an ouster clause which is quoted below:-

A decision made by the Tribunal shall be final and conclusive and shall not be called in question in any suit or proceedings in a court of law.

Learned State Counsel has contended strenuously that since AAT has been constituted as contemplated by Article 59 (1) of the Constitution, the Constitutional ouster of jurisdiction contained in Article 61A of the Constitution will apply to AAT as well. He has further submitted that one cannot do indirectly what he cannot do directly, and that a challenge to any order or decision of AAT would amount to indirectly putting in question an order or decision of PSC. Learned Counsel for the Petitioner has submitted equally strenuously that what was sought to be challenged in the Court of Appeal was a decision of AAT on an appeal from PSC, and therefore a decision of AAT can by no stretch of imagination be construed to be a direct or indirect challenge of a decision of the PSC. He submitted that since the *vires* of AAT has been challenged by the Petitioner both in his application to the Court of Appeal as well as to this Court, and as the preclusive clause contained in Section 8 (2) of the Administrative Appeals Tribunal Act does not amount to a constitutional ouster of jurisdiction, the Court of Appeal was possessed of jurisdiction to hear and determine the application of the Petitioner, and this Court is not bereft of jurisdiction to consider this application for special leave to appeal.

This Court is mindful of the facts and circumstances of this case as set out in the application seeking special leave to appeal. The Petitioner was served with a charge sheet on or about 15th April 2003, and after a disciplinary inquiry, was found guilty of all charges. Accordingly, the Public Service Commission (PSC) by its order dated 12th January 2007, proceeded to dismiss the Petitioner from service. Being aggrieved by the said order of the PSC, the Petitioner appealed against the said decision to AAT, which affirmed the PSC decision to terminate the services of the Petitioner, and accordingly dismissed the Petitioner's appeal on 17th March 2009. However, in view of AAT not being properly constituted at the time it made this purported order, the parties agreed in the Court of Appeal in a previous application filed by the Petitioner in that

court, to refer the matter back to AAT for its determination. Thereafter, AAT after re-hearing the Petitioner's appeal, by its order dated 22nd February 2011 (P8) found no basis to interfere with the decision of the PSC dated 12th January 2007, and accordingly dismissed the Petitioner's appeal. It is against this order of AAT that the Petitioner invoked the jurisdiction of the Court of Appeal under Article 140 of the Constitution.

We have carefully examined the submissions of learned Counsel for the Petitioner as well as the learned State Counsel, and we are of the view that in all the circumstances of this case, the Court of Appeal did possess jurisdiction to hear and determine the application filed before it. AAT is not a body exercising any power delegated to it by PSC, and is an appellate tribunal constituted in terms of Article 59 (1) of the Constitution having the power, where appropriate, to alter, vary or rescind any order or decision of the PSC. When refusing notice, the Court of Appeal has not held that it has no jurisdiction to hear and determine the matter in view of Article 61A of the Constitution, and probably had other reasons for refusing notice.

In these circumstances, the preliminary objection has to be overruled, as we are of the opinion that the application of the Petitioner seeking special leave to appeal from the impugned decision of the Court of Appeal has to be considered on its merits. In arriving at this decision this Court has not given its mind fully to the legal effect of Section 8 (2) of the Administrative Appeals Tribunal Act No. 4 of 2002, and in particular to the effect of the provisions of Section 22 of the Interpretation Ordinance No. 21 of 1901, as subsequently amended, as the preliminary objection raised by learned State Counsel was confined to Article 61A of the Constitution.

Accordingly, the preliminary objection is overruled, and the application will be fixed for support on a date convenient to Court. There shall be no order for costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

RATNAYAKE J

JUDGE OF THE SUPREME COURT

IMAM J

JUDGE OF THE SUPREME COURT

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

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

1. Ms. A.M. Noon
46/ 2, Lady Lavinia Housing,
1st Templers Mawatha,
Templers Road,
Mount Lavinia.

2. K.P. Noon,
46/ 2, Lady Lavinia Housing,
1st Templers Mawatha,
Templers Road,
Mount Lavinia.

Petitioners

Case No. S.C.F.R 352/2010

Vs.

1. University Grants Commission,
20, Ward Place,
Colombo 07.

2. Prof. Samaranayake,
Chairman, University Grants Commission, Ward Place,
Colombo 07.

3. Secretary, Ministry of External Affairs, Republic Building,
Colombo 01.

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

Respondents

BEFORE : Mohan Pieris, P.C.,C.J.,
K. Sripavan, J.
E. Wanasundera, P.C.,J.

COUNSEL : Shibley Aziz P.C. with Senany Dayarathna for the Petitioners
Wijeyadasa Rajapaksha, P.C. With Nilantha Kumarage and Rakitha Rajapaksha for the 1st and 2nd Respondents.

Ms.Indika Demuni de Silva, D.S.G. For the Attorney General

ARGUED ON : 06.03.2013 & 30.09.2013

WRITTEN SUBMISSIONS FILED : By the Petitioners on 18.11.2013
By the 1st and 2nd Respondents on 26.09.2013 & 25.11.2013

DECIDED ON : 28.11.2013

K. SRIPAVAN, J.

The Petitioners filed this application seeking admission to the First Petitioner in a University in Sri Lanka for the Academic year 2008/2009 under and in terms of the special quota allocated by the

University Grants Commission for students with foreign qualifications. Leave to proceed was granted on 29.06.2010 for the alleged violation of Article 12(1) of the Constitution. The provision relating to the special quota in respect of the Academic year 2008/2009 appears in the Manual issued by the University Grants Commission titled "Admission to Undergraduates Courses of the Universities in Sri Lanka" marked **P2.**

Clause 18(d) of the said Manual provides, inter alia, as follows:-

> "*Up to 0.5 percent of the places from the proposed intake in each course study have been allocated to Sri Lankan students who have obtained qualifications abroad and foreign students. Accordingly, candidates who have foreign qualifications equivalent to G.C.E. (A/L) Examination of Sri Lanka are eligible to apply.*
>
> *Selections are based on the following priority:*
>
> *(a) Children of Sri Lankan diplomatic personnel who are/have been stationed in other countries provided they have received education abroad for at least three years in the six-year period immediately preceding the qualifying examination. "*
>
> *(*emphasis added)

In addition, the University Grants Commission issued a separate handbook called "Admission of Students with the Foreign Qualifications to Undergraduate Courses of the Universities of Sri Lanka – Academic Year 2008/2009" marked **R1.**

The minimum requirements for admission are contained in Clauses 2:1 and 2.2 of the said Handbook.

The conditions referred to therein are as follows:-

"*2.1 Candidates with impressive results at a foreign examination held outside Sri Lanka deems equivalent to G.C.E.(Advanced Level) Examination of Sri Lanka are also eligible to apply admission to universities in Sri Lanka.*

(a) Applicants are advised to attach to their applications a letter (original) obtained from the Examinations Board concerned, that their educational qualifications are equivalent to the G.C.E (A/L) Examination of the University of London for admission to a university in their own country to follow an undergraduate course of study leading to a Bachelor Degree.

(b) Applicants must make sure that all required passes should be obtained in one and the same sitting under a recognized Board of Examinations.

2.2 In order to become eligible for admission under this special provision,

(a) Sri Lankan candidates should have studied abroad for a period of not less than five years immediately prior to sitting the qualifying examination.

N.B. - Applicants must provide documentary proof.

(b) *In the case of children of Sri Lankans attached to Sri Lanka diplomatic missions abroad or on foreign assignments sponsored by the Government of Sri Lanka, candidates should have studied abroad at least for a period of 03 years in the six-year period immediately prior to sitting the qualifying examination.* (emphasis added)

N.B. - Applicants must provide documentary proof."

Thus, in terms of the Manual and the Handbook issued by the University Grants Commission the governing criteria for admission of the children of Sri Lankans attached to the Sri Lanka Diplomatic Missions abroad to the Sri Lankan Universities for the Academic Year 2008/2009 is that a candidate should have received education abroad for at least three years in the six-year period immediately preceding the qualifying examination. It is not in dispute that during the year commencing from 2002 to 2006, the 1st Petitioner who was a minor at the time, accompanied her father (the 2nd Petitioner), on his foreign postings to Indonesia and Maldives and proceeded her education in those countries, successfully completing the London (O/L) Examination conducted by Ed-excel International. When the 2nd

Petitioner returned to Sri Lanka in 2006, the 1st Petitioner too accompanied her father, joined the Colombo International School and followed a course of study leading to the London G.C.E. (A/L) Examination and sat the said examination in June 2008. The Petitioners in their petition conceded that the 1st Petitioner remained in Sri Lanka and sat for the G.C.E. (A/L) Examination in Colombo and obtained the following results :

Biology	-	A
Chemistry	-	A
Mathematics	-	A
Physics	-	B

Thus, it is obvious that the 1st Petitioner having returned to Sri Lanka in 2006, has studied for a period of two years for the Qualifying Examination in Sri Lanka. The three year period `referred to in Clause 18(d) should be understood as meaning "receiving education abroad in relation to the Qualifying Examination." The failure on the part of the 1st Petitioner to satisfy that she received education abroad during a period of three years prior to sitting the Qualifying Examination, (viz. G.C.E. (A/L) Examination) dis-entitle her to be considered for admission to any Universities in Sri Lanka for the Academic Year 2008/2009. The 1st Petitioner's father too was not attached to any Sri Lankan diplomatic mission after his return in 2006 until he was posted to Abu-Dhabi in January 2008. Thus, the Petitioners have not satisfied the requirements contained in Clause 2.2(b) of the Handbook.

Learned President's Counsel for the Petitioners submitted that the Petitioners were aware of at least two previous instances where candidates gained admission under the said special quota having sat for the Qualifying Examination in Sri Lanka. Learned Counsel urged that Miss D.N.S. Serasinghe, the daughter of a former SLFS Officer and one time High Commissioner was admitted to follow a course of study in Medicine at the University of Colombo in 1996, under and in terms of the special quota contained in Clause 18(d) of the Manual.

The other instance was where Mr. M.H. Noon, the 1st Petitioner's elder brother was admitted to follow a Course in Engineering at the University of Moratuwa in 2007 deviating the provisions contained in Clause 18(d) of the Manual.

Article 12(1) of the Constitution which deals with the right to equality states that "All persons are equal before a law and are entitled to the equal protection of the law". The object of this concept of "right to equality" is to secure every person against any intentional and/or arbitrary discrimination. This concept cannot be understood as requiring officers to act illegally because they have acted illegally on previous occasions. Sharvananda, C.J. in the case of *C.W. Mackie and Company Ltd.* Vs *Hugh Molagoda Commissioner General of Inland Revenue and Others* (1986) 1 S.L.R. 300 observed that -

> "*...the equal treatment guaranteed by Article 12 is equal treatment in the performance of a lawful act. Via Article 12, one cannot seek the execution of any illegal or invalid act.*

Fundamental to this postulate of equal treatment is that it should be referable to the exercise of a valid right, formulated in law in contradistinction to an illegal right which is invalid in law."

The dicta in *C.W. Mackie* (supra) was followed by M.D.H. Fernando, J. in the case of *Gamaethige* Vs. *Siriwardene* (1988) 1 S.L.R. 384 where the learned Judge stated thus:-

Two wrongs do not make a right, and on proof of the commission of one wrong the equal protection of the law cannot be invoked to obtain relief in the form of an order compelling commission of a second wrong."

This question was once again considered by Dr. Shirani Bandaranayake, J. (as she then was) in the case of *Dissanayake* Vs. *Priyal de Silva* (2007) 2 S.L.R. 134 where reference was made to the decision in *C.W. Mackie* (Supra) to hold that Article 12(1) of the Constitution provides only for the equal protection of law and not for the equal violation of the law.

*A*ccordingly, it is evident that the Petitioners cannot rely on the provisions of Article 12(1) of the Constitution which guarantees equality and equal protection of the law to compel the University Grants Commission to act illegally merely because the Commission acted illegally on previous occasions with regard to two other students.

It is observed that in terms of Section 15 (vii) of the Universities Act

No. 16 of 1978 as amended, the selection of students for admission to universities has to be done in consultation with an Admission Committee. Once the governing criteria for admission is decided by the Commission, it is the duty of the Commission to apply the said criteria strictly in terms of the powers vested in it. The conditions given in the Handbook with regard to admission of students to the Universities shall not be changed in an ad hoc manner to satisfy persons attached to the Sri Lankan Missions abroad. In this context, it is imperative to refer to the observation made by S.N. Silva, C.J. in the case of *Patrick Lowe and Others* Vs. *Commercial Bank of Ceylon Ltd.,* (2001) 1S.L.R. 280 at 284:

> "*It is a fundamental principle of law that a person who functions in terms of statutory power vested in him is subject to an implied limitation that he cannot exceed such power or authority. The ultra vires doctrine, now recognized universally, evolved in England on this premise (vide Ashbury Railway Carriage & Iron Co. Ltd., vs. Hector Riche and the Attorney-General vs. The Great Eastern Railway). It follows that what is not permitted by the provisions of the enabling statute should be taken as forbidden and struck down by Court as being in excess of authority.*

Hence, what is not permitted by the Manual and the Handbook should be taken as forbidden and struck down by Court as being in excess of the powers of the University Grants Commission.

Considering the totality of the submissions made by the learned President's Counsel for the Petitioners, the Court holds that the Petitioners have failed to establish any violation of their fundamental rights guaranteed to them in terms of Article 12(1) of the Constitution. The petition is accordingly dismissed. There will be no costs.

JUDGE OF THE SUPREME COURT.

MOHAN PIERIS, P.C.,

I agree.

CHIEF JUSTICE

E. WANASUNDERA, P.C.,J.

I agree.

JUDGE OF THE SUPREME COURT.