SRI LANKA SUPREME COURT **Judgements Delivered (2014)**

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Judgments Delivered in 2014

18/12 /2014	SC (CHC) Appeal No. 38/2010	Distilleries Company of Sri Lanka No. 110, Norris Canal Road Colombo 10 Plaintiff Vs. Randenigala Distilleries Lanka (Private) Limited No. 162, Rajagiriya Road, Rajagiriya Defendant AND NOW In the matter of an appeal in terms of section 5 and 6 of the High Court of Provinces (Special Provisions) Act No.10 of 1996 read with Chapter LVIII of the Civil Procedure Code Randenigala Distilleries Lanka (Private) Limited No. 162, Rajagiriya Road, Rajagiriya Defendant-Appellant Vs Distilleries Company of Sri Lanka No. 110, Norris Canal Road Colombo 10 Plaintiff-Respondent
16/12 /2014	SC/HCCA/ L.A Case No. 279/2012	M. Tudor Danister Anthony Fernando No. 475, Colombo Road, 3rd Kurana Negombo. Plaintiff Vs. Rankiri Hettiarachchige Fredie Perera No. 587/10, Colombo Road, 3rd Kurana, Negombo. Defendant AND BETWEEN Rankiri Hettiarachchige Fredie Perera No. 587/10, Colombo Road, 3rd Kurana, Negombo. Defendant-Appellant Vs. M. Tudor Danister Anthony Fernando No. 475, Colombo Road, 3rd Kurana Negombo. Plaintiff-Respondent AND NOW BETWEEN M. Tudor Danister Anthony Fernando No. 475, Colombo Road, 3rd Kurana Negombo. Plaintiff-Respondent-Petitioner Vs. Rankiri Hettiarachchige Fredie Perera No. 587/10, Colombo Road, 3rd Kurana, Negombo. Defendant-Appellant-Respondent
16/12 /2014	SC FR Application No. 248/2011	Adam Bawa Issadeen, 55/16, A3, Peiris Road, Mt. Lavinia. Petitioner Vs. 1. Sudharma Karunaratne, Director General of Customs, Customs House, Sri Lanka Customs, Bristol Street, Colombo 1. And 20 others. Respondents
16/12 /2014	SC Appeal 96/2011	Jayantha Liyanage Petitioner-Appellant Vs Commissioner of Elections Election Secretariat No.2, Sarana Mawatha, Rajagiriya Respondent-Respondent
16/12 /2014	SC CHC APPEAL 53/2006	1. Nihal Seneviratne, No. 22, Mile Post Avenue, Colombo 03. 2. Jeevana Priyantha Seneviratne, No. 11/1, Mahanuga Gardens, Colombo 03. DEFENDANTS - APPELLANTS -Vs- State Bank of India, No. 16, Sir Baron Jayatilaka Mawatha, Colombo 01. PLAINTIFF - RESPONDENT
16/12 /2014	SC (CHC) Appeal No. 29/2003	Gamini Ranasinghe, No. 27, Kandawala Road, Ratmalana. PLAINTIFF - APPELLANT -Vs- Commercial Bank of Ceylon Limited, No. 21, Bristol Street, Colombo 01. DEFENDANT - RESPONDENT

16/12 /2014	SC [FR] Application 637 / 2009	1. Lake House Employees Union 2. B.M.D. Athula, President 3. Dharmasiri Lankapeli, General Secretary All of Lake House Employees Union, 35, D.R. Wijewardena Mawatha, Colombo 10. PETITIONERS -Vs- 1. Associated Newspapers of Ceylon Ltd, No.35, D.R. Wijewardena Mawatha, Colombo 10. 2. B. Padmakumara, Chairman / Managing Director. 3. Captain P. B. L. Silva, Deputy Security Manager, Associated Newspapers of Ceylon Ltd, No.35, D.R. Wijewardena Mawatha, Colombo 10. 4. Hon. Attorney General, Attorney General's Department, Colombo 12. RESPONDENTS
16/12 /2014	SC APPEAL No. 125/2010	Nandasena Wickramasekara Rajapaksha, No. 51, New Town, Kataragama. DEFENDANT - APPELLANT - APPELLANT -Vs- 1. Wanniarachchi Kankanamalage Temawathie, 2. Wanniarachchi Kankanamalage Julie Nona, Both of No. 104, Old Buttala Road, Kataragama. PLAINTIFFS – RESPONDENTS - RESPONDENTS
16/12 /2014	SC Appeal No. 193/2011	K. Mary Margret Fernando of Thopputhota, Waikkal. Substituted-Plaintiff-Respondent-Petitioner-Appellant -Vs- 1. Beeta de Silva of Guest House and Hotel, Anuradhapura. 2. L. Sarathchandra de Silva, Assistant Manager, Guest House and Hotel, Anuradhapura Defendants-Appellants-Respondents-Respondents
14/12 /2014	SC APPEAL 163/2011	People's Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02. PLAINTIFF-APPELLANT -Vs- 01. Minal Chandra Jayasinghe, No. 49/15, Fife Road, Colombo 05. 02. Suresh Harkishim Mirchandani, No. 7, Sulaiman Terrace, Colombo 05. 03. Amith Mahinder Mirchandani, No. 7, Sulaiman Terrace, Colombo 05. DEFENDANT-RESPONDENTS
14/12 /2014	SC APPEAL 10/2009	Saranguhewage Garvin De Silva, 36/1, Old Kesbewa Road, Nugegoda. PETITIONER-APPELLANT -Vs- 1. Lankapura Pradeshiya Sabha, Talpotha. 2. Chairman, Lankapura Pradeshiya Sabha, Talpotha. 3. W.A.J.C. Fernando, BOP 398 (near Patunugama Junction), Abeypura, Pulasthigama. 4. Rev. Fr. Ranjith de Mel, Our Lady of Rosary Church, Palugasdamana, Polonnaruwa. RESPONDENTS-RESPONDENTS
14/12 /2014	SC (FR) Application No. 514/2010	Hewawasam Sarukkaligae Rathnasiri Fernando 07 D, Warapitiya Darga Nagaraya Petitioner Vs. 1. Police Sergeant Dayarathna (Service No. 501) Police Station, Welipenna 2. Police Constable Madusanka (Service No. 501) Police Station, Welipenna. 3. Jayasinghe Police Staff Assistant Police Station, Welipenna 4. Police Inspector A.D. Kariyawasam Officer-in-Charge Police Station, Welipenna 5. Inspector General of Police Police Headquarters Colombo 01. 6. Hon. Attorney General Attorney General's Department Colombo 12. Respondents

14/12 /2014	SC Appeal No. 03/2012	1. Flexport (Pvt) Limited of No. 127, Jambugasmulla Road, Nugegoda 2. Puwak Dandawe Narayana Nandadasa of No. 127, Jambugasmulla Road, Nugegoda 3. Mallika Devasurendra of No. 127, Jambugasmulla Road, Nugegoda Defendants-Appellants-Petitioner Vs. Commercial Bank of Ceylon Limited of No.21, Bristol Street, Colombo 01 and having a branch office and/or a place of business called and known as the “Wellawatte Branch” at No. 343, Galle Road, Mount Lavinia. Plaintiff-Respondent-Respondent
11/12 /2014	SC Appeal 5/2011	1. Shelton Upali Paul 1st Plaintiff-Respondent-Respondent-Respondent-Petitioner-Appellant 2. KKPS Silva (Deceased) Neelawathura Walawe Premawathi Party substituted for the deceased 2nd Plaintiff- Respondent-Respondent-Respondent-Petitioner-Appellant Vs EG Dayananda Defendant-Petitioner-Petitioner- Petitioner-Respondent-Respondent
09/12 /2014	SC Spl LA No. 198/2011	Jeneeta Martel Loren Perera Nee Cooray, No. 8 Block M, Government Flats, Bambalapitiya, Colombo 4 Plaintiff Vs. 1. Francis Rajeev Perera 2. Rexy Alfred Perera 3. Reginold Perera 4. Mary Violet Perera (deceased) 4(a) Princy Priyadarshanie 5. Henry Leonard Perera, All at No. 1600, Cotta Road, Colombo 08. Defendants And between Jeneeta Martel Loren Perera Nee Cooray, No. 8 Block M, Government Flats, Bambalapitiya, Colombo 4 Plaintiff-Appellant Vs 1. Francis Rajeev Perera (Deceased) 1(a) Weerasinghe Arachchige Amarawathie, 2. Rexy Alfred Perera (Deceased) 2(a) Karunawathie Ranasinghe 3. Reginold Perera (Deceased) 3(a) M.W. Dharmawathie 4. Mary Violet Perera (Deceased) 4(a) Princy Priyadarshanie 5. Henry Leonard Perera, (Deceased) 5(a) Bopitiya Gamage Kapila Dilhan Perera, All at No. 1600, Cotta Road, Colombo 08. Defendant-Respondents And Now Between 1(a) Weerasinghe Arachchige Amarawathie, 2(a) Karunawathie Ranasinghe 3(a) M.W. Dharmawathie 4(a) Princy Priyadarshanie 5. Henry Leonard Perera All at No. 1600, Cotta Road, Colombo 08. Defendant-Respondent-Petitioners Vs. Jeneeta Martel Loren Perera Nee Cooray, No. 8 Block M, Government Flats, Bambalapitiya, Colombo 4 . Plaintiff-Appellant-Respoindent
09/12 /2014	SC Appeal No. 33/2012	Peoples’ Bank, Head Office, 12th Floor, Sri Chittampalam A. Gardiner Mawatha, Colombo 02. Respondent – Appellant-Petitioner Vs. H.L. Ariyapala No. 85/2, Bandarawela Road, Badulla. Applicant-Respondent-Respondent
08/12 /2014	SC Appeal No.212/12	Dissanayake Gamini Ratnasiri Applicant Vs Sri Lanka Ports Authority Respondent AND Sri Lanka Ports Authority Respondent-Petitioner Vs Dissanayake Gamini Ratnasiri Applicant-Respondent AND NOW BETWEEN Dissanayake Gamini Ratnasiri Applicant-Respondent- Petitioner-Appellant Vs Sri Lanka Ports Authority Respondent-Petitioner- Respondent-Respondent

02/12 /2014	S.C. Appeal No. 79/2006	1. Yuni Motors (Pvt.) Ltd., No. 105, New Bullers Road, Colombo 4. 2. Yasasiri Kasturiarachchi, Chairman/Managing Director, Yuni Motors (Pvt) Ltd., No. 34, Vajira Road, Colombo 5. PETITIONERS Vs. 1. S.A.C.S.W. Jayatillake Director General of Excise (Special Provisions), 3rd Floor, Bristol Street, Paradise Building, Colombo 1. 2. Sarath Amunugama, Minister of Finance, Ministry of Finance, Colombo 1. 3. The Attorney General, Attorney General‟s Department, Colombo 12. RESPONDENTS AND NOW BETWEEN 1. Yuni Motors (Pvt) Ltd., No. 105, New Bullers Road, Colombo 4. 2. Yasasiri Kasturiarachchi, Chairman/Managing Director, Yuni Motors (Pvt) Ltd., No. 34, Vajira Road, Colombo 5. PETITIONER – PETITIONERS Vs. 1. S.A.C.S.W. Jayatilleke, Director General of Exercise, (Special Provisions) 3rd Floor, Bristol Paradise Building, Colomnbo 1. 2. Sarath Amunugama, Former Minister of Finance, Ministry of Public Administration, Independence Square, Colombo 7. 3. The Attorney General, Attorney – General‟s Department, Colombo 12. RESPONDENT-RESPONDENTS
26/11 /2014	SC FR No. 349/2011	B.P. Udawatta No.239/15A,Mada Mawatha Sri Sumanagala Road Pannipitiya Petitioner Vs. 1. National Water Supply & Drainage Board Galle Road, Ratmalana. 2. K.L.L. Premanath General Manager, National Water Supply & Drainage Board, Galle Road, Ratmalana. 3. A. Abeygunasekera Ministry of Water Supply & Drainage “Lakdiya Medura, No. 35, Pelawatta Battaramulla. 4. K. Hettiarachchi 5. K.D. Gamini Gunaratne 6. N.P. Thibbotumunuwa 7. Dr. P.G. Mahipala 8. A.K. Seneviratne 9. P. Sanath Panawennage 4th to 9th All of National Water Supply & Drainage Board, Galle Road, Ratmalana. 10. M.P. Fernando No. 118/36, Uyana Road, Uyana, Moratuwa. 11. K.A.D.S. Nanayakkara No. 59, Kanduboda, Delgoda. 12. Hon. Attorney General Attorney General’s Department Colombo 12. Respondents
17/11 /2014	SC. Appeal No. 153/2010	Paradeniyalage Andirisa, Kudapallegama, Mahapallegama. Plaintiff (Deceased) Paradeniyalage Gunapala, Kudapallegama, Mahapallegama. Substituted Plaintiff Vs. 1A. Paradeniyalage Jayaneris, 2A. Paradeniyalage Somapala, 3A. Paradeniyalage Sumanawathie 4A Paradeniyalage Anulawathie 5A. Hewayalage Jayantha Wimalasiri, All of Kudapallegama, Mahapallegama Substituted-Defendants And Between Paradeniyalage Gunapala, Kudapallegama, Mahapallegama. Substituted Plaintiff-Appellant Vs. 1A. Paradeniyalage Jayaneris, 2A. Paradeniyalage Somapala, 3A. Paradeniyalage Sumanawathie 4A Paradeniyalage Anulawathie 5A. Hewayalage Jayantha Wimalasiri, All of Kudapallegama, Mahapallegama Substituted-Defendant-Respondents And Now Between Paradeniyalage Gunapala, Kudapallegama, Mahapallegama. Substituted Plaintiff-Appellant-Appellant Vs. 1A. Paradeniyalage Jayaneris, 2A. Paradeniyalage Somapala, 3A. Paradeniyalage Sumanawathie 4A Paradeniyalage Anulawathie 5A. Hewayalage Jayantha Wimalasiri, All of Kudapallegama, Mahapallegama Substituted Defendant Respondent-Respondents

28/10/2014	SC.TAB 01A/ 2014-01F/ 2014	
28/10/2014	SC. Appeal 130/2012	1. Edirisinghe Pedige Jayasinge, 2. Edirisinghe Pedige Thilakarathne, Both of Keraminiya, Horampella. Plaintiffs Vs. 1. Edirisinghe Pedige Mangalasena Edirisinghe, 1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella. 2. Edirisinghe Pedige Somasiri, 3. Noiyya, more correctly Malhinnage Premawathie, 4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella. 5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella. 6. Ramanayake Pedige Asilin, Keraminiya, Horampella. Defendants 1. Edirisinghe Pedige Jayasinge, 2. Edirisinghe Pedige Thilakarathne, (deceased), both of Keraminiya, Horampella. 2A. Edirisinghe Pathiranage Chamari Dushanthi Edirisinghe, all of Keraminiya, Horampella. Plaintiff- Petitioners Vs. 1. Edirisinghe Pedige Mangalasena Edirisinghe, (deceased) 1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella. 2. Edirisinghe Pedige Somasiri, 3. Noiyya, more correctly Malhinnage Premawathie, 4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella. 5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella. 6. Ramanayake Pedige Asilin, Keraminiya, Horampella. Defendants-Respondents 2. Edirisinghe Pedige Somasiri, 4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella Defendants-Respondents-Appellants Vs. 1. Edirisinghe Pedige Jayasinge, 2A. Edirisinghe Pathiranage Chamari Dushanthi Edirisinghe, all of Keraminiya, Horampella. Plaintiff- Petitioner-Respondents 1. Edirisinghe Pedige Mangalasena Edirisinghe, (deceased) 1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella. 3. Noiyya, more correctly Malhinnage Premawathie, 5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella. 6. Ramanayake Pedige Asilin, Keraminiya, Horampella. Defendants-Respondents- Respondents.
27/10/2014	SC. Appeal 134/2013	Abusali Sithi Fareeda, No. 74, Anguruwella Road, Warakapola. Plaintiff Vs. 1. Mohamed Noor, 2. Mohamed Farook, Both of No. 76, Anguruwella Road, Warakapola. Defendants And Between Abusali Sithi Fareeda, No. 74, Anguruwella Road, Warakapola. Plaintiff-Appellant Vs. 3. Mohamed Noor, 4. Mohamed Farook, Both of No. 76, Anguruwella Road, Warakapola. Defendant-Respondents And Now Between Abusali Sithi Fareeda, No. 74, Anguruwella Road, Warakapola. Plaintiff-Appellant-Appellant Vs. 5. Mohamed Noor, 6. Mohamed Farook, Both of No. 76, Anguruwella Road, Warakapola. Defendant-Respondents- Respondents

23/10/2014	S.C.(L.A.) Application S.C. (HC)LA 42/2013	Munasinghege Don Eranga Indrajith 105/4, 1st Lane Parakrama Mawatha Thalahena, Malabe. Plaintiff-Petitioner Vs. George Steuart Finance Limited “City Office” No. 15, Station Road Colombo 03. Defendant-Respondent
23/10/2014	SC (HC) LA 58/2012	Board of Investment of Sri Lanka World Trade Centre, West Tower, 15-17 Floors, Echelon Square, Colombo 1. RESPONDENT-PETITIONER -Vs- Million Garments (Pvt) Ltd, No. 14/7, Saparamadu Mawatha, Nugegoda. At present Head Office situated at:- A/14/2/3/, Matha Para, Narahenpita. PETITIONER-RESPONDENT
16/10/2014	SC Appeal No. 143/2013	Fritzroy Clarance De Seram Plaintiff. Vs Dehiwela Mount Lavinia Municipal Council Defendant. AND BETWEEN Dehiwela Mount Lavinia Municipal Council Defendant-Appellant Vs Fritzroy Clarance De Seram Plaintiff-Respondent AND BETWEEN Dehiwela Mount Lavinia Municipal Council Defendat-Appellant-Petitioner Vs Fritzroy Clarance De Seram Plaintiff-Respondent-Respondent AND NOW BETWEEN Dehiwela Mount Lavinia Municipal Council Defendant-Appellant-Petitioner-Appellant Vs Fritzroy Clarance De Seram Plaintiff-Respondent-Respondent-Respondent
16/10/2014	SC Appeal 123/2010	Balasinghe Pedige Wilson 7th Defendant-Respondent- Petitioner-Apellant. Vs Nilgal Pedige Kusumawathi Plaintiff-Appellant-Respondent-Respondent 1. Balasinghe Pedige Babiya (Deceased) 1a. Balasinghe Pedige Wilbert 2. Balasinghe Pedige Edwin 3. Balasinghe Pedige Wilbert 4. Balasinghe Pedige Anulawathi 5. Balasinghe Pedige Jayamanna 6. Balasinghe Pedige Nalini Jayamanna 7. Balasinghe Pedige Wilson 8. Sinhala Pedige Pesona 9. Balasinghe Pedige Swarna 10. Chandrasiri Pathiranage Keerthiratne Defendant-Respondent-Respondent- Respondents
16/10/2014	SC. Appeal 83/2012	Rygamage Dona Kamalawathie Diwrumpola, Godakawela. Plaintiff Vs. Godakawela Kankanamge Sirisena No. 17, Diwrumpola, Godakawela. Defendants And Rygamage Dona Kamalawathie Diwrumpola, Godakawela. Plaintiff-Appellant Vs. Godakawela Kankanamge Sirisena No. 17, Diwrumpola, Godakawela. Defendant-Respondent And Now Between Rygamage Dona Kamalawathie Diwrumpola, Godakawela. Plaintiff-Appellant-Appellant Vs. Godakawela Kankanamge Sirisena No. 17, Diwrumpola, Godakawela. Defendant-Respondent-Respondent
02/10/2014	SC CHC Appeal No.28/2009	G P de Silva & Sons International (Pvt) Limited Plaintiff Vs Union Assurance Limited Defendant And now Between G P de Silva & Sons International (Pvt) Limited Plaintiff-Appellant Vs Union Assurance Limited Defendant-Respondent

02/10 /2014	SC Appeal No. 6/2013	Hiriyadeniya Karunarathna Ananda Athapattu Mudali. 3rd Defendant-Respondent-Petitioner-Appellant Vs Abeykoon Mayadunnage Isuru Udayantha Abeykoon Plaintiff-Appellant-Repondent-Respondent Abeykoon Mayadunnage Somapala Abeykoon 1st Defendant-Apellant-Respondent-Respondent Abeykoon Mayadunnage Gnanalatha Abeykoon Defendant-Respondent-Respondent-Respondent
02/10 /2014	SC. FR. Application No. 74/2012	H. W. Rajitha Udakara Sampath, 316G, Bajjagodawatta, Hayley Road, Aththiligoda, Galle. Vs. 1. Secretary, Ministry of Higher Education, No. 18, Ward Place, Colombo 07. 2. Chairman, No. 20, Ward Place, Colombo 07. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
02/10 /2014	SC. FR. Application No. 73/2012	Natasha Dulmi Hewagama, 'Vikumsiri', Gurukanda, Kathaluwa, Ahangama. Petitioner Vs. 1. Secretary, Ministry of Higher Education, No. 18, Ward Place, Colombo 07. 2. Chairman, No. 20, Ward Place, Colombo 07. 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
28/09 /2014	SC.CHC. Appeal No.19/200 9	Adamjee Lukmanjee & Sons Limited, No. 140, Grandpass Road, Colombo 14. Plaintiff Vs. Samarasinghe Arachchige Premasiri, No. 28/18, Bauddhaloka Mawatha, Suwarapola, Piliyandala. Defendant And In the matter of an application under Section 839 read with Section 218 and 343 of the Civil Procedure Code. Samarasinghe Arachchige Premasiri, No. 28/18, Bauddhaloka Mawatha, Suwarapola, Piliyandala. Defendant-Judgment-Debtor- Petitioner Vs. 1. Adamjee Lukmanjee & Sons Ltd. No. 140, Grandpass Road, Colombo 14. Plaintiff-Judgment-Creditor- Respondent 2. Hatton National Bank, HNB Towers, No. 479, T.B. Jayah Mawatha, Colombo 10. Respondent And In the matter of an application under Section 298 and Section 300 of the Civil Procedure Code. Adamjee Lukmanjee & Sons Limited, No. 140, Grandpass Road, Colombo 14. Plaintiff-Petitioner Vs. Samarasinghe Arachchige Premasiri, No. 28/18, Bauddhaloka Mawatha, Suwarapola, Piliyandala. Defendant-Respondent And Now In the matter of an application for Special Leave to Appeal under Article 128(4) of the Constitution read with Section 5(2) of the High Court of the Province (Special Provisions) Act No. 10 0f 1996. Samarasinghe Arachchige Premasiri, No. 28/18, Bauddhaloka Mawatha, Suwarapola, Piliyandala. Defendant-Judgment-Debtor- Petitioner-Appellant Vs. 1. Adamjee Lukmanjee & Sons Ltd, No. 140, Grandpass Road, Colombo 14. Plaintiff-Judgment Creditor- Respondent-Respondent 2. Hatton National Bank HNB Towers, No. 479, T.B. Jayah Mawatha, Colombo 10. Respondent-Respondent

28/09/2014	SC. Appeal 104/2008	K.H.M.S. Bandara No. 46, Circular Road, Malkaduwawa, Kurunegala. Petitioner Vs. 1. Air Marshal G.D. Perera, Commander of the Sri Lanka Air Force, Air Force Headquarters, Katunayake. 2. Group Captain K.A. Gunatilleke, Base Commander, Sri Lanka Air Force Base, Katunayake. 3. Wing Commander Prakash Gunasekera, Commanding Officer- 14th Battalion, Sri Lanka Air Force Base, Katunayake. 4. Wing Commander P.R. Perera Sri Lanka Air Force Base, Katunayake. 5. Mr. Ashoka Jayawardane, Secretary, Ministry of Defence, Colombo. 6. Hon. The Attorney General Attorney General's Department, Colombo 12. Respondents. And Now Between 1. Air Marshal G.D. Perera, Commander of the Sri Lanka Air Force, Air Force Headquarters, Katunayake. 2. Group Captain K.A. Gunatilleke, Base Commander, Sri Lanka Air Force Base, Katunayake. 3. Wing Commander Prakash Gunasekera, Commanding Officer- 14th Battalion, Sri Lanka Air Force Base, Katunayake. 4. Wing Commander P.R. Perera Sri Lanka Air Force Base, Katunayake. 5. Mr. Ashoka Jayawardane, Secretary, Ministry of Defence, Colombo. 6. Hon. The Attorney General Attorney General's Department, Colombo 12. Respondents-Appellants Vs. K.H.M.S. Bandara No. 46, Circular Road, Malkaduwawa, Kurunegala. Petitioner-Respondent
28/09/2014	S.C (C.H.C) Appeal No. 41/2014	ARPICO FINANCE COMPANY PLC. 146, Havelock Road, Colombo-05. Plaintiff Vs. RICHARD PIERIS ARPICO FINANCE LIMITED. 310, High Level Road, Nawinna, Maharagama. Defendant AND NOW In the matter of an application for Leave to Appeal under and in terms of Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with Chapter LVIII of the Civil Procedure Code. 2 RICHARD PIERIS ARPICO FINANCE LIMITED 310, High Level Road, Nawinna , Maharagama. Defendant-Petitioner.
24/09/2014	S.C./H.C CA/L.A./ 137/12.	1. Kumarapatti Pathrannehelage Namal Rohitha Peiris, No. 320, Thalawathugoda Road, Madiwela, Kotte. 2 Kumarapatti Pathrannehelage Sunil Jackson Peiris, No. 320, Thalawathugoda Road, Madiwela, Kotte. Defendants-Petitioners-Petitioners Vs. Kumarapatti Pathiranalage Freeda Doreen Peiris,(After marriage Gunathilaka), No. 117/4, Thalapathpitiya Road, Udahamulla, Nugegoda. Present Address: No. 06, Albert Place, Hopperskrosin, Victoria, Australia. Plaintiff-Respondent-Respondent

17/09 /2014	S.C. F.R. 457/2012	1. Sujeewa Arjune Senasinghe, No. 03, Chelsea Gardens, Colombo 03. Petitioner Vs. 1. Ajith Nivard Cabraal, Governor, Member, Monetary Board, Central Bank of Sri Lanka, No. 30, Janadhipathy Mawatha, Colombo 1. 2 Monetary Board of the Central Bank No. 30, Janadhipathy Mawatha, Colombo 1. 3. P.B. Jayasundera, Secretary, Ministry of Finance, No. 30, Janadhipathy Mawatha, Colombo 1. 4. Nimal Welgama, Member, Monetary Board, No. 30, Janadhipathy Mawatha, Colombo 5. Mrs. Mano Ramanathan, Member, Monetary Board, No. 30, Janadhipathy Mawatha, Colombo 1. 6. N.A. Umagiliya, Member, Monetary Board, No. 30, Janadhipathy Mawatha, Colombo 1. 7. Hon. Sarath Amunugama, Minister of International Monetary Cooperation, No. 50/1, Siripa Road, Colombo 05. 8. H.A.S. Samaraweera, Auditor General, Auditor General's Department, 306/72, Polduwa Road, Battaramulla. 9. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
17/09 /2014	S.C.F.R. Application 27/11	1. Kariyawasam Widanarachilage Gathidu Ugeeshwara Perera, . No. 80/1, 12176,(T20) Kassapa Road, Colombo 05. 2. Kariyawasam Widanarachilage Dimuthu Sanjeewa Perera, . No. 80/1, 12176,(T20) Kassapa Road, Colombo 05. Petitioners Vs. 1. Upali Gunasekera, Principal, Royal College, Colombo 07. 2 Director National Schools Isurupaya, Battaramulla. 3. Secretary, Ministry of Education, Isurupaya, Battaramulla. 4. Honourable Attorney-General, Department of Attorney General, Colombo 12. Respondents
10/09 /2014	SC. Appeal No. 150/2012	Wanakkuwatta Waduge Nirosh Priyasad Fernando. "Swarna", Swarnajothi Mawatha, Thanthirimulla, Panadura. Plaintiff Vs. 1. Subramaniam Indrajith, No. 26, Thissa Mawatha, Horethuduwa, Panadura. 2. Hettiyakandage Jagath Jayalal Fernando, 37/30, Edward Benadict Mawatha, Horethuduwa, Panadura. Defendants Between 1. Subramaniam Indrajith, No. 26, Thissa Mawatha, Horethuduwa, Panadura. 2. Hettiyakandage Jagath Jayalal Fernando, 37/30, Edward Benadict Mawatha, Horethuduwa, Panadura. Defendant-Appellants Vs. Wanakkuwatta Waduge Nirosh Priyasad Fernando. "Swarna", Swarnajothi Mawatha, Thanthirimulla, Panadura. Plaintiff-Respondent And Now Between Wanakkuwatta Waduge Nirosh Priyasad Fernando. "Swarna", Swarnajothi Mawatha, Thanthirimulla, Panadura. Plaintiff-Respondent- Petitioner Vs. 1. Subramaniam Indrajith, No. 26, Thissa Mawatha, Horethuduwa, Panadura. 2. H. Jagath Jayalal Fernando, 37/30, Edward Benadict Mw, Horethuduwa, Panadura. Defendant-Appellant- Respondents.

10/09 /2014	SC. FR. Application No. 261/2013	Alagaratnam Manoranjan 22/1, Racca Lane, Racca Road, Chandukuli, Jaffna. Petitioner Vs. 1. Hon. G.A. Chandrasiri Governor, Northern Province, Governor's Secretariat, Old Park, Kandy Road, Chundukuli, Jaffna. 2. Ms. R. Wijialudchumi Chief Secretary, Chief Secretary's Secretariat, Northern Province Council, 187, Adiyapatham Road, Thirunelvely, Jaffna. 3. Dr. Dayasiri Fernando, Chairman 4. Mr. Palitha Kumarasinghe, PC. Member. 5. Mrs. Sirimavo A. Wijeratne Member 6. Mr. S.C. Mannapperuma Member 7. Mr. Ananda Seneviratne Member 8. Mr. N.H. Pathirana Member 9. Mr. Thillai Nadarajah Member 10. Mr. D.W. Ariyawansa Member 11. Mr. Mohamed Nahiya Member All of Public Service Commission 177, Nawala Road, Narahenpita, Colombo 5. 12. The Hon. Auditor General 306/72, Polduwa Road, Battaramulla. 13. Secretary to the Treasury, and Secretary to the Ministry of Finance and Planning, The Secretariat, Colombo 01. 14. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents. 15. Hon. Justice C.V.Vigneswaran Chief Minister-Northern Province, Chief Minister's Office, 26, Somasumderam Avenue, Chundukuli, Jaffna. 15th Added Respondent
09/09 /2014	SC. Appeal No. 85/2011	Sarath Dharma Siri Bandara, No. 86, Hewaheta Road, Galaha. Petitioner Vs. 1. Sarath Ekanayake, Chief Minister and the Minister in Charge of the Local Authorities-Central Province, No. 126, Secretarial Office, Kandy. 2. Pradeshiya Sabha Pathahewaheta, Thalathu Oya. 3. Abubakar Mohomadu Subuhan, Acting Chairman, Pradeshiya Sabha Pathahewaheta, Thalathu Oya. 4. Election Officer- Pathahewaheta, Election Office, Kandy. 5. Gamini S. Wathegedara, Inquiring Officer, No. 4, 3rd Lane, Right Circular Road, Kurunegala. Respondents And Now Between SC. Appeal 85/2011 Sarath Ekanayake, Chief Minister and the Minister in Charge of the Local Authorities-Central Province, No. 126, Secretarial Office, Kandy. Respondent-Petitioner Vs. Sarath Dharma Siri Bandara, No. 86, Hewaheta Road, Galaha. Petitioner-Respondent 1. Pradeshiya Sabha Pathahewaheta, Thalathu Oya. 2. Abubakar Mohomadu Subuhan, Acting Chairman, Pradeshiya Sabha Pathahewaheta, Thalathu Oya. 3. Election Officer-Pathahewaheta, Election Office, Kandy. 4. Gamini S. Wathegedara, Inquiring Officer, No. 4, 3rd Lane, Right Circular Road, Kurunegala. Respondent-Respondents.
04/09 /2014	SC CHC 19/2008	Lanka Kect (Pvt) Limited Plaintiff Vs 1. DA Wickramasinghe, Director Buildings, Buildings Department, Battaramulla. 2. Secretary. Ministry of Public Administration and Reforms 3. The Attorney General Defendants And now Between 1. DA Wickramasinghe, Director Buildings, Buildings Department, Battaramulla. 2. The Attorney General Defendant-Appellants Vs Lanka Kect (Pvt) Limited Plaintiff-Respondent
03/09 /2014	SC/HC/LA 02 /2014	Senok Trade Combine Ltd., No.03, R.A. de Mel Mawatha Colombo-05. Respondent-Respondent-Petitioner. Vs. K.H.S. Pushpadeva, No.233/33, Mahawatta Road, Colombo-14. Applicant-Appellant-Respondent.

02/09/2014	SC. FR. Application No. 24/2013	Kalidasage Roshan Chaminda Wijewardhana, No. 179/9, Udupila, Delgoda. Petitioner Vs. 1. Kurunegala Plantations Limited, No. 80, Dambulla Road, Kurunegala. 2. S.K. Nillegoda, Chief Executive Officer, Kurunegala Plantations Limited, No. 80, Dambulla Road, Kurunegala 3. Hon. Attorney General, Attorney General's Department, Colombo 12. Respondents.
02/09/2014	S.C. Spl. L.A. No. 258/2013	1. M. Kanagaratnam, Sri Bhadra Kali Amman Kovil, Munneswaram, Chilaw 7th Respondent-Petitioner 2. Kalimuttu Sivapathasunderam, Sri Bhadra Kali Amman Kovil, Munneswaram, Chilaw 8th Respondent-Petitioner 3. Mahendrasamy, Sri Bhadra Kali Amman Kovil, Munneswaram, Chilaw 9th Respondent-Petitioner Vs. 1. Sri Bodhiraja Foundation, Sri Bodhiraja Dhamayathanaya, Embilipitiya 2. Jathika Sangha Sammelanaya, Jathyanthara Thorathuru Saha Dharma Paryeshayathanaya, Gothami Mawatha, Rajagiriya. 3. Olcott Gunasekara, President, Dharmavijaya Foundation, No. 380/7, Sarana Road, Colombo 7 4. Ven. Bandirippuwe Vineetha Thero, Thuparamaya, Bandirippuwa, Lunuwila 5. Iragani de Silva, Chairperson- Animal Welfare Trust, No. 93/20, Elvitigala Mawatha, Colombo 8 6. Vishaka Tillekarathne, Trustee, Animal Welfare Trust, No. 73/2, Kirulapone Avenue, Colombo 5 7. Lorraine Margueritte Bartholomeusz, Vice President Sri Lanka Animal Protection Association, No. 5/3, Sulaiman Terrace, Colombo 5 8. Sharmini Desiree Ratnayake, Secretary, Sri Lanka Animal Protection Association, No. 6/2, De Silva Road, Kalubowila 9. Sagarica Rajakarunanayake, President, "Sathwa Mithra", No. 73/28, Sri Saranankara Place, Dehiwala 10. Lalani Serasinghe Perera, No. 14, Nuwarawatte, Nawala 11. Dr. Chamith Nanayakkara, No. 5, New Station Road, Sarasavi Uyana 12. Somasiri Alokolange, No. 15/3, Peiris Mawatha, Kalubowila, Dehiwala 13. Nikita Ravin Tissera, No. 29/8, Pangiriwatte Road, Mirihana, Nugegoda 14. Gamini Wanigaratne, No. 733/62, Gurugewatte, Koraleima, Gonapola Petitioners-Respondents 15. Inspector General of Police, Police Headquarters, Colombo 16. Deputy Inspector General of Police, Deputy Inspector General's Office, Puttalam 17. Senior Superintendent of Police Chilaw, Senior Superintendent's Office, Chilaw 18. Officer-in-Charge, Police Station, Chilaw 19. Urban Council of Chilaw, Puttalam Road, Chilaw 20. Chairman, Urban Council of Chilaw, Puttalam Road, Chilaw 21. President, All Ceylon Hindu Congress, No. 91/5, Chittampalam A. Gardiner Mawatha, Colombo 12 22. Hon. Attorney General, Attorney General's Department, Colombo 12 Respondent-Respondents

31/08 /2014	SC/FR 79/2014	Muthuwa Sarukkalige Ranjith de Silva Petitioner Vs 1. Sumith Parakramawansa Principal, Dharmashoka College, Ambalangoda 2. Ravindra Pushpakumara 3. A.W.Sriyani Chandrika 4. N.H. Eranga Indralal 5. K. Indunil de Silva All members of the Interview Board for Admission to Year 1- 2014 Dharmashoka Vidyalaya, Ambalangoda 6. K.P. Wijerathne 7. Nuwan dayantha de Silva 8. Dev Rohan 9. K.D. Lalith Ravindra All members of the Appeal Board for Admission to Year 1- 2014 Dharmashoka Vidyalaya, Ambalangoda 10. Hon. Bandula Gunawardene Minister of Education. 11. Anura Dissanayake. Secretary, Ministry of Education. 12. Hon. Attorney General Respondents

31/08/2014	SC. Appeal 41/2013	Hewage Don Piyasena Owitigala, Matugama. Plaintif Vs. Karunasena Hathurusinghe, Rannagala, Naboda, Matugama. Defendant And Between Karunasena Hathurusinghe, Rannagala, Naboda, Matugama. Defendant-Appellant Vs. Hewage Don Piyasena Owitigala, Matugama. Plaintif-Respondent (Deceased) a. Hewage Don Aruna Nishantha, No. 35, Sirikandura Road, Badugama, Matugama. b. Yakdehige Dona Somawathie, No. 35, Sirikandura Road, Badugama, Matugama. c. Hewage Don Lalith Susantha, No. 34, Sirikandura Road, Badugama, Matugama. d. Hewage Don Sandya Malkanthi, Owitigala, Matugama. e. Hewage Don Nayana Priyantha No. 34, Sirikandura Road, Badugama, Matugama. f. Hewage Don Yamuna Irangani, No. 34, Near Police Station, Baduraliya. g. Hewage Dona Ganga Priyanthi, No. 35, Sirikandura Road, Badugama, Matugama. h. Hewage Don Sanjeeva Prasanna, No. 35, Sirikandura Road, Badugama, Matugama. i. Hewage Don Sujeewa Nilantha, No. 35, Sirikandura Road, Badugama, Matugama. Substituted-Plaintiff-Respondents of Deceased Plaintiff-Respondent And a. Hewage Don Aruna Nishantha, No. 35, Sirikandura Road, Badugama, Matugama. b. Yakdehige Dona Somawathie, No. 35, Sirikandura Road, Badugama, Matugama. c. Hewage Don Lalith Susantha, No. 34, Sirikandura Road, Badugama, Matugama. d. Hewage Don Sandya Malkanthi, Owitigala, Matugama. e. Hewage Don Nayana Priyantha No. 34, Sirikandura Road, Badugama, Matugama. f. Hewage Don Yamuna Irangani, No. 34, Near Police Station, Baduraliya. g. Hewage Dona Ganga Priyanthi, No. 35, Sirikandura Road, Badugama, Matugama. h. Hewage Don Sanjeeva Prasanna, No. 35, Sirikandura Road, Badugama, Matugama. i. Hewage Don Sujeewa Nilantha, No. 35, Sirikandura Road, Badugama, Matugama. Substituted-Plaintiff-Respondents- Petitioners Vs. Karunasena Hathurusinghe, Rannagala, Naboda, Matugama. Defendant-Appellant- Respondent And Now Between a. Hewage Don Aruna Nishantha, No. 35, Sirikandura Road, Badugama, Matugama. b. Yakdehige Dona Somawathie, No. 35, Sirikandura Road, Badugama, Matugama. c. Hewage Don Lalith Susantha, No. 34, Sirikandura Road, Badugama, Matugama. d. Hewage Don Sandya Malkanthi, Owitigala, Matugama. e. Hewage Don Nayana Priyantha No. 34, Sirikandura Road, Badugama, Matugama. f. Hewage Don Yamuna Irangani, No. 34, Near Police Station, Baduraliya. g. Hewage Dona Ganga Priyanthi, No. 35, Sirikandura Road, Badugama, Matugama. h. Hewage Don Sanjeeva Prasanna, No. 35, Sirikandura Road, Badugama, Matugama. i. Hewage Don Sujeewa Nilantha, No. 35, Sirikandura Road, Badugama, Matugama. Substituted-Plaintiff-Respondents- Petitioners-Appellants Vs. Karunasena Hathurusinghe, Rannagala, Naboda, Matugama. Defendant-Appellant- Respondent –Respondent
03/08/2014	SC.FR.Application No.82/2014	Wijialudchumi Ramesh No.84, Chetty Street, Nallur, Jaffna. Petitioner Vs. 1. Justice C.V. Wigneswaran Chief Minister Northern Provincial Council, No.125, Temple Road, Jaffna. & 13 Others. Respondents

29/07/2014	SC Appeal No. 14/2013	Hettimudiyanselage Nani Wijesiri Somalatha Menike Applicant Vs Dalugama Multi Purpose Cooperative Society Ltd. Respondent And Hettimudiyanselage Nani Wijesiri Somalatha Menike Applicant-Appellant Vs Dalugama Multi Purpose Cooperative Society Ltd. Respondent-Respondent And Hettimudiyanselage Nani Wijesiri Somalatha Menike Applicant-Appellant-Petitioner Vs Dalugama Multi Purpose Cooperative Society Ltd. Respondent-Respondent-Respondent Now Between Hettimudiyanselage Nani Wijesiri Somalatha Menike Applicant-Appellant-Petitioner-Appellant Vs Dalugama Multi Purpose Cooperative Society Ltd. Respondent-Respondent-Respondent-Respondent
16/07/2014	SC (CHC) LA Application No. 37 Of 13	Ranjith Wagaarachchi , No. 246, Thissa Road, Wali Ara, Netolpitiya.PLAINTIFF Vs Union Assurance P.L.C Union Assurance Centre No. 20, St Michal Road, Colombo 03. DEFENDANT AND NOW BETWEEN Ranjith Wagaarachchi No. 246, Thissa Road, Wali Ara, Netolpitiya. PLAINTIFF - PETITIONER Union Assurance P.L.C Union Assurance Centre No. 20, St. Michal Road, Colombo-03. DEFENDANT- RESPONDENT
16/07/2014	SC Spl LA No. 229/11	Dassanayake Mudiyanselage Ranbanda, “Dharshana” Narammala Road Wadha Kada Applicant-Respondent-Petitioner Vs. Peoples’ Bank P.O.Box 728 Colombo 02 Respondent-Appellant-Respondent
10/07/2014	SC (Appeal) 79/2009	Gusthinggna Waduge Somasiri No. B/14, Jayanthipura-Yaya 11 Accused-Appellant-Petitioner Vs. Hon. Attorney General Attorney General’s Department Colombo 12. Respondent -Respondent
09/07/2014	S.C. Appeal No. 99/2012	The British High Commission, No. 389, Bauddhaloka Mawatha, Colombo 07. Respondent-Respondent- Appellant Vs. Ricardo Wilhelm Michael Jansen No. 62, Perakumba Mawatha Kolonnawa. Applicant-Appellant-Respondent
15/05/2014	S.C. Appeal 23A/2009	Arumabadadurage Ariyaratne, Bolhinda, Weragama, Ambalantota. Accused Appellant Petitioner Vs Honouable Attorney General, Colombo 12 Respondent.
12/05/2014	SC. Appeal 03/2011	W. Suvinipala, No. 83, Bandaranayake Mawatha, Matugama. Applicant Vs. The Peoples’ Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. Respondent And Between W. Suvinipala, No. 83, Bandaranayake Mawatha, Matugama. Applicant-Appellant Vs. The Peoples’ Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. Respondent -Respondent And Now Between The Peoples’ Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 2. Respondent-Respondent-Petitioner
08/05/2014	S.C.(F.R.) Application 308/2013	Dr. Vickrambahu Karunarathne, 17, Barrack Lane, Colombo 02. Petitioner Vs 1. Prof. A. Senaratne Vice-Chancellor Ex-Officio Members – Council of the University of Peradeniya & 26 Others

03/04 /2014	SC Appeal 178/2011	1. Kodithuwakku Arachchige Dayawathie 2. Kodithuwakku Arachchige Dayarathne Both of No. 119/1 Saranankara Road Kalubowila Dehiwala The Defendants-Appellants-Appellants Vs Pattiayage Iranganie Sirisena of No. 15/4, Sudharshana Road Dehiwala The Plaintiff-Respondent-Respondent
03/04 /2014	SC. Appeal No. 157/2011	Warnakulasuriyage Charlert, Kusumawathi Kulasuriya,..Defendant-Respondent-Petitioner Vs. Don Wimal Harischandra Gunathilaka 27, Circular Road, Wadduwa. Plaintiff-Appellant-Respondent
03/04 /2014	S.C. Appeal No. 45/11	A. Arangallage No. 3/3, Rajakeeya Mawatha, Colombo 7. Plaintiff-Petitioner-Petitioner-Appellant Vs. 1. Pauline Herath No.24B, Alfred Place, Colombo 3. 2. Bank of Ceylon Bank of Ceylon Building, No. 4, Lanka Banku Mawatha, Colombo 1. Defendant-Respondent-Respondent-Respondents
03/04 /2014	S.C. Appeal No. 126/2012	Amaradasa Liyanage, Kosmodara Ihalawatte, Kotapola, Carrying on business as a sole proprietor under the name and style of “Kosmodara Tea Factory”. Respondent-Respondent-Petitioner Vs. Sampath Bank PLC, No. 11, Sir James Pieris Mawatha, Colombo 02. Petitioner-Petitioner-Respondent
03/04 /2014	SC. Appeal No. 40/2010	
01/04 /2014	SC Appeal No. 39/2011 &39A/11	1. Dissanayake Rallage Ranasingha Karuppattiya, Nelundeniya 2. Dissanayake Rallage Wijesinghe Karuppattiya, Warakapola 1st and 3rd Accused-Appellant-Appellant Vs. 1. Officer-in-Charge Police Station, Warakapola Complainant 1st Respondent-Respondent 2. Hon. Attorney General Attorney General’s Department Colombo 12. 2nd Respondent-Respondent
01/04 /2014	SC Appeal 92/2011	S.A.D.T. Jayathilaka 25, Alehiwatta Road Welisara, Ragama. Presently residing at 90/2, Palliyawatte, Hendala, Wattala. Applicant-Petitioner-Appellant Vs 1. Peoples’ Bank, 2. General Manager, 3. Chief Manager- Human Resources, 4. Assistant General Manager-Human Resources, 5. Chief Manager-Audit All of People’s Bank No. 75, Chittampalam A. Gardiner Mawatha Colombo 02. Respondent-Respondent-Respondents
01/04 /2014	S.C. TAB Appeal No. 02/2012	1. W.M.M. Kumarihami, Chief Registrar, High Court, Colombo 12. Complainant Vs. 1. Galagamage Indrawansa Kumarasiri, 2. Thumbedura Vitty Newton, 3. Jayaratnage Dhammika Nihal Jayaratne, 4. Godapitiyawatte Arachchilage Janapriya Senaratne, Accused And now between 1. Galagamage Indrawansa Kumarasiri, 2. Thumbedura Vitty Newton, 3. Jayaratnage Dhammika Nihal Jayaratne, 4. Godapitiyawatte Arachchilage Janapriya Senaratne, Accused-Appellants Vs. 1. W.M.M.Kumarihamy, Chief Registrar, Colombo. 2. Hon. Attorney General, Attorney General‟s Department, Colombo 12. Respondents

30/03 /2014	SC. Appeal 199/2011	1. Meerasaibo Mahamed Haniffa of Division No. 15, Ninthavur. 2. Meerasaibo Ummul Hair of Division No. 16, Ninthavur. 3. Meerasaibo Ummu Sellam of Division No. 16, Ninthavur. 4. Meerasaibo Jamal Mohamed of Division No. 14, Ninthavur. 5. Meerasaibo Atham of Division 2, Ninthavur. 6. Meerasaibo Sithy Faiza of Division No. 3, Ninthavur. 7. Meerasaibo Sara of Division No. 3, Ninthavur. 2nd to 8th Substituted-Defendants- Appellants-Petitioners-Petitioners Vs. Athambawa Mohamed Idroos of Division No. 3, Ninthavur. Substituted-Plaintiff-Respondent- Respondent-Respondent..etc...
30/03 /2014	SC. Appeal 87/2010	1. Sangarapillai Navaratnarajavel 2. Wife Kangadevi Both of Puttur East, Puttur. Plaintiffs Vs. 1. Kandiah Naganathan 2. Wife Baskaradevi, Both of Punkadi, Puloli South, Puloli. 3. Arunasalam Varnadevid 4. Wife Santhanayaki 5. Jesudasan Santhirabose All three of Selvavalavu, Chunnakam. Defendants AND NOW 1. Kandiah Naganathan 2. Wife Baskaradevi, Both of Punkadi, Puloli South, Puloli. 3. Arunasalam Varnadevid ..etc..
27/03 /2014	S.C.(F.R.) Application 277/09	1. B.V.M.W.Kumarasiri, No. 105/1, Egodawatta, Bellana. & 15 others Petitioners Vs. 1. M.M.N.D. Bandara, Secretary, Ministry of Education, Isurupaya, Battaramulla. & 13 others Respondents., Added Respondents.
26/03 /2014	S.C.F.R. 64/2009	1. S.A.W. de Silva “Kusum”, Etholuwa Meetiyagoda, Ambalangoda and 59 Others PETITIONERS Vs. 1. Saliya W. Mathew, Chairman and 21 others RESPONDENTS
26/03 /2014	SC CHC - Appeal No. 54/2007	Ambewela Livestock Co. Ltd. Ambewela Farm, Ambewela. Plaintiff Vs. Sri Lanka Co-operative Marketing Federation Ltd. Markfed, Co-operative Square, 127, Grandpass, Colombo 14. Defendant And Sri Lanka Co-operative Marketing Federation Ltd. Markfed, Co-operative Square, 127, Gandpass, Colombo 14. Defendant-Appellant Vs. Ambewela Livestock Co. Ltd. Ambewela Farm, Ambewela. Plaintiff-Respondent
25/03 /2014	SC Spl LA No. 169/2013	Wewalwalahewage Hemantha AriyaKumara No. 63/B “Wasana” Tower Side City, Kandawala, Katana. Defendant-Respondent-Appellant-Petitioner Vs. Kaluappu Kankanamalage Dona Bernadeth Yamuna Rani Karunarathne, of No. 31/4 , Temple Road, Negombo Plaintiff-Petitioner-Respondent-Respondent
25/03 /2014	SC (HC) LA Application No. 68/2012	Wajira Prabath Wanasinghe, No. 120/1, Balagalla, Diwulapitiya. PLAINTIFF-PETITIONER -Vs- Janashakthi Insurance Company Limited, No. 47, Muttiah Road, Colombo 02. DEFENDANT-RESPONDENT
25/03 /2014	SC APPLICAT ION (FR) 524/2008	Dr. P.W.S.M. Samarasinghe, No. 6, Sarasavi Mawatha, Department of Agriculture Quarters, Peradeniya. PETITIONER -Vs- Justice Priyantha Perera, Former Chairman, Public Service Commission, No. 1777, Nawala Road, Narahenpita, Colombo 5. And Others RESPONDENTS

25/03 /2014	SC Appeal 70/2010	Subramaniam Sivapalanathan No. 115 Kotahene Road, Colombo 13. Currently of No. 285 Mahawatte Road Colombo 14. Accused-Appellant-Appellant Vs. 1. The Attorney General Attorney General's Department Colombo 12 2. The Officer-in-Charge Police Station Kotahena Respondent-Respondent-Respondents
24/03 /2014	SC Appeal No. 11/2011	International Water Management Institute, No. 127, Sunil Mawatha, Pelawatta, Battaramulla. Respondent-Petitioner-Appellant Vs. Kithsiri Jayakody, No. 250, Gemunu Mawatha, Kotuwegoda, Rajagiriya. Applicant-Respondent-Respondent
24/03 /2014	SC APPEAL No. 150/2010	DFCC Bank, No. 73/5, Galle Road, Colombo 03. 1ST RESPONDENT-APPELLANT -Vs- Weliwita Don Kusumitha Mudith Perera, No. 112, Sewagama, Polonnaruwa. PETITIONER-RESPONDENT 1. Mrs. Induni Karunananda, Attorney-at-Law, Legal Officer-DFCC Bank, No. 73/5, Galle Road, Colombo 03. 2. A.N. Fonseka, General Manager-DFCC Bank, No. 73/5, Galle Road, Colombo 03. 3. Sewagama Rice Products (Pvt) Ltd, No. 112, Sewagama, Polonnaruwa. RESPONDENT-RESPONDENTS
24/03 /2014	SC. Appeal No. 93A/ 2011	Kapila Warnasooriya No. 285/2, Idama, Moratuwa. (Acting through Attorney holder Patabendi Mahakariyakarawanage Rahal Warnasooriya of the same address) Plaintiff Vs. Dayawathi Sellahewa No. 13/2, Mendis Lane, Idama, Moratuwa. Defendant And Dayawathi Sellahewa No. 13/2, Mendis Lane, Idama, Moratuwa. Defendant-Appellant Vs. Kapila Warnasooriya No. 285/2, Idama, Moratuwa. (Acting through Attorney holder Patabendi Mahakariyakarawanage Rahal Warnasooriya of the same address) Plaintiff-Respondent And Dayawathi Sellahewa No. 13/2, Mendis Lane, Idama, Moratuwa. Defendant-Appellant-Appellant Vs. Kapila Warnasooriya No. 285/2, Idama, Moratuwa. (Acting through Attorney holder Patabendi Mahakariyakarawanage Rahal Warnasooriya of the same address) Plaintiff-Respondent-Respondent

23/03/2014	S.C. APPLICATION No: 665/2012(FR) S.C. APPLICATION No: 666/2012(FR) S.C. APPLICATION No: 667/2012(FR) S.C. APPLICATION No: 672/2012(FR)	1. Athula Chandraguptha Thenuwara, 60/3A, 9th Lane, EthulKotte. (Petitioner in SC Application 665/12 [FR]) 2. Janaka Adikari Palugaswewa, Perimiyankulama, Anuradhapaura. (Petitioner in SC Application 666/12 [FR]) 3. Mahinda Jayasinghe, 12/2, Weera Mawatha, Subhuthipura, Battaramulla. (Petitioner in SC Application 667/12 [FR]) 4. Wijedasa Rajapakshe, Presidents' Counsel, The President of the Bar Association of Sri Lanka. (1st Petitioner in SC Application 672/12 [FR]) 5. Sanjaya Gamage, Attorney-at-Law The Secretary of the Bar Association of Sri Lanka. (2nd Petitioner in SC Application 672/12 [FR]) 6. Rasika Dissanayake, Attorney-at-Law The Treasurer of the Bar Association of Sri Lanka. (3rd Petitioner in SC Application 672/12 [FR] 7. Charith Galhena, Attorney-at-Law Assistant-Secretary of the Bar Association of Sri Lanka. (4th Petitioner in SC Application 672/12 [FR]) Petitioners Vs. 1. Chamal Rajapakse, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenepura Kotte. 2. Anura Priyadarshana Yapa, Eeriyagolla, Yakawita. 3. Nimal Siripala de Silva, No. 93/20, Elvitigala Mawatha, Colombo 08. 4. A. D. Susil Premajayantha, No. 123/1, Station Road, Gangodawila, Nugegoda. 5. Rajitha Senaratne, CD 85, Gregory's Road, Colombo 07. 6. Wimal Weerawansa, No. 18, Rodney Place, Cotta Road, Colombo 08. 7. Dilan Perera, No. 30, Bandaranayake Mawatha, Badulla. 8. Neomal Perera, No. 3/3, Rockwood Place, Colombo 07. 9. Lakshman Kiriella, No. 121/1, Pahalawela Road, Palawatta, Battaramulla. 10. John Amaratunga, No. 88, Negambo Road, Kandana. 11. Rajavarothiam Sampathan, No. 2D, Summit Flats, Keppitipola Road, Colombo 05. 12. Vijitha Herath, No. 44/3, Medawaththa Road, Mudungoda, Miriswaththa, Gampaha. 2nd – 12th Respondents Hon. Members of Parliament; Members of the Select Committee of Parliament appointed with regard to the Charges against the Chief Justice. 13. The Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. Respondents 1. Koggala Wellala Bandula, No. 67A, Kandy Road, Dalugala, Kelaniya. (Intervenient-Petitioner-Respondent in SC Application 665/12 [FR],666/12 [FR], 667/12[FR] and 672/12 [FR]) 2. Jayasooriya Alankarage Peter Nelson Perera, No. 22/51, Chamikara Cannel Road, Chilaw. (Intervenient-Petitioner-Respondent in SC Application 666/12 (FR) and 667/12 [FR]) 3. Arumapperuma Arachchige Sudima Chandani, No. 300/3, Kandy Road, Kirillawala, Webada. (Intervenient-Petitioner-Respondent in SC Application 672/12 [FR]) Intervenient – Petitioners – Respondents

23/03 /2014	SC (FR) Application No. 23/2013	1. Centre for Policy Alternatives (Guarantee) Ltd., No. 24/2, 28th Lane, off Flower Road, Colombo 7. 2. Dr. Paikiasothy Saravanamuttu, No. 03, Ascot Avenue, Colombo 5. PETITIONERS Vs. 1. D.M. Jayaratne, Prime Minister, Prime Minister's Office, No. 58, Sir Ernest De Silva Mawatha, Colombo 7. 2. Chamal Rajapakse, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenapura Kotte. 3. Ranil Wickremasinghe, Leader of the Opposition, No. 115, 5th lane, Colombo 3. 4. A.H.M. Azwer, Member of Parliament, No. 4, Bhathiya Road, Dehiwala. 5. D.M. Swaminathan, Member of Parliament, No. 125, Rosmead Place, Colombo 7. 6. Mohan Pieris, President's Counsel, No. 3/144, Kensey Road, Colombo 8. 7. The Attorney General, Attorney General's Department, Hulftsdorp, Colombo 12. RESPONDENTS
23/03 /2014	SC Appeal No. 114/2013	Sumudu Kantha Hewage, No. 38/7, Pokuna Road, Oruthota, Gampaha. INTERVENIENT-PETITIONER-PETITIONER-APPELLANT -Vs- Dr. Upathissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake. Residence of the Chief Justice of Sri Lanka No. 129, Wijerema Mawatha, Colombo 07. Presently at: No. 170, Lake Drive, Colombo 08. PETITIONER-RESPONDENT-RESPONDENT -Vs- 1. Chamal Rajapakse, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenepura, Kotte. 2. Anura Priyadarshana Yapa, Eeriyagolla, Yakawita. 3. Nimal Siripala de Silva, No. 93/20, Elvitigala Mawatha, Colombo 08. 4. A. D. Susil Premajayantha, No. 123/1, Station Road, Gangodawila, Nugegoda. 5. Rajitha Senaratne, CD 85, Gregory's Road, Colombo 07. 6. Wimal Weerawansa, No. 18, Rodney Place, Cotta Road, Colombo 08. 7. Dilan Perera, No. 30, Bandaranayake Mawatha, Badulla. 8. Neomal Perera, No. 3/3, Rockwood Place, Colombo 07. 9. Lakshman Kiriella, No. 121/1, Pahalawela Road, Palawatta, Battaramulla. 10. John Amaratunga, No. 88, Negambo Road, Kandana. 11. Rajavarothiam Sampathan, No. 2D, Summit Flats, Keppitipola Road, Colombo 05. 12. Vijitha Herath, No. 44/3, Medawaththa Road, Mudungoda, Miriswaththa, Gampaha. 13. W.B.D. Dassanayake, Secretary General of Parliament, Parliament Secretariat, Parliament of Sri Lanka, Sri Jayawardenapura, Kotte. 14. The Attorney General, Attorney General Department, Colombo 12. RESPONDENTS-RESPONDENTS-ESPONDENTS

20/03/2014	SC/CHC/ Appeal No. 39/2010	National Development Bank PLC Formerly of National Development Bank Limited, No. 40, Nawam Mawatha, Colombo 2. Plaintiff Vs. 1. Nelka Rupasinghe alias Rupasinghe Arachchilage Nelka alias R.A. Nelka Nanayakkara Galgodawatta, Talduwa, Ahangama. 2. Ahangama Gamage Nandawathie Galgodawatta, Talduwa, Ahangama. 1st & 2nd Defendants. And 1. Nelka Rupasinghe alias Rupasinghe Arachchilage Nelka alias R.A. Nelka Nanayakkara Galgodawatta, Talduwa, Ahangama.2. Ahangama Gamage Nandawathie Galgodawatta, Talduwa, Ahangama. 1st & 2nd Defendant- Appellants Vs. National Development Bank PLC Formerly of National Development Bank Limited, No. 40, Nawam Mawatha, Colombo 2. Plaintiff-Respondent
19/03/2014	SC Appeal 13/2012	Bentota Multi Purpose Cooperative Society Limited, Bentota Defendant-Judgement Debtor- Respondent-Appellant-Petitioner Vs Payagalage Girly Yvonne Karunaratne, Angagoda, Galle Road, Bentota. Plaintiff-Judgement Creditor- Petitioner-Respondent-Respondent
19/03/2014	SC Appeal 156/2010	The People’s Bank, No. 75, Sir Chittampalam A. Gardiner Mawatha, Colombo 02 Petitioner-Respondent-Petitioner- Appellant Vs. Rosy Jayasuriya No. 39B, Delkada Road Matara Respondent-Petitioner-Respondent 1. Ajith Ranasinghe Kodituwakku Layland Florists Station Road Matara 2. Ekman Dalugoda No. 39B, Delkada Road Matara Respondents-Respondents-Respondents 4. H.M. Ariyapala No. 76, Rahula Road Matara 4A. H.H. Shiromani Mala No. 76, Rahula Road Matara Substituted –Respondent-Respondent
16/03/2014	SC.Appeal No. SC/ CHC/ 19/2011	MOD TEC LANKA (PVT) LTD, No.7, Rajagiriya Udyanaya, Rajagiriya. Defendant-Appellant -Vs- FOREST GLEN HOTEL & SPA(PVT) LTD No.7, Wilson Street, Colombo-12. Plaintiff-Respondent

09/03/2014	SC. FR. No. 191/09 with Nos. FR. 192/09, 197/09-206/09, 208/09-216/09, 225/09, 226/09, 244/09, 246/09-255/09, 315/09, 335/09, 372/09 (Golden key Order)	(Golden Key)
06/03/2014	SC Appeal No. 18B of 2009	Terrace Linton Percival Tirunayake No. 7/1, Menerigama Place, Mt. Lavinia PLAINTIFF -Vs- M.S.R. Fernando, No. 222, Puttalam Road, Kurunegala. DEFENDANT M George Anthony Fernando No. 220, Puttalam Road, Kurunegala. SUBSTITUTED DEFENDANT AND BETWEEN M. George Anthony Fernando No. 220, Puttalam Road. Kurunegala. SUBSTITUTED DEFENDANT APPELLANT -vs- Terrace Clinton Percival Thirunayake No. 7/1, Menerigama Place. Mt. Lavinia. PLAINTIFF RESPONDENT AND Terrace Clinton Percival Thirunayake No. 7/1, Menerigama Place, Mt. Lavinia. PLAINTIFF RESPONDENT PETITIONER -Vs- M. George Anthony Fernando No.220, Puttalam Road, Kurunegala. SUBSTITUTED DEFENDANT APPELLANT RESPONDENT

20/02/2014	SC Appeal No. 67/2013	Hon. Attorney General, Attorney General's Department, Colombo 12. PETITIONER - APPELLANT -Vs- Dr. Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, Residence of the Chief Justice of Sri Lanka No. 129, Wijerema Mawatha, Colombo 07. Presently at: No. 170, Lake Drive, Colombo 08. PETITIONER - RESPONDENT 1. Chamal Rajapakse, Speaker of Parliament, Parliament of Sri Lanka, Sri Jayawardenepura, Kotte. 2. Anura Priyadarshana Yapa, Eeriyagolla, Yakawita. 3. Nimal Siripala de Silva, No. 93/20, Elvitigala Mawatha, Colombo 08. 4. A. D. Susil Premajayantha, No. 123/1, Station Road, Gangodawila, Nugegoda. 5. Rajitha Senaratne, CD 85, Gregory's Road, Colombo 07. 6. Wimal Weerawansa, No. 18, Rodney Place, Cotta Road, Colombo 08. 7. Dilan Perera, No. 30, Bandaranayake Mawatha, Badulla. 8. Neomal Perera, No. 3/3, Rockwood Place, Colombo 07. 9. Lakshman Kiriella, No. 121/1, Pahalawela Road, Palawatta, Battaramulla. 10. John Amaratunga, No. 88, Negambo Road, Kandana. 11. Rajavarothiam Sampathan, No. 2D, Summit Flats, Keppitipola Road, Colombo 05. 12. Vijitha Herath, No. 44/3, Medawaththa Road, Mudungoda, Miriswaththa, Gampaha. Also of Parliament of Sri Lanka, Sri Jayawardenepura, Kotte. 13. W.B.D. Dassanayake, Secretary General of Parliament, Parliament Secretariat, Parliament of Sri Lanka, Sri Jayawardenapura, Kotte. RESPONDENT - RESPONDENTS
17/02/2014	S.C. [F/R] No. 555/2009	Herath Mudiyanselage Yohan Indika Herath, "Ambasevana", Dummalasuriya. Petitioner Vs. 1. Ajith, Police Constable, Police Station, Dummalasuriya. 2. Ariyasena, Police Constable, Police Station, Dummalasuriya. 3. Jayamaha, Police Constable, Police Station, Dummalasuriya. 4. Officer- in-Charge, Police Station, Dummalasuriya. 5. Assistant Superintendent of Police, Office of the Assistant Superintendent of Police, Kuliyapitiya. 6. Inspector General of Police, Sri Lanka Police Headquarters, Colombo 1. 7. Hon. the Attorney General, Department of Attorney General, Colombo 12. Respondents
17/02/2014	S.C. Appeal No. 51/2011 & S.C. Appeal No. 52/2011	Nurun Anberiya Hanifa, No. 10, 4th Lane, Rajagiriya. Plaintiff Vs. 1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6. 2. Weliweriya Tholka Mudalige Kulasiri [deceased], No. 1173, 3rd Maradana, Borella, Colombo 8. 2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte. Defendants.....

11/02 /2014	SC Appeal No. 75/2010	ArattanaGederaSusiripala, No.96, Senarathgama , Katugastota. PETITIONER Vs 1. Commissioner of Elections, Election Commission Department Kotte Road, Rajagiriya. 2. U.Amaradasa, Returning Officer, HarispattuwaPradeshiyaSabhawa Secretariat Kandy. 3. NalinSanjiwaKurunduwatte HarispattuwaPradeshiyaSabha Tittapajjala, Werallagama. 4. SusilPremajayantha Secretary, United People's Freedom Alliance No. 301, T.B. Jaya Mawatha, Colombo 10 RESPONDENTS AND NOW BETWEEN 1. Commissioner of Elections Election Commission Department Kotte Road , Rajagiriya 1st Respondent-Petitioner 2. U.Amaradasa Returning Officer, HarispattuwaPradeshiyaSabhawa Secretariat , Kandy 2nd Respondent –Petitioner Vs 1. ArattanaGederaSusiripala, No. 96, Senarathgama, Katugastota. Petitioner- Respondent. 2. NalinSanjeewaKurunduwatte, HarispatuwaPradeshiyaSabha, Tittapajjala, Werallagama. 3rd Respondent-Respondent. 3. SusilPremajayantha, Secretary, United People's Independent Alliance, No. 301, T.B. JayahMawatha, Colombo-10. 4th Respondent-Respondent.
05/02 /2014	SC /CHC 27/2007	Central Finance Company Limited, 84, Raja V eediya, Kandy. Plaintif Vs. Janatha Estate Development Board, 55/75, Vauxhall street, Colombo-02. Defendant. And now In the matter of an appeal in terms of Section 754(1) of the Civil Procedure Code. Janatha Estate Development Board, 55/75, Vauxhall Street, Colombo-02. Defendant-Appellant Vs. Central Finance Company Limited, 84, Raja Veediya, Kandy. Plaintiff-Respondent.
29/01 /2014	S.C.(F.R) Application 308/2009	1. Janaka I. De A. Goonetileke, Assistant Superintendent of Police, Sri Lanka Police College, Elpitiya. & 21 others Petitioners Vs. 1. Neville Piyadigama, Chairman, National Police Commission & 3 Others Respondents...
22/01 /2014	SC. Appeal 08/2011	The Incorporated Trustees of the Sathya Sai Baba Trust of Sri Lanka. Of No. 113, New Chetty Street, Colombo 13. Plaintiff Vs. Cine Printers Limited, No. 117, New Chetty Street, Colombo 13. Defendant And The Incorporated Trustees of the Sathya Sai Baba Trust of Sri Lanka. Of No. 113, New Chetty Street, Colombo 13. Plaintiff-Appellant Vs. Cine Printers Limited, No. 117, New Chetty Street, Colombo 13. Defendant-Respondent And Now Between Cine Printers Limited, No. 117, New Chetty Street, Colombo 13. Defendant-Respondent- Appellant Vs. The Incorporated Trustees of the Sathya Sai Baba Trust of Sri Lanka. Of No. 113, New Chetty Street, Colombo 13. Plaintiff-Appellant- Respondent

21/01 /2014	SC. Appeal 172/2011	1. Herath Mudiyanselage Leelawathie Menike 2. Kotahawadige Don Wimalasena Both of Mahajana Dispensary, Buttala. Plaintiffs Vs. 1. Ananda Dharmasinghe Bandara, Kalyani Pedesa, Kelaniya. 2. Herath Mudiyanselage Heen Bandara Jambu Sameeraya, Kiridigala. Defendants And Between 1. Ananda Dharmasinghe Bandara, Kalyani Pedesa, Kelaniya. 2. Herath Mudiyanselage Heen Bandara Jambu Sameeraya, Kiridigala. Defendant-Appellants Vs. 1. Herath Mudiyanselage Leelawathie Menike 2. Kotahawadige Don Wimalasena Both of Mahajana Dispensary, Buttala. Plaintiff-Respondents And Now Between 1. Ananda Dharmasinghe Bandara, Kalyani Pedesa, Kelaniya. Presently At No. 565/2C, 15th Lane, Mahindu Mawatha, Athurugiriya Road, Malambe. 2. Herath Mudiyanselage Heen Bandara Jambu Sameeraya, Kiridigala. Defendant-Appellant- Appellants Vs. 1. Herath Mudiyanselage Leelawathie Menike 2. Kotahawadige Don Wimalasena Both of Mahajana Dispensary, Buttala. Plaintiff-Respondent- Respondents
19/01 /2014	SC. FR. No. 37/2013	1. Galabada Gamage Sunethra Arambawela. 2. Nihinsa Senuli Arambawela Both of 109/10, Fife Road, Colombo 5. Petitioners Vs. 1. Mrs. Dhammika C.A. Jayanetti Principal Sirimavo Bandaranaike Vidyalaya, Stanmore Crescent Colombo 7. 2. Mr. S.M. Gotabaya Jayaratne Secretary to the Ministry of Education, Ministry of Education , surupaya, Battaramulla. 3. Hon. Bandula Gunawardhana (M.P.) Minister of Education, Ministry of Education, Isurupaya, Battaramulla. 4. The Interview Board (on admissions to Grade 1, 2013), C/O, Sirimavo Bandaranaike Vidyalaya, Stanmore Crescent Colombo 7.5. Mr. J.H.M.W. Ranjith 6. Ms. B.G.I. Kalani Hemali 7. Ms. A.D.M.P. Gunasekara 8. Mr. P. Wickremasinghe 9. Ms. Ranjana Perera All members of the Appeal Interview Board (on admissions to Grade 1, 2013) for Sirimavo Bandaranaike Vidyalaya, Stanmore Crescent Colombo 7. 10. Hon. Attorney General Attorney General’s Department, Hulftscdorp Colombo 12. Respondents.
16/01 /2014	SC. Appeal No. 22/2013	1. Wickrama Arachchilage Shriyakanthi 2. Hewa Malavige David, Both of at C.S. 105, Thambala Road, Railroad Junction, Polonnaruwa. Plaintiffs Vs. E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa. Defendant And Between E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa. Defendant-Appellant Vs. 1. Wickrama Arachchilage Shriyakanthi 2. Hewa Malavige David, Both of at C.N. 105, Thambala Road, Railroad Junction, Polonnaruwa. Plaintiff-Respondents And Now Between E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa. Defendant-Appellant-Appellant Vs. 1. Wickrama Arachchilage Shriyakanthi 2. Hewa Malavige David, Both of at C.N. 105, Thambala Road, Railroad Junction, Polonnaruwa. Plaintiff-Respondent-Respondents

16/01 /2014	SC APPEAL No. 14/2011	1. Hakkini Asela De Silva 2. Hakkini Asanga De Silva 3. Kirimadura Kumudu Gunawardene Accused-Appellants-Petitioners-Appellants Vs. Hon. Attorney General
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
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
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
06/09 /2012	SC/ Appeal/ 106/2009	M.D.Gunasena & Co. Ltd., 217, Olcott Mawatha, Colombo 11. Employer-Appellant-Appellant Vs. Somaratne Gamage , 4/101, Padukka Road, Horana Applicant-Respond-Respondent

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

In the matter of an application for Special Leave to Appeal under and in terms of Articles 127 and 128 of the Constitution read together with the Supreme Court Rules from the Judgment of the Court of Appeal dated 9th November 2009.

SC. Appeal No. 40/2010

SC. (Special) Leave to Appeal
No: 296/2009

C.A. Writ Application
No. 893/2007

Associated Motorways PLC,
Registration No. PQ 16,
No. 185, Union Place,
Colombo 02.
Petitioner-Petitioner

-Vs.-

1. The Commissioner General of Inland Revenue,
   Inland Revenue Building,
   P.O. Box No. 515,
   Sir Chittampalam A, Gardinier Mawatha,
   Colombo 02.

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

Respondents-Respondents

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

COUNSEL : K. Kanag-Iswaran, PC, with Nigel Bartholameusz, Shivan Kanag-Iswaran, L. Jeyakumar and Ms. Sankhitha Gunaratne for the Petitioner-Petitioner-Appellant.

Ms. S. Barrie, SSC, for the Respondents-Respondents-Respondents.

ARGUED ON : 05.09.2011, 23.09.2011, 27.09.2011, 22.11.2011, 25.09.2012, 05.03.2013 and 25.06.2013.

DECIDED ON : 04.04.2014

SHIRANEE TILAKAWARDANE, J

Special Leave to Appeal was sought by the Petitioner-Petitioner [hereinafter referred to as the Petitioner] by way of Application No. 296/2009 in order to enable an Appeal against the judgment of the Court of Appeal dated 09.11.2009. Special Leave to Appeal was granted on 21.05.2010 on the following questions of law as enumerated in paragraph 47 (a) and (c) of the Petition dated 17.12.2009:

1. **Did the Court of Appeal err in law in failing to consider that Section 13 of the Stamp Duty (Special Provisions) Act No. 12 of 2006 mandates that where there is an inconsistency between it and the Stamp Duty Act No. 43 of 1982, the Stamp Duty (Special Provisions) Act No. 12 of 2006 prevails?**

2. **Did the Court of Appeal err in law in ignoring the canons of interpretation of taxing statutes when it sought to apply the definition of "value" in the Stamp Duty Act No. 43 of 1982 when interpreting the "aggregate value of such number" of shares as appearing in the Gazette "P9" under the Stamp Duty Act No. 12 of 2006?**

The facts relevant to the present case are elucidated as follows:

The Board of Directors of the Petitioner [Company] at the Extraordinary General Meeting convened on 12.10.2006 passed an Ordinary Resolution which approved the issue of Bonus Shares, unanimously. The Resolution approved the issuance of bonus shares of 46, 373, 000 in the ratio of five (5) new shares for every one (1) share held. Subsequent to approval, Share Certificates dated 18.10.2006 were dispatched to the shareholders and these Certificates indicated the value of one share [par value] as Rs. 10/-.

On 28.11.2006, the Petitioner, acting on the advice given by the Tax Consultants of the Company, forwarded a cheque for Rs. 2, 318, 650/- to the Department of Inland Revenue as stamp duty payable on the issuance of bonus shares accompanied by a letter dated 05.12.2006 explaining the delay in payment of the sum. As clarified in the accompanying letter, this payment was forwarded with the intention of complying with Item No. 6 of Gazette No. 1465/19 of 05.10.2006 which declares as follows:

"Any share certificate issued consequent to the issue, transfer or assignment

of any number of shares of any company –

For every Rs. 1000 or part thereof of the aggregate value of such number - Rs. 5.00".

The payment made by the Petitioner was 0.5 per cent of the aggregate value of the number of shares issued by the Company as bonus shares and calculated using the par value i.e. the value denoted on the face of the Share Certificate. Thus, the manner in which the sum was calculated can be elucidated as follows:

46, 373, 000 x 10 x 5/1000 = Rs. 2, 318, 650/-

On 06.12.2006, the Deputy Commissioner of the Inland Revenue responded by letter stating that in relation to No. 6 of Gazette No. 1465/19, the definition given to the word "Value" in the Stamp Duty Act No. 43 of 1982 should apply: the definition given is quoted below:

"Value with reference

a) *To any property (other than immovable properties which is gifted) and to any date, means the price which in the opinion of the Assessor, that any property would have fetched in the open market on that date."*

The value of a share in the open market on 12.10.2006 as determined by the Colombo Stock Exchange was Rs. 170/-. Therefore, the stamp duty payable was revised by the Deputy Commissioner as follows:

46, 373, 000 x 170 x 5/1000 = Rs. 39, 417, 050/-

In addition to this revision, a penalty of 10% was imposed for the delay.

Aggrieved by this decision, the Petitioner lodged an Appeal with the Commissioner General of Inland Revenue on 01.01.2007 in accordance with ***Section 40*** of the **Stamp Duty Act No. 43 of 1982** as amended by the **Stamp Duty (Special**

Provision) Act No. 12 of 2006 and/or read with ***Section 136*** of the **Inland Revenue Act No. 38 of 2000**. Thereafter, subsequent to further discussions between the Petitioner and the Deputy Commissioner, the former informed the latter by telephone that the Company is not liable to pay stamp duty on the market value of the shares. The Petitioner then instituted proceedings challenging the imposition of stamp duty on the market value of the shares by the Petition dated 27.09.2007 in the Court of Appeal Writ Application No. 826/2007.

The Application was then withdrawn, with liberty to file a new application, subsequent to the Counsel for the 1st Respondent indicating that the letter from the Deputy Commissioner marked "P12" was not an 'assessment' and the Court of Appeal directed the 1st Respondent to issue a Notice in terms of ***Section 10*** of **Stamp Duty [Special Provisions] Act No. 12 of 2006**. On 17.10.2007, the Petitioner was sent the Notice of Assessment and the attached Stamp Duty Assessment Sheet indicated an increase of the penalty on balance payable at Rs. 11, 129, 520/-, thereby increasing the total payable amount to Rs. 48, 227, 920/-.

Aggrieved by this assessment, the Petitioner instituted Writ Application No. 893/2007 in the Court of Appeal wherein, on 09.11.2009, the Court dismissed the application of the Petitioner stating that

> *"The value of share cannot be interpreted anything other than the market value of the share as interpreted in the Stamp Duty Act…… Hence, there is no illegality or impropriety in the Stamp Duty Assessment sheet dated 12.10.2007".*

In order to effectively answer the questions of law that have been posed before this Court the Gazette bearing No. 1465/19 cannot be examined in isolation: it must be examined in the context of the **Stamp Duty Act No. 43 of 1982** and that of **Act No. 12 of 2006**. Thus, given that the more recent provisions have sought to amend the original Act, a detailed summary of the changes made to the legislative provisions is

called for.

The original Act which deals with the imposition of stamp duty remains the **Stamp Duty Act No.43 of 1982** which was certified on 14.12.1982 with the primary purpose of imposing stamp duty on '*instruments and documents'* as set out in the Act. The imposition of stamp duty in this manner was temporarily discontinued by the **Finance Act No. 11 of 2002** wherein Section 15 stated the following:

> *"No stamp duty shall be imposed or paid under the Stamp Duty Act, No. 43 of 1982 (hereinafter in this Part referred to as the "principal enactment") on any instrument executed or any document presented or filed on or after the date on which the provisions of this Part shall come into force".*

It must be noted that the **Stamp Duty Act No. 43 of 1982** was not repealed and, while this Section was in operation for a period of four years, the **Stamp Duty [Special Provision] Act No. 12 of 2006**, which was certified on 31.03.2006, re-imposed stamp duty on the instruments set out in the Act. The long title of this Act reads as follows:

> *"AN ACT TO PROVIDE FOR THE RE-IMPOSITION OF STAMP DUTY; TO PROVIDE FOR THE REPEAL OF PART lll OF THE FINANCE ACT NO.11 OF 2002; AND TO PROVIDE FOR MATTERS CONNECTED THEREWITH OR INCIDENTAL THERETO".*

Relevant to this case is ***Section 13*** of **Act No. 12 of 2006** which stated that the provisions of **Act No. 12 of 2006** will prevail over that of **Act No. 43 of 1982** if any inconsistencies arise between the two Acts.

> *"From and after the date of the coming into operation of this Act, the provisions of the Stamp Duty Act No. 43 of 1982, relating to the imposition of Stamp Duty [other than any instrument relating to the transfer of immovable*

> *property, the transfer of motor vehicles or documents filed in Court], exemptions and any other provision in the aforesaid Act, shall, in so far as the same are inconsistent with the provisions of this Act, have no operation and the provisions of this Act shall prevail".*

This Act, by ***Section 3(1)***, also allows the duty to be charged as determined by the Minister, published in the Gazette on every instrument as specified in the Act:

> *"From and after the date of the coming into operation of this Act, there shall be charged a duty [hereinafter to be called 'stamp duty'] at such rate as the Minister may determine by Order published in the Gazette on every 'specified instrument'.."*

Thus, Gazette notifications 1439/1 and 1465/19 are relevant in considering this issue as they were published under ***Section 3*** of **Act No. 12 of 2006**.

Firstly, given that the interpretation of specific legislative provisions is called for, an evaluation of the type of interpretation that can be exercised by the Court is in order. In **Halsbury's Laws of England** [*4th Edition, Volume 44*] it is stated that

> *"In construing the statutory provisions concerning stamp duty, many of which are to be construed as one, strict attention must be paid to the actual words used by the legislature….ambiguous words are construed in favour of the person liable to the duty."*

In '**Interpretation of Statutes'** by *N. S. Bindra, 9th Edition*, it is stated that

> *"A taxing statute must be construed strictly; one must find words to impose the tax, and if words are not found which impose the tax, it is not imposed".*

It is, thus, abundantly clear that in the interpretation of a fiscal statute, a strict

outlook must be taken with specific regard to the words chosen and any ambiguity would benefit the Petitioner.

In this light, it must be noted that in this case there is a marked difference between the two relevant gazette notifications and the Counsel for the Petitioner has asserted that the wording used in these two notifications signify a change in legislative intention.

Item 6 of Gazette No. 1439/1 of 03.04.2006 states that stamp duty will be charged

> *'"On the issue, transfer or assignment of any share of a company, other than a quoted public company on the market value determined by the Commissioner General of Inland Revenue on the date of such issue, transfer or assignment of such share*
> *For each Rs. 1, 000 or part thereof of such **market value** of the value of shares Rs. 5. 00"*

While this Notification specifically excluded a quoted public company, thereby excluding the Petitioner Company [which is a quoted public company], the notification specifically refers to stamp duty being imposed on the market value of the shares concerned.

This Notification must be read in light of the more recent Gazette Notification No. 1465/19 of 05.10.2006 which effectively rescinded the Order made under ***Section 3*** and published in the Gazette Extraordinary No. 1439/1 of 03.04.2006. Item 6 of Gazette No. 1465/19 states that stamp duty will be charged on

> *"Any share certificate issued consequent to the issue, transfer or assignment of any number of shares of any company*
> *For every Rs. 1, 000 or part thereof of the aggregate value of such number Rs. 5.00"*

As the abovementioned item is the subject of the present case, clearly, the words used have given rise to a degree of ambiguity, especially with regard to what '*aggregate value'* entails. As a result, it is necessary to consider this Item in conjunction with Gazette No. 1439/1.

A noteworthy difference between the words published in Gazette No. 1439/1 and Gazette No. 1465/19 is the inclusion of the phrase 'share certificate'. This Court feels that this inclusion is of paramount importance in the interpretation of the legislative provisions in question.

A share certificate is defined by ***Section 71*** of **Act No. 43 of 1982** to mean

> *"a certificate or other document evidencing the right or title of the holder thereof or any other person either to any shares, scrip, stock or debenture stock in or any incorporated company or other body corporate, or to become proprietor of shares, scrip, stock or debenture stock in, or of, any such company or body".*

Thus, a share certificate is used as mere evidence of ownership of shares in a company. Furthermore, ***Section 4*** of the **Stamp Duty [Special Provisions] Act No. 12 of 2006**, which defines the 'specified instruments' upon which duty is imposed expressly reads as follows:

> *"For the purpose of Section 3, 'specified instruments' means*
> *(f) A share certificate on new or additional issue or on transfer or assignment*

Thus, in the present case, the Petitioner Company issued additional shares in the form of bonus issues and dispatched share certificates evidencing the issue, upon which, under **Act No. 12 of 2006**, duty is applicable.

The primary issue arises due to the inclusion of 'share certificate' in Gazette No.

1465/19. The share certificate is the specified instrument upon which duty can be imposed. This is of paramount importance for, given a literal interpretation, the Court cannot ignore the fact that the instrument specified by the legislature is the share *certificate*. Keeping this in mind, its inclusion in the Gazette must be analysed and this analysis must go hand in hand with the assessment of the change of wording from 'market value' to 'aggregate value'.

Firstly, it must be observed that the specified instrument defined by **Act No. 12 of 2006** is the 'share certificate'. It must be noted that **Act No. 12 of 2006** came into operation on 31.03.2006 and Gazette No. 1439/1 came into operation on 03.04.2006 while the latter included the provision that duty must be imposed based on the market value as determined by the Commissioner General of Inland Revenue. However, within a mere six months, it was varied into imposing duty on *share certificates* issued by any company. It must be noted that the imposition of duty on such a share certificate is undisputed.

This Court cannot, therefore, ignore the existence of the phrase *share* ***certificate*** in the notification and surmises that its inclusion means that the value on the face of the share certificate is paramount in the calculation of the stamp duty to be imposed. This summation is further supported by the exclusion of the words '*market value'* and inclusion of the words '*aggregate value'.* Relevant here is *N.S. Bindra* in **'Interpretation of Statutes'** *9th Edition* wherein it is stated as follows:

> *"When a legislature amends an Act by deleting something which was there, then in the absence of an intention to the contrary, the deletion must be taken to be deliberate".*

This Court cannot ignore the fact that the Legislature has failed to include 'market value' in the Item, which they would have done, had that been the intention. Instead, this phrase which was initially included, was deleted in the subsequent Gazette Notification and it would be remiss of this Court to not take this change into account

when interpreting Gazette No. 1465/19.

It is not a stretch of imagination or a purposive interpretation to interpret the Gazette Notification in this manner. The inclusion of share certificate renders the interpretation that the duty should be imposed on the certificate itself i.e. the value shown on the certificate. The absence of the term 'market value' further supports this contention. In adopting a literal interpretation of this notification, any other interpretation given to the notification would be uncalled for as the *specified instrument*, defined by **Act No. 12 of 2006** is the 'share certificate'; **not the share nor the market value of the share, but the *certificate*** and thus, the interpretation that the '*aggregate value'* of shares refers to the par value given on the certificate multiplied by the total number of shares is wholly justified.

In fact, it appears to this Court, that even if Gazette No. 1465/19 is considered in isolation, consideration of the market value of the shares would amount to an **inference** as the phrase *market value* is not mentioned in Item 6. In fact, such a construction appears untenable, especially given that the statute in question is a taxing statute and a liberal interpretation can easily result in an incorrect summation. This Court cannot possibly ***imply*** anything that has not been expressed in words by the legislature. There exists a sound reason behind the principle of employing a literal interpretation of taxing statutes and it would be extremely remiss of this Court to employ any other interpretation. Given this reality, and given the wording used, there is no doubt in the mind of this Court that the aggregate value in Item 6 refers to the total arrived at by multiplying the par value with the total number of shares, especially given that the phrase 'share certificate' [which is also the specified instrument according to **Act No. 12 of 2006**] is included in the Notification.

This Court must further assert that even if the change from market value to aggregate value creates any doubt, *it must be in favour of the Petitioner.*

Next, the usage of the word '*value'* in item 6 of Gazette No. 1465/19 has given rise

to the argument of the Respondents that the definition given to the word '*value'* by ***Section 71*** of **Act No. 43 of 1982** which states that "*'Value' with reference to any property [other than immovable property which is gifted] and to any date, means the price which in the opinion of the Assessor, that property would have fetched in the open market on that date"* must be applied to the phrase '*aggregate value'.* Thus, the Respondents argued that shares, coming within the definition provided by ***Section 71***, should mean that the market value of the share is considered when imposing duties and that '*aggregate value*' of such shares would entail the total number of shares multiplied by the market value i.e. the amount for which something can be sold on a given market [as defined by the **Oxford Dictionary**].

Indeed a share is defined as 'movable property' under the **Companies Ordinance 1938** as well as the **Companies Act No. 7 of 2007** but reference must also be made to the judgment of Sharvananda C.J in **Ratwatte v Goonesekera (1987)** *(2 SLR 260)* where it was stated that although shares have been defined as such

> *"…this is for the purposes of the provisions of the Companies Ordinance only and not for purposes outside the province of Company Law. A share is neither movable nor immovable property as known to the Roman or Roman-Dutch law. It is a bundle of rights and liabilities. It is an English law concept and a typical item of property of the modern commercial era in a distinct class of its own. It is a chose in action".*

The decision also quotes Lord Greene in **Re G. M. Holdings Limited** where it was stated that:

> *"A share is a chose in action. A chose in action implies the existence of some person entitled to the rights which are rights in action as distinct from rights in possession…….. A chose in action confers no right to possession of a physical thing… it is manifest that a share does not dovetail into the Roman or Roman-Dutch Law categorisation of movable and immovable.."*

In short, a share cannot be categorised strictly into a movable or immovable property and the distinction made in the Companies Act will apply to the domain of company law only. In the present case, it is abundantly clear to this Court that a *share* is a chose in action which cannot be categorised as *property* and thus, does not come within the definition of '*value'* as ***Section 71*** specifically concerns '*property'.*

Even if one were to consider shares as amounting to *property*, bonus share, specifically are different from the general understanding of property. The issuing of bonus shares by the Board of Directions was to capitalize part of the Company's reserves. In doing so, the shares were issued free of charge [bonus], without an agreement of sale, with a par value of Rs. 10/- and most importantly, without a knowledgeable and willing buyer and seller. The shares were not sold in the open market at market value either. Thus, one can draw a distinction between property and the issuance of bonus shares and this Court cannot, in good conscience, ignore this significant difference which makes bonus shares significantly distinct from property in the general sense. It would be truly illogical and impractical to classify bonus shares as property in the accepted sense of the word as a sale of property would entail the passage of consideration, an agreement to do so and of course, the presence of a knowledgeable and willing buyer and seller: qualities which are absent in bonus shares.

Therefore, this Court finds that the definition given by ***Section 71*** to the word '*value'* does not apply in the present case to bonus shares either way. Given this reality, one must consider the two Gazette notifications and the wording used to ascertain the intention of Parliament. Even then, one must take care not to imply meanings which are not included in the notification itself as this Court has reasoned above.
Thus, for the reasons set forth above, I set aside the Court of Appeal judgment dated 09.11.2009 and allow the Appeal. No costs.

Sgd.
JUDGE OF THE SUPREME COURT

MARSOOF, PC, J.

I agree.

Sgd.
JUDGE OF THE SUPREME COURT

DEP, PC, J.

I agree.

Sgd.
JUDGE OF THE SUPREME COURT

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

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 12th February,2013 made in Case No. WP/HCCA/COL/308/2006 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.
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

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 Arachchcige 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. 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:

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"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

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. (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with the Supreme Court Rules 1990 from the Judgment pronounced on 03.05.2011 by the High Court of the Western Province sitting in Kalutara in Civil Appeal No. WP/HCCA/KAL 18/2003 (F) in terms of Section 5A (1) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

SC. Appeal No. 157/2011

SC. HC. (Leave to Appeal)
Application No: 206/2011

H.C. Kalutara Civil Appeal
No. WP/HCCA/KAL 18/2003 (F)

Warnakulasuriyage Charlert
Kusumawathi Kulasuriya,
'Gangasiri",
Weragama,
Wadduwa.
Defendant-Respondent-Petitioner

D.C. Kalutara Case
No. 1290/L

-Vs.-

Don Wimal Harischandra
Gunathilaka
27, Circular Road,

Wadduwa.

Plaintiff-Appellant-Respondent

BEFORE : Tilakawardane, J.
Sathyaa Hettige, PC, J. &
Marasinghe, J.

COUNSEL : Chandana Prematilake for the Defendant-Respondent-Petitioner-Appellant.

Ranjan Gooneratne for the Plaintiff-Appellant-Respondent-Respondent.

ARGUED ON : 13.01.2014

DECIDED ON : 04.04.2014

SHIRANEE TILAKAWARDANE. J

Leave to Appeal was granted by this Court on 14.10.2011 against the judgment of the High Court of the Western Province holden in Kalutara dated 03.11.2011, on the following questions of law as enumerated in paragraph 11 (i) - (ix) of the Petition dated 13.06.2011:

(i) Did the Provincial High Court [exercising civil appellate jurisdiction] err in holding that the Learned District Judge had erred in arriving at the finding that a constructive trust had been created as a result of the transaction in P1 [i.e. Deed No. 7948 dated 15.07.1987]

(ii) Did the Provincial High Court err in concluding that it cannot reasonably be inferred consistently with the attendant circumstances that the defendant did not intend to dispose of the beneficial interest of the property concerned?

(iii) Did the Provincial High Court err in not even referring, leave aside evaluating, the attendant circumstances from which the Learned District Judge had concluded that the plaintiff was holding the land in issue as a constructive trust on behalf of the defendant and she had not intended to transfer beneficial interest by P1?

(iv) Did the Provincial High Court err in holding that the defendant's admitted, continued and uninterrupted possession [i.e. even after P1 and P2] and the documents V8-V11 being evidence of such possession do not render any assistance in establishing that the consideration in P1 was in fact a loan and the transaction in P1 had resulted in the creation of a constructive trust?

(v) Did the Provincial High Court err in insisting that failure to place evidence of the Notary Public and the witnesses involved in P1 militates against the defendant's position of a loan transaction and a resulting constructive trust in the teeth of other overwhelming evidence?

(vi) Did the Provincial High Court err in the teeth of other overwhelming evidence in suggesting that the absence of clauses on repayment of the money and re-transfer of the property in P1 parole evidence from the said Notary Public and the witness to the effect that P1 was only a security bond for the loan should have been led?

(vii) Did the Provincial High Court err in assuming that the defendant had not pleaded that there was a parole agreement between the parties to the effect that P1 was subject to a constructive trust in the light of paragraphs 3 and 11 of the answer where she had pleaded that she transferred the

property in trust for the loan obtained, never intended to transfer the title of possession to the Vendee in P1 and the plaintiff was therefore holding the property in constructive trust for her?

(viii) Did the Provincial High Court err in relying on inadmissible and irrelevant considerations such as the value of a perch of land as given by Counsel at the argument and the defendant's failure to file action against the plaintiff or his predecessor after the dismissal of District Court of Panadura Case No. 551/L in allowing the Appeal?

(ix) Did the Provincial High Court err in stating that Section 91 of the Evidence Ordinance is applicable to the facts of the instant case and that the defendant had failed to strictly rebut the contents in P1 which denotes a valid transfer?

The Counsel appearing for the Plaintiff-Appellant-Respondent also wished to raise the following question of law:

- Is the Judgment and Decree of dismissal of the District Court, Panadura Case No. 551/L res judicata against the Petitioner?

This case [S.C. Appeal 157/2011] relates to a block of land which was conveyed by Deed of Transfer bearing No. 7948 dated 15.07.1987 attested by B. H. Hemaratne Perera, Notary Public by Warnakulasuriyage Charlert Kusumawathie Kulasuriya [hereinafter referred to as the Petitioner] and Warnakulasuriyage P. Kulasuriya to Gamini Sarathchandra Mohotti for Rs. 10, 000/-. The premises in suit was later transferred by Gamini Sarathchandra Mohotti [hereinafter referred to as Mohotti] by Deed of Transfer bearing No. 10944 dated 12.09.1990 to Mastiyage Don Wimal Harischandra Gunathilake [hereinafter referred to as the Respondent] for Rs. 40, 000/-.

The main issue which led to the institution of this Action is the entry of the Petitioner into the premises in suit subsequent to removing part of the wire fence surrounding the property and the erection of two columns. The Respondent, in a Police

Complaint made to the Police Station in Wadduwa on 26.01.1998 [recorded on page 82, paragraph 324 of the Complaint Book] complained that the Petitioner had also brought panels of wood and reported that the Petitioner appeared to be constructing a small structure on the property.

On 05.02.1998, action was instituted in the District Court of Panadura by Case No. 1290/L by the Respondent to obtain a Declaration of Title and an order of ejectment to eject the Petitioner from the premises in suit. The Petitioner, in her Answer, took up the position that Deed No. 7948 was not in fact a Transfer, but was executed in favour of Gamini Sarathchandra Mohotti [hereinafter referred to as Mohotti] as security for a loan and that he was holding the premises in suit on a constructive trust for the Petitioner. She further claimed that he had transferred the land to the Respondent dishonestly and fraudulently in order to place the property beyond her reach and disallow the Petitioner to make the requisite payments and reconvey the property.

The Learned District Court Judge by the Judgment delivered on 14.07.2003 dismissed the Respondent's action. Aggrieved by this decision, the Respondent appealed to the High Court of Civil Appeals holden in Kalutara [hereinafter referred to as the High Court] where the Learned High Court Judge, on 03.05.2011, delivered Judgment in Case No. WP/HCCA/KAL 18/2003 allowing the Appeal.
Aggrieved by the aforesaid decision, the Petitioner appealed to this Court and was granted Leave to Appeal on 14.10.2011 and progressed on the abovementioned questions of law.

In the present case, the property in question was conveyed by the Petitioner to one Mohotti by a Deed of Transfer. This particular Deed, was an absolute transfer on the face of it, and made no mention regarding a conditional agreement or an agreement to re-transfer the property. Therefore, in the eyes of this Court, P1 is, prima facie, an absolute conveyance executed by a Notary Public upon which consideration of Rs. 10,000/- has passed. However, given the assertion of the Petitioner that the

property was conveyed as security for a loan, the Court finds it imperative to analyse the evidence placed before Court.

The only evidence that has been put forth by the Petitioner is oral in nature. In this regard, Ennis J in **Perera v. Fernando [1914]** *[17 NLR 486]* is pertinent as it summarises the applicable law surrounding the admissibility of oral evidence to establish a constructive trust.

> *"In order to prove the trust, oral evidence was admitted, and the admissibility of this evidence is the first question on the appeal. So far as I have been able to follow the argument of the plaintiff-respondent, this evidence is to show that the parties to the deed No. 89 were in the relationship of borrower and lender, and that the lands were really conveyed by way of mortgage.*
>
> *Such evidence, in my opinion, comes within the direct prohibition of section 92 of the Evidence Ordinance; it is oral evidence to show that the transaction was other than that disclosed by the deed and to contradict-the deed. It was then urged that it would be admissible under the second proviso to section 92, but evidence of a separate oral agreement under that proviso is only admissible when it is not inconsistent with the terms of the deed. Neither of these contentions give any ground, in my opinion, for the admission of the oral evidence.*
>
> *The deed purports to be a conveyance on sale, not a mortgage, and it is not alleged that Diego Perera did not use his own money, or that he acted as agent for another, or that he acted fraudulently, or any of the grounds upon which in Ceylon (Somasunderam Chetty v. Todd;* [1] *Pronchihamy v. Don Davith;* [2] *D. C. Jaffna, 7,409)* ***oral evidence is admissible to prove a trust not inconsistent with the deed****".* [Emphasis added].

While, according to the above reasoning, oral evidence is inadmissible to establish a trust when the Deed itself does not indicate as such, this Court notes that **Section 83** of the *Trusts Ordinance* allows taking attendant circumstances into account, which, if credible, can establish the existence of a constructive trust. Furthermore,

as held by Dheeraratne J in **Dayawathie v. Gunasekara [1991]** *[1 SLR 115]*, this Court agrees that **Section 92** of the *Evidence Ordinance* does not bar parol evidence to prove a constructive trust and that the transferor did not intend to pass the beneficial interest in property.

What must be clearly indicated is that parol evidence must be substantiated with *attendant circumstances* as allowed for under **Section 83** of the *Trusts Ordinance* which states as follows:

> *"Where the owner of property transfers or bequeaths it, and it cannot reasonably be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or his legal representative".*

The purpose of **Article 83** has been eloquently noted by Basnayake C.J in **Muttammah v. Thiyagaraja (1960)** *(62 NLR 559),*

> *"The section is designed to prevent transfers of property which on the face of the instrument appear to be genuine transfers, but where an intention to dispose of the beneficial interest cannot reasonably be inferred consistently with the attendant circumstances."*

Therefore, the most important consideration in this case is whether the attendant circumstances are consistent with the inference that the Petitioner did not intend to dispose of the beneficial interest in the property when executing the conveyance.
While in **Muttammah v. Thiyagaraja (1960)** *(62 NLR 559)*, the Court further clarified the meaning and extent of *"attendant circumstances"* as

> *"….circumstances which precede or follow the transfer but are not too far removed in point of time to be regarded as attendant which expression in this context may be understood as 'accompanying' or 'connected with'",*

In **Ehiya Lebbe v. Majeed [1947]** *[48 NLR 357]*, Dias J noted certain circumstances

which would indicate whether the transferor intended for the beneficial interest to pass or not as follows:

> *"Thus, if the transferor continued to remain in possession after the conveyance, or if the transferor paid the whole cost of the conveyance or if the consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed - all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."*

Furthermore, in **Carthelis v. Ranasinghe [2002]** *[2 SLR 359]*, Dissanayake J noted that

"In the case of Thisa Nona and Three Others v. Premadasa, it was observed, that the following circumstances which transpired in that case were relevant on the question whether the transaction was a loan transaction or an outright transfer

> *(1) the fact that a non-notarial document was admitted to have been signed by the transferee,*
>
> *(2) the payment of the stamp duty and the Notary's charges by the transferor,*
>
> *(3) the fact that the transfer deed came into existence in the course of a series of transactions, and*
>
> *(4) the continued possession of the premises in suit by the transferor just the way she did before the transfer deed was executed".*

The judgment further continued to note that if, subsequent to considering the attendant circumstances, it would be apparent that the Appellant [in the stated case] "*did not intend to part with the beneficial interest in the property"* and thus, in terms of **Section 83** of the *Trusts Ordinance*, the Respondent would hold such property for the benefit of the 1st Appellant.

In analysing the present Supreme Court case in accordance with the tests and rules set out in the above cases, several factors such as there being a purported oral

agreement to re-transfer the property subsequent to payment of borrowed sum and interest, who claims possession of the property and the consideration paid appear pertinent questions whose answers can assist in the establishment of a trust.

One of the questions of law posed to this Court turns on the point of whether the High Court was incorrect to have taken into account the perch value at the time the conveyance was executed. This Court finds that this question is relevant in discussing whether the value of a perch amounts to an *attendant circumstance* under **Section 83**. As Dias J noted in **Ehiya Lebbe v. Majeed [1947]** *[48 NLR 357]*

> *"…if the transferor paid the **whole cost of the conveyance** or if the **consideration expressed on the deed is utterly inadequate to what would be the fair purchase money for the property conveyed** - all these are circumstances which would show whether the transaction was a genuine sale for valuable consideration or something else."* [Emphasis added].

Therefore, it is clearly established that the consideration that passed upon the execution of the conveyance of property is a very valid circumstance that can assist in establishing whether the transferor intended for the beneficial interest to pass to the transferee.

The High Court judgment took into account the fact that the market value of a perch in the area at the time of executing the Deed [in 1987] was between Rs. 750/- and Rs. 1, 000/-. As the extent of the land sold is 15.95 perches, the total market value of the property ranges between Rs. 11, 962.50 – Rs. 15, 950.00. Therefore, the sale of the land for a consideration of Rs. 10, 000 does not appear to be grossly inadequate. The passage of valuable consideration close to the market value of the property during the transaction indicates, if at all, that the conveyance intended the beneficial interest to pass to the transferee. Therefore, while the value of the property is a valid consideration in terms of an *attendant circumstance,* in the present case, it appears that there was a genuine sale for valuable consideration.

The purported continued possession of the Petitioner was also raised as a point of

contention, which, according to the judgment given in **Thisa Nona and Three Others v. Premadasa [1997]** [*1 SLR 169*] indicates that such continued possession of the premises by the transferor was a relevant consideration in assessing whether it was a loan or an outright transfer.

In the present case, the Petitioner has asserted that she remained in continuous occupation and has presented several documents marked V8, V9, V10 and V11 in support of this contention. The only document that affirms that she may have been in possession is V8 which is a permit issued on 20.06.1989 to cut down a jak tree, which indicates the Petitioner's name and the address of the premises in suit. However, V9, a police complaint lodged on 23.05.1990 indicates her address as being 'Gangasiri, Weragama, Wadduwa', and not the premises in suit.

Furthermore, the credibility of her assertion of being in continuous occupation of the premises in suit is seriously impaired in light of the fence erected by the Respondent, which was not controverted or challenged. In the eyes of this Court, the erection of the fence and the absence of any effort on the part of the Petitioner to take steps to report this development, and/or file legal action, indicate to the Court clear and cogent evidence that the Respondent was in possession of the premises.

In addition to considering whether the above circumstances can come within **Section 83** and concluding that they could not, it is further necessary to comment on several questions of law posed to the Court regarding the establishment of a constructive trust in favour of the Petitioner. The Counsel for the Petitioner has posed the questions whether the High Court erred in stating that failure to place evidence of the Notary Public and the witnesses militates against the contention that P1 was security for a loan.

In this regard, it is important to note that evidence by the Notary Public that attested Deed No. 7948 would've been of immense value to this case. This is especially so

as the Deed of Transfer, prima facie, indicates that the transaction was an absolute conveyance, with no mention of there being any indication of an agreement to reconvey the property, or that the premises in suit was security for a loan. Sworn testimony from the Notary Public would have clarified whether there was an agreement, when executing the conveyance, that the premises in suit was security for a loan and establish whether the Petitioner did in fact hand over Rs. 10, 000 as interest, in the presence of the transferee, to the Notary Public, which would have in turn established that the premises in suit was indeed security. However, though the Petitioner in the District Court indicated that she intended to call the Notary Public as a Witness [and the Notary was listed as a Witness as well], he was never called to place evidence before the Court. The assertions of the Petitioner would have also gained credibility if the individuals who signed as Witnesses in Deed No. 7948 had been called to place evidence before the Court.

This Court also notes that the Petitioner affirmed that she made the alleged payments of Rs. 10, 000/- on two separate occasions, once to the Notary Public, and the other to the father of the transferee, by borrowing from her siblings as she herself did not enjoy the financial capacity to do so. However, the Court cannot confirm the veracity of this statement without conclusive evidence from the siblings confirming the assertion which would've been achieved had they been called as Witnesses.

What is important to note here is that in the absence of concrete and conclusive evidence to support the assertions made by the Petitioner, it is impossible to assign veracity to them and in this instance, with the onus being on the Petitioner to establish that the premises in suit was indeed security for a loan.

Such evidence, even in the form of a notarial or non-notarial agreement, writing or document, would have amounted to an attendant circumstance that could have established a constructive trust. While such a document does not enforce the promise, a non-notarial writing is admissible to prove that the equitable estate under

a notarial transfer was intended to pass upon the non-fulfilment of a certain condition as held in **Carthelis v. Perera [1930]** *[32 NLR 19]*. This was affirmed in **Ehiya Lebbe v. Majeed [1947]** *[48 NLR 357]* where a non-notarial document signed on the same day as the transfer of property was held to give rise to a constructive trust under **Section 83** of the *Trusts Ordinance*. The utility of a non-notarial document to establish an '*attendant circumstance'* was further emphasized in **Premawathi v. Gnanawathi [1994]** *[2 SLR 171]* and **Thisa Nona and Three Others v. Premadasa [1997]** *[1 SLR 169].*

Therefore, the absence of a notarial instrument to establish the agreement to re-convey, or even a non-notarial agreement that could have been taken into account as an attendant circumstance, along with the fact that adequate consideration has passed, there is inconclusive proof of continued possession, makes it impossible for this Court to accept the existence of such an agreement to re-convey through which a constructive trust could be established.

While it is clear that a constructive trust cannot arise in the present case, if such a trust could have been established by attendant circumstances, this would give rise to a question of ownership as the premises in suit has already passed on to a third party to the original transaction, the Respondent. In this regard, **Section 65(1)** of the *Trusts Ordinance* enacts,

> *"Where trust property comes into the hands of a third person inconsistently with the trust, the beneficiary may institute a suit for a declaration that the property is comprised with the trust".*

However, **Section 65(1)** must be read with **Section 66(1)** which enacts,

> *"Nothing in Section 65 entitles the beneficiary to any right in respect of property in the hands of –*
>
> *a) A transferee in good faith for consideration without having notice of the trust, either when the purchase money was paid, or when the conveyance was executed, or*

b) A transferee for consideration from such a transferee".

What is relevant here is whether the Respondent constitutes a bona fide purchaser: if so, the premises in suit cannot be restored to the Petitioner. As discussed by ***L. J. M. Cooray*** in **'The Reception in Ceylon of the English Trust'** *"to take free of the trust, the transferee, under 66(1)(a) must prove that (i) he did not have notice and (ii) he paid consideration".*

In the present case, consideration amounting to a value of Rs. 40, 000 passed from Mohotti to the Respondent. Therefore, the next issue turns on the point of notice and as enacted by **Section 3(j)** of the *Trusts Ordinance:*

> *"A person is said to have "notice" of a fact either when he actually knows that fact, or when, but for wilful abstention from inquiry or gross negligence, he would have known it, or when information of the fact is given to or obtained by any person whom the court may determine to have been his agent for the purpose of receiving or obtaining such information,"*

In the eyes of this Court, there is no evidence to support the contention that the Respondent had actual notice or constructive notice of such an alleged agreement between the Petitioner and Mohotti. For instance, if the Petitioner was in possession of the property, this could have been taken into account by this Court as a fact which should put the Respondent on inquiry. However, such physical possession has not been established and as discussed above, the address given by the Petitioner at several instances during this period of time is different from the premises in suit and this militates against the contention that the Respondent had constructive notice.

In the eyes of this Court, the Respondent certainly qualifies as a bona fide purchaser for there are no circumstances under which the Court can impute notice either as there are absolutely no features on the Deed of Transfer to show that it was anything other than a genuine sale of property. A title search would have

merely indicated that the premises in suit was sold by the Petitioner to Mohotti for Rs. 10, 000/- and that the transaction was legally sound. There was no feature to indicate to the Respondent that the transaction was conditional.

Having established that the Respondent is a bona fide purchaser, it is well established law that where the legal title has passed to a bona fide purchaser for value without notice, equity refuses to intervene to preserve any rights held by the former beneficial owner of the property. This is further affirmed by **Section 98** of the *Trusts Ordinance* which states that

> *"Nothing contained in this Chapter shall impair the rights of transferees in good faith for valuable consideration.."*

Therefore, even if a constructive trust could have been established, a prayer to grant possession of the property to the Petitioner will not stand as the property has already passed into the hands of a bona fide purchaser.

Finally, the Counsel for the Respondent raised the question as to whether the Judgment and Decree of dismissal of the District Court in Case No. 551/L operated res judicata against the Petitioner. Case No. 551/L was instituted by the Petitioner seeking a declaration that Mohotti was holding the premises in suit on constructive trust for her benefit and pleaded that the conveyance by Deed No. 10944 to the third party [the Respondent in the present case] be invalidated.. However, prior to the commencement of the trial, the Petitioner agreed to pre-pay the costs of the trial and if she failed to do so by a certain date, the action was to be dismissed.

As the Petitioner did in fact fail to pay said costs, the action was dismissed on 05.07.1994. The dismissal of the action due to non-payment of costs was subsequently affirmed by both the Court of Appeal on 02.10.1995 [Case No. 458/95] and the Supreme Court on 14.02.1997 [S.C. Appeal No. 32/96].

Therefore, the question is whether the decision in Case No. 551/L operates res judicata against the Petitioner.

As elucidated by Victor Perera J. in **Chulalankara Thero v. Lavendris and Others [1981]** [*1 SLR 226*]

> *"The term 'res Judicata' by its very words mean a matter upon which the Court has exercised its judicial mind and pronounced a decision in regard to the claim of the plaintiff or the defendant".*

Furthermore, it was enunciated in **M. Kandavanam v. V. Kandaswamy [1955]** [*58 NLR 413*] wherein it was held that

> ***"****If, therefore, an action had been dismissed on the merits in view of an adjudication as to a particular point of contest, that adjudication certainly operates as res judicata".*

However, the above dicta makes it clear that if the previous action was not dismissed on the merits of the case, the adjudication does not operate as res judicata. This reasoning is clearly supported in **Pannaloka Thero v. Saranankara Thero [1983]** [*2 SLR 523*] Sharvananda J held that

> *"..res judicata will not operate against the defendant for* ***there had been no adjudication on his claim in the earlier action****"* [Emphasis added].

In addition, in **Keokuk Ry. Co. v. Donnell [1889]** [*77 Iowa 221]*, it was held that in order for res judicata to operate

> *"…the Judgement in the former action must be on the merits".*

Thus, clearly, the operation of the principle of res judicata is governed by certain principles and the doctrine was clearly outlined and summarised by Thambiah J. in **Karunaratna v. Amarisa [1964]** [*66 NLR 567*] which is extracted as follows:

> *"The doctrine of Res Judicata, based on the two Latin maxims "Nemo debet vis vexari pro una et eadem causa " and " Interest republicae ut sit finis litium ", is a plea which bars subsequent action on the same cause of action between the same parties on the ground that the matter has been judicially determined and is a safeguard against unnecessary litigation over the same matter. The doctrine operates when the following essentials are present:-*

1. *There must be a judgment of a court of competent jurisdiction (Ibrahim Baay v. Abdul Rahim [1 (1909) 12 N. L. R. 177.]*

2. *There must be a final judgment (Fernando v. Menika (2 (1906) 3 Bal. 115).*

3. *The case must have been decided on its merits (Annamalai Chetty v. Thornhill 3 [3 (1932) 34 N. L. R. 381]).*

4. *The parties must be identical or be the representatives in interest of the original parties (Sivakolunthu v. Kamalambal [4 (79,53) 56 N. L. R. 52.[]).*

5. *The causes of action must be identical (Dingiri Menika v. Punchi Mahatmaya 5 [5 (1910) 13 N. L. R. 59.])".*

In analysing the present Supreme Court case in accordance with the above principles, it is clear that the present case was not decided on its merits but was dismissed as the Petitioner failed to prepay the costs as indicated above. What is noteworthy in Case No. 551/L is that there was no adjudication upon the issue which was raised. Thus, it appears that the doctrine of res judicata does not operate in the given instance. National courts have followed this line of reasoning and illustrative is the dicta in **Dingiri Amma v. Appuhamy [1969]** [*72 NLR 347*] by Sirimane J. held as follows:

> *"Where a partition action is dismissed …… on the ground of the non-appearance of the plaintiff on the trial date and without any adjudication on the plaintiff's rights, the order of dismissal would not operate as res judicata in a subsequent action brought by the plaintiff for partition of the same land".*

In the above case, it is clear that, as there was no actual adjudication on the issue of the action and the dismissal was due to the non-appearance of the Plaintiff, the doctrine of res judicata does not apply. Similarly in the present Supreme Court case,

the dismissal of the action was due to the non-payment of costs and not on the adjudication of the issue.

It was further argued on the basis of **Jayawardene v. Arnolishamy [1966]** [*69 NLR 497*] that a consent decree supports a plea of res judicata, even though there was no adjudication by Court. On this basis, the Counsel argued that since there was a consent decree in Case No. 551/L, res judicata should operate.

However, this Court notes that Samarawickrema J at p. 500, in the same judgment, notes that this was *"because such a decree implies a decision upon the rights in dispute at the action by the parties".* It is the opinion of this Court that the above dictum that a consent decree should allow the doctrine to operate was in a context where a consent decree is entered where the rights in dispute are decided upon. In the present Supreme Court case, it is clear that there was no such decision and that the consent decree was solely a preliminary consideration which required compliance prior to the commencement of the trial.

Therefore, for the abovementioned reasons, this Court finds that, in the absence of a notarial document that confirms the existence of the agreement to reconvey, the passage of valuable consideration amounting to the market value of the premises in suit and the inability to conclusively establish continuous possession, a constructive trust in favour of the Petitioner cannot be established. Furthermore, even if such a trust could be established, the Respondent qualifies as a bona fide purchaser for value without notice, thereby placing the premises in suit outside the bounds of equity making restitution impossible.

Therefore, this Court affirms the decision of the High Court in Case No. WP/HCCA/KAL 18/2003, and the Appeal is dismissed. This Court also awards the Respondent costs in a sum of Rs 25,000/-

Sgd.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC, J.
I agree.

Sgd.

JUDGE OF THE SUPREME COURT

Marasinghe, J.
I agree.

Sgd.

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 from the Judgment of the High Court (Civil) of the Western Province Holden in Colombo.

SC CHC - Appeal No. 54/2007

CHC No.66/2003(1)

Ambewela Livestock Co. Ltd.
Ambewela Farm, Ambewela.

Plaintiff

Vs.

Sri Lanka Co-operative Marketing Federation Ltd. Markfed,
Co-operative Square, 127,
Grandpass, Colombo 14.

Defendant

And

Sri Lanka Co-operative Marketing Federation Ltd. Markfed,

Co-operative Square, 127,
Gandpass, Colombo 14.

Defendant-Appellant

Vs.

Ambewela Livestock Co. Ltd.
Ambewela Farm, Ambewela.

Plaintiff-Respondent

Before: Thilakawardena, J.
Chandra Ekanayake, J.
Sathyaa Hettige, PC, J.

Counsel: Harsha Soza, PC. With Athula Perera for
Defendant-Appellant.
V.K. Choksy for Plaintiff-Respondent.

Written submissions
tendered on 15.11.2012 (by Defendant-Appellant)
19.04.2012 (by Plaintiff-Respondent)

Decided on: 27.03.2014

Chandra Ekanayake, J.

The defendant-appellant (hereinafter sometimes referred to as the defendant) by its petition dated 27/11/2007 has sought *inter alia* to set aside the judgment dated 2/10/2007 entered in favour of the plaintiff-respondent (hereinafter sometimes referred to as the plaintiff) by the Commercial High Court of Colombo in case No. HC(Civil) 66/2003(1).

By the plaint dated 3/3/2003 the plaintiff had prayed for judgment against the defendant in a sum of Rs.4,694,000/- together with legal interest from 1/12/1993 till payment in full with costs.

The basis of the plaint was as follows:-

(a) the plaintiff is a company incorporated by the Secretary to the Treasury on 19/7/1999 to succeed to and carry out the business of Ambewela Farm managed by the National Livestock Development Board. The said Board was said to have been established by an order published in the Government Gazette of Sri Lanka on 4/5/1973 under and in terms of section 2 of the State Agriculture Corporations Act No. 11/1972,

(b) at the request of the defendant to supply 100 Metric Tons of Potato seedlings by contract dated 18/10/1993 as was agreed between the plaintiff's predecessor and the defendant that the plaintiff's predecessor would supply to the defendant 100 Metric Tons of Potato seedlings to the value of 7 million rupees,

(c) by letter dated 11/10/1993 the defendant having agreed to make payment for the same,

(d) as such at the request of the defendant the plaintiff sold and delivered the said quantity of seedlings for a price of 7 million rupees and the defendant acknowledged the receipt of the same,

(e) having given credit in a sum of Rs.2,307,810/- being the amount paid by the defendant, a balance sum of Rs.4,694,000/- became due and owing from the

defendant to the plaintiff and the defendant failed and neglected to pay the same, and

(f) in the alternative the defendant was unjustly enriched in the said sum of Rs.4,694,000/-.

The defendant by its answer dated 20/2/2009 had moved for a dismissal of plaintiff's action whilst vehemently denying the sale and delivery of the seedlings and the existence of such a contract between the parties. By way of further answer the defendant had mainly raised the following amongst others:

(a) that the alleged cause of action against the defendant is prescribed on the face of the plaint,

(b) that the transaction between the plaintiff and the defendant was one of that the defendant having only assisted the farmers in the Welimada and Uva Paranagama Districts enabling them to establish Farmers' Societies and to supply fertilizer, agro-chemicals and potato seedlings,

(c) that the defendant offered to act only as an intermediary between the National Live Stock Development Board (NLDB) and Farmers' Societies for the purpose of remitting the sums so received from the Societies as against the purchase price of the seedlings,

(d) that the defendant's offer to remit the said sums of money to the NLDB was conditional upon the said sums being received by the defendant from the said Societies and,

(e) that the defendant duly remitted the sums of money so received from the Societies (totalling to Rs.606,000/-) to the NLDB as against the price of the said seedlings.

The learned Judge of the Commercial High Court after an *inter-parte* trial delivered

the judgment in favour of the plaintiff granting all the reliefs sought by the plaint. This appeal has been preferred against the said judgment.

Mr.Ranjith Attygalle, the Director (Finance & Administration) of the plaintiff company had testified on behalf of the plaintiff. His uncontradicted testimony was to the effect that the plaintiff is the successor to Ambewela Farm of the National Livestock Development Board and as evidenced by the document marked as P35 [which being the share sale and purchase agreement entered into between the Government of Sri Lanka and Lanka Milk Foods (CWE) Limited], Lanka Milk Foods (CWE) Limited had purchased 90% of shares of Ambewela Livestock Company.

It is noteworthy that the primary objects of the plaintiff' Company as per the Memorandum of Association marked as P1 were :-

> 1)To succeed to and carry out the business of Ambewela Farm managed by the National Livestock Development Board established by an order published in the Gazette of Sri Lanka on 04-05-1973 in terms of Section 2 of the State Agriculture Corporations Act No.11 of 1972.
>
> 2) To take over and succeed to the :
>
> (a) Ownership of all movable property owned, possessed and used by the said Ambewela Farm and all rights, powers, privileges and interest arising out of such property.
>
> (b) To take over all liabilities of Ambewela farm including liabilities of the National Livestock Development Board incurred in connection to the said farm and gratuities payable to employees of Ambewela Farm in respect of service provided on or to the date of takeover and debt incurred in connection with the farm as identified in the books of the farm on that day immediately preceding the date of take over.

(c) Contracts and agreements including contracts of employment entered into by the National Livestock Development Board for the purpose of the business of Ambewela Farm.

(d) Ownership of all books, accounts and documents relating or pertaining to Ambewela Farm.

3) To take over all moneys that may have to be paid or acts that may have to be performed after the date of take over in consequence of orders made by Industrial Tribunals and the like in respect of present or former employees of the the National Livestock Development Board while they served in the said Farm at inquiries pending on the date of take over.

4) To take over and succeed to the ownership of all current assets identified in the books of the Farm on the day immediately preceding the date of takeover.

5) To enter into a 50 year lease agreement with the National Livestock Development Board with regard to the land and buildings processed and used by the Ambewela Farm.

6) To take over all rights powers privileges and interests arising out of the properties defined in Section (2), (3), (4) & (5).

7) To rear breed and farm livestock and carry on agricultural activities to supply high quality breeding materials, to import all necessary inputs and machinery for the same, export of all forms of livestock and agricultural produce, deal in livestock products including cattle, goats, sheep,

poultry, pigs, rabbit, meat and eggs.

8) To carry on business of manufacturers, producers, buyers, sellers, importers and exporters of all types of livestock, feeds, forages, feed supplements, medicines and ingredients required for feeding and fattening and nutritional preparations of every description, chemicals, fish meal, poonac of all kinds, processed fish and sugar products including molasses.

In view of the primary objects as enumerated in sub paragraphs 2(c), 3 and 6 of P1 plaintiff will take over all contracts and agreements (including contracts of employment) entered into by the National Livestock Development Board for the purpose of the business of Ambewela Farm and succeed to the ownership of all current assets identified by the books of the Farm on the day immediately preceding the date of the take over to wit - 19.7.1999.

As borne out by the document marked P 34 produced in the testimony of the said witness Attygalle which being the statement of expenditure of the Ambewela Farm of NLDB on the day immediately preceding the date of handing over containing current assets and the debtors as per schedule 3 therein, the defendant (Markfed) has been shown as a debtor in a sum of Rs.4,695,810/-. Accordingly, the said amount of money is an asset of the Ambewela Farm of NLDB and after the incorporation of the Ambewela Livestock Company Limited (the plaintiff in this case) the said amount has become an asset of the plaintiff. Furthermore, it is manifestly clear from the uncontradicted testimony of plaintiff's said witness that the plaintiff has become the successor to the Ambewela Farm of NLDB.

Now I shall advert to the contention of the plaintiff's counsel that a contractual transaction existed between the plaintiff and the defendant for the purchase and supply of 100 M. tons of potato seedlings for the price of Rs.7 million payable on or before 30.11.1993 by the defendant to the plaintiff. In fact plaintiff's issues 2 to 4 had been raised on the above footing.

It has been well demonstrated in the course of the testimony of the plaintiff's

witness Mr.Attygalle, by the letter of the defendant's Chairman dated 23.09.1993, a request was made by the defendant to the plaintiff's predecessor for the supply of the said quantity of potato seedlings and further the letter of the defendant dated 11.10.1993 (P5) had reiterated the request for the supply of the said seedlings. It is pertinent to note that the letter of the defendant bearing the same date as P5 (11.10.1993) by which the defendant whilst acknowledging P5 had undertaken to make the payment in respect of the sale of said seedlings before 30.11.1993 as borne out by the letter of the defendant dated 15.10.1993 (P6) setting out the amount to be paid for the supply of said quantity of seedlings together with an undertaking to make payment before 30.11.1993. The letter of the defendant dated 18.10.1993 addressed to the NLDB reiterates the position with regard to the supply of the aforesaid quantity of seedlings for a sum of Rs. 7 million payable on or before 30.11.1993.

It would also be pertinent to note that the promissory note executed on 18.10.1993 (P8) the defendant promised and undertook to pay the plaintiff the aforesaid sum of Rs. 7 million on or before 30.11.1993. All the aforementioned documents were not contradicted during the cross examination by the defence.

What has to be determined now is whether a contractual transaction existed between the plaintiff and the defendant for the purchase of the aforesaid quantum of seedlings, subject to the terms and conditions enumerated above.
At the outset I opt to approach the above issue by considering - 'what is a contract'?

C.G. Weeramantry in his monumental work titled - 'The Law of Contracts' volume – I, in paragraph 84 [at p.84] has opted to summarise the basic essentials of a valid contract as follows :-

(a) agreement between parties,
(b) actual or presumed intention to create a legal obligation,
(c) due observance of prescribed forms or modes of agreement, if any,
(d) legality and possibility of the object of the agreement,
(e) capacity of parties to contract.

With regard to (a) above, an agreement is essential to the formation of a valid contract. Further, it depends on the intentions of the parties. Same author of the above book at paragraph 104, [pp.107 and 108] under 'Manifestation of Agreement' has expressed as

follows :-

> "..... The law therefore adopts an objective test in determining the intention of the parties to a contract, and is guided by their manifestations of intention whether by words, or by acts. From such words or acts it draws its inferences regarding intention on the basis of a reasonable person's assessment of them in the context in which they were uttered or performed".

What is essential for the making of a contract is the manifestation of mutual assent. "..... When there is such a manifested meeting of minds the law says that there is "*consensus ad idem*" between the parties, or, more shortly, that the parties are "*ad idem*".

In this regard, the observations of Weerasooriya SPJ in the case of Muthukuda V Sumanawathie (1962) 65 NLR 205 at 208 would also be of importance. Per Weerasooriya SPJ :-

> "It is an elementary rule that every contract requires an offer and an acceptance. An offer or promise is binding on the person making the same unless it has been accepted".

> See also – Noorbhai v Karuppan Chetty (1925) 27 NLR at 325. Per Lord Wrenbury at p. 325 :-

> "For the decision of the case there is no need to travel beyond the very elementary proposition of law that a contract is concluded when in the mind of each contracting party there is a *consensus ad idem*, and that a modification or revocation of the contract requires a like consensus".

In other words the above observation too affirms the elementary proposition of law to be that a contract is concluded only when there is a *consensus ad idem* in the mind of each contracting party.

It's a basic requirement that every contract requires an offer and acceptance. An offer – is a promise of performance which is however, conditional upon a written

promise or an act of forbearance being received in exchange for it, whereupon it matures into a contract. Furthermore an offer must contain definite terms of performance. An offer may lapse for want of acceptance or could be revoked before acceptance. In other words, only acceptance can convert an offer into a promise and then it will be too late to revoke it. Acceptance always must be manifested if it is to be given any legal effect and must also be communicated to the offerer. It has to be borne in mind that, acceptance must correspond directly with the terms of the offer – an acceptance which does not correspond/accord with the terms of the offer is ineffectual to conclude a contract. Further, acceptance must be always clear and unambiguous. When the above threshold requirements are fulfilled a contract is formed.

Upon careful consideration of oral and documentary evidence led in the plaintiffs case, it becomes manifestly clear that documents lead in evidence marked P3 - P8 suffice to constitute a promise and undertaking to pay, thereby forming a written contract. In view of the reasons enumerated in the foregoing paragraphs of this judgement, I am inclined to uphold the conclusion of the learned Judge appearing at p.15 of the impugned judgement with regard to formation of a written contract.

It is observed that the defendant had taken up the defence of prescription of the plaintiff's claim. This is borne out by the issue bearing No. 12 (a) and (b) raised by the defendant which had been admitted to trial. At the conclusion of the trial the learned Judge of the Commercial High Court had proceeded to answer the aforesaid issue No. 12 in her judgement as follows :-

12 (a) – No
(b) – No

It appears from the impugned judgement that the learned judge, after a careful analysis of the evidence has stated as follows - (at p. 14 of the impugned judgement).

> "It is salient to notice that the defendant has taken up the position that the plaintiff's claim is prescribed in law and as such the plaintiff's claim should be rejected in *limine*. It was observed through out the trial that the defendant has not established this position. The plaintiff has adverted the attention of

> Court to the fact that the plaintiff has been a Government Institution and a part of the Government. Therefore, it is said that Section 15 of the Prescription Ordinance will not affect the state. It is also the position of the plaintiff that it was after the year 2001 that it became a private company. Hence, it is clear that the prescription should commence from the year 2001. It is important to note that the Plaintiff has sent the letter of demand to the defendant on 23.10.2002 and the Plaint has been filed on 03.03.2003 which clearly shows that the action has been filed within 2 years of plaintiff became a private company".

In this regard, it would be pertinent to consider Section 6 of the Prescription Ordinance. Section 6 reads thus :-

> "No action shall be maintainable upon any deed for establishing a partnership,or upon any promissory note or bill of exchange, or upon any written promise, contract, bargain, or agreement, or other written security not falling within the description of instruments set forth in Section 5, unless such action is brought within 6 years from the date of the breach of such partnership, deed or of such written promise, contract, bargain, or agreement, or other written security, or from the date when such note or bill shall have become due, or of the last payment of interest thereon".

It had been the clear stance of the plaintiff that the request for the supply of potato seedlings to the above value was made by the letter dated 23.09.93 (P3) which contains a clause to the effect that a sum of Rs. 7 million being the value of the aforementioned quantity of potato seedlings to be paid within 30 days. The same request was subsequently pursued by the defendant whilst agreeing that steps will be taken to pay the value for the 100 M. Tons of seedlings on or before 30.11.93 (see the letter dated 11.10.93 P4). It was the uncontradicted evidence of the plaintiff's witness Attygalle that by the letter of the defendant dated 11.10.93 (P5) the defendant reiterated the same request from the plaintiff's predecessor. It is noteworthy that by letter of the Chairman of the defendant dated 15.10.93 (P6) addressed to the Chairman Peoples Bank (copied to Chairman – NLDB) the defendant had even negotiated with the Peoples Bank to pay a sum of Rs. 7 million to the plaintiff being the value of the aforesaid 100 M. Tons of seedlings supplied by the plaintiff to the defendant. Even the document marked as P7 (letter of the Chairman of the defendant dated

18.10.93) bears testimony to the fact that the defendant had specifically undertaken to pay the said sum of Rs. 7 million which being the value of the said quantity of seedlings before 30.11.93.

Furthermore it is amply clear that the promissory note (P8) was also executed (signed by 2 officers of the defendant) and by the same, the defendant had undertaken to pay the aforementioned amount on or before 30.11.93. The documents marked P9 – P12 would further demonstrate that a representative of the defendant had accepted and/or received the said quantity of potato seedlings from the plaintiff. By the letter of the General Manager of the defendant dated 12.03.2002 (P28) addressed to the Managing Director, Lanka Milk Foods CWE Limited whilst admitting the aforesaid transaction, had stated that due to the failure of the respective Cooperative Societies to settle the debt the defendant is unable to settle the same. The document P 28 was sent after entering into the Share Sale and Purchase Agreement (P35) on 28.09.2001. Thus it becomes manifestly clear that even after P35 to wit - (after 28.09.2001) the defendant had admitted that the aforesaid money was due to the plaintiff. As the action was instituted on 07.03.2003 the claim is not prescribed. Further it is observed that the letter of demand was dated 23.10.2002 (P32) while the plaint dated 03.03.2003 had been filed on 07.03.2003. In view of the foregoing analysis, I am inclined to hold the view that the plaintiff's claim had not been prescribed. As such I conclude that the final determination of the learned Judge of the Commercial High Court to the effect that the plaintiff's claim was not prescribed is correct and the answers given to all the issues admitted to trial inclusive of the answer to the issue on prescription, [12(a) and (b)] are also correct.

At the hearing before this court it was strenuously urged by the counsel for the defendant that there was a novation of the contract in question. According to Black's Law Dictionary, (8th Edition), Bryan A. Garner defines "novation" as follows:

> 'The act of substituting for an old obligation a new one that either replaces an existing obligation with a new obligation or replaces an original party with a new party'.

A novation may substitute :- (1) a new obligation between the same parties,

(2) a new debtor, or

(3) a new creditor.

A contract that (1) immediately discharges either a previous contractual duty or a duty to make compensation, (2) creates a new contractual duty, and (3) includes as - a party, one who neither owed the previous duty nor was entitled to its performance. – *Also termed substituted agreement.* In other words, *novation* is the emerging and transfer of a prior debt into another obligation either civil or natural, that is, the constitution of a new obligation is such a way as to destroy a prior one. The only way in which it is possible to transfer contractual duties to a third party is by the process of novation, which requires the consent of the other party to the contract. In fact, novation really amounts to the extinction of the old obligation, and the creation of a new one, rather than transfer of the obligation from one person to another.

The Law of Contracts by C.G. Weeramantry - Volume 2 at page 718 has defined *novation* as below :-

> "The term 'novation' is used in two senses. In its wider sense it means the creation of a fresh contract by the extinction of pre-existing one in whose room it stands. In its narrower sense it refers to one only of the varieties of novation comprised within the broader meaning of the term".

Further, the nature of novation proper is described by the said author at page 719 as follows:

> "Where there is a novation of a contract, there comes into existence in the eye of the law a new and independent contract.
>
> A new obligation must be created which contains some element not found in the earlier obligation. Thus an absolute obligation may succeed to a conditional one or a money debt to an obligation to transfer property. A mere variation of the terms of a document does not produce this effect, for there must be a new agreement superseding the terms and conditions of the old. The grant by the creditor of an extended time to the debtor for payment thus does not constitute a novation, or does the grant of an

additional security or the mere confirmation of an original agreement."

In the case at hand, the defendant has denied that it entered into any contract with the plaintiff. However the defendant takes up the position that the contract is vitiated due to novation. It is a case of approbation and reprobation in respect of the contract. The defendant on one hand denies entering into a contract with the plaintiff and at the same time attempts to claim the benefit of novation.

The evidence led at the trial, does not disclose that there has been any substitution in the place of the defendant or its interests in favour of another. There is no evidence to infer that the defendant's obligations were transmitted to or taken over by any other substituted party by way of a new agreement. For novation to take place the parties to the transaction should necessarily consent to the previous agreement being replaced or taken over by another, or another party being substituted. However, in this instance the defendant has failed to establish that the debt owed to the plaintiff has been transferred to another or that another has been substituted by consent of the parties.

The position of the plaintiff in this case is that the defendant owed a sum Rs.4,694,000/- to the plaintiff. The said debt thus is an asset of the plaintiff. Accordingly, plaintiff stands in the shoes of a creditor in a sum of Rs.4,694,000/- to be recovered from the defendant. The evidence elicited at the trial demonstrates that the very institution of the action was for the recovery of that asset. In the circumstances the sum due to the plaintiff is not a liability of the plaintiff company but an asset to be recovered from the defendant.

The defendant has not established that the plaintiff at the point of conversion to a company (by P35) entered into a new agreement with the defendant to waive off the amount due as a bad debt. Neither has the defendant established at the trial that by mutual agreement nor by consent its debt devolved on a new debtor. However, the defendant endeavors to establish that novation arose as a result of the National Livestock Development Board changing its name to Ambewela Livestock Company Limited and the subsequent sale of 90% shares of it to Lanka Milk Foods (CWE) Limited by P35.

The Memorandum of Association of Ambewela Livestock Company Limited has been produced in evidence marked as P1. Primary Objects and Ancillary Powers in P1 clearly establish the takeover and succession. Primary objects 2(a)-(d) provide for the taking over and succession of movable property, rights, powers, privileges and interests of the National Livestock Development Board. Similarly, contracts and agreements and ownership of books, accounts and documents vested lawfully with Ambewela Livestock Company limited with effect from 19.07.1999. In terms of P1 the assets devolved on the plaintiff by specific provisions in clauses 2(a), (c) & (d). However, P1 does not refer to the extinguishing of the contract or extinction of the obligation of the defendant in making the payment of Rs.4,694,000/- .

An examination of the evidence led at the trial amply demonstrates that there was no mutual consent (express or implied), to waive the debt owed by the defendant to the plaintiff. As such there is no novation or any change with regard to the obligation to repay the money. Thus, the status of the debtor -(in the present case the defendant) remains unchanged.

The defendant further contends that the said Ambewela Livestock Company Limited has sold 90% of its shares to Lanka Milk Foods Limited. The relevant Share Sale and Purchase Agreement has been produced in evidence by the plaintiff marked as P35. The said sale of the shares has taken place on 28.09.2001. By P35, the obligations and duties of the defendant has not been renounced or changed. On the other hand the plaintiff company has not gone into liquidation or become non-existent. The Purchaser's Covenants in 3.3 (i) clearly signifies that the plaintiff has retained the power and authority to proceed with such cases in the best interests of the Company. The plaintiff having sent the letter of demand dated 23.10.2002 (P32) had proceeded to institute the present case for the recovery of the aforesaid debt in the Commercial High Court of Colombo.

Further, it would be pertinent to note that it is only the description of the name of the creditor that got changed but certainly not the nature and character of the debt. More specifically, Lanka Milk Foods (CWE) Limited has taken over only the operation and management of the said Company (see P35). In order to prove novation the defendant had to establish in evidence the intention of the creditor to discharge the debtor from the

obligation. In the case before us, no such evidence was led at the trial. The express and declared will of the creditor is required in order to constitute novation. In this case the defendant has completely failed to produce such evidence. In the circumstances, the defendant in this case cannot avoid liability on the basis that there has been novation. In this regard, the observation of Lascelles Chief Justice in the case of Karthikesu v. Ponnachchy 14 NLR 486 at 487 would lend assistance:-

> ".....Novation may take place, not only by express agreement, but also tacit or by implication, the consent of the parties to the *novatio* being implied from the circumstances and the conduct of the parties. In the latter event, however, the inference must be so probable and conclusive as to make it quite clear that the parties intended to recede from the original obligation and to replace it by another in fact, it must be a necessary inference, the new obligation being inconsistent and incompatible with the continued existence of the original obligation".
>
> This passage, I think, indicates the principle which should be followed in considering the sufficiency of evidence to establish an agreement of novation"

It has to be stressed here that, in the present case the defendant has failed to place any evidence with regard to the existence of meeting of minds of the creditor and the debtor in forming a new obligation arising out of an express agreement or by conduct or by tacit understanding in the place of the previous obligation. On the contrary the plaintiff has produced several letters (P13, P14, P18 & P32) sent to the defendant over a period of time requesting it to make the relevant payments. This amply establishes that there had been no deviation or change of intention to recede from the original claim for the debt and thus there had been no novation.

For the foregoing reasons, I proceed to affirm the impugned judgement of the learned Judge of the Commercial High Court dated 02.10.2007. This appeal is dismissed with costs fixed at Rs. 50,000/- payable by the defendant-appellant to the plaintiff-respondent.

Judge of the Supreme Court

Thilakawardena, J.

I agree

Judge of the Supreme Court

Sathyaa Hettige PC, J.

I agree

Judge of the Supreme Court.

SC. FR. No. 191/09 with Nos. FR. 192/09, 197/09-206/09, 208/09-216/09, 225/09, 226/09, 244/09, 246/09-255/09, 315/09, 335/09, 372/09

10.03.2014

Before : Mohan Pieris, PC, CJ

Dep, PC, J &

Wanasundera, PC, J

Prof. H.M. Zafulla with Thilan Liyanage for Petitioners (SC/FR No. 191/09 & 192/09).

V.K. Choksy for Petitioners in SC. FR. No. 208/09 and 252/09.

Dr. Asanga Gunawansa with Dilshan Jayasuriya and Mrs. Dinusha Mirihana for 6th Respondent.

Romesh de Silva, PC for 7th Respondent.

Faisz Musthapha, PC for 10th, 11th and 14th Respondents.

D.P. Kumarasinghe, PC with M.A. Kumarasinghe for 13th Respondent.

S.A. Collure for 15th Respondent (SC/FR No. 191/09)

Ikram Mohamed, PC for Intervenient Petitioner.

Nigel Hatch, PC with Ms. S. Illanage for Intervenient Petitioners. (Nation Lanka Finance (Pvt) Ltd & Seylan Bank PLC.)

K. Iswaran, PC with Kuvera de Zoysa, PC, Sanjeewa Jayawardane, PC, Dilshani Wijewardane and Senaka de Seram for CIESOT Pvt. Limited.

Viraj Dayaratne, DSG for 1st, 3rd - 5th and 17th Respondents.

The Learned Deputy Solicitor General submits the third report of the Task Force dated 7 March 2014 which is filed of record marked X1.

The report in paragraph 1 sets out the efforts taken to locate assets, in paragraph 2 the identification of assets and in paragraph 3 the investigations that have been terminated. The second paragraph which identifies assets also include recommendations made in respect of properties of Mrs. S P C Kothalawala, Mr. A D Jegasothy, Mr. W G B M Ranaweera, Mrs. P K Karunanayake and Mr. S T Karunaratne. This Court will revert to these matters at a later point in this Order.

Learned Deputy Solicitor General also refers to a parcel of gems which is presently the subject matter of a Customs inquiry, and submits that the Customs inquiry will be concluded within a week of today, the findings of which will be communicated to the Court in due course. The Counsel for the 13th Respondent Mr. Kumarasinghe submits that the Court be pleased to make an Order that at the point of examination and valuation of the gems, his client be permitted to be present at such time so as to ensure that he will be in a position to fulfill his obligations to the Court.

The Chairman of the GKCCCL, Mr. Priyantha Fernando submits a progress report which is structured in 10 parts. The first four parts addresses the repayment mode up to February of this year and the proposed repayment in the months of March, April, May and June of 2014, which the Chairman describes as a **"Time Bound Repayment Approach".** The fifth part of the report deals with the mechanisms which sets out how the plan will operate on a self-sustaining model. The sixth part deals with how the GKCCCL has taken action to facilitate this process. Part 7 deals with the mechanisms adopted to deal with those matters that were taken up before this Court on 06 November 2013. We have been informed that there is reference to the matters delivered as per that Order and the matters that are pending and arising from the Court Order. Part 8 sets out the Orders that are sought by GKCCCL today. Part 9 is a report on the legal entity styled CIESOT. Part 10 is with regard to a legal entity report styled PICTET AND CIE. It has also been brought to our notice that there has been a transfer of Rs. 6,677,230/- from The Finance Company Ltd. to another entity and moves that the typographical error in the description of names appearing in page 13 of

that Order be rectified. Consequently, 3 motions have been filed, firstly regarding the name change, which this Court directs, be effected immediately, secondly with regard to an Order made by this Court for a transfer of shares which has not been complied with by Ceylinco Investments and thirdly regarding the transfer of money from The Finance Company to another entity.

Mr. Kanag-Iswaran, PC made submissions on behalf of CIESOT which company is referred to at page 21 of our last Order. He also makes subsequent reference to part **"C"** which is at page 65 and 66 of the Order. He submits that CIESOT was incorporated in the year 2000 essentially as a Trustee Company and for this reason alone does not fall within the ambit of this investigation. It is alleged that the Trustee Company was created to hold in trust a parcel of shares for the benefit of the employees, and that he would in due course, submit sufficient material to satisfy this Court of the genuineness of this mechanism.

Mr. Avindra Rodrigo who represents a depositor submits that this mechanism of a trust was a legal sham, and that documents 4 to 7 of the annexures clearly show the contrary, as the position taken therein is that it was not a share ownership scheme for the benefit of the employees and that steps would be taken soon to have them disposed. We observe that the decision taken by CIESOT was in response to a query made by the Securities Exchange Commission.

Mr. Romesh de Silva PC submitted that the application for the cancellation of bail as set out in page 12 and referred to in the proceedings of 23rd October 2009 has been complied with fully by his clients by a full disclosure of all assets.

Mr. Kanag-Iswaran, PC further submits in unequivocal terms that Mr. Lalith Kothalawala is not the Chairman of CIESOT. We shall come back to this aspect at a later point of this Order.

We were then referred to an entity described as PICTET AND CIE. The Court has been informed that PICTET AND CIE is a Swiss Bank incorporated in Switzerland and it holds a large parcel of shares for a client (whose identity has still not been disclosed by Ceylinco Insurance Ltd.)

Mr. Avindra Rodrigo moves that an Order be made for the appointment of an independent person in place of Mr. Lalith Kothalawala to the Board of Ceylinco Insurance Ltd. with a mandate to hold the parcel of shares in trust until this matter is finally determined, as the PICTET AND CIE is the actual and beneficial owner of the shares.

Mr. Faiz Mustapha who appears for the 10th Respondent referring to paragraph 2.2 of the report submits that the Order to sell the assets of a client, more particularly the residential premises, should be excluded from the recovery mechanism and refers this Court to the proceedings of 10th March 2014.

Mr. Zafrullah, Attorney-at-Law submits that as this whole transaction is a corporate fraud, that all assets held by the Directors are liable to be seized.

Mr. Nigel Hatch PC submits that he appears for Nation Lanka which matter has been referred to at page 20 of the report of 2nd December 2013, and that he will reserve his rights to make submission on the next date as he is scheduled to take instructions from Nations Lanka regarding this matter next week.

Mr. Ekanayake Attorney-at-Law representing his client Mr. Marco Perera seeks three Orders of this Court structured consequent to the Orders made by this Court on 29th April 2009 and 29th December 2009.

Mr. Choksy brings to our notice that there are 3 cases pending in the Commercial Court and he will apprise this Court of their progress in the course of these proceedings.

SC. FR. No. 191/09 with Nos. FR. 192/09, 197/09-206/09, 208/09-216/09, 225/09, 226/09, 244/09, 246/09-255/09, 315/09, 335/09, 372/09

Mr. Saman Galappatti, Attorney-at-Law brings to our notice two important matters. He also submits that there are two cases in the High Court of Colombo which have commenced and another in the Magistrates Court of Mt. Lavinia. He submits that the case in Mt. Lavinia relates to the misappropriation of Rs. 126 million by the use of 6 credit cards by a person named Pakianathan Kumar who has transferred Rs. 10 million of that money to a company in Australia styled "Arts and Life" and that the CID on the instructions of the Attorney-General has surprisingly sought to make an application for the discharge of the suspect. He submits that she also claims a parcel of jewelry which is presently in the safe of the GKCCCL.

Learned Deputy Solicitor General undertakes to stay any action on this matter until an appropriate Order is made by this Court. Through an abundance of caution, we hereby direct the Learned Judge of the Magistrates Court in Mt. Lavinia that no steps should be taken in respect of the said parcel of jewelry and for the discharge of Pakianathan Kumar, the suspect in the credit card fraud until a further direction is made by this Court and that no application be entertained with regard to this matter. We would also request the Hon. Attorney-General to apprise this Court of the facts and circumstances of this transaction and the reasons why an application to discharge is made.

Mr. Kamran Aziz Attorney-at-Law refers us to a motion dated 28 February 2014, the contents of which we have noted. He submits that his client be given an opportunity to pursue the matters set out in the motion with the "Committee". We direct that an opportunity be granted to this party.

Mr. Ekanayake, Attorney-at-Law refers us to a motion dated June 2013 in which he makes representation for an entity styled "Ceylinco Limited". The outstanding matters that will be pursued with GKCCCL regarding Ceylinco International Realty Pvt. Ltd. is the deposit to the value of Rs. 200 million and the undertaking to transfer half of a floor in Ceylinco House.

A submission was also made on behalf of Ceylinco Printing and Stationery Company Ltd. The Court has been informed that the matter is before the Commercial Court and that on the 29th of July 2013 the case has been laid by. It has also been brought to our notice that certain statutory dues have to be recovered by the state and a limited variation of the Order staying the proceedings of the case be made by this Court to enable the Court's cases to proceed with, for the recovery of the outstanding dues.

We make Order that the proceedings in the Magistrates Court and in the High Court (Revision application) for the recovery of statutory dues be proceeded with.

This Court now proceeds to consider the recommendations made in the 3rd Report of the Task Force dated 7th March 2014. The report, we note is a product of 10 meetings with its members during the course of which the former Directors Mr. S.T. Karunaratne, Daniel Jegasothy and D G S P Sumanasekera were called for discussions. While Karunaratne appeared before the Task Force on 10th December 2013, Jegasothy and Sumanasekera appeared on 30th January 2014. The Task Force has also identified properties owned by Mrs. S P C Kothalawala, Mr. W G B M Ranaweera, Mrs. P K Karunanayake which had not been declared hitherto.

On the basis of these recommendations, this Court makes the following Orders : -

1. Properties of Mrs. S P C Kothalawala referred to at page 4 of the said report.

We Order staying the alienation of Lot No. 29 in Plan No. 1309 of 9th October 1977 prepared by Mr. K D G Weerasinghe, Licensed Surveyor at Ruskin Island conveyed to Mrs. S P C Kothalawala by Deed of Transfer No. 4184 on 29th August 1999 attested by L L Ponnukone, N.P. in extent of 1 Rood and 12.19 perches by whatsoever manner, until further directed by this Court.

2. The Registrar General of Lands is directed to make an entry in the relevant folio of the Land Register that the Supreme Court has stayed the execution of any conveyance of whatsoever nature until further directed.

3. We Order staying the alienation of all such lands set out at para 2.2 (a), 2.2(b), 2.2 (c) and 2.2 (d) of the properties of Mr. A D Jegasothy at pages 4, 5 and 6 of the said report by whatsoever manner, and direct the Registrar General of Lands to make an entry in the relevant folios of the Land Register that the Supreme Court has stayed the execution of a conveyance of whatsoever nature until further directed.

4. We Order staying the alienation of all the lands set out at para 2.3 (a), 2.3(b), 2.3(c), 2.3(d), 2.3 (e), 2.3(f), 2.3(g), 2.3(h), 2.3(i), 2.3(j) owned by Mr. W G B M Ranaweera in pages 6, 7 8, 9, 10, 11 and 12 of the said report. The Registrar General of Lands to make an entry in the relevant folios of the Land Register that the Supreme Court has stayed the execution of a conveyance by whatsoever nature until further directed.

5. We Order staying the alienation of the land set out at para 2.4(a) at Ruskin Island owned by Mrs. P K Karunanayake at page 12 of the said report. We direct the Registrar General of Lands to make an entry in the folios of the Lands Register that the Supreme Court has stayed the execution of a conveyance by whatsoever nature until further directed.

6. We Order staying the alienation of the land set out at para 2.5 owned by Mr. S T Karunaratne at page 13 of the said report. We direct the Registrar General of Lands to make an entry in the folios of the Lands Register that the Supreme Court has stayed the execution of a conveyance by whatsoever nature until further directed.

This Court has taken appropriate cognizance of the matters set out in para 3 of the report. We have also taken cognizance of the documents X2, X3, X4 and X5 submitted by the Registered Attorneys for the 6th Respondent-Respondent, Ceylinco Consolidated International Property Development Pvt. Ltd., the Intervenient Petitioner.

We direct the Task Force to give the matters set out in the aforementioned motions and submit a report to Court having given due consideration to the matters set out therein. This Court has also given appropriate consideration to the matters set out in a motion dated 3rd March 2014 supported by an affidavit of Mr. Rajkumar Renganathan, a Director of CIESOT Pvt. Ltd. The Task Force is directed to give appropriate consideration to the matters set out therein and submit a report to Court on the next date. However, this Court will now proceed the deal with the entity styled CIESOT Pvt. Ltd. having regard to the material that is before this Court today.

We note that, notwithstanding the Order made by this Court on 2nd December 2013 and an undertaking given by the Counsel to comply with this Order that no steps have been taken by CIESOT Pvt. Ltd. to register the GKCCCL as a holder of 10 shares held by Mr. J L B Kothalawala in CIESOT. Counsel for CIESOT submits that the failure to carry out this order was due to an allegedly contradictory Order made by this Court directing the said parcel of shares be transferred to the GKCCCL Special Purpose Vehicle and that there is no refusal by CIESOT if the position is clarified. This Court, by way of clarification makes the following Orders which will supersede all other Orders made hitherto.

1. CIESOT Pvt Ltd. shall register the GKCCCL as the holder of 10 shares held by Mr. J L B Kothalawala in CIESOT Pvt. Ltd. and issue a share certificate accordingly.

2. All Directors of GKCCCL shall henceforth be appointed as Directors of the GKCC Special Purpose Vehicle.

3. The Registrar General of Companies is directed to register the names of all Directors of the GKCCCL as Directors of the GKCC Special Purpose Vehicle forthwith. The present Directors of GKCC Special Purpose Vehicle are directed to take cognizance of the aforementioned Order and ensure the appointment of the GKCC Special Purpose Vehicle at the next meeting of the Board.

4. We also make Order to the Company Secretary to comply with the aforementioned Orders forthwith and inform the Registrar General of Companies of the new ownership of the shares and take all such other steps as necessary in terms of the provisions of the Company's Act No. 7 of 2007.

5. We note that Ceylinco Insurance Plc whilst maintaining that CIESOT Pvt. Ltd. is not governed by the transitional provisions of an Employee Share Option Scheme/Purchase Scheme as contemplated by Section 5.6.10 of the Colombo Stock Exchange Listing Rules and that by letter dated 19th December 2012 informs the Securities and Exchange Commission that Ceylinco Insurance Plc would be taking steps to dispose of the shares held by CIESOT Pvt. Ltd. prior to 1st March 2015, through the Colombo Stock Exchange. The exchange of letters through the Securities Exchange Commission and Ceylinco Insurance Plc. on the face of them confirms the position that CIESOT Pvt. Ltd. is a mechanism resorted to, for a collateral purpose, and that a share ownership scheme does not genuinely exist.

We, therefore, make Order that the Securities and Exchange Commission in co-operation with the Financial Investigation Unit of the Central Bank investigates this transaction to determine its true nature, transgressions of any of the legal provisions, and submit a report to this Court within two weeks of the receipt of this Order. The Registrar of this Court is directed to communicate a copy of this Order to the Director General of the Securities and Exchange Commission and the Director of FIU of the Central Bank forthwith.

By a motion filed on 31st March 2014, the Chairman of the GKCCCL has informed this Court of an impending declaration of a dividend by Ceylinco Insurance Ltd. the benefit of which will also accrue to CIESOT Pvt. Ltd.

We therefore make Order enjoining the Directors of Ceylinco Insurance Ltd. from paying out a dividend in favour of CIESOT Pvt. and directing them to pay such dividend to GKCCCL who will hold it in trust until further directed by this Court. In the event of a dividend having being declared after the 2nd April 2014 and the communication of this Order, such dividend shall be paid to GKCCCL which will hold it in trust until directed by this Court. The Registrar of this Court will communicate this Order to the Chairman, Managing Director and Company Secretary of Ceylinco Insurance Plc. forthwith. We further Order CIESOT Pvt. Ltd. restraining and/or appropriating and/or disposing of the dividend income in the event of the declaration of a dividend or any other payment or disbursement on or after the 2nd of April 2014 without the prior approval of this Court. Having regard to the aforesaid circumstance we also make the following Orders.

1. CIESOT Pvt. Ltd. is enjoined from disposing of the shares in Ceylinco Insurance Ltd. until further directed by this Court.
2. The Securities and Exchange Commission and the Colombo Stock Exchange will ensure that no transactions takes place of the said shares until further directed by this Court.

3. Nilika Abhayawardena, the Company Secretary of CIESOT Pvt. Ltd. to take steps forthwith to record GKCCCL as the owner of 10 shares hitherto held by Mr. J L B Kothalawala and take necessary steps to record the ownership change including, informing the Registrar General of Company's, of the new ownership and all other steps as are necessary in terms of the Company's Act No. 7 of 2007.

4. The Board of Directors of CIESOT Pvt. Ltd. are removed with immediate effect. The shareholders Mr. H D K P Alwis and E T L Ranasinghe will appoint the Chairman of the GCCCL Mr. Priyantha Fernando and upto 4 members as nominated by him to the Board of Directors of CIESOT Pvt. Ltd. with immediate effect.

5. The new Board members as appointed by the aforementioned Order will act in consultation with the Hon. Attorney-General who shall have overall supervision of their activity.

We now turn to the entity described as "PICTET and CIE". It is brought to our notice that this entity commenced purchasing shares in Ceylinco Insurance Plc. through the custodian bank Citibank N.A. of 67, Dharmapala Mawatha, Colombo 7 on 29th May 2009 and has continued to purchase Ceylinco Insurance shares until 29th September 2009 and has accumulated 2,136,100 shares in Ceylinco Insurance Plc. equivalent to 10.68% of the issued share capital. PICTET AND CIE has issued the proxys in respect of the shares to the Board of Directors of Ceylinco Insurance Plc. through its Power of Attorney Citibank N.A. The Task Force has made several requests to PICTET and CIE to disclose the source of funds for the purchase of the said shares, the names of the final beneficiaries and the details in respect of the proxys. A request has also been made to Citibank N.A. the Power of Attorney holders to disclose the source of funds and the details of the proxys and of any remittances made on behalf of PICTET AND CIE. We have informed that during the period leading up to 28th September 2009 several Ceylinco Group Companies have disposed large quantities of shares of Ceylinco Insurance Plc. and that PICTET AND CIE have been purchasing directly from the Ceylinco Group of Companies. It could well be that the said shares have been purchased for the purpose of maintaining control of the Ceylinco Insurance Plc. and that the said shares were purchased from the shares disposed of by Ceylinco Group of Companies. We also take cognizance of the fact that Mr. J L B Kothalawala has been in control of the Ceylinco Insurance Pl.c prior to the collapse of Golden Key and that Mr. Kothalawala is also a controlling member of the Board of Trustees of CIESOT Pvt. Ltd. and that it is therefore highly probable that the said shares have been purchased by PICTET AND CIE for and on behalf of Mr J L B Kothalawala. We also note that PICTET AND CIE is a private Swiss Bank which resorts to banking secrecy to veil the identity of investors and have been sued with US$ 156 million by the Trustees in the

Bernard Madoff case which is presently under investigation by the Justice Department of the United States as a part of a probe on Swiss Bank's aiding tax evasion.

We, therefore, make Order -

1. that the 2,136,100 shares of Ceylinco Insurance Plc. held by PICTET AND CIE (Banque PICTET AND CIE SA) be transferred to a blocked account at the Bank of Ceylon until further ordered by this Court.
2. That PICTET AND CIE to disclose the identity of the investor on behalf of the aforementioned parcel of shares in Ceylinco Insurance Plc.
3. That Citibank N.A. the Power of Attorney holder to discloses the details of the proxy they hold on behalf of PICTET AND CIE and all such other information that they have in their custody regarding this transaction.
4. That the Director Bank Supervision of the Central Bank will seize all such documents in the possession of Citibank N.A. with regard to this transaction and to submit a comprehensive report with regard Citibank's role as the Power of Attorney holder.
5. That the Financial Investigation Unit (FIU) of the Central Bank will probe into this transaction and furnish a comprehensive report of the role of each and every party concerned in this transaction and to invoke the provisions of the Money Laundering Act and the Financial Transaction Reporting Act for the purposes of such an investigation.
6. That the Central Depository System Pvt. Ltd. will suspend the dealing of the 2,136,100 shares held by PICTET AND CIE in Ceylinco Insurance Plc. and furnish the details of all transactions which have been effected through the Central Depository System Pvt. Ltd to the FIU of the Central Bank.
7. That the Colombo Stock Exchange takes cognizance of the Order made to the Central Depository Systems Pvt. Ltd. directing them to suspend the dealing of the 2,136,100 shares held by PICTET AND CIE held in Ceylinco Insurance Plc. and to ensure compliance of that direction.

8. This Court has also considered the matters set out in the motion dated 10th March 2014 with regard to the audited financial statements of GKCCCL as at 31.03.2013 and Accounts for subsequent transactions upto 30th April 2013.

We make Order directing the Committee of Chartered Accountants to furnish the relevant financial statements set out in the said motion, (a copy of which shall be served with this Order) to the Board of Directors of GKCCCL, within two months of the receipt of this Order.

This matter will be mentioned on 29th May 2014.

(Approved by Hon. Chief Justice)

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 DEMOCRATICE SOCIALIST

REPUBLIC OF SRI LANKA

Central Finance Company Limited,

84, Raja V eediya,

Kandy.

Supreme Court No.SC /CHC 27/2007 **Plaintif**

Commercial High Court **Vs.**

Case No: HC (Civil) 159/2004 (1) **Janatha Estate Development Board,**

55/75, Vauxhall street,

Colombo-02.

Defendant.

And now

In the matter of an appeal in terms of Section 754(1) of the Civil Procedure Code.

Janatha Estate Development Board,

55/75, Vauxhall Street,

Colombo-02.

Defendant-Appellant

Vs.

Central Finance Company Limited,

84, Raja Veediya,

Kandy.

Plaintiff-Respondent.

BEFORE: **Hon. K. Sripavan J**

Hon. Sathyaa Hettige PC J

Hon. P. Dep PC J

COUNSEL: **Sumedha Mahawanniarachchi with**

Amila Vithana for the Defendant appellant

Avindra Rodrigo with Manoj de Silva

and Shanaka Gunasekare for the Plaintiff

Respondent .

DATE OF ARGUMENT: 21st January, 2013

WRITTEN SUBMISSIONS OF THE PLAINTIFF RESPONDENT : On 1st February, 2013

DATE OF JUDGMENT: 6th February , 2014

SATHYAA HETTIGE PC J

The defendant Appellant (hereinafter referred to as the appellant) has filed this appeal from the judgment of the Commercial High Court dated 10.05.2007 which was entered in favour of the plaintiff respondent (hereinafter referred to as the respondent) exercising civil jurisdiction of the High Court of the Western Province as prayed for in the plaint. The appeal has been filed based on the following grounds.

a) The Judgment dated 10/05/2007 is contrary to law and the facts in this case
b) The learned High Court Judge has disregarded the fact that the basic term of the lease agreement between the parties , that is the delivery of the leased article , had been fulfilled by the respondent.
c) The learned High Court Judge has erred in law by holding that the appellant is estopped from taking up the position that some of the documents marked by the respondent were not properly listed and therefore are inadmissible.
d) The learned High Court Judge has disregarded the fact that the respondent should have complied and complained as the respondent cannot complain of a loss supposed to have incurred in the process of supplying the leased articles when the same was not even delivered to the appellant.
e) The learned High Court Judge has ignored the basic principles of leasing.
f) The judgment of the learned High Court Judge was against the decided authorities on law of evidence, leasing and contract,
g) The learned High Court Judge has disregarded the disadvantages already caused to the appellant from the transaction with the respondent, due to no fault on the part of the appellant.

The facts of the case as presented before this court are as follows:

The appellant called for tenders from the local suppliers of four wheel drive motor vehicles for their use and selected Carplan Limited who were the local agent for Kia Motor Corporation of South Korea to supply four units of "Kia Sportage" Four Wheel motor vehicles vide P.10 .

The appellant requested the respondent to provide finance leasing facilities for purchase of four units of four wheel drive motor vehicles. Thereafter the appellant entered into a Lease Agreement dated 29/09/2000 marked P1 with the respondent. Under the said lease agreement the appellant agreed to pay the total purchase price of the motor vehicles in 48 installments.

The respondent was reluctant to finance the import of vehicles since the motor vehicles were not physically available at the time of paying the money. However, respondent agreed to finance the import of vehicles after the appellant undertook to furnish four letters of indemnity in respect of each of the vehicles. The respondent accordingly issued the four letters of Indemnity marked P2,P3,P4 and P5 and the respondent paid accordingly a total sum of USD 49. 680 to the manufacturer in South Korea for the said four motor vehicles.

The said four vehicles were seized and confiscated by the Sri Lanka Customs when they were imported by the importer without disclosing **a**n additional payment of USD 6000.00 in the Customs Declaration that were made to the manufacturer in South Korea and due to the failure to pay the heavy fine imposed by the customs. The respondent instituted action in the Commercial High Court for recovery of the loss suffered based on the four Letters of Indemnity as the petitioner failed to comply with the demand made by the respondent in terms of the four Letters of Indemnity.

It can be seen from the material placed before the High Court and this court that the respondent was reluctant to finance the importation of four motor vehicles without the letters of indemnities being furnished and the role of the respondent had been restricted to finance the transaction to import the said vehicles.

I will deal with all the grounds of law urged by the appellant in this appeal . It must also be noted that the appellant has failed to file any written submissions after the hearing was concluded though the opportunity was granted to both the parties. The respondent has filed the written submissions on 1st February , 2013. However, I will consider the appellant's case on the material placed before this court.

I will now proceed to consider the relevant clause (iii)in the Letter of Indemnity marked P1 addressed to the respondent (same clause appears in all four Letters of Indemnity marked P2, P3 and P4) which reads as follows:

" ***We/will indemnify and keep indemnified you, your successors and assigns from and against all loss or damage suffered and all claims, costs and expenses made against or incurred by you in any way directly or indirectly arising out of or consequent upon your having established the Letter of Credit and / or importing the consignment, whether arising out of a breach by us or any of the terms and conditions hereof or otherwise and whether or not you have a legally enforceable right to claim in respect of such loss, damage, claims costs and expenses against us for any other guarantor or indemnifier and whether or not you have availed yourself of all your legal remedies against us or any other guarantor or indemnifier. A certificate of any manager employed as to the time being due from us shall be conclusive and binding upon us***." *(emphasis added)*

On a perusal of the above clause it appears that the appellant was bound to pay and indemnify the respondent for the losses and damages incurred by the petitioner in the importation of the vehicles referred to above because the indemnity that has been given by the appellant has created a primary obligation on his part to pay. The appellant cannot absolve himself from the liability to pay under the above clause.

It was the contention of the respondent that under the letters of indemnities , the appellant undertook to indemnify the respondent against all loss and damage suffered and all claims costs and expenses made against or incurred by the respondent directly or indirectly arising out of or consequent upon the respondent having established the letters of credit / importing the consignment, whether arising out of a breach by the defendant or not and thereafter the letters of credit were opened through the HSBC Bank and the opening of the letters of credit were financed by the respondent.

It can be seen that when the trial commenced in the Commercial High Court on 23rd September 2005 there had been admissions recorded by the parties admitting that the Sri Lanka Customs confiscated the four vehicles at the time of importation , the four letters dated 13.11.2002 in respect of each letter of indemnity written by the respondent through its Attorney at Law to the appellant and the four replies written by the appellant to those letters dated 14.1.2003 and the fact that the respondent and the appellant entered into a lease agreement dated 29.9.2000.

It is also to be noted that the appellant under the lease agreement marked P1 (in the original court) agreed to pay the total purchase price of the said motor vehicles in 48 monthly installments and once the vehicles were imported the appellant was required to hand over the said vehicles to the plaintiff respondent who would be the absolute owner of such vehicles. However, it must be stated that, in this commercial transaction, though the respondent transferred the total money in a sum of US $ 49,680 including the conversion charges to the manufacturer in Korea the four vehicles imported had not been physically delivered to the respondent and indemnified any loss and damage suffered by the respondent as undertaken. In fact the four letters of indemnities in question had expressly covered such loss.

The appellant strongly contended that the evidence led on behalf of the respondent in the original court was not of a satisfactory nature to prove the respondent's case on a balance of probability. The learned counsel also argued that the documents marked P6 and P6 (a) in the High Court were inadmissible and documents marked P10, P 14 and P 15 were not listed documents before the first trial date but subsequently filed by an additional list of documents just two days prior to the evidence of the second witness called by the respondent and therefore, it was the contention of the appellant that the said documents marked were inadmissible.

On a careful examination of the case in the High Court it appears that the respondent has called two witnesses on behalf of the respondent and the appellant has failed to call a single witness to give evidence controverting the evidence of the respondent's witnesses.

In fact , It must be stated that the learned High Court Judge has dealt with very carefully at page 5 of the Judgment, in regard to the submissions of the appellant on the question of admissibility of the documents P6 and P6 (a) and P 10 , P 14 and P 15 which is reproduced as follows:

" ***In the submissions of the defendant ,it is stated that the documents marked P6 and P 6 (a) has not been properly proved and therefore the contents therein should not be considered as evidence. These are the invoices sent by Car Plan Limited to the plaintiff company informing of the prices of the vehicles that were to import from Korea. Even if the contents of these documents are not considered at all, the testimony of the witnesses for the plaintiff would establish the amount of monies that have been paid by the plaintiff company in importing the vehicles in dispute. This piece of evidence has not been controverted. On the other hand, the question of admissibility of documents P6 and P6 (a) as evidence , will not arise since the oral evidence led in this regard is sufficient to establish the necessary facts.***

The learned Counsel for the defendant also has stated that the documents P 10 , P14 and P 15 had not been listed before the first date of trial and has moved that the contents of those documents be disregarded. If those documents have not been listed in terms of the Civil Procedure Code the counsel for the defendant should have raised this objection at the time, the documents were marked. There was no such objection raised at that point of time. Thus the defendant is estopped from raising this objection at this stage and therefore, I hold that this court cannot disregard the contents of those documents as inadmissible evidence."

Therefore I do not agree with the submissions of the counsel for the appellant on the question of admissibility of the documents referred to above.

Now I will deal with the legal position of the case.

The contention of the respondent had been that the respondent did not have the physical possession of the vehicles at the time of payment and therefore the respondent had to keep some security for the money paid to the manufacturer. Furthermore it was contended that respondent would not have financed the import of the vehicles if the appellant had not furnished the letters of indemnities undertaking to indemnify the respondent of any loss and or damage that he would suffer as a result of financing the purchase. If I proceed to examine the nature of the terms of the Letters of Indemnities in this case it is clear that the appellant covenanted to indemnify the respondent in respect of any loss or damage and that the assured would be fully indemnified and the appellant cannot escape the liability attached under the indemnity contract.

It will be useful to understand the meaning of the word "indemnity" as the whole case is based on the interpretation of the letters of indemnities involved in this appeal. The word "indemnity" derives from the Latin term " indemnis" combined with "facere" meaning " to make".

(Garner: A Dictionary of Modern Legal usage , 2nd Edition)

The word "indemnity" has been defined in the Black's Law Dictionary as "***a duty to make good any loss, damage or liability incurred by another"***

" ***indemnity has the general meaning of "hold harmless"; that is one party holds the other harmless for some loss or damage***. Please see article on "**Indemnity agreement**" by **Jean Murray** published in US Business Law / Taxes.

Forbes J in **Renolds** v **Phonix Assurance Co. Ltd (1978) 2 Lloyds Rep 440** had referred to the judgment of Brett L.J in **Castellain** v **Preston (1883) 11 QBD 380 at page 386** wherein the assured's right to be indemnified was discussed.

" ***The very foundation , in my opinion , of every rule which has been applied to insurance law is this , namely that the contract of insurance contained in a marine or fire policy is a contract of indemnity and indemnity only, and this contract means that the assured , in case of a loss against which the policy has been made , shall be fully indemnified but shall never be more than fully indemnified. That is the fundamental principle of insurance , and if ever proposition is brought forward which is at variance with it, that is to say which either will prevent the assured from obtaining a full indemnity, or which will give to the assured more than a full indemnity that proposition must certainly be wrong***".

Is not it that the respondent in the case before this court has suffered malicious damage as a result of non payment of pecuniary loss caused by the appellant and the appellant has been unjustly enriched .

In **Murphy** v **Wexford County Council** (1921) 2 IR 230 at page 240 the court held that "… ***the law will endeavor so far as money can do it to place the injured person in the same position as if the contract had been performed or before the occurrence of the tort…"***

It can be seen from the above that the respondent in this case is the injured person and has to be placed in the original position as if his contracts of indemnities have been performed rightly and lawfully. It has been decided in cases in other jurisdictions referred to above that the assured's right to be indemnified for any loss or damage has been protected by law and the circumstances of the case before us would afford grounds

for interference of this court to give effect to the express provisions and terms of the letters of indemnities and not to grant relief to the appellant but to grant reliefs to the respondent.

The purpose of an indemnity is to secure that the indemnitee does not suffer economic loss . It must be mentioned that the power of the court was called upon by the respondent to prevent any economic loss and injustice occasioned by the act of the appellant and accordingly the court has intervened to do justice.

It can be stated that the oral evidence that was elicited in the High Court coupled with other documentary evidence in favour of the respondent would suffice to support the reasoning and the conclusion of the learned High Court Judge's judgment which I think is sufficient to decide the case before us. I am satisfied with the submissions of the learned counsel for the respondent and conclude that the appellant has failed in all the grounds of appeal to convince this court that the learned High Court Judge made an error of law in the judgment.

Accordingly , I affirm the Judgment of the Commercial High Court dated 10/05 2007.

In the circumstances , This court is not inclined to grant any relief to the appellant.

Appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

K. Sripavan J.

I agree

JUDGE OF THE SUPREME COURT

P.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 in respect of

A Judgment of the Court of Appeal dated

10th November 2009.

ArattanaGederaSusiripala,

No.96, Senarathgama ,

Katugastota.

PETITIONER

SC Appeal No. 75/2010 **Vs**

S.C Special .L.A. Application No. 288/2009

C.A. (Writ) Application No. 985/2007

SC Appeal 55/2011

SC (Spl) Leave to Appeal application No. 298/2009

SC (Writ) Application No. 985/2007

1. Commissioner of Elections,

Election Commission Department

Kotte Road,

Rajagiriya.

2. U.Amaradasa,

Returning Officer,

HarispattuwaPradeshiyaSabhawa

Secretariat

Kandy.

3. NalinSanjiwaKurunduwatte

HarispattuwaPradeshiyaSabha

Tittapajjala,

Werallagama.

4. SusilPremajayantha

Secretary,

United People's Freedom Alliance

No. 301, T.B. Jaya Mawatha,

Colombo 10

RESPONDENTS

AND NOW BETWEEN

1. Commissioner of Elections

Election Commission Department

Kotte Road ,

Rajagiriya

1st Respondent- Petitioner

2. U.Amaradasa

Returning Officer,

HarispattuwaPradeshiyaSabhawa

Secretariat , Kandy

2nd Respondent –Petitioner

Vs

1. ArattanaGederaSusiripala,
   No. 96, Senarathgama,

Katugastota.

Petitioner- Respondent.

2. NalinSanjeewaKurunduwatte,
HarispatuwaPradeshiyaSabha,
Tittapajjala,
Werallagama.

3rd Respondent-Respondent.

3. SusilPremajayantha,
Secretary,
United People's Independent
Alliance,
No. 301, T.B. JayahMawatha,
Colombo-10.

4th Respondent-Respondent.

BEFORE: **MOHAN PIERIS,PC. CJ**

SATHYAA HETTIGE, PC. J

PRIYASATH DEP,PC. J

COUNSEL: Janak de Silva, DSG with Ms. RuwanthiHerathGunaratne, SC for

the 1st and 2nd Appellants (In SC Appeal No. 75/2010)

Kushan D' Alwis, PC with Chanaka Fernando for the 3rd and 4th Respondent-Petitioners. (In SC Appeal No. 55/2011).

Kushan D' Alwis, PC with Chanaka Fernando for the 3rd Respondent-Respondent. (In SC Appeal No. 75/2010)

UpulRanjanHewage for the Petitioner –Respondent.

(In SC Appeal No. 55/2011 and SC Appeal No. 75/2010)

Janak De Silva, DSG with Ms. RuwanthiHerathGunaratne, SC for the 1st and 2nd Respondents- Respondents (In SC Appeal No. 55/2011)

ARGUED ON: 09TH September, 2013.

Written Submissions: Tendered by the petitioners on 26th August 2010

Tendered by the respondent on 29th Oct. 2013

(out of time)

DECIDED ON: 12TH February, 2014

SATHYAA HETTIGE P.C. J

The petitioner-respondent (hereinafter referred to as the respondent) sought a writ of Certiorari and a writ of Mandamus in the Court of Appeal to quash the declaration published in the government gazette No. 1510/2 dated 13th August 2007 and to compel the second respondent-petitioner to declare the petitioner respondent as an elected member of the HarispaththuwaPradeshiyaSabhawa who contested on the nominations list of the United Peoples Freedom Alliance at the Local Government Elections held on 30th March 2006.

On 10.11.2009 the Court of Appeal allowed the application and issued a writ of Certiorari and quashed the decision contained in Extra Ordinary Gazette dated 13th August 2007 marked P 3 and issued a Writ of Mandamus on the 2nd respondent –petitioner directing to appoint the respondent as a member of the HarispattuwaPradeshiyaSabha as prayed for in prayer "C" of the petition filed in the Court of Appeal with costs.

The 1st respondent - petitioner (hereinafter referred to as the 1st petitioner) and the 2nd respondent- petitioner (hereinafter referred to as the 2nd petitioner) filed the Special Leave to Appeal application in this court challenging the decision of the Court of Appeal dated 10th November 2009 on the following grounds:

(a) Did the Court of Appeal err in law in failing to consider that the 2nd petitioner was performing a ministerial act under section 65A(2) of the Act.
(b) Did the Court of Appeal err in law and in fact in failing to consider that the declaration made by the 2ndpetitioner was not amenable to a writ of certiorari
(c) Did the Court of Appeal err in law in finding that the act of the 4th respondent – respondent be construed as an act amenable to a writ of certiorari.

(d) Did the Court of Appeal err in law in construing section 65(A (2) of the Act to mean that the term "eligible" includes a consideration of the highest number of preferences .

(e) If any of the above questions is answered in the affirmative , did the Court of Appeal err in law and in fact in issuing a writ of Mandamus directing the 2nd respondent to appoint the respondent as a member of the HarispattuwaPradeshiyaSabhawa.

On 29th June 2010 this court having heard the counsel, granted Special Leave to Appeal on the questions set out in paragraphs 9 (a) , (b) (c) (d) and (e) of the petition dated 11th December 2011.

When this matter was taken up for hearing on 9th September 2013 along with SC Appeal no. 55 of 2011 counsel in both matters informed court that they will abide by the decision of this case in SC Appeal 55/2011 as well. Accordingly this appeal was heard and was set down for Judgment.The written submissions have been filed by the State (appellants) and the respondents as directed by court.

Brief Outline of facts

The second petitioner who was the returning officer appointed for HarispattuwaPradeshiyaSabhawa acting in terms of section 65 (A) of the Local Authorities Ordinance No 53 of 1946 as amended (hereinafter referred to as the "said Act") informed the General Secretary of the United People's Freedom Alliance , the 4th respondent –respondent by the letter dated 13th June 2007 that a vacancy in the membership of the HarispattuwaPradeshiyaSabhawa has occurred as UpatissaSenaratne, member of the HarispattuwaPradeshiyaSabhawa had passed away consequent to being elected a member thereof in April 2007.

Further the 2nd respondent petitioner requested the General Secretary of the United People's Freedom Alliance to nominate a person to fill the vacancy occurred consequent to the passing away of the member above referred to.

The 4th respondent, the General Secretary of the United People's freedom Alliance accordingly by the letter dated 6th July 2007 nominated the 3rd respondent , NalinSanjivaKurunduwatteto fill the said vacancy in terms of the provisions in section 65A(2) of the Act.

The second petitioner thereafter declared the 3rd respondent- respondent as elected member of the HarispattuwaPradeshiyaSabghawa by a notice published in the Government ExtraordinaryGazette No. 1510/2 dated 13th August 2007.
The petitioner-respondent challenged the said declaration published in the Gazette dated 13th August 2007 in the Court of Appeal and obtaineda writ of Certiorari and a writ of Mandamus on the 2nd petitioner with costs in a sum of Rs. 25000.00 on 10th November 2009.

This court when granting Special Leave To Appeal 29/06/2010 considered the questions of law set out in the petition which were fit for review by this court.

The questions to be determined before this court areas to whether the act of the 4th respondent –respondent was amenable to a writ of certiorari and whether the act of the 2nd petitioner is a ministerial act under section 65 A (2) of the said Act and therefore whether the Court of Appeal by granting reliefs sought by the respondent, made an error of law in erroneously construing the provisions contained in section 65 A(2) of the said Act.
It is important to consider the provisions carefully encapsulated in section 65A(2) of the Act for the purpose of determining this matter as the whole issue is based on interpretation of this section.

Interpretation ofSection 65A(2)

Section 65A(2) of the Local Authorities Elections Amendment Act No 24 of 1987 reads as follows:
" If the office of a member falls vacant due to death, resignation or for any other cause , the returning officer of the district shall call upon the secretary of the recognized political Party or the group leader of the Independent Group to which the member vacating officer belonged , to nominate within a period to be specified by the returning officer , a person "eligible" under this Ordinance for election as a member of the Local Authority, to fill such vacancy. If such secretary or the group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation, as the case may be, in the form set out in the seventh schedule to the Constitution , taken and subscribed , as the case may be, by the person nominated to fill such vacancy, the returning officer shall declare such person elected as a member of that local authority. If on the other hand, such secretary or group leader fails to make a nomination within the prescribed period, the returning officer shall declare elected as member from nomination paper submitted the candidate who has the highest number of preferences at the election of members to that Local Authority next to

the last of the members declared elected to that local authority from that party or group."(emphasis added)

I also find a similar provision in section 65 (1) and section 65 (2) of the Provincial Councils Act No. 2 of 1988 which provide as follows:

Section 65 (1) reads

"*Where the office of a member of a provincial Council becomes vacant the secretary of the Provincial Council shall inform the Commissioner of the fact of the occurrence of such vacancy . The Commissioner shall fill such vacancy in the manner hereinafter provided*."

Section 65(2) reads:

" *If the office of a member of a Provincial Council becomes vacant due to death , resignation or any other cause , the Commissioner shall call upon the secretary of the recognized political party or the group leader of the independent group to which the member vacating office belonged , to nominate within a period to be specified by the Commissioner , a person eligible under this Act for election as a member of the Provincial Council, to fill such vacancy. If such secretary or the group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation (by him in the prescribed form) the Commissioner shall declare such person elected if on the other hand such secretary or the group leader fails to make a nomination within the specified period ,* ***the commissioner shall declare*** *elected as member , from the nomination paper submitted by that party or group for the administrative district in respect of which the vacancy occurred , the candidate who has secured the highest number of preferences at the election of members to that Provincial Council time, next to the last of the members declared to that Provincial Council from that party or group.." (emphasis added)*.

On a careful reading of the above provisions of section 65 A (2) of the Local Government Elections Act it can be seen that there are two limbs reflected in the section . The first limb is the secretary of the recognized political party or the group leader of the independent group has been authorized to nominate a person "eligible" for election under the Act when called upon to do so by the Returning Officer.

Secondly If the secretary of the recognized political party or the group leader when required to nominate within the time specified defaults to nominate the Returning Officer has been authorized to declare elected as member from the nomination paper submitted by the candidate who has secured the highest number of preferences at the election of members to that Local Authority.

Furthermore it appears that the above provisions in section 65A (2) of the Act do not refer to the candidates on the nomination paper but it refers to "eligible person" for election under the Act (whom the returning officer shall declare elected) to be nominated by the secretary of the recognized political party or the group leader according to his choice. I do not think that the intention of the Legislature was to restrict the Secretary's choice to "eligible persons" on the nomination paper since it has shown a wider interpretation . However, it can be inferred from the interpretation of the words "eligible person" that the Secretary's choice is confined to the persons referred to at the time of the nomination paper.
It is important to note that the first limb of the section does refer only to the persons " eligible" and not the persons who had obtained the highest number of preferences at the election.

Eligibility

I do not find any express provision in the Act which defines the word "eligibility". However, the section 9 of the Act provides that a person shall be qualified to be elected if he is not subject to any disqualifications specified in section 3 of the Provincial Councils Act.
Section 3 of the Provincial Councils Act No. 42 of 1987 provides for disqualifications of a person to be elected as follows:

> " No person shall be qualified to be elected as a member of a Provincial Council or to sit and vote as a member of such Council-
>
> (a) if such person is subject to any of the disqualifications specified in
>
> paragraphs (a), (c),)d, (e), (f) and (g) of Article 91(1) of the Constitution;
>
> (b) If such person is under any law, disqualified from voting at an election of members to a local authority;
>
> © if he is a Member of Parliament;
>
> (d) if he is a member of any other Provincial Council or stands nominated asa candidate for election for more than one Provincial Council;
>
> (e) if he stands nominated as a candidate for election to a Provincial Council, by more than one recognized political party or independent group.

Therefore it can be seen that all the candidates whose names appear in the nomination paper were eligible persons to be elected as members to the HarispattuwaPradeshiyaSabhawa.

Court of Appeal

The question of law raised by the appellant in this appeal is that " Did the Court of Appeal err in failing to consider that section 65A(2) of the Local Authorities Elections Amendment Act No 24 of 1987 vested the Secretary of a recognized political party with a discretion which had been properly exercised by the 4th respondent in the circumstances of this case and as such the nomination of the 3rd respondent had been duly made?

I will now reproduce the section 65A(2) of the Act as stated in the Court of Appeal Judgment at page 5 .

"If the office of a member falls vacant due to death, resignation or for other cause , the returning Officer of the district shall call upon the secretary of the recognized political party or the group leader of the Independent group to which the member vacating officer belonged to nominate within a period to be specified by the returning officer , a person "eligible" under this Ordinance for election as a member of that local authority , to fill such vacancy and ……..on the other hand if such secretary or group leader fails to make a nomination within the prescribed period, the returning officer shall declare elected as member from the nomination paper submitted by that party or group, the candidate who has secured the highest number of preferences at the election of members to that local authority……."

It appears that the Court of Appeal erroneously has dropped the important part of the section 65A(2) of the Act which I reproduce below.

"***If such secretary or the group leader nominates within the specified period an eligible person to fill such vacancy and such nomination is accompanied by an oath or affirmation (by him in the prescribed form) the Commissioner shall declare such person elected" (Emphasis added)***

The Court of Appeal has specifically stated in the judgment that in the instant case both the petitioner-respondent and the 3rd respondent were eligible to be nominated and the party secretary has nominated the 3rd respondent on the basis of youth representation. The Court of Appeal has considered that youth representation is a criterion that should have been considered at the time of nomination only. I do not agree with the proposition of the Court of Appealthat youth representation criterion should be considered only at the time of nomination.

It is also to be noted that the nomination of the 3rd respondent on the basis of youth representation isreferable to an intelligible rationale as the new nomination is to fill the vacancy of a member (nominated on the basis of youth representation) falling vacant due to the death of that youth member . This rationale too satisfied the eligibility criteria set out in section 65A(2) of the Act. Therefore, we observe that the concept of "youth for youth" representing the youth category as envisaged in the Statute has been preserved and satisfied.

It is obviously clear that the Party Secretary has exercised his right or his discretion in nominating the "eligible" person as a party choice from the same nomination paper having being required to do so. The 2nd petitioner accordingly declared the 3rd respondent elected as member of the HarispattuwaPradeshiyaSabha. The 2ndpetitioner has no power to examine or inquire into the nomination made by the Party Secretary . The 2nd respondent had no choice or discretion but to declare elected the nominated member. The returning officer has the power to nominate only if the Party Secretary of the recognized political party or independent group defaults nomination within the specified period.

The learned Deputy Solicitor General strongly contended that the 2nd petitioner by giving effect to the statutory provisions contained in section 65A(2) of the Act exercised only a ministerial act and that the declaration made by the returning officer is not a decision or determination and cannot be challenged by way of a writ application. The law does not contemplate any inquiry or investigation when making the declaration under the statutory provisions in section 65A (2) of the Act. The section 65A(2) only mandates the declaration of the name having communicated by the secretary of the recognized political party.

In the case of **GaminiAthukorale** v **DayanandaDissanayake, Commissioner of Elections**(1998) 3 SLR 207WijetungaJ held that

" *As regards the question whether in any event a Writ of Certiorari would lie to quash the declaration of the result of an election by the returning Officer in terms of section 65 of the Ordinance , one must necessarily examine the nature of the Returning officer's functions in respect thereof*. The Returning Officer does not have to exercise a discretion or make decision at that stage , in that he has merely to declare the result on the basis of the total number of valid votes cast for each political party or independent group , as reflected in the returns sent by the relevant officers of each polling station. This is no more than a ministerial act and by its very nature does not attract the jurisdiction exercisable by way of a Writ of Certiorari" (Emphasis Added)

It is to be emphasized that the section 65A(2) of the Act specifically states that the "Commissioner (returning officer) **shall declareelected** such person" and therefore that the

returning officer has no discretion in the exercise of his statutory function but to declare the nomination.

The learned Deputy Solicitor General invited our attention to the case of **Abeygunasekere** v **Local Government Service Commissions**51 NLR 8 wherein His Lordship Justice Nagalingam, when discussing the writ jurisdiction on of the Court on ministerial acts as to whethersuch acts are amenable to writ,held that ,

"*The test however, seems to be that , where a statutory body is called upon to exercise its functions according to principles lad down in the statute , if it does not act in consonance with those provisions , any order made by it may be liable to be questioned on certiorari, as for instance, where the Commission , without framing charges , without affording an opportunity to the employee to exculpate himself and without holding an inquiry, purports to dismiss him , I do not think it can be gainsaid that such an order would, as being one made without jurisdiction , be liable to be quashed in certiorari; but where it has performed its duties in accordance with the statutory provision, the soundness of the conclusions reached or the decision arrived at cannot form the subject of review by means of a writ of certiorari.*"(emphasis is mine)

Now I would like to consider as to whether the Court of Appeal erred when interpreting the statutory provisions contemplated in section 65A(2) of the Local Authorities Elections (Amendment) Act No. 24 of 1987 .

I think that It is necessary to consider the intention of the legislature when enacting the new amendment in 1987 when filling vacancies to the Local Authorities .

Maxwell on the **Interpretation of Statutes (12th Edi.) 1969 P.1** says that " *Statute law is the will of the Legislature.." (emphasis added)*

It can be seen that In line of authorities it has been decided that the function of the court is to find out and declare the intention of the legislature and not to add words to a statute. It is also not the function of the court to drop the vital part of the statutory provisions in the section but to obey the statutory provisions. It has to be given the true meaning intended by the legislature.

In **R**. **vWimbletonJusticesEX.P.Derwent** (1953) 1 QB 380 **Lord Goddard CJ** at 384 observed that

" *A court cannot add words to a statute or read words into it which are not there*."

(emphasis added)

It was decided in an earlier case in the case of **R.v City of London Court Judge(1892)1 QB 273Lopes LJ** at page 310 said *" I have always understood that If the words of an Act are unambiguous and clear, you must obey those words however absurd the result may appear.."*

N.R.Bindra's Interpretation of Statutes (Tenth Edition 2007) at page 279 states that "*The golden rule of interpretation is that we must first try to ascertain the intention of the Legislature from the words used , by attaching the ordinary meaning of the word on the grammatical construction adding nothing and omitting nothing and give effect to the intention thus ascertained if the language is unambiguous, and no absurdity results…."*

To my mind the language used in the section is crystal clear and the procedure and the statutory process laid down in the statute must be strictly followed and there is no ambiguity or uncertainty in the statutory provisions in section 65A(2) of the Act. The 1st petitioner or 2nd petitioner in the instant case are public functionaries who are required to discharge the public duties vested in them and the those public functionaries have no discretion or choice but to declare the nomination.

Sarath Silva J (as he then was) in **Y.P de Silva , General Secretary, S.L.M.P.** and **Another** v **Raja Collure Secretary USA** (United Socialist Alliance) and two others (1991) 2 Sri. L.R.at page 328 carefully examined the provisions contained in section 65 of the Provincial Councils Elections Act and said that there are several stages in the process of filling a vacancy in a Provincial Council as follows:

(1) The Secretary of the Provincial Council informs the Commissioner of Elections of the fact of the occurrence of the vacancy (section 65(1);
(2) The Commissioner calls upon the Secretary of the recognized political party or the group leader of the independent group to which the member vacating office belonged to nominate within a period specified by the Commissioner a person eligible to be elected as a member to fill such vacancy (section 65(2);
(3) A nomination made by the Secretary of the recognized political party or the group leader accompanied by the requisite oath or affirmation and the Commissioner declares that person elected to the Council (section 65(2);
(4) If the Secretary or the group leader fails to make such a nomination within the period specified , the Commissioner declares as elected the candidate who secured the highest number of preferences at the election of members next to the last member declared elected from the relevant party or group(section 65(2);
(5) Where there are no names remaining in the nomination list of the relevant party or group , the Commissioner informs the President who may direct the Commissioner to hold an election to fill such vacancy Section 65(3);

As in the present case the stages 1,2,3, referred to above are the same and identical provisions . The Court of Appeal in the above case further proceeded to hold that though there is considerable public interest in the activities of the political parties the political parties are voluntary organizations of its members regulated by its Constitution. As the learned Deputy Solicitor General submitted that the Secretary of a

recognized political party or the group leader of an independent group are not subject to the norms of Administrative Law.

It is useful to refer to the earlier provisions contained in section 65A ((3) of the Local Authorities Elections Law of 1977 which provided that when filling vacancies in the Local Authorities , the elections officer shall declare as member the candidate whose names appear next after the last of the elected members in the nomination paper of the recognized political party or independent group to which the member who vacated office belonged. However, the law was amended by the Local Authorities Elections (Amendment) Act no. 24 of 1987 by which the Secretary of a recognized political party or the group leader of an independent group will be called upon to nominate within a specified period "an eligible person" to fill such vacancy. The learned Deputy Solicitor General strongly contended that the effect of the Court of Appeal judgment by taking way the right and the choice given to the Secretary of a recognized political party or group leader of an independent group to nominate an eligible person, the second limb of the section 65A(2) of the Act will be redundant.

CONCLUSION

I am in agreement with the submissions of the learned Deputy Solicitor General on that point, whose the essence of the contention is that the vacancy should be initially filled by the nomination by the Secretary of the recognized political party or the group leader of an independent group and the returning officer shall declare elected such person to fill such vacancy. The right and choice given to the Secretary to the recognized political party and the group leader of the independent group to nominate an "eligible person" to fill such vacancy in the Local Authority by the statute cannot be taken away or disregarded by the returning officer and the returning officer has no discretion but to give effect to such nomination and declare as elected such person as member.

Furthermore, it is to be noted that that 3rd respondent nominated by the 4th respondent is a "person eligible" from the nomination paper itself and therefore the nominated 3rd respondent is not an outsider. I also hold that the 3rd respondent's nomination is a valid and lawful nomination as declared by the returning officer.

For the reasons stated above and having considered the written submissions of all the parties , I hold that the judgment of the Court of Appeal dated 10th November,2009 was erroneously decided and should be set aside.

Accordingly, I set aside the judgment of the Court of Appeal dated 10th November, 2009.

Appeal allowed .

No costs.

Parties in the SC Appeal No. 55 /2011 will abide by the decision in this Appeal.

JUDGE OF THE SUPREME COURT.

Mohan Peiris, PC. CJ
I agree.

JUDGE OF THE SUPREME COURT.

PriyasathDep, 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 03/2011

L.T. No. 18/KT/3235/04
HCALT No. 02/2009

W. Suvinipala, No. 83, Bandaranayake Mawatha, Matugama.

Applicant

Vs.

The Peoples' Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

Respondent

And Between

W. Suvinipala, No. 83, Bandaranayake Mawatha, Matugama.

Applicant-Appellant

Vs.

The Peoples' Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

Respondent -Respondent

And Now Between

The Peoples' Bank, Head Office, Sir Chittampalam A. Gardiner Mawatha, Colombo 2.

Respondent-Respondent-Petitioner

SC. Appeal 03/2011

Vs.

W. Suvinipala, No. 83, Bandaranayake Mawatha, Matugama.

Applicant-Appellant-Respondent

* * * * *

Before : Saleem Marsoof, PC. J.
K. Sripavan, J. &
Eva Wanasundera, PC.J.

Counsel : Manoli Jinadasa with Tharanga Ambepitiya for the Respondent-Respondent-Appellant.

Indra Ladduwahetty for the Applicant-Appellant- Respondent.

Argued On : **18-02-2014**

Decided On : **13-05-2014**

* * * *

Eva Wanasundera, PC.J.

This Court has granted Leave to Appeal on the questions set out in paragraphs 16 (a) & (b) of the petition dated 20th July 2011. They are;

16(a)-Whether the order of Provincial High Court for compensation is excessive and/or erroneous in law .

(b) Whether the Provincial High Court erred in law in the evaluation of evidence and has made order without a consideration of the totality of the evidence.

The facts of this case are as follows:-

The Respondent-Respondent- Petitioner (hereinafter referred to as the 'Petitioner') is the People's Bank who employed the Applicant-Appellant-Respondent (hereinafter referred to as the 'Respondent') as the Manager. The Respondent filed an application in the Labour Tribunal seeking relief that he was denied of the full term of his second extension amounting to a constructive term of his services. He asked for reinstatement of his services and/or compensation from the Labour Tribunal. The Learned President of the Labour Tribunal made order dated 24-04-2009 dismissing the application of the Respondent holding that the Respondent had been retired from the services of the Petitioner, People's Bank and collected his retirement benefits and as such is prevented from claiming that his services had been terminated. The Respondent appealed to the Provincial High Court and the learned High Court Judge by order dated 10-06-2010 awarded compensation to the Respondent consisting of aggregating of his monthly salary from the date of his interdiction to 19-12-2003 less the salary already paid to him. The Petitioner People's Bank has appealed to this Court from the order of the said Provincial High Court.

The retiring age of the Respondent was 55 years. The Bank Circular No. 323/2001,which provides for retirement at the age of 55 years, is admitted by the Respondent, who reached the age of 55 years on 16-12-2000. He was granted his first extension of services for a period of one year. When he asked for the second extension under the circular No. 323/2001, he was granted an extension up to 15-06-2002 for a period of 6 months. The Respondent was informed by the Petitioner that his date of retirement was 15-06-2002. A few days before his retirement, the Petitioner Bank discovered some irregularities allegedly committed by the Respondent when granting overdrafts during the tenure of his service as the Manager of the People's Bank, Matugama branch. The Petitioner Bank intended to take disciplinary action against the Respondent and as such the Bank wanted to keep the Respondent without retiring, so that the irregularities could be properly investigated. In these circumstances, the Petitioner Bank interdicted the Respondent on 03-06-2002 and made arrangements to

pay the Respondent half month's salary on a request made by the Respondent and in accordance with the disciplinary procedures of the Bank. The Petitioner Bank by letter dated 19-12-2003 retired the Applicant with effect from 03-06-2002. Anyway the Respondent received his pension with effect from 03-06-2002. I observe that the original due date of retirement of the Respondent was 15-06-2002 and as a punishment the Respondent was made to retire 12 days before the original date, ie. on 03-06-2002. But this punishment was intimated to him, 1½ years later on 19-12-2003.

The Petitioner Bank did not appeal from the order of the Labour Tribunal. But the Respondent appealed to the Provincial High Court and the Respondent got compensation on the premise that his services had been terminated by the Petitioner Bank unlawfully.

Even though the Labour Tribunal did not grant relief to the Respondent, in the body of its order dated 24-04-2009, the Labour Tribunal President held that the Respondent's services were terminated by the Petitioner Bank unlawfully and unjustifiably. The Labour Tribunal has specifically held that the letter of termination was a decision taken by a Committee appointed by the General Manager and communicated to the Respondent by the Chief Manager (Human Resources). The disciplinary authority of the Petitioner Bank was the Chairman and the Board of Directors and there had been no indication to the effect that the Chairman or the Board of Directors had considered the contents of the letter of termination. Therefore, the letter of termination dated 03-06-2002 was held unlawful and unjustifiable and null and void by the President of the Labour Tribunal. The Provincial High Court of the Western Province has also arrived at the finding that the Respondent's services was unjustifiably and unjustifiably terminated by the Appellant and granted relief to the Respondent by way of compensation.

I am of the view that both the Provincial High Court and the Labour Tribunal has evaluated the evidence before arriving at the decisions on the material placed before them even though the final decisions are different from each other. I have gone through the evidence led before the Labour Tribunal from the record which is filed in this Court. The question that has to be answered at the end of evaluation of the evidence, is

(a)whether the Respondent was in employment of the Appellant Bank from the day that he was interdicted up to 19-12-2003 or not? and (b) If he was in employment, was he unlawfully and unjustifiably terminated? and (c) if the termination is unjustifiable and unlawful, how much of compensation should have been granted?

The Respondent was due to retire on 15-06-2002. He was made to retire with effect from 03-06-2002, which means that he was punished by giving an order to retire earlier than the due date. When the date of retirement is an earlier date than the due date and the date of the order which determined the date of retirement as 03-06-2002, happens to be a later date which is 19-12-2003, on which date he was punished, the inference that can be drawn according to these facts is none other than the fact that the Respondent was employed and working at the Petitioner Bank up until 19-12-2003. It is the Appellant Bank who decided to pay him half salary from the date of interdiction, till the date of the order of the disciplinary committee on 19-12-2003. It is undisputed that the Respondent was not given an opportunity to defend himself at the inquiry held by the Appellant Bank. It was only a charge sheet served on the Respondent and a letter of explanation that was considered by the disciplinary committee. In addition, the order was not sent by the lawful disciplinary authority which is the Chairman of the Petitioner Bank and the Board of Directors. I am in agreement with the finding of the Labour Tribunal and the Provincial High Court that the Respondent's services were terminated unlawfully and unjustifiably. The Provincial High Court in evaluating the evidence has given due consideration to the totality of the evidence just as much as the Labour Tribunal President did.

When the services were terminated wrongfully, the only matter to be decided is the amount of compensation which should be granted in lieu of reinstatement when reinstatement is not an option. The Provincial High Court has thought it fit only to grant the salary in full for the period that the Appellant Bank decided to keep the Respondent in the service of the Bank even though interdicted, by paying him half the salary per month. I do not believe that it is excessive or erroneous at all. If it was thought by the Bank to pay him half salary, then at the end of the inquiry if he was not dismissed from service but giving him a warning and an early date to retire as a punishment, it is not

proper for the Bank to have deprived him of his full salary. The Appellant Bank has taken into consideration that a pension is being paid to him and therefore he need not be given the salary in full. I am of the view that the Bank cannot take two different stands at one and the same time. He was an employee who drew only a half salary till 19-12-2003. The order for the full salary to be granted for the whole 1½ years (during which time he was interdicted by the Bank) is not excessive.

In the case of *Ceylon Planters Society vs. Bogawanthalawa Plantation Ltd*. 2004, 1 SLR 88*,* it was held that had the employer refrained from dismissing the employee and allowed him to retire on a particular date, he could well have applied, even before his due date of retirement, for other employment and could have commenced such employment soon after retirement and the wrongful termination had denied him that opportunity and for that, he must be compensated.

I have given consideration to the case of *Piyasena Silva Vs. Ceylon Fisheries Corporation* 1994 2 SLR 292 *, Saleem Vs. Hatton National Bank* 1994 3 SLR 409 and *Jayasooriya Vs. Sri Lanka State Plantation Corporation* 1995 2 SLR 379, which were quoted by Counsel arguing this matter before deciding this matter.

I dismiss this appeal and affirm the judgment of the Provincial High Court dated 29th of April 2009. However, considering all the circumstances of this case, I order no costs.

Judge of the Supreme Court

Saleem Marsoof, PC. J.

I agree.

Judge of the Supreme Court

K. Sripavan, J

I agree.

Judge of the Supreme Court

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

1. Flexport (Pvt) Limited of No. 127, Jambugasmulla Road, Nugegoda

2. Puwak Dandawe Narayana Nandadasa of No. 127, Jambugasmulla Road, Nugegoda

3. Mallika Devasurendra of No. 127, Jambugasmulla Road, Nugegoda

Defendants-Appellants-Petitioner

SC Appeal No. 03/2012
SC.HC.CA.LA No. 268/11
WP/HCCA/Mt/70/04/F
D.C. Mt. Lavinia Case No. 1032/96/M

Vs.

Commercial Bank of Ceylon Limited of No. 21, Bristol Street, Colombo 01 and having a branch office and/or a place of business called and known as the "Wellawatte Branch" at No. 343, Galle Road, Mount Lavinia.

Plaintiff-Respondent-Respondent

Before	:	Marsoof, PC, J Dep, PC. J & Marasinghe, J
Counsel	:	H. Withanachchi with S.N. Vijithsingh for the Defendant-Appellant-Appellants. S.A. Parathalingam, PC with V. Senadhira instructed by M/s Samararatna Associates for the Plaintiff-Respondent-Respondent.
Argued on	:	26.09.2014
Decided on	:	15.12.2014

Priyasath Dep, PC, J

This is an appeal against the judgment dated 07-06-2011 of the Provincial High Court of Civil Appeal of Mt Lavinia in Case No. WP/HCCA/MT/70/04/F. The High Court affirmed the order dated 17-11-2004 of District Court of Mt Lavinia in Case No.DC1032/96/M which rejected the application made under section 86 (2) of the Civil Procedure Code to set aside the ex parte judgment on the basis that it was filed out of time.

The Plaintiff-Respondent-Respondent (hereinafter called and referred to as the "Respondent") on 6th August 1996 instituted an action against the Defendants-Appellants-Petitioners (hereinafter called and referred to as the "Appellants") for the recovery of money based on two causes of action.

The Petitioners filed an answer with a claim in reconvention .The Respondent filed a replication in answer to the claim in reconvention. Thereafter this case was fixed for trial and subsequently proceeded to trial. The trial was postponed on numerous occasions due to various reasons.

On 24th June, 2003 when this case came up for further trial the Petitioners were absent and unrepresented and the case was fixed for ex-parte trial. An ex-parte judgment and decree was entered on the 01st July 2003 against the Petitioners as prayed for in the Plaint. The decree was served on the Petitioners on 11-10-2003.

The Petitioners on 27th October 2003 filed an Application under section 86(2) of the Civil Procedure Code to set aside the ex-parte judgment. The inquiry pertaining to the application filed by the Petitioners was taken up on 17th November 2004.When the inquiry was taken up an objection was raised by the Respondent that the Petitioners have failed to prefer the said Application within fourteen days as stipulated by Section 86(2) of the Civil Procedure Code and moved for a dismissal of the said Application.

The Additional District Judge having heard the submissions of the learned Counsel for the Respondent and the learned Counsel for the Petitioners upheld the objection and dismissed the Application of the Petitioners. Thereafter the Defendants (Appellants) preferred an appeal against the order dated 17th November 2004 of the Additional District Judge of Mount Lavinia to the Court of Appeal which was subsequently transferred to the Provincial High Court of Civil Appeal of Mount Lavinia.

The Provincial High Court having considered the written submissions as well as the oral submissions of the Counsel for the Petitioners and the Respondent, by judgment dated 07th June 2011 dismissed the Appeal of the Petitioners.

Being aggrieved by the said judgment dated 07th June 2011, the Petitioners preferred this Application for Leave to Appeal against the said Judgment to the Supreme Court. The Supreme Court granted Leave to Appeal from the said judgment on the grounds set out in sub paragraphs (i) to (iv) of paragraph 14 of the Petition dated 18th July2011.

The Court having heard the submissions of both parties directed parties to tender written submissions . As directed by court parties tendered their written submissions.

The main question that has to be decided by this Court is whether the order dated 17th November 2004 of the Additional District Judge of Mount Lavinia in dismissing the application of the Petitioners to set aside the ex parte order and the order of the Provincial High Court of Civil Appeal dated 07th June 2011 affirming the said order of the Additional District Judge on the basis that the Petitioners have failed to prefer the said Application within the prescribed period as set out in Section 86(2) of the Civil Procedure of the District Court is correct or not.

The section 86(2) of the Civil Procedure Code read thus:

> 86(2) "Where , within fourteen days of the service of the decree entered against him for default, the defendant with notice to the Plaintiff makes application to and thereafter satisfies court, that he has reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper"

It is not disputed that the decree was served on the Defendants on 11th October 2003 and petition and affidavit and other documents were filed by the Petitioners on 27.10.2003 to vacate the ex-parte order after the lapse of 14 days. The 14th day fell on 24th October 2003 which was declared a public holiday, on 25th Saturday the court house was closed and Sunday was a public holiday. Petitioners submit that Section 8 (1) of the Interpretation Ordinance is applicable and if these 3 days were excluded the Application is within time. It is to be observed that the learned Additional District judge and the learned High Court Judge did not consider the applicability of section 8 (1) of the Interpretation Ordinance.

The learned President's Counsel for Respondent Bank vehemently argued that the Interpretation Ordinance has no application to Section 86(2) of the Civil Procedure Code. The learned Counsel for the Petitioners on the other hand argued that section 8 (1) of the Interpretation Ordinance applies and both the learned Additional District judge and the learned High Court judge erred in law by failing to consider the applicability of the Interpretation Ordinance.

The main question we have to decide is whether section 8 (1) of Interpretation Ordinance applies to section 86(2) of the Civil Procedure Code or not.

The section 8(1) of the Interpretation Ordinance reads thus:

> "Where a limited time from any date or from the happening of any event is appointed or allowed by any written law for the doing of any act or the taking of any proceeding in a court or office, and the last day of the limited time is a day on which the court or office is closed, then the act

> or proceeding shall be considered as done or taken in due time if it is done or taken on the next day thereafter on which the court or office is open."

The word 'within' in relation to the time limit occurs in section 86 (2) (application to set aside an ex-parte order), section, 754 (4) (notice of appeal) and section 755(3) (petition of appeal) in the Civil Procedure Code. Therefore judgments in relation to a particular section mention above are relevant to the other sections too.

Under section 755(3) the Petition of Appeal shall be filed within 60 days from the date of the judgment. There is no exclusion of dates. However, the Appellant has a long period of 60 days to file the Petition of Appeal

Under Section 754(4) of the Civil Procedure Code Notice of Appeal shall be preferred within 14 days from the date of the decree or order. However, the date of the decree or order and the date of filing the notice and all Public holidays are excluded. Therefore, invariably the appellant will get more than 14 days to file the Notice of Appeal.

Under Section 86(2) of the Civil Procedure Code the Applicant is required within 14 days to file the Application. Unlike in the Notice of Appeal intervenient public holidays falling within 14 day period, date of the decree or order or date of filing the application are not excluded.

The learned President Counsel for the Respondent in support of his argument that there should be a strict compliance with the time limit cited the following cases namely; the *Ceylon Brewery Ltd., v. Jax Fernando, Proprietor, Maradana Wine Stores* (2001) 1 SLR 270, *Wickremasinghe v De Silva* (1978-79)2SLR 65, *Silva v. Sankaran and others* (2002) 2 SLR 65.

In *Ceylon Brewery Ltd., v. Jax Fernando, Proprietor, Maradana Wine Stores*, Fernando, J. held that

> "section 86(2) of the Civil Procedure Code confers jurisdiction on the District Court to set aside a default decree. Hence the period 14 days provided by that section to make an application to set aside a default decree is mandatory.

Per Fernando.J.

> "It is settled law that provision which go to jurisdiction must be strictly complied with".

In the above case the Petition and affidavit was filed on the 15th day and the 14th day was not a Public holiday or a day the court was closed. Hence the question of applicability of Interpretation Ordinance did not arise.

In the Judgment given by the Court of Appeal in *Wickremasinghe v De Silva (*Supra*)* Soza J held that:

> ' The provisions of section 753(3) of the Civil Procedure Code which requires the petition of appeal to be filed within 60 days from the date of the judgment are mandatory. Accordingly, where a petition had been filed after the period of 60 days had lapsed the learned District judge was correct in rejecting such a petition.'

Soza J in the above Judgment remarked that " Parties should not wait till the last moment and then complain when they are caught out of time"

In the judgment of the Court of appeal in *Silva v. Sankaran and others* (Supra) the Appellant lodged the Petition of Appeal under section 754 of the Civil Procedure Code on Monday, 61st day as the 60th day fell on Sunday, a public holiday. It was held in this case:

(1) A strict compliance is imperative and non-compliance is fatal to the appeal.

(2) The words 'within 60 days' in section 755(3) restrict the right of the appellant to file the petition of appeal beyond the time frame of 60 days given.

(3) The provisions of s.8(1) Interpretation Ordinance do not apply.

In order to emphasis the word 'within' the learned President Counsel for the Respondent referred to the Black's Law Dictionary (6th Edition,pp1602-1603) which provided definitions to the word 'within' thus : "when used relative to time, has been defined variously as meaning anytime before; at or before; at the end of; before the expiration of; not beyond; not exceeding; not later than**".** (Glenn v.Garett, Tex.Civ.App.,84 S.W. 2d 515,516)

The learned President's Counsel for the Respondent submits that the time period given in 86(2) of the Civil Procedure Code is mandatory and it should be strictly complied with and section 8(1) of the Interpretation Ordinance has no application .

The learned Counsel for the Defendant-Appellant Appellant submits that 14th day stipulated under section 86(2) of the Civil Procedure Code fell on 24th October 2003 which happened to be a public holiday followed by Saturday, a day the court was closed and Sunday was a public holiday, filing the application on Monday the 27th is within time in view of the section 8(1) of the Interpretation Ordinance. He relied on the following cases *State Trading Corporation V Dharmadasa* (1987) 2SLR 235, *Nirmala de Mel v. Seneviratne and others* 1982 2SRI LR 569 and *Chandrakumar v. Kirubakaran* 1989 2Sri LR (pg38) *Selenchina v. Mohomad Marikkar* (2000) 3 SRI LR (Pg. 100), and *Mendis v Mendis* (2004) BLR(pg. 35).

In *State Trading Corporation v. Dharmadasa* (Supra) Sharvananda CJ observed that:-

> "Section 8(1) of the Interpretation Ordinance will not avail the appellant since the last date of presenting the notice of appeal to court was 16th June, a Friday- a day on which the court was not closed. Had the last being Saturday, the 17th,

> then the notice of appeal could validly have been filed on Monday the 19th when the court was opened".

In this case it was observed that:

> "Notice of appeal was not within the time limit of fourteen days permitted by Section 754(4) of the Civil Procedure Code because allowing for the fact that the date of judgment and date of filing of notice are not counted and the 2 Sundays (4th and 11th June) had to be excluded, there was time to file the notice of appeal only until 16th June (Friday)."

In the case of *Nirmla de Mel v. Seneviratne and others* (Supra) after the granting of leave by the Court of Appeal to the Supreme Court ,petition of appeal was filed one day after the due date. The Rule No. 35 of the Supreme Court Rules of 1978 was then applicable. The court applied section 8(1) of the Interpretation Ordinance and accepted the petition of appeal. It was held that :

> " On the Application of this Rule of interpretation it would appear that the Petition of Appeal filed on Monday the 16th February 1981 which was the next working day was within time.

In the case of *Selenchina v. Mohomad Marikkar* and others (2000)CLR Vol 111(pg. 100) S.N. Silva, CJ held :

> " ….the notice of appeal was presented on 20.10.1986. If that day is excluded, the period of 14 days excluding the date of judgment pronounced (i.e. 30.09.1986) and intervening Sundays and public holidays would end on 17.10.86 which was a public holiday. The next day on which the notice should have been presented was the 18th , being a Saturday, on which the office of the court was closed. The next day, the 19th was a Sunday which too had to be excluded in terms of the section. In the circumstances the notice filed on 20.10.1986 was within the period of 14 days as provided for in section 754(4) of the Civil Procedure Code".

As stated earlier under Section 86(2) of the Civil Procedure Code, the Applicant is required within 14 days to file the Application. Unlike in the Notice of Appeal[section 754 (4)] intervenient public holidays falling within 14 day limit, the date of the decree, date of filing the application are not taken into account. Therefore applicant's time is limited to 14 days. If the 14th day falls on a public holiday or the date on which the court is closed if he is required to file on the previous day he has only 13 days. If that interpretation is given it will be disadvantageous and cause grave prejudice to the Applicant.

In this case 24th October 2003 fell on a Public holiday, Saturday was a day on which the court house was closed and Sunday a public holiday. If strict interpretation is given to section 86(2) Appellant is required to file papers on the 13th day. For the purpose of argument if we take a hypothetical case where the 14th day fell on Sunday the 26th

October 2003, the applicant has to file papers on the 23rd.. In that event he has to file papers within 11 days. The section 8(1) of the Interpretation Ordinance is meant for situations like this to prevent inconvenience or injustice to the litigant.

I am inclined to follow the Supreme Court judgments in *State Trading Corporation v. Dharmadasa, supra, Nirmala de Mel v. Seneviratne and others supra, Selenchina v. Mohomad Marikkar, supra;* which held that if the last date of filing falls on a public holiday or on a day the court house was closed, the act of filing of papers could be done or taken on the next date thereafter, the day the court or office is open. I hold that section 8 (1) of the Interpretation Ordinance Applies to section 86 (2) of the Civil Procedure Code.

For the reasons stated above, I set aside the judgment of the District Court of Mount Lavinia dated 17.11.2004 and the judgment of the Provincial High Court dated 07.06.2011 which affirmed the judgment of the District Court.

In view of this order, the learned District Judge is directed to inquire into the Application filed by the Defendant-Appellant to set aside the ex-parte order and thereafter make an appropriate order.

Appeal allowed. No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.

I agree.

Judge of the Supreme Court

Rohini 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 against the judgment of the Civil Appellate High Court of Mt. Lavinia

1. Shelton Upali Paul
   1st Plaintiff-Respondent-Respondent-Respondent-Petitioner-Appellant

2. KKPS Silva
   (Deceased)

   Neelawathura Walawe Premawathi

   Party substituted for the deceased 2nd Plaintiff-Respondent-Respondent-Respondent-Petitioner-Appellant

SC Appeal 5/2011
SC/HCCA/LA 196/2010
WP/HCCA/Mt/90/08/RA
DC Mt. Lavinia Case No.2667/M

Vs

EG Dayananda
Defendant-Petitioner-Petitioner-Petitioner-Respondent-Respondent

Before : Saleem Marsoof PC, J
Priyasath Dep PC, J
Sisira J De Abrew J

Counsel : Athula Bandara Herath with Mrs. Shashika de Silva
for the Plaintiff-Respondent-
Respondent-Respondent-Petitioner-Appellants
JP Gamage for the Defendant-Petitioner-
Petitioner-Petitioner-Respondent-Respondent

Argued on : 14.10.2014
Decided on : 12.12.2014

Sisira J De Abrew J.

The 1st and the 2nd Plaintiff-Respondent-Respondent-Respondent-Petitioner-Appellants (hereinafter referred to as the Plaintiff-Appellants) instituted action in the District Court of Mount Lavinia claiming Rs.3,000,000/- as damages for the alleged cause of action set out in the plaint. The Defendant-Petitioner-Petitioner-Petitioner-Respondent-Respondent (hereinafter referred to as the Defenadant-Respondent) filed an answer moving for dismissal of action. The trial commenced on 9.7.2004. After several adjournments, the case was fixed for further trial on 14.12.2005. On 14.12.2005 around 12.45p.m, when the case was taken for further trial the Defendant-Respondent was absent and unrepresented and the case was fixed for ex-parte trial. However around 1.10 p.m. on the same day, learned counsel for the Defendant-Respondent apparently having obtained permission from court to mention the case, explained reasons for his failure to appear in court around 12.45 p.m. According to his explanation, around 12.45 p.m. he was held up in the other court (court No.1). He therefore made an application to vacate the ex-parte order. The learned District Judge made an order to have the case mentioned on the next date (27.1.2006). However Attorney-at-law for the Defendant-Respondent probably to be on safe side filed petition and affidavit dated

19.12.2005 and moved the order dated 14.12.2005 fixing the case for ex-parte be vacated. The learned District Judge made an order to have the case mentioned on 27.1.2006.

When the case was taken up on 27.1.2006, despite the petition and affidavit dated 19.12.2005 filed by the Defendant-Respondent, the case was taken up for ex-parte trial. Although the case was taken up for ex-parte trial, the learned District Judge failed to make an order either rejecting or accepting the petition dated 19.12.2005.

After ex-parte trial, the learned District Judge on 21.4.2006 delivered the judgment in favour of the Plaintiff-Appellants. Upon the ex-parte decree being served, the Defendant-Respondent made an application by petition dated 8.3.2007 (page 213 of the brief) to have the said ex-parte judgment and the decree set aside. This application was made under Section 86(2) of the Civil Procedure Code (CPC). The learned District Judge, on 9.3.2007 (Journal Entry No.42), made an order to have the case mentioned on the next date (27.4.2007). The said application made under Section 86(2) of the CPC was not fixed for support or inquiry on 27.4.2007. On 27.4.2007 too the Defendant-Respondent was absent. There is nothing to indicate that the Defendant-Respondent was not represented by his Attorney-at-Law on 27.4.2007. However, if the Defendant-Respondent was represented by an Attorney-at law, in my view, it would have been recorded. The learned District Judge, on 27.4.2007, made an order dismissing the said application of the Defendant-Respondent.

The Defendant-Respondent thereafter, by petition dated 13.9.2007 (page 226 of the brief), made an application under and in terms of Section 839 of the CPC, inter alia, to have the order dated 27.4.2007 set aside and to hold an inquiry on his application made under Section 86(2) of the CPC. After an inter parte

inquiry, the learned District Judge by his order dated 2.10.2008 refused this application.

Being aggrieved by the said order of the learned District Judge dated 2.10.2008, the Defendant-Respondent filed a revision application in the Civil Appellate High Court of Mount Lavinia (hereinafter referred to as the High Court) to have the said order of the learned District Judge dated 2.10.2008 revised. The High Court, by its order dated 17.5.2010, set aside the order of the learned District Judge dated 2.10.2008. The High Court in fact granted all the relief sought by the Defendant-Respondent in his petition. The Defendant-Respondent, in his petition filed in the High Court sought the following relief.

1. To issue notice on the Respondents.
2. To revise and set aside the order of the learned District Judge dated 2.10.2008.
3. To set aside the order of the learned District Judge rejecting the petition of the Petitioner (the Defendant-Respondent) made under Section 86(2) of the CPC.
4. To make an order directing the District Court to re-inquire petition filed under Section 86(2) of the CPC.
5. To make an order staying the execution of the decree and all other steps.
6. Costs.
7. Grant such other and further reliefs that the court shall seem meet.

The High Court, by its order dated 17.5.2010, granted the above reliefs. It is important to note that the Defendant-Respondent in the above revision application has not moved the High Court to set aside the ex-parte judgment. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellants have filed the

present appeal. This Court by its order dated 24.1.2011 granted leave to appeal on the following questions of law.

1. Should the party who makes an application under Section 86(2) of the CPC exercise due diligence and prosecute and satisfy court that such party had reasonable grounds for the default?
2. Is the Court obliged to grant another date to support a petition filed in terms of Section 86(2) of the CPC?
3. Can the Court hold an inquiry in terms of Section 86(2) of the CPC after execution of writ?
4. Can the Court exercise the discretionary power in terms of Section 839 of the CPC when there is specific section governing the question involved?

The most important question that must be decided in this case is whether the order made by the learned District Judge on 27.4.2007 rejecting the application of the Defendant Respondent made under Section 86(2) of the CPC without it being fixed for support or inquiry is correct or not. I now advert to this question. In order to find an answer to this question I must consider Section 86(2) of the CPC which reads as follows.

> "*Where, within fourteen days of the service of the decree entered against him for default, the defendant with notice to the plaintiff makes application to and thereafter satisfies court, that he had reasonable grounds for such default, the court shall set aside the judgment and decree and permit the defendant to proceed with his defence as from the stage of default upon such terms as to costs or otherwise as to the court shall appear proper."*

According to this section, if the defendant satisfies court that he had reasonable grounds for his default, the District Court will have to vacate his ex-parte judgment and permit the defendant to proceed with his defence. For the defendant to satisfy court that he had reasonable grounds for his default, he must be given an opportunity to adduce evidence. To implement this task he should know that his application has been fixed for inquiry. Who gives a date for the inquiry? It is the District Judge. The defendant cannot perform this task as he has no control over judicial proceedings. It is the Judge who has the control over judicial proceedings. Therefore when an application is made under Section 86(2) of the CPC, it becomes the duty of the District Judge to fix the matter for inquiry. He cannot refuse or reject such an application without it being fixed for inquiry. The interest of justice demands to notify the defendant of the date of inquiry.

The learned District Judge in the present case without fixing the application made by the Defendant-Respondent in his petition dated 8.3.2007 for inquiry, has, by order dated 27.4.2007, rejected it. This order, in my view, is wrong and should be set aside.

Learned counsel for the Plaintiff-Appellant contended that the Defendant-Respondent could not have invoked the revisionary jurisdiction of the High Court when he has a right of appeal under Section 88(2) of the CPC. It is a well established principle that a litigant who has a right of appeal cannot invoke the revisionary jurisdiction of the Superior Court unless there are exceptional circumstances. Are there exceptional circumstances in the present case? I now advert to this question. I have earlier pointed out that the order made by the learned District Judge on 27.4.2007 rejecting the application of the Defendant-Respondent made under section 86(2) of the CPC was wrong. A wrong order made by a court cannot be permitted to stand. In my view existence and/or operation of a wrong

order of a lower court can be considered as an exceptional ground to exercise the revisionary jurisdiction of Superior Court. For these reasons, I hold that the Defendant-Respondent was entitled to invoke the revisionary jurisdiction of the High Court and the High Court was right when it exercised its revisionary jurisdiction. For the above reasons, I reject the above contention of learned counsel for the Plaintiff-Appellant.

I now advert to the question of law raised by the Plaintiff-Appellant. They are as follows.

1. Should the party who makes an application under Section 86(2) of the CPC exercise due diligence and prosecute and satisfy court that such party had reasonable grounds for the default?

This question is answered in the affirmative. But I would like to state here that in order to satisfy court that the defendant had reasonable grounds for the default, the court must fix the application for inquiry.

2. Is the Court obliged to grant another date to support a petition filed in terms of Section 86(2) of the CPC?

The District Court has not given any date for the inquiry or to support the application made under Section 86(2) of the CPC. Therefore this question does not arise.

3. Can the Court hold an inquiry in terms of Section 86(2) of the CPC after execution of writ?

If the order made by the learned District Judge rejecting the application to purge default made under Section 86(2) is set aside, he will have to hold a fresh inquiry under Section 86(2) of the CPC whether the application to purge the default should or should not be allowed. If the defendant satisfies court that he had reasonable

grounds for such default, the District Court will have to set aside the ex-parte judgment. By this time if the writ has been executed, the execution of the writ has to be recalled or stayed. Therefore the execution of a writ cannot operate as a bar to hold an inquiry under Section 86(2) of the CPC. Therefore the above question of law is answered in the affirmative.

4. Can the Court exercise the discretionary power in terms of Section 839 of the CPC when there is specific section governing the question involved?

Revisionary jurisdiction of the Higher court is exercised in the discretion of the court. When the lower court makes a wrong order, the Higher court, in the exercise of its revisionary jurisdiction, can set aside such order. The applicant need not even state the section under which the application is made. I therefore answer the above question of law in the affirmative.

For the above reasons, I hold that High Court was correct when it allowed the revision application of the Defendant-Respondent.

I have earlier held that the order of the District Judge dated 27.4.2007 rejecting the application of the Defendant-Respondent made by his petition dated 8.3.2007 without it being fixed for inquiry was wrong and should be set aside. I hold that the High Court was right when it set aside the order of the District Judge dated 27.4.2007. I direct the learned District Judge to hold an inquiry on the said petition dated 8.3.2007 after informing the date of inquiry to the Defendant-Respondent. The High Court, by its order dated 17.6.2010, has set aside the order of the District Judge dated 2.10.2008.

For the above reasons, I upholding the judgment of the High Court dated 17.5.2010, dismiss the appeal of the Plaintiff-Respondent with costs fixed at Rs.25,000/-

Appeal dismissed.

Judge of the Supreme Court.

Saleem Marsoof PC, J

I agree.

Judge of the Supreme Court.

Priyasath Dep.

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 against the judgment dated 16.03.2012 of the Provincial Civil Appellate High Court of the Western Province (Holden at Gampaha)

In the District Court

Abeykoon Mayadunnage Isuru Udayantha Abeykoon

Plaintiff.

SC Appeal No. 6/2013
SC/HCCA/ LA 156/2012
DC Gampaha No. 38641/P

Vs

1. Abeykoon Mayadunnage Somapala Abeykoon
2. Abeykoon Mayadunnage Gnanalatha Abeykoon
3. Hiriyadeniya Karunarathna Ananda Athapattu Mudali

Defendants.

In the provincial High Court

WP/HCCA/GPH- 39/2008(F)

Abeykoon Mayadunnage Isuru Udayantha Abeykoon

Plaintiff-Appellant

Vs

1. Abeykoon Mayadunnage Somapala Abeykoon
2. Abeykoon Mayadunnage Gnanalatha Abeykoon
3. Hiriyadeniya Karunarathna Ananda Athapattu Mudali

Defendant-Respondents

And Between

Abeykoon Mayadunnage Somapala Abeykoon

1st Defendant-Appellant

WP/HCCA/GPH-39A/2008(F)

Vs

1. Abeykoon Mayadunnage Isuru Udayantha Abeykoon
Plaintiff-Respondent
2. Abeykoon Mayadunnage Gnanalatha Abeykoon
3. Hiriyadeniya Karunarathna Ananda Athapattu Mudali.

Defendant-Respondents

In the Supreme Court

Hiriyadeniya Karunarathna Ananda Athapattu Mudali.

3rd Defendant-Respondent-Petitioner

Vs

Abeykoon Mayadunnage Isuru Udayantha Abeykoon
Plaintiff-Appellant-Repondent
Abeykoon Mayadunnage Somapala Abeykoon
1st Defendant-Apellant-Respondent
Abeykoon Mayadunnage Gnanalatha Abeykoon
Defendant-Respondent-Respondent

AND NOW IN THE SUPREME COURT

Hiriyadeniya Karunarathna Ananda Athapattu Mudali.

3rd Defendant-Respondent-Petitioner-Appellant

Vs

Abeykoon Mayadunnage Isuru Udayantha Abeykoon
Plaintiff-Appellant-Repondent-Respondent
Abeykoon Mayadunnage Somapala Abeykoon
1st Defendant-Apellant-Respondent-Respondent
Abeykoon Mayadunnage Gnanalatha Abeykoon
Defendant-Respondent-Respondent-Respondent

BEFORE : CHANDRA EKANAYAKE J
SISIRA J DE ABREW J
SARATH DE ABREW J

COUNSEL : Sudarshani Coorey for the 3rd Defendant-Respondent-Petitioner-Appellant

Vinodh Wickramasoorioya for
the Plaintiff-Appellant-Repondent-Respondent
Ms.Thanuja Hathurusinghe for
the1st Defendant-Appellant-Respondent-Respondent

ARGURD ON : 10.7.2014
DECIDED ON : 3.10.2014

SISIRA J DE ABREW J.

Plaintiff filed this action to have the land described in the schedule to the plaint partitioned among the parties (plaintiff and 1st to 3rd defendants). After trial learned the learned District Judge dismissed the case. Being aggrieved by the said judgment of the learned District Judge, the Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff) and 1st Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the 1st defendant) filed appeals in the Provincial High Court (High Court). The High Court, by its judgment dated 16.3.2012, set aside the judgment of the learned District Judge. Being aggrieved by the said judgment of the High Court, 3rd Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the 3rd defendant) appealed to this court. This court, by its order dated 21.1.2013, granted leave to appeal on the questions of law set out in paragraph 9(c) and 9(d) of the petition dated 25.4.2012 which are reproduced below.

1. Have their Lordships erred in failing to appreciate that the 3rd defendant has possessed the relevant portion of land, namely Lot 2 in Preliminary Plan No.25997("X") to the exclusions of all others by erecting fences and not allowing any other person to enter the land and thereby clearly shown an ouster from 1975 onwards and acquired a prescriptive title to the land.
2. Have their Lordships erred in holding that there was no evidence to show that the parties had possessed the land independently according to the plan

prepared after the settlement when infact the plaintiff's evidence and the other witnesses who gave evidence on behalf of the plaintiff admitted the fact that the lands of the 3rd defendant was separated by long standing fences from the other lands and that no other person was allowed to enter into the land of the 3rd defendant.

The learned District Judge, in his judgment, came to the conclusion that the land sought to be partitioned had been amicably partitioned in the Conciliation Board case in the year of 1975 and as such the ownership had come to an end. Learned Counsel for the 3rd defendant made the same submission and further stated that the parties, after settlement, had independently possessed their blocks of land.

The most important thing that must be decided in this case is whether the parties had amicably partitioned the land in the Conciliation Board case in the year of 1975. For this amicable partition to have taken place, all the parties should have participated in the Conciliation Board case. If all the parties had not participated in the Conciliation Board case, it cannot be said that the land had been amicably partitioned among the parties. I ask the following question. Have all the parties participated in the Conciliation Board case? The 2nd defendant giving evidence before the learned District Judge stated that neither she nor her father participated in the Conciliation Board case. Thus it cannot be said that parties had amicably partitioned the land in the Conciliation Board case. Thus I hold that the learned District Judge was wrong when he came to the conclusion that the parties had amicably partitioned the land. The learned High Court Judges considering this position came to the conclusion that the learned District Judge was wrong when he

came to the above conclusion. When I consider the above matters, I hold that the learned High Court Judges were correct on this point.

The learned District Judge further decided that as a result of the amicable partition of the land in the Conciliation Board case, the ownership of the co-owners had come to an end. Is this decision correct? I now advert to this question. In this connection it is pertinent to consider whether a co-owner can acquire prescriptive title to a co-owned land without the other co-owners being ousted from common usage of the land. It must be remembered here that all the parties did not participate in the Conciliation Board case. To find an answer to the above question it is pertinent to consider the judgment in the case of Wickramarathne and Others Vs Alpenis Perera [1986] 1 SLR page 190 wherein the Court of Appeal held thus: "A co-owner's possession is in law the possession of other co-owners. Every co-owner is presumed to be in possession in his capacity as co-owner. A co-owner cannot put an end to his possession as co-owner by a secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

In Corea Vs Appuhamy 15 NLR 65 Privy Council held thus: "A co-owners's possession is, in law, the possession of his co-owners. It is not possible for him to put an end to that possession by any secret intention in his mind. Nothing short of ouster or something equivalent to ouster could bring about that result."

Having considered the above legal literature, I hold that a co-owner cannot acquire prescriptive title to a co-owned land without the other co-owners being ousted from common usage of the land

When I consider the above matters, I hold that the learned District Judge was wrong when he came to the above conclusion. The learned High Court Judges after considering the above matters decided that the learned District Judge was wrong on this point too. In my view the learned High Court Judges were correct when they reached the above conclusion. In view of the above conclusion reached by me the questions of law raised by the appellant are answered in the negative.
After considering all the above matters I would like to express the following view. If a co-owner of a co-owned land can get the co-owned land amicably partitioned in a conciliation board case without participation of all co-owners, then the provisions of the Partition Act will be rendered redundant.

When I consider all the above matters, I hold the view that I should not interfere with the judgment of the Civil Appellate High Court. For the above reasons, I dismiss the appeal with costs.
Appeal dismissed.

Judge of the Supreme Court.

CHANDRA EKANAYAKE J
I agree.

Judge of the Supreme Court.

SARATH DE ABREW J
I agree.

Judge of the Supreme Court.

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

SC. Appeal 08/2011

SC/HCCA/LA 136/2010
Hc. (Civil) Appeal Col. 292/2007 (F)
D.C. Colombo No. 20682/L

The Incorporated Trustees of the Sathya Sai Baba Trust of Sri Lanka.
Of No. 113, New Chetty Street,
Colombo 13.

Plaintiff

Vs.

Cine Printers Limited,
No. 117, New Chetty Street,
Colombo 13.

Defendant

And

The Incorporated Trustees of the Sathya Sai Baba Trust of Sri Lanka.
Of No. 113, New Chetty Street,
Colombo 13.

Plaintiff-Appellant

Vs.

Cine Printers Limited,
No. 117, New Chetty Street,
Colombo 13.

Defendant-Respondent

And Now Between

Cine Printers Limited,
No. 117, New Chetty Street,
Colombo 13.

Defendant-Respondent-Appellant

SC. Appeal 08/2011

Vs.

The Incorporated Trustees of the Sathya Sai Baba Trust of Sri Lanka.
Of No. 113, New Chetty Street,
Colombo 13.

Plaintiff-Appellant-Respondent

* * * * * *

BEFORE : **Tilakawardane, J.**
Wanasundera, PC.J. &
Marasinghe, J.

COUNSEL : C.E. de Silva for the Defendant-Respondent-Appellant instructed by Ms. P. Narendran with Ms. B. Senarath.

Wijayadasa Rajapaksha PC., with Kapila Liyanagamage for the Plaintiff-Appellant-Respondent.

ARGUED ON : **02.12.2013**

DECIDED ON : **23.01.2014**

*** * * * ***

Wanasundera, PC.J.

In this case leave was granted to the Defendant-Respondent--Appellant (hereinafter referred to as the Appellant) from the judgment of the Civil Appellate High Court of the Western Province dated 26.03.2010 on the questions of law set out in paragraph 15(d) of the Petition dated 07.05.2010 which reads as follows:-

15(d) “Did the High Court err in not holding that the Petitioner had attorned to the Respondent and is the tenant of the Respondent in respect of the premises in suit”.

The Plaintiff-Appellant-Respondent (hereinafter referred to as the Respondent) instituted action in the District Court of Colombo against the Appellant seeking an order to eject the Appellant from the premises bearing No. 111, New Chetty Street, Colombo 13, for the reason that the Appellant had failed and neglected to accept the Respondent as the landlord with effect from 1st of January 2005. The Appellant had been the tenant of S.R.G. Corea at one time and who died later on. Her children requested the Appellant to attorn to one of them, namely F.E.S. Corea which the Appellant had failed to do. So, the children of the dead landlord sold the premises in suit to the Respondent in December 2004.

The Respondent as well as the children of the deceased landlord sent letters to the Appellant in December 2004 after the transfer of ownership of the premises, requesting the Appellant to accept the Respondent as the landlord and to pay rent to the Respondent with effect from 1st January 2005. The Appellant failed and neglected to do so, which resulted in the Respondent filing action in the District Court for ejectment of the Appellant from the premises in question.

At the end of the trial the Additional District Judge delivered the judgment on 31.1.2007 dismissing the action filed by the Respondent. The Respondent appealed to the Provincial High Court of Civil Appeal. On 26.3.2010 the High Court delivered judgment to the effect that the District Court judgment is set aside and a de novo trial should be held before another Judge of the District Court. Now the Appellant is before this Court challenging the High Court judgment.

The points of contest are (1) whether the Appellant had attorned to the Respondent, the new landlord, (2) whether the Appellant was a tenant of the Respondent in respect of the premises in suit, at the time action was filed in the District Court and (3) if the Appellant was not a tenant attorned to the

Respondent, in turn does he become a trespasser and is the Respondent entitled to eject him from the premises in question.

The Appellant a company incorporated in 1956 had been the tenant of Sheila G. Corea after she became the owner of the premises in suit in 1978. When she died, her five children became the owners of the said premises in 1999 by a deed of administration at the end of a testamentary case. The children wrote to the Appellant and wanted one of them i.e. Florence E.S. Corea to be attorned as the landlord in the year 2000. The Appellant neither recognized that person as landlord nor paid any rent. Thereafter the five children of the very first landlord of the Appellant sold the premises to the Respondent on 04th October 2004.

The premises in suit is business premises in Colombo 13. On 02.12.2004 the Respondent wrote to the Appellant and requested to attorn to the Respondent as landlord and pay all rentals with effect from 01.01.2005. The Appellant Company replied on 20.01.2005 stating that it is 'willing to attorn' to the Respondent but requested the Appellant to send a copy of the deed of title even though the letter dated 02.12.2004 contained all the details of the title deed of the Respondent. I am of the view that the Appellant Company is not legally entitled to call for evidence of title when it is possessed of the details from which it could find out and confirm the ownership of the Respondent regarding the premises. Yet, the Appellant did not pay the rentals nor did it write to the Respondent accepting the Respondent as the landlord and as such attorning to the Respondent. In summary there was no specific acceptance of the new landlord or any action taken, considering the Respondent as landlord as no rent was paid. It was not only the Respondent who wrote to the Appellant requesting the Appellant to attorn to the Respondent but also the Respondent's predecessors by letter dated 03.12.2004, even though the Appellant had even by then failed an neglected to attorn to the one person out of five and pay rent to that person from 1999 to 2004 December.

At this point, I observe that the Appellant had repudiated its tenancy long before the Respondent requested that the Respondent be attorned as the landlord by not having attorned to Florence E.S. Corea as the landlord and not having paid rent to her even though the owners, the five children of Sheila G. Corea never went to Courts to eject the Appellant which they could have done. Nevertheless the Respondent the purchaser of the property had requested that the Respondent be attorned and paid rent from 01.01.2005.

It is only after the Respondent filed action in the District Court to eject the Appellant that the Appellant sent a money-order by post to the Respondent for a sum or rupees 2000/- calculating at the rate of Rs.500/- per month, i.e. the monthly rental paid by the Appellant in 1979 to the 1st landlord Sheila G.Corea. The Respondent did not accept the same as the Respondent had by then already filed a legal action in the District Court for ejection. Then the Appellant had paid rent to the authorized person, the Municipal Council of Colombo on 28.7.2005, Rs.2000/- and on 21.10.2005 /- Rs. 3000/- which is there as a deposit up to date.

Before the Appellant appealed to this Court it had two judgments, one in the District Court and the other in the Civil Appellate High Court. Unfortunately both these Courts had not analysed the evidence and concluded the matter in a proper way.

The Appellant's Counsel argued that he is the tenant of the premises in suit and that he is not a trespasser therein. Counsel for the Appellant referred Court to the following cases-

1. S.M.J. Fernandos Vs. W.R.S. Perera 77 NLR 220
2. David Silva Vs. Madanayake 1967, 69 NLR 396
3. E.A. Wahabdeen and two others vs. M.S.A.C.M. Abdul Carder and another 79, 2 NLR 462
4. Sabapathypillai Vs. Ramupillai 58 NLR 367
5. K.P. Punchi Nona Vs. T. Hendrick Perera 73 NLR 430
6. E.N. Fernando Vs. G. Wijesekera 73 NLR 110

7. Sameen and another Vs. Ceylon Hotels Ltd. 1989 1 SLR 81
8. Seelawathie vs. Ediriweera 1989 2 SLR 170
9. Gunasekera vs. Jinadasa 1996 2 SLR 115

The Respondent's Counsel argued that the Appellant did not attorn to the Respondent and is not the tenant of the Respondent and that he is a trespasser and should be ejected from the premises. Counsel referred Court to the following cases:-

1. Seelawathie vs. Ediriweera 1989 2 SLR 170
2. Gunasekera vs. Jinadasa 1996 2 SLR 115
3. Silva vs. Jayasinghe 2008 BLR Part II pg. 56

In the case of ***Seelawathie Vs. Ediriweera 1989 2 SLR 170,*** the scenario was totally different from the present case. In that case, the tenant expressly refused to attorn to the new landlord, the transferee, in the deed of change of ownership. Fernando, J. has summarized the crucial matter in that case thus:- "The crucial matter for decision in this appeal is whether a tenant who remains in occupation of the rented premises, after receiving notice of the transfer and of the purchaser's election, has thereby exercised the option to become the tenant of the purchaser; or whether a tenant is entitled, while continuing to remain in occupation, to refuse to accept the purchaser as his landlord". Fernando, J. gave judgment in favour of the new landlord, against the tenant for arrears of rent, damages and ejectment with costs. The rent of the said house was only Rs.96/-. In the present case, the tenant did not expressly refuse or expressly attorn to the landlord and did not start paying any rent, even though in the year 2005, Rs.500/- per month as rent could be considered a paltry amount for business premises in Colombo 13.

I am of the view that any tenant should pay the landlord the proper rent monthly as agreed and continue to pay the rent at all times promptly, the reason being that the tenant is occupying the premises belonging to another i.e. the landlord. The tenant has a bounden duty to pay the rent. The Rent Act No. 7 of 1972 was never intended to give any chance for a tenant to be without paying rent to the

landlord but to protect the poor tenants who were subject to harassment by landlords in that era.

In the present case, the premises in suit was admitted by both parties not to be 'excepted premises' under the Rent Act and therefore it is governed by the Provisions of the Rent Act and Amendments thereto.

In a more recent case, i.e. in the case of ***Gunasekera Vs. Jinadasa 1996 2 SLR 115***, Fernando, J. at the very outset mentioned thus:- "When this appeal first came up for hearing, Mr. Goonesekera for the Plaintiff submitted that it was necessary to reconsider the series of decisions (referred to in ***Seelawathie Vs. Ediriweera***) in which it had been held that continuation in occupation by the tenant, with notice of the transferee's election to recognize him as the tenant, constitutes an exercise of the tenant's option to acknowledge the transferee as land-lord; and also that there now arose for decision the question left open in ***Seelawathie Vs. Ediriweera*** whether such a transferee was entitled, either in addition or in the alternative, to claim relief based on title. This appeal was thereupon referred to this bench of five Judges in terms of Article 132(3) of the Constitution, as an important question of law was involved whether in those circumstances a transferee is entitled to institute a vindicatory action instead of a tenancy action."

I observe that it is the decision in ***Seelawathie Vs. Ediriweera*** which has given cause to the decision of ***Gunasekera Vs. Jinadasa***. Even though this 5 Judge Bench has not overruled the ***Seelawathie Vs. Ediriweera*** case, Fernando, J. expounds thus;- "It seems to me that while it is legitimate initially to infer attornment from continued occupation, thus establishing privity of contract between the parties, another principle of the law of contract comes into play in such circumstances to which the presumption of attornment must sometimes yield. When the occupier persists in conduct which is fundamentally inconsistent with a contract of tenancy, and amounts to a repudiation of that presumed contract, the transferee has the option either to treat the tenancy as subsisting, and to sue for arrears of rent and ejectment or to 'accept' the occupier's

repudiation of the tenancy and to proceed against him as a trespasser". "When the Defendant, having failed expressly to accept the Plaintiff as landlord, thereafter failed to pay him the rent for several months after 16.11.1981, and instead deposited that rent to the credit of the former landlord, he repudiated the fundamental obligation of a tenancy, he denied the Plaintiff's status as landlord and did not pay rent due to him – a paltry sum of Rs.30/- per month."

I observe that in the instant case also the rent due was only a paltry sum of Rs.500/- for a business premises on 14.3. perches of land in Colombo 13, which the Appellant failed to pay with effect from 01.1.2005. The Appellant failed to expressly declare his acceptance of the new owner, the transferee in the recent deed of transfer either. So, I conclude that the Appellant has repudiated the fundamental obligation of a tenancy.

Fernando, J. further on, expressed his views in ***Seelawathie Vs. Ediriweera*** as follows:- "The position might have been different if the Defendant had duly discharged his tenancy obligations for a period as for instance by paying rent to the Plaintiff and had defaulted thereafter". I agree with Fernando, J. totally and wish to state that in the instant case also instead of stating that the Appellant was willing to attorn and not having paid for the months starting on 01.1.2005, if the Appellant commenced payments from the due date, i.e. 01.01.2005 and went on for several months paying the rent and then defaulted, the position would have been different.

I am of the view that only continuous occupation of the premises by itself does not in any way give any right to the tenant to be legally treated as a rightful tenant of the transferee when the ownership of the premises is transferred by the landlord to another person. The tenant has to expressly attorn to the new landlord and continue to pay the rent to the transferee from the day of the receipt of the notice of the new transfer, if he wants to keep the contract of tenancy. In the instant case, the tenant wrote that he is willing to attorn and pay in the future and asked for a copy of the deed, which action of the tenant (Appellant) clearly shows that it has not expressly accepted the transferee, having doubts about the

transfer and also did not commence payment or pay until action was filed by the Respondent. After the action was filed only, the Appellant paid the rent to the Municipal Council, the authorized person under the Rent Act.

It is again, interesting to note that in ***Gunasekera Vs. Jinadasa***, Fernando, J. commented as follows:-

> "This interpretation commends itself to me as being consistent also with **equity** and **fairness**. The Court must not apply the presumption of attornment as a trap for the transferee; allowing the occupier who fails to fulfil the obligations of a tenant, **if sued on the tenancy,** to disclaim tenancy and assert that he can only be sued for ejectment and damages in a vindicatory action; but **if faced with an action based on title,** to claim that notwithstanding his conduct he is a tenant and can only be sued in a tenancy action. Since it is the occupier's conduct which gives rise to such uncertainty, equitable considerations confirm the option which the law of contract gives to the transferee.
>
> The position might have been **Different** if the defendant had duly discharged his tenancy obligations for a period- as for instance by paying rent to the Plaintiff- and had defaulted only thereafter".

In ***Silva Vs. Jayasinghe reported in 2008 Bar Association Law Reports Part II at page 56,*** it was held that "where the tenant continued to occupy the premises let to her without attorning or paying rent to the new owner despite having noticed by his former landlord to do so, she (the Defendant-Respondent-Respondent) is liable to be sued in ejectment."

In the aforesaid circumstances, I hold that the Appellant's conduct as the occupier of the premises has created this situation and the transferee has taken the correct path of suing the Appellant for ejectment and damages. I answer the questions of law on which leave to appeal was granted in the negative. For the aforementioned reasons I decide that the Appellant had not attorned to the Respondent and therefore the Appellant is not the tenant of the Respondent in

respect of the premises in suit. I direct that the Appellant and those who hold under him be ejected forthwith from the premises No. 111, New Chetty Street, Colombo 13. I order that costs of suit in this Court as well as in the High Court and the District Court be paid by the Appellant to the Respondent in this case. Appeal is thus dismissed with costs.

JUDGE OF THE SUPREME COURT

Tilakawardane, J.

I agree.

JUDGE OF THE SUPREME COURT

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 application for Special Leave to Appeal under and in terms of the provisions of Article 128(2) of the Constitution against the judgment of the Court of Appeal in C.A. Ap. No. 2022/2003 dated 15.5.2007.

Saranguhewage Garvin De Silva,
36/1, Old Kesbewa Road,
Nugegoda.

SC APPEAL 10/2009

C.A. Ap. No. 2022/2003

PETITIONER-APPELLANT

-Vs-

1. Lankapura Pradeshiya Sabha,
   Talpotha.
2. Chairman,
   Lankapura Pradeshiya Sabha,
   Talpotha.
3. W.A.J.C. Fernando,
   BOP 398 (near Patunugama Junction),
   Abeypura,
   Pulasthigama.
4. Rev. Fr. Ranjith de Mel,
   Our Lady of Rosary Church,
   Palugasdamana,
   Polonnaruwa.

RESPONDENTS-RESPONDENTS

BEFORE : Hon. Saleem Marsoof P.C., J,
Hon. Chandra Ekanayake J, and
Hon. Priyasath Dep P.C., J.

COUNSEL : Manohara de Silva, P.C. for Appellant.

M.A. Sumanthiran with Viran Corea for 3rd Respondent.

Shammil Perera, P.C. with Ms. Vijula Arulanandan and Duthika Perera for 4th Respondent.

Argued On : 10.10.2013

Written Submissions On : 31.10.2013

Decided On : 15.12.2014

SALEEM MARSOOF, P.C. J,

This is an appeal from the judgment of the Court of Appeal dated 15th May 2007, which dismissed the application of the Petitioner-Appellant (hereinafter referred to as "the Appellant") for a writ of *mandamus* to compel the 1st and 2nd Respondent-Respondents to cause the demolition of a building constructed on land belonging to the 3rd Respondent-Respondent on the basis that it is unauthorised. The Appellant is the honorary joint secretary of the Society for the Upliftment and Conservation of Cultural, Economic and Social Standards ('SUCCESS'), which, it is claimed, is a voluntary social services organisation established for the attainment of the cherished objective of the advancement and protection of cultural, economic and social standards of the Sri Lankan Buddhists.

The Appellant alleged in his Petition filed in the Court of Appeal *inter alia* that a building has been constructed on a land described as B.O.P 398 Abeyapura, Pulasthigama, belonging to the 3rd Respondent-Respondent (hereinafter referred to as "the 3rd Respondent") and within the local limits of the 1st Respondent-Respondent which is the Lankapura Pradeshiya Sabha without obtaining the approval of the 2nd Respondent-Respondent, the Chairman of the said Lankapura Pradeshiya Sabha, in contravention of Section 5 and Section 15(1) and (2) of the Housing and Town Improvement Ordinance No. 19 of 1915 (as amended), read with Section 221 of the Pradeshiya Sabha Act No. 15 of 1987 (as amended), thereby rendering the construction and occupation of the said building as a church, both unauthorised and illegal.

When granting special leave to appeal, this Court restricted the appeal to the following substantial question of law:-

> "Whether the provisions of the Housing and Town Improvement Ordinance (as amended) apply to the entirety of a Pradeshiya Sabha area, without exception."

The substantive issue is whether the Housing and Town Improvement Ordinance (as amended) is applicable to the said property, and if so, whether the approval of the 2nd Respondent-Respondent is necessary for any construction, alteration or change of use of any building within the local authority area of the 1st Respondent-Respondent.

The applicability of the Housing and Town Improvement Ordinance

Section 2 of the Housing and Town Improvement Ordinance defines "local authority" as the following:-

> "Local authority" means;
>
> (a) within any Municipal limits, the Municipal Council;
>
> (b) within the limits of any Urban Council or Town Council, the Urban Council or Town Council;
>
> (c) within the administrative limits of any Village Council, the Assistant Commissioner of Local Government for the administrative region within which such limits are situated, or if the Minister by Order published in the Gazette so directs, the Village Council; and
>
> (d) in any place outside any of the limits aforesaid, the Assistant Commissioner of Local Government for the administrative region within which such place is situated.

Section 3 of the Housing and Town Improvement Ordinance relates to the scope of applicability of the said Ordinance and reads as follows:-

> "This Ordinance shall apply:
>
> (a) within the administrative limits of any Municipal Council, Urban Council or Town Council;
>
> (b) within any other limits in which it shall be declared to be in force by resolution of Parliament."

Section 3 of the Ordinance limits the application of the Ordinance to the administrative limits of any Municipal Council, Urban Council or Town Council or any other limits in which it shall be declared to be in force by resolution of Parliament. There is no reference to Pradeshiya Sabhas in the Act, since at the time of its enactment, Pradeshiya Sabhas did not exist.

It is evident that the applicability of the Ordinance is limited to Municipal Councils, Urban Councils and Town Councils. It specifically excludes Village Councils, unless the Ordinance has been declared to be in force within the limits of a Village Council or part thereof, by resolution of Parliament.

Interpretation of Article 221 of the Pradeshiya Sabhas Act

Section 221 of the Pradeshiya Sabhas Act No.15 of 1987 provides as follows:-

> "A reference in any written law in operation on the date appointed under section 1 of this Act;
>
> a) To a Town Council or a Village Council shall be deemed to be a reference to a Pradeshiya Sabha; and
>
> b) to a local authority, shall unless the context otherwise requires, be deemed to include a Pradeshiya Sabha."

Based on the above provision wherein a reference to a Town Council or a Village Council is deemed to be a reference to a Pradeshiya Sabha, the gravamen of the Appellant's submission is that all written laws applicable within Town Council or Village Council areas shall be applicable to all Pradeshiya Sabhas, and accordingly, that the Housing and Town Planning Ordinance would be applicable in all Pradeshiya Sabhas. The Respondents have argued that on a plain reading of the Pradeshiya Sabhas Act, it is very clear that the Legislature has opted to use the words "Town Council or a Village Council" instead of the words "Town Council and a Village Council", to specifically maintain Town Councils and Village Councils as mutually exclusive alternatives.

Bindra, in *Interpretation of Statutes* (8th Edition, page 1011) has stated as follows:-

> "When the word 'or' is used in relation to two or more alternatives it is not necessarily the case that the alternatives are mutually exclusive. The question as to whether they are mutually exclusive or not must be determined by applying the general rule that words should be construed to ascertain the intention of the provision in question to be collected from the whole of its terms (Horsey v. Caldwell, 73 CLR 304,314). It may, in an appropriate context mean 'and'. But such a construction is not warranted unless it would reduce the provision to absurdity or prevent the manifest intention of the Legislature from being carried out……"

In the present case, the Legislature has opted to use the wording "Town Council or Village Council" and thereby, has maintained a clear distinction between Village Councils and Town Councils. This clear distinction is consistently observable in the Ordinance. Similar language is used in Section 225(2) of the Pradeshiya Sabha Act which provides as follows:-

> "Section 225(2): All by-laws made by a Town Council constituted for a town or by a Village Council constituted for a village area, and deemed, under section 18 (2) (e) of the Development Councils Act, No. 35 of 1980 to be by-laws made by a Development Council shall, with effect from the date appointed under section 1 of this Act, be deemed to be by-laws made by the Pradeshiya Sabha constituted for the Pradeshiya Sabha area within which such town or village area was situated."

Before the enactment of the Pradeshiya Sabha Act, Town Councils and Village Councils were local authorities with separate jurisdiction. In 1987, Pradeshiya Sabhas were introduced in place of Town Councils and Village Councils and thus, as a matter of necessity, the transitional provisions in the said Act provide that any reference to a Town Council or a Village Council shall be deemed to be a reference to a Pradeshiya Sabha. However, this provision does not result in a situation wherein laws which were applicable in Town Councils (which were deemed to be Pradeshiya Sabhas) would apply in Village Councils (which were also deemed to be Pradeshiya Sabhas). To interpret the provision in this way would result in Village Councils being deemed to be Town Councils.

The clear intention of the legislature to consider as distinct the separate regimes of law applicable to Town Councils and Village Councils is also evident in Section 225(2) of the Pradeshiya Sabha Act, wherein by-laws made by a Town Council continue in force only in respect of Town Councils deemed to be Pradeshiya Sabhas, and by-laws made by a Village Council continue in force only in respect of Village Councils deemed to be Pradeshiya Sabhas.

The judgment of the Court of Appeal dated 15th May 2007 contains adopts similar reasoning wherein Sriskandarajah J states at page 8 as follows:-

> "….By the above provision, the applicability of the said Act is limited to the Municipal Council, Urban Council and Town Council areas. In other words it specifically excludes Village council areas. The said law has specifically provided that if this law has to be extended to other areas other than those are covered by Municipal Council, Urban Council or Town Council it has to be by a resolution of Parliament.
>
> Even though the Pradeshiya Sabhas are established under the Pradeshiya Sabhas Act, each Pradeshiya Sabha is assigned a name (Section 2(1)). If a Pradeshiya Sabha is constituted comprising of a Town Council area the Housing and Town Improvement Ordinance will be applicable to that Pradeshiya Sabha area. But if a Pradeshiya Sabha is constituted comprising of a Village Council area the Housing and Town Improvement Ordinance will not be applicable to that Pradeshiya Sabha area unless by resolution of Parliament it is declared that the said Act is in force in that Pradeshiya Sabha area."

I am of the opinion that the Court of Appeal has properly analyzed the applicable law. Hence, I am unable to agree with the Appellant's argument that the Housing and Town Improvements Ordinance applies to all

Pradeshiya Sabhas, without exception. Section 3 of the Ordinance makes it clear that the Ordinance does not apply within Village Councils, and there is no evidence that Parliament has passed a resolution declaring that the Housing and Town Improvement Ordinance is applicable within the area in which the building is situated. Further, the deeming provision in section 221 of the Pradeshiya Sabhas Act does not result in a situation wherein laws which were applicable within formerly Town Council areas apply within formerly Village Council areas.

Evidence available to show that the particular area in which the construction was built was formerly a Village Council area

No substantive evidence has been adduced by either side to prove that the area of Abeypura, Pulasthigama was located within a former Village Council area before the Pradeshiya Sabhas Act came into operation.

However, Sriskandarajah J, at page 6 of the judgment of the Court of Appeal dated 17th May 2007 states that:-

> "…It is admitted fact that the said property, which is in Abeypura, Pulasthigama, falls within the Village Council area before the Pradeshiya Sabhas Act, No. 15 of 1987, came into operation…."

Learned President's Counsel for the Appellant did not at the hearing of this appeal deny the accuracy of the above quoted statement found in the judgment of the Court of Appeal, or attempt to controvert the finding of the Court of Appeal at page 9 of the said judgment that Abeypura, Pulasthigama was within a formerly Village Council area and that the said Village Council is by operation of law deemed to be the Lankapura Pradeshiya Sabha, which is the 1st Respondent Pradeshiya Sabha.

Further, the 1st and 2nd Respondents have specifically stated at paragraph 5 of their Statement of Objections in the Court of Appeal that no prior approval needed to be obtained from the 1st and 2nd Respondents for the building which forms the subject matter of the present application.

Section 101 of the Evidence Ordinance reads thus:-

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

The Appellant's case is contingent on the application of the Housing and Town Improvement Ordinance to the area in which the property under consideration is situated. The burden of proof in any application for prerogative writ including *mandamus* is on the person who seeks such relief, to prove the facts on which he relies, which in this instance, would be to establish either that the Housing and Town Improvement Ordinance applied to formerly Village Council Areas or that Parliament has by resolution declared that the said Ordinance is applicable within the area in which the building in dispute is situated. Alternatively, the Appellant has to prove that the property in which the building is situated came within a formerly Town Council area, and accordingly that the Housing and Town Improvement Ordinance applied to such area. The Appellant has not persuaded me on either of these grounds.

Accordingly, I answer the substantive question on which special leave to appeal was granted by this Court, in the negative, and hold that the Housing and Town Improvement Ordinance does not apply to the building in relation to which the application for writ of *mandamus* was filed by the Appellant in the Court of Appeal.

The appeal is dismissed, but in all the circumstances of this case, without costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J.

I agree.

JUDGE OF THE SUPREME COURT

Priyasath Dep, P.C. 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 for Leave to Appeal from the Order of the learned High Court Judge Avissawella dated 1st September 2010 under and in terms of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006.

SC Appeal No. 11/2011

SC HC (CA) LA No. 323/10

HC Avissawella No. 120/2010 (Revision)

LT Kaduwela No. 30/175/2005

International Water Management Institute,
No. 127, Sunil Mawatha,
Pelawatta,
Battaramulla.
Respondent-Petitioner-Appellant

Vs.

Kithsiri Jayakody,
No. 250, Gemunu Mawatha,
Kotuwegoda,
Rajagiriya.
Applicant-Respondent-Respondent

BEFORE : Hon. Saleem Marsoof, PC. J,
Hon. Sathyaa Hettige, PC. J, and
Hon. Priyasath Dep, PC. J.

COUNSEL : S. Parathalingam, PC. with Shanaka Amarasinghe and Nishkan Parathalingam, for the Respondent-Petitioner-Appellant.

Faisz Musthapha, PC. With Shantha Jayawardane, for the Applicant-Respondent-Respondent.

ARGUED ON : 17.7.2012, 30.8.2013, 9.12.2013, and 28.01.2014

DECIDED ON : 25.3.2014

SALEEM MARSOOF, PC., J.

This is an appeal against the judgment of the Provincial High Court of Civil Appeal of the Western Province holden in Avissawella, dated 1st September 2010, which affirmed an order of the Labour Tribunal, Kaduwela dated 18th December 2009. By the said order, the Labour Tribunal had

overruled a plea of immunity from process of court taken up before the said tribunal by the Respondent-Petitioner-Appellant (herein after referred to as "the Appellant").

The Appellant is the International Water Management Institute which had been incorporated by the International Irrigation Management Institute Act No.6 of 1985. The said Act was amended by the amending Act No. 50 of 2000, which *inter-alia* renamed the Institute as the International Water Management Institute.

The Applicant-Respondent-Respondent (hereinafter referred as to "the Respondent") filed an application dated 27th June 2005 in the Labour Tribunal, Kaduwela seeking relief in terms of Section 31B of the Industrial Disputes Act No 43 of 1950 as subsequently amended, for the alleged unlawful termination of his services by the Appellant. When the application came up for inquiry on 2nd July 2006, the Appellant took up a preliminary objection on the basis that it was entitled to immunity under and in terms of the International Irrigation Management Act No.6 of 1985, as amended by Act No. 50 of 2000, read with the "Charter and Founding Documents" of the Appellant's predecessor, the International Irrigation Management Institute. The Labour Tribunal, by its order dated 18th January 2006 held that the respondent did not enjoy immunity. In overruling the plea of immunity, the Tribunal emphasized Section 33 of the aforesaid Act, that sought to provide the immunity claimed, has to be read subject to the Constitution, particularly, Articles 3 and 4(c) thereof, and cannot violate or supersede the fundamental rights of a citizen.

It is significant to note that when making its aforesaid order dated 18th January 2006, the Labour Tribunal also considered an additional submission advanced by the Appellant that the plea of immunity is strengthened by the order made by the relevant Minister dated 10th December 1997 in terms of Section 4 of the Diplomatic Privileges Act No. 9 of 1996. It rejected this submission on the basis that there was no evidence presented to the Tribunal of the publication of the said order of the Minister in the Gazette as required by Section 4(1) of the said Act. However, when the case came up for trial on 21st July 2006, the Appellant took up the plea of immunity once again, armed with evidence of publication of the said order of the Minister in the Gazette Extraordinary dated 12th December 1997, the Tribunal by a brief order dated 13th February 2007, overruled the plea of immunity once again, on the basis that it "sees no reason to allow the objection". No other reason was given by the Labour Tribunal in support of its decision. The Appellant filed a revision application in the High Court of the Western Province, holden in Avissawella against the aforesaid order of the Tribunal dated 13thFebruary 2007, and the High Court by its order dated 9th September 2008, set aside the said order for inadequacy of reasons. The High Court further directed the President of the Labour Tribunal to make a fresh order on the preliminary objection with reasons.

Accordingly, the Labour Tribunal made a reasoned order on the 18th December 2009, overruling the preliminary objection, previously taken, primarily on the basis that the Appellant had not tendered "any evidence which is conclusive proof as to whether the order has been placed before Parliament" as required by Section 5(1) of the Diplomatic Privileges Act. The Tribunal also relied on Articles 3, 4(c) and 105(1) of the Constitution, and emphasized that "a charter or any other agreement cannot violate or supersede the fundamental rights of citizen."

The Respondent filed an application in revision in the Provincial High Court of the Western Province holden in Avissawella against the aforesaid order of the Labour Tribunal dated 18th

December 2009, which entertained the application in revision, and after hearing learned Counsel, by its judgment dated 1st September 2010, affirmed the decision of the Labour Tribunal and dismissed the application for revision with costs. In arriving at his decision, the High Court (M.R.C. Fernando J) examined the relevant provisions of Constitution and the Diplomatic Privileges Act, No. 9 of 1996, and observed as follows:-

> "There is no doubt that in terms of section 4(2), an order made by the Minister under section 4(1) comes into force upon the publication of the Gazette and hence the said order made by the Minister came into force on Gazette and hence the said order made by the Minister came into force on the 12.12.1997. However, the operation of this section is subject to one qualification as is specified in section 5(1) of the Act. Thus, in view of section 5(1) of the said Act, the order made by the Minister of Foreign Affairs *shall after its publication in the Gazette be placed before Parliament for approval.* Therefore section 4(2) of the Act does not per se confer immunity and unless the Gazette was placed before Parliament for approval of Parliament and the approval is granted by Parliament as required by section 5(1), mere publication of the Gazette would not make the order made by the Minister valid."

The learned Judge also noted that the best evidence that could have been adduced by the Appellant before the Labour Tribunal to prove that it is entitled to immunity is the Certification issued under the hand of the Secretary to the Minister in charge of the subject of the Foreign Affairs in terms of Section 6 of the Diplomatic Privileges Act, and no such evidence was available to the Tribunal or even to Court. Having said that, the learned High Court Judge embarked on an exposition of Articles 3, 4(c) and 105 of the Constitution, and observed as follows:-

> "It must be stated here that this court is not in this application exercising writ jurisdiction conferred on it by Article 154P (4) of the Constitution but exercising revisionary jurisdiction in terms of Article 154P (3) (c) read with section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990…….
>
> The Labour Tribunal which derived jurisdiction from Article 105 of the Constitution read with the provisions of the Industrial Disputes Act, which established such tribunals by an Act of Parliament. Therefore if the jurisdiction of the Tribunal is taken away, it can only be done by Parliament in terms of Article 105 of the Constitution. Therefore, I am of the view that *the jurisdiction conferred on the Labour Tribunal under Article 105 of the Constitution and the subsequent Industrial Disputes Act enacted by Parliament cannot be taken away by an order published by a Minister in a Gazette without any subsequent approval by Parliament*." (*Emphasis added*)

The Appellant filed an application dated 12th October 2010 seeking leave to appeal against the said order of the High Court of the Western Province holden in Avissawella, and this Court after considering "exhaustive submissions" of learned President's Counsel for both parties, by its order dated 27th January 2011, granted leave to appeal against the said order without restricting the ambit of submissions on appeal to any one or more of the grounds set out in paragraph 13 of the petition filed by the Appellant, which are set out below as follows:

13.1. The said Order is contrary to law and against the weight of evidence presented to the learned Judge of the High Court;

13.2. The learned High Court Judge has misdirected himself in the application of section 5 of the Diplomatic Privileges Act No. 9 of 1996;

13.3. The learned High Court Judge has not properly addressed the issue of the burden of proving immunities, and who discharges the said burden;

13.5. The learned High Court Judge has erred in law in holding that the Respondent-Petitioner-Petitioner is not granted immunity by virtue of the Gazette marked X7 until the said Gazette is approved by Parliament;

13.6. The learned High Court Judge has not applied his mind to the situation faced in the interim period until the Gazette X7 is tabled before Parliament;

13.7. The learned High court Judge has erred in law, in not coming to the finding that the International Irrigation Management Institute Act No. 6 of 1985 displayed the legislature's unambiguous intention to grant the said immunities.

The aforesaid grounds may conveniently be reformulated into the following two substantive questions of law:-

(a) Did the High Court err in rejecting the plea of immunity raised by the Appellant based on the order 10th December 1997 made by the Minister in terms of Section 4 of the Diplomatic Privileges Act No. 9 of 1996, and published in the Gazette Extraordinary dated 12th December 1997 (X7)?

(b) Did the High Court err in not coming to the finding that the International Irrigation Management Institute Act No. 6 of 1985, as amended by Act No. 50 of 2000, displayed the legislature's unambiguous intention to grant the said immunity.

I shall consider these questions in turn.

(a) Immunity under the Diplomatic Privileges Act

Mr. S.A. Parathalingam, PC., who appeared for the Appellant has submitted that his client was entitled to immunity from suit in the Labour Tribunal by virtue of the order dated 10th December 1997 made by the Minister of Foreign Affairs in terms of Section 4 of the Diplomatic Privileges Act No. 9 of 1996, and published in the Gazette Extraordinary dated 12th December 1997. He contended that the High Court erred in holding that the said order was not valid as it was not approved by Parliament as contemplated by Section 5(1) of the Diplomatic Privileges Act.

Mr. Faisz Mustapha, PC., has however argued that even if it is conceded that a valid and *intra vires* order made by the relevant Minister would come into force upon publication in the Gazette despite there being no evidence before the Labour Tribunal that it was placed before Parliament as required by section 5(1) of the Diplomatic Privileges Act, in his submission, the said purported order was, in any event, *ultra vires* and invalid.

Before looking at these submissions of learned Counsel, it may be useful to set out the relevant statutory provisions based on which the aforesaid submissions were made. As previously noted in this judgment, the Appellant is the International Water Management Institute which had been incorporated by the International Irrigation Management Institute Act No.6 of 1985, under the name and title of the "International Irrigation Management Institute" (hereinafter sometimes referred to as "IIMI"). The said Act was amended by Act No. 50 of 2000, which *inter-alia* renamed the Institute as the "International Water Management Institute" (hereinafter sometimes referred to as "IWMI"). Before the Labour Tribunal, immunity was claimed by the Appellant in terms of section 4 of the Diplomatic Privileges Act as well as in terms of section 33 of the International Water Management Institute Act, which latter basis for the immunity will be examined in greater detail under question (b) above.

What is relevant for substantive question (a) above, which is being presently considered, are sections 4 and 5 of the Diplomatic Privileges Act, which are reproduced below in full:

> 4(1) Where the Government of Sri Lanka has entered into *an agreement with any inter-governmental or international organization providing for the grant of any immunities and privileges, to the officers or agents or property of such organization*, the Minister may, by Order published in the Gazette, and *to the extent necessary to give effect to the terms of such agreement, declare that such of the provisions of this Act as are specified in such Order shall apply to such officers, agents and property, of such organization as are, or is, specified in such Order, to such extent as is specified therein*, and upon the making of such Order such, of the provisions of this Act as are specified therein, shall, mutatis mutandis, apply to such officers, agents and property of such Organization as are, or is, specified therein.
>
> (2) Every Order made under this section *shall recite or embody the terms of the agreement in consequence of which such Order, was made and shall come into force on the date of publication of such* Order*, or on such later date as may be specified therein*, and shall remain in force for so long, and so long only, as the agreement in consequence of which such Order was made remains in force. (*Emphasis added*)

I shall now advert to the order purportedly made by the Minister of Finance under section 4(1) of the said Act, and which was published in the Gazette as aforesaid, which said order was to the following effect:-

> "By virtue of the powers vested in me by Section 4 of the Diplomatic Privileges Act, No. 9 of 1996, I, Lakshman Kadirgamar, Minister of Foreign Affairs, do, by this order, declare that the provisions of the aforesaid Act shall apply in respect of *the International Irrigation Management Institute, to the extent necessary to give effect to the terms of the Memorandum of Agreement entered into between the Ford Foundation acting on behalf of the International Irrigation Management Institute Support Group and the Government of the Democratic Socialist Republic of Sri Lanka for the establishment of an International Institute for Research and Training in Irrigation Management on 1st of September 1983, the relevant articles of which Agreement are recited in the Schedule hereto*." (*Emphasis added*)

It is important to note that the Schedule to the said order which is part of the said order published in the Gazette, contains *inter alia* clause 7(a)(1) of the Memorandum of Agreement

mentioned in the order, which was entered between the Ford Foundation, which purportedly acted on behalf of the International Irrigation Management Institute Support Group and the Government of Sri Lanka, in 1983 prior to the incorporation of the predecessor to the Appellant, provides as follows:-

> "7. Agreements – (a) The Government of Sri Lanka shall recognize IIMI as an autonomous, international, non-profit, research, educational, and training organization with objectives and engaged in the activities set forth in this Memorandum. The international status and personality of IIMI will be ensured by its Charter and will be recognized by the Government of Sri Lanka.
>
> The Government of Sri Lanka agrees to provide IIMI with certain facilities and to grant certain privileges and immunities which shall be no less favourable than those granted to the UNDP Office in Sri Lanka, including the following:-
>
> (I) IIMI, its property, funds, assets, and officials shall have the privileges and immunities set out in the Annexure to this Memorandum.
>
> IMMUNITIES AND PRIVILEGES
>
> *PART I*
>
> *Immunities and Privileges of the Institute*
>
> 1. The *Institute*, *its property and assets* wherever located and by whomsoever held, shall enjoy immunity from *every form of legal process* except, insofar as in any particular case it has *expressly waived immunity*. It is however understood that *no waiver of immunity shall extend to any measure of execution.*" (*Emphasis added*)

I wish to have it on record that indeed the order as published in the Gazette is extremely lengthy, and too cumbersome to reproduce in full. I have thoroughly examined it fully, and did not find any other provision which sought to confer immunity on the Institute from legal process. In fact the Annexure to the Memorandum was divided into five parts, each dealing with respectively the immunities and privileges of (I) the Institute, (II) the Director General of the Institute and (III) the officials of the Institute, with the remaining two parts dealing with (IV) Waivers of Privileges and Immunities and (V) Privileges and Immunities with respect of Customs and Import Duties and Taxes.

Mr. Parathalingam, PC., has simply relied on the aforesaid said order of the Minister made under Section 4(2) of the Diplomatic Privileges Act, and contended that it came into force on the date of publication of the said order in the Gazette. I am in agreement with this submission, and am of the view that it is clear from section 4(2) or the Diplomatic Privileges Act that any valid order made by the Minister shall come into force on the date of publication of such Order, or on such later date as may be specified in the order, and since no other date is so specified in the order in question, subject to its *vires*, it would have come into force on the date of the Gazette, namely in this case on 12th December 1997.

However, Mr. Mustapha, PC., has sought to attack the validity of the order purportedly made under Section 4 of the Diplomatic Privileges Act, on the following grounds:-

a) There was no agreement between the State and *the Appellant International Water Management Institute or its predecessor*, *the International Irrigation Management Institute which had been incorporated by Act No. 6 of 1985*, as amendment by Act No. 50 of 2000 as the only relevant agreement was the one entered into between the Government of Sri Lanka with the Ford Foundation, which purportedly acted on behalf of the International Irrigation Management Institute Support Group.

b) In any event, the order made under Section 4 is *ultra vires* in view of the fact that –

   (i) The Diplomatic Immunity Act does not empower the Minister to confer immunity *on an entity incorporated in Sri Lanka and which does not bear an international character*; and

   (ii) The order made by the Minister *does not specify therein the provisions of the agreement* between the Government of Sri Lanka with the International Irrigation Management Institute which has been incorporated by the Charter, with respect to which, immunity is sought to be conferred.

It was argued by the learned President's Counsel for the Respondents that the order made by the Minister purportedly under section 4(1) of the Act only refers to the Memorandum of Agreement entered into between the Ford Foundation acting on behalf of the International Irrigation Management Institute Support Group and the Government of the Democratic Socialist Republic of Sri Lanka for the establishment of an International Institute for Research and Training in Irrigation Management on 1st of September 1983, and that *there was no agreement between the Sri Lankan government and the Appellant or its predecessor the IIMI which was incorporated by International Irrigation Management Institute Act No. 6 of 1985, as amended*.

It is necessary for fully dealing with this submission to refer to the said Memorandum of Agreement from which it appears that the Support Group referred to consisted of several nations such as Australia, France, Netherlands, the United Kingdom, the United States of America, which participated with international organizations such as the Ford Foundation, the Asian Development Bank, the United States Development Programme, the World Bank amongst others as funding partners and India, Pakistan, Philippines and Sri Lanka as participating nations. It is also manifest that the main objective of the said Memorandum of Agreement was the establishment in Sri Lanka of a research and training Institute to be known as the "International Irrigation Management Institute" (IIMI) with its headquarters in Digana, in the Kandy District of Sri Lanka, with a liaison office in Colombo, if found to be necessary, and that the parties to the Memorandum will ensure that the said Institute will have legal personality and capacity to contract, to acquire and to dispose of immovable property, and to institute legal proceedings in that name with the view to achieving the objectives elaborately set out in the Memorandum.

Admittedly, the International Irrigation Management Institute (IIMI) was incorporated by Act No. 6 of 1985 as envisaged by the said Memorandum, and that the Act was amended in 2000 to change its name to the International Water Management Institute (IWMI) with its headquarters

in Battaramulla, Sri Lanka. It is material to note that the preamble to Act No. 6 of 1985, as amended by Act No. 50 of 2000, narrates that "the Government of Sri Lanka and the Ford Foundation acting on behalf of the International Water Management Institute Support Group entered into an agreement for the establishment of the International Water Management Institute" which made it necessary and expedient to make legislative provisions to enable such Institute to effectively operate within Sri Lanka in accordance with the Charter of the Institute, which has been ratified by the Government of Sri Lanka. It is also relevant to note that in terms of section 9 to 15 of the Act, which provide for the composition of the first and subsequent Board of Directors of IWMI, ensure that the International Water Management Institute Support Group is adequately represented in the said Board, and that in terms of section 31, the annual budget of IWMI has to be submitted to the said Support Group for consideration. It is significant that section 34 of the Act provides that "no member of the International Water Management Institute Support Group or of the Board shall be liable, by reason only of such membership, for the debts and obligations of the Institute." It is clear from all this that although autonomous and independent both from the said Support Group and the Government of Sri Lanka, IWMA was intended by the said Memorandum of Agreement as well as the International Water Management Institute Act, No. 6 of 1985 as amended by Act No. 50 of 2000, to be the vehicle or agency through which the objectives of both the said Memorandum of and the Act were to be carried to fruition.

I therefore see no merit in the submission of Mr. Mustapha, PC., that there was no agreement between the State and the IWMI which was incorporated by Act No. 6 of 1985 as amended by Act No. 50 of 2000, as the Memorandum of Agreement entered into between the Government of Sri Lanka with the Ford Foundation, which purportedly acted on behalf of the International Irrigation Management Institute Support Group, envisaged the establishment of IIMI now renamed IWMI as *the vehicle or agency* which would carry forward the objectives of the said Memorandum of Agreement. I also see no merit in learned President's further argument that the wording of section 4(1) of the Diplomatic Privileges and Immunities Act of 1996 specifically omits the institution itself from immunity and refers only to "the officers or agents or property of such organization". In my opinion, the inclusion of the word 'agents' is sufficiently wide enough to include the Appellant, as it is clearly the "International Institute for Research and Training" contemplated by the aforesaid Memorandum of Agreement between the Government of Sri Lanka and the Ford Foundation acting on behalf of the IIMI Support Group, and referred to in the order made by the Minister under section 4(1) of the said. Equally lacking in merit is the other submission of Mr. Mustapha that the Diplomatic Immunity Act does not empower the Minister to confer immunity *on an entity incorporated in Sri Lanka and which does not bear an international character,* as the said Memorandum of Agreement envisaged the incorporation of a body, which was international character, which objective was achieved by *inter alia* by section 2 of the International Water Management Institute Act of 1985, which provided that the said Institute "shall operate as an *autonomous organization*, *International in character*".

The next submission of Mr. Mustapha, PC., was that the order made by the Minister in terms of section 4(1) of the Act did not *specify therein the provisions of the agreement* between the Government of Sri Lanka with the International Irrigation Management Institute which has been

incorporated by the Charter, with respect to which, immunity is sought to be conferred. I fail to understand this submission, as it is clear from the order itself that the Memorandum of Agreement between the Government and the Ford Foundation on behalf of the aforesaid Support Group, very clearly spells out the rights, privileges and immunities that are to apply to the Appellant institution, its Director General and other staff. It is also manifest from Part I item 1 of the Annexure to the said Memorandum reproduced in the said order that the IWMI, its property and assets wherever located and by whomsoever held, was sought to be conferred immunity from *every form of legal process* except, insofar as in any particular case it has *expressly waived immunity*. Since, there is no evidence that IIMI or its successor IWMI had at any stage waived its immunity, I hold that the Appellant is entitled in law to succeed in its plea of immunity in terms of section 4 of the Diplomatic Privileges Act.

Of course, I must advert to the fact that there is absolutely no evidence that the order made by the Minister was ever placed before Parliament, and there is no certificate under the hand of the Secretary to the Ministry of the Minister in charge of the subject of Foreign Affairs (currently External Affairs) which would have been in terms of section 6 of the Diplomatic Privileges Act which would have amounted to conclusive proof of the fact that the Appellant enjoyed diplomatic immunity. However, in my opinion, the order under section 4(1) of the Act, if made validly, would come into force when published in the Gazette, and would remain in force until and unless it is disapproved by Parliament. The failure to place the order before Parliament does not affect its coming into force. It is also my opinion that a certificate under section 6, which would have facilitated proof of immunity, is not indispensable to proving the existence of immunity, if it can be established by other evidence, as the Appellant has succeeded in doing in this appeal.

Accordingly, I answer substantive question (a) above in the affirmative, and hold that the High Court has misdirected itself in rejecting the plea of immunity raised by the Appellant based on the order 10th December 1997 made by the Minister in terms of Section 4 of the Diplomatic Privileges Act No. 9 of 1996, and published in the Gazette Extraordinary dated 12th December 1997 (X7).

(b) Immunity under the IIMI Act

In view of the fact that question (a) above has been answered in the affirmative, and the plea of immunity based on section 4 of the Diplomatic Privileges Act No. 9 of 1996 upheld, it is unnecessary for me to consider at length question (b) on which leave was granted by this Court, namely whether the High Court erred in not coming to the finding that the International Irrigation Management Institute Act No. 6 of 1985, as amended by Act No. 50 of 2000, displayed the legislature's unambiguous intention to grant the said immunity.

It would suffice for me to observe that the step taken by the Minister of Foreign Affairs in 1997 to make an order in terms of section 4(1) of the Diplomatic Privileges Act of 1996 was a positive step to comply with the obligation of the Government of Sri Lanka under section 33 of the International Water Management Institute Act No. 6 of 1985, which expressly provided that "the Government shall take all such steps as are necessary to ensure that (a)the Institute; and (b) the

Director General, Consultants and officers and servants of the Institute, are accorded *subject to the provisions of the Constitution* all such rights, privileges and immunities as the Government has agreed to, accord to such Institute, the Director-General, consultants and officers and servants of the Institute, by the Memorandum of Agreement between the Government of the Democratic Socialist Republic of Sri Lanka and the Ford Foundation, acting on behalf of the International Water Management Institute Support Group, for the establishment of an International Institute for Research and Training in Irrigation Management, signed on 1st September, 1983."

In considering the question raised in (b) above, section 33 of the International Irrigation Management Act 1985 Act must be read together with section 2 of the Act, section 3 and other provisions of the Amending Act No. 50 of 2000 and the Memorandum of Agreement between the Ford Foundation and the Government of Sri Lanka.

Section 2 of the 1985 Act states as follows:

> There shall be established in accordance with the provisions of this Act, an Institute which shall be called the "International Irrigation Management Institute" (amended to read as the International Water Management Institute in 2000) which shall operate as an autonomous organization, international in character.

Section 3 of the Amending Act of 2000 provided for renaming the Institute and relocating its headquarters, as already noted, but section 33 of the original Act was not touched except for the change of name.

I have serious doubts as to whether the obligation cast on the Government of Sri Lanka by section 33 of the International Irrigation Management Act 1985, was by itself, sufficient to support a plea of immunity from suit in the Labour Tribunal or any other court or tribunal. In my view, it was only a provision that imposed on the government a legal obligation in the municipal sphere which a Court of law, tribunal or other institution in Sri Lanka could take cognizance of which is into accord with an obligation the government had incurred in the international plain by entering to the Memorandum of Agreement with the Ford Foundation on behalf of the International Irrigation (Water) Management Institute Support Group.

Having said that, I answer question (b) in the affirmative, and hold that the High Court did err in not coming to the finding that the International Irrigation Management Institute Act No. 6 of 1985, as amended by Act No. 50 of 2000, displayed the legislature's unambiguous intention to grant the said immunity, but add the rider that that does not mean that section 33 of the International Irrigation Management Institute Act, by itself, had the effect of conferring the Appellant immunity from suit.

Conclusions

For the forgoing reasons, I would hold that the learned High Court Judge erred in his decision to uphold the order of the Labour Tribunal dated 18th December 2009 to overrule the preliminary objection taken up by the Appellant in the said Tribunal on the basis of the order of the Minister of Foreign Affairs under section 4 of the Diplomatic Privileges Act No. 9 of 1996.

Accordingly, I allow the appeal, set aside the impugned judgment of the High Court of the Western Province holden in Avissawella dated 1st September 2010 as well as the order of the Labour Tribunal Kaduwela dated 18th December 2009.

The application filed by the respondent in the Labour Tribunal will stand dismissed for lack of jurisdiction.

In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Priyasath 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 Leave to appeal under Section 5C of the High Court of Provinces (Special Provisions) Act No. 54 of 2006

Bentota Multi Purpose Cooperative Society
Limited,
Bentota

Defendant-Judgement Debtor-Respondent-Appellant-Petitioner

SC Appeal 13/2012
S.C.H.C.C.A.(LA)Application No. 297/11
SP/HCCA/GA/21/2010
D.C. Balapitiya Case No. 3107/L

V.

Payagalage Girly Yvonne Karunaratne,
Angagoda,
Galle Road,
Bentota.

Plaintiff-Judgement Creditor-Petitioner-Respondent-Respondent

Before : Tilakawardane, J
Marsoof, PC, J
Dep, PC, J

Counsel : Manohara de Silva PC with Pubudini Wickramaratne for Defendant-Judgement Debtor-Respondent-Appellant-Petitioner.

D.M.G. Dissanayake with Upali Lokumarakkala for Plaintiff-Judgement Creditor-Petitioner-Respondent- Respondent

Argued on : 25.06.2012

Decided on : 20.03.2014

Priyasath Dep, P.C. .

The Plaintiff-Judgment Creditor-Petitioner-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Balapitiya bearing Case No 3107/L against the Defendant – Judgment Debtor- Respondent- Appellant- Petitioner-Appellant (hereinafter referred to as the Defendant) claiming the following reliefs:

1 A declaration to the effect that the Plaintiff is the owner of 1/64 shares of the land described in the schedule to the plaint;

2 To eject the Defendant and its servants and agents from the premises bearing assessment numbers 136/1, 136/2 and 136/3;

3 Damages in a sum of Rs 25,000/= per month from 01-09-2005 until vacant ,quiet and peaceful possession is handed over.

At the trial the Plaintiffs raised the following issues:

1. Did the Plaintiff grant leave and license to the Defendant to occupy the premises relevant to this case from 28.08.1985?

2. If it is so, did the Plaintiff by the letter dated 29.07.2005 sent through D.C. Balasuriya, attorney-at-law terminate the leave and license ?

3. If the above two issues are answered in the affirmative, is the Defendant unlawfully and unjustly in possession of the premises from 01.09.2005.

4. If one or more of the above issues are answered in the affirmative, is the Plaintiff entitled to the relief prayed for?

The Defendant raised issues numbered 5-12. Out of the issues raised by the Defendant ,the issues number 7 and 10 given below are the most important issues for the determination of the case.

Issue No. 7

Is the Defendant Society a tenant of the Plaintiff?

Issue No. 10

According to the Plaint the tenancy of the Defendant has not terminated ?

The Plaintiff in her evidence stated that she along with her husband A.K.Dharmasekera constructed three shops bearing assessment numbers 136/1, 136/2 and 136/3. These premises were let to the Defendant

by her husband. Her husband died on 28-08-1985 and after his death, she requested the Defendant to hand over the premises to her. The Defendant undertook to hand over the premises after the construction of a building . She alleged that the Defendant is in occupation of the premises with her leave and license.

She stated that she, through her Attorney D.C.Balasuriya sent a letter dated 24-7-2005 to the Defendant terminating the leave and license granted to the Defendant after one month's notice. She submits that the Defendant has been in unlawful occupation of the premises since 01-09-2005 causing damages of a sum of Rs. 25,000/= per month.

In cross-examination, she admitted that she entered into an agreement with the Defendant on 1-6-1974 and let three premises for a monthly rental of Rs 250/= for each of the premises.

The Defendant admitted that the Plaintiff is the owner of the premises in suit and the Defendant is the lawful tenant of the Plaintiff and that there is no termination of the tenancy. The Defendant refuted the claim of the Plaintiff that it occupied the premises with leave and license of the Plaintiff.

The learned District Judge accepted the evidence of the Plaintiff and answered the issues of the Plaintiff in the affirmative and gave judgment in favour of the Plaintiff. However the damages awarded to the Plaintiff was restricted to monthly rentals with interest. The learned District Judge answered issue no 7 and 10 raised by the Defendant in the affirmative.

Being aggrieved by the judgment of the District Judge, the Defendant appealed against the judgment to the High Court of the Southern Province exercising appellate jurisdiction in Case No. SP/HCA/115/2009(F). The Plaintiff as the Judgment -Creditor applied for a writ of execution pending the appeal. The Defendant –Judgment Debtor objected to the application. The District Judge rejected the objections of the Defendant- Judgment Debtor on the basis that the Defendant-Judgment Debtor failed to establish that there was a substantial question of law involved in the appeal and if the decree is executed it will suffer grave and irreparable loss.

The Defendant –Judgment- Debtor being aggrieved by the Order of the District Judge filed a Leave to Appeal Application in High Court of the Southern Province exercising civil appellate jurisdiction in SP/ HCCA/GA/LA/21/2002. The Civil Appellate High Court dismissed the leave to Appeal application and in its Order held that:

> "It appears that the Defendant-Petitioner has not stated in his petition that there is a substantial question of law to be considered in appeal and also it is observed by this Court that the Learned District Judge has not determined the fact that the premises are subject to the Rent Act and also it is apparent to this Court that the Learned District Judge has not determined that the Defendant-Petitioner is a tenant in terms of the provisions of the Rent Act. In the circumstances, we are of the opinion that there is no substantial question of law to be considered in appeal . The Defendant-Petitioner has failed to satisfy the Court that substantial loss may result unless execution is stayed."

Being aggrieved by the order of the High Court of the Southern Province exercising Appellate jurisdiction, the Defendant filed a Leave to Appeal Application to this Court and obtained leave on the following questions of law.

1. Did the Learned Judges of the High Court err in holding that there is no substantial question of law to be considered in Appeal ?

2. Did the High Court err in dismissing the Defendant's application on the basis that the Defendant has not stated in his petition that there is a substantial question of law to be considered in Appeal?

The Learned President's Counsel for the Defendant-Appellant submitted that there is a substantial question of law to be decided as the District Judge has seriously erred in answering the issues raised by the parties. The learned District Judge answering the issues raised by the Plaintiff held that the Defendant was in occupation of the premises with leave and license of the Plaintiff and the Plaintiff by the letter dated 29-7-2005 sent by D.C. Balasuriya, Attorney-at-Law had terminated the leave and license granted to the Defendant.

On the contrary in answering two vital issues raised by the Defendant namely issue No. 7 and 10 the learned District Judge held that the Defendant is a tenant of the Plaintiff and the tenancy between the Plaintiff and the Defendant was not terminated.

The learned President's Counsel for the Defendant- Appellant submitted that this is a serious contradiction that will affect the validity of the judgment. The learned President's Counsel further submitted that this contradiction raises a substantial question of law and for that reason District judge should not have issued a writ pending appeal. In support of his argument he cited the judgment in *Collettes v. Bank of Ceylon (1982) 2SLR 14*. In that case the Supreme Court considered what constitutes a substantial question of law. Supreme Court drew a distinction between 'question of law' and a 'substantial question of law'. It adopted several tests to determine what constitutes a substantial question of law and among the numerous tests referred to in the judgment which are not exhaustive was the following criteria. 'Where there is no evidence to support the determination or where the evidence is inconsistent with or contradictory of the determination or where the true and only reasonable conclusion contradict the determination, a substantial question of law is involved'

On the other hand the learned Counsel for the Plaintiff submitted that there is no substantial question of law involved and according to the tenor of the judgment it appears that the Learned District Judge had made a mistake in answering issues No. 7 and 10 in favour of the Defendant. His contention is that the learned District Judge had answered all the issues raised by the Plaintiff in the affirmative and gave judgment in favor of the Plaintiff rejecting the position taken up by the Defendant that it is a tenant. Therefore in answering issue numbers 7 and 10 raised by the Defendant the learned District Judge had made a mistake.

The Plaintiff's position is that the Defendant failed to establish a substantial question of law involved in the Appeal and if the execution is not stayed grave and irreparable damage will be caused to the Defendant. Plaintiff further submitted that Plaintiff should not be deprived of the fruits of victory. The Counsel for the Plaintiff cited the cases of *Cooray v. Ilukkumbura* 1996 2SLR 263. *Chartolt Perera v.Thambaiyah* 1983 1SLR 352, *Mohamed v. Seneviratne* 1989 2SLR 389 in support of his argument.

The learned President's Counsel for the Defendant Appellant submits that there is a serious contradiction in the Judgment that could not be reconciled and it affects the validity of the judgment. There is merit in the submissions made by the Counsel for the Appellant. I am of the view that there is a substantial question of law involved in the Appeal. In these circumstances I am of the view that the learned District Judge should not have granted a writ of execution pending appeal.

For the reasons set out above, I set aside the order of the learned District Judge dated 30-08-2010 in D. C. Balapitiya Case No. 3107/L made under section 763 of the Civil Procedure Code allowing a writ of execution pending appeal and the Judgment dated 26-07-2011 of the High Court of Galle exercising appellate jurisdiction in Case No. SP/HCCA/GA/21/2010 affirming the judgment of the District Court.

Appeal allowed. No Costs.

Judge of the Supreme Court

Shiranee Tilakawardene, J.

I agree.

Judge of the Supreme Court

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

1. Hakkini Asela De Silva
2. Hakkini Asanga De Silva
3. Kirimadura Kumudu Gunawardene

SC APPEAL No. 14/2011

C.A. Appeal 114/07

HC Balapitiya 478/02

Accused-Appellants-Petitioners-Appellants

Vs.

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

Complainant-Respondent-Respondent-Respondent

BEFORE	:	Hon. Saleem Marsoof, PC. J, Hon. Chandra Ekanayake, J, and Hon. Sathyaa Hettige, PC. J.
COUNSEL	:	C.R. De Silva, PC, with S.J. Gunasekara and R.J. De Silva for Accused - Appellants - Petitioners. Palitha Fernando, PC, Solicitor General, with Sarath Jayamanne, DSG for the Complainant - Respondent - Respondent.
Argued on	:	04.07.2011, 27.09.2011, 06.06.2012 and 27.09.2012
Written Submissions on	:	30.10.2012
Decided on	:	17.01.2014

SALEEM MARSOOF, PC. J,

This is an appeal against conviction and sentence in a case of murder. The Accused-Appellants-Petitioners-Appellants (hereinafter sometimes referred to as the "appellants") were indicted in the High Court of Balapitiya for the murder of Patabandige Hiran Sanjeewa Perera of Ambalangoda (hereinafter sometimes referred to as the "deceased") in terms of Section 296 read with Section 32 of the Penal Code, and upon being found guilty by the High Court, sentenced to death. The Court of Appeal, by its impugned judgment dated 6th August 2010, affirmed the conviction and sentence, and dismissed the appeal.

Salient Facts relating to the Trial before the High Court

Briefly stated, the prosecution case at the trial was that on 4th January 1997 at about 5.30 pm, when one Nishshanka Rasika de Silva, was riding a bicycle which had been borrowed from a friend, towards

the residence of the deceased in Ambalangoda, with the deceased seated on its cross-bar, they were pursued by the three appellants and another unidentified person on two other bicycles. According to the testimony of Rasika, having heard something similar to the sound of crackers being lit, the deceased alighted from the cross-bar, and ran forward with all four assailants on hot pursuit of the deceased, when the third appellant, who was ahead of the rest, dealt him a blow with a sword, subsequent to which the first appellant shot at the deceased, causing him to fall on his face. While the all four assailants fled away from the crime scene, Rasika rushed to the Ambalangoda police station, which was about a kilometre away.

Six witnesses including Rasika, before whom the whole drama was enacted, were called to give evidence at the trial on behalf of the prosecution. While Rasika identified the appellants as the persons who had, along with another unidentified person, pursued the deceased and caused his death, Reserve Police Constable Karunasena, testified that just after 5 pm on the day of the incident, he encountered four persons at Kande Road, Amabalangoda, when he was returning to the police station after collecting a television booster that had been given for repairs, and that when he initially saw them, the first and second appellants were pushing their bicycles and the third appellant and another person were with them on foot carrying swords, and that when he signalled them to stop, the first and second appellants got on to their bicycles and took the other two carrying the swords on the cross-bar and went out of his sight. The testimony of Dr. Athula Piyaratne, District Medical Officer, District Hospital, Balapitiya, revealed that the deceased had died instantly on being shot, and the gun shot injuries and the other injuries found on the body of the deceased were consistent with the testimony of Rasika in all material aspects.

On behalf of the defence, the first appellant gave evidence denying altogether his, and the second appellant's, presence at the scene of the crime. The second and third appellants made dock statements. The position of the first appellant, who testified in court, was that he and his brother, the second appellant, had been engaged together in the business of selling tea in three *polas* (fairs), namely, the Saturday Pola in Horawpathana, the Sunday Pola in Anuradhapura town and the Monday Pola in Kahatagasdigiliya, during which period they were in the habit of taking temporary abode in the Abhinawaraama Temple in Anuradhapura town, with the permission of Rev. Rahula Thera, who was the chief incumbent of the temple. He stated in evidence that on this particular occasion, they left from Ambalangoda, their home town, on Friday, 3rd January 1997 and took up temporary residence in the said temple, and returned to Ambalangoda only on Tuesday, 7th January 1997, and could not therefore have been at the scene of the crime in Ambalangoda on 4th January 1997. The second appellant set up a similar alibi in his dock statement, and stated that he left with his brother to Anuradhapura on 3rd January 1997 and returned to Ambalangoda only on 7th January 1997. The third appellant, in his dock statement, denied his presence at the scene or any knowledge of the incident.

The learned High Court Judge, who sat without a jury, rejected the alibi set up by the first and second appellants, and found the Appellants guilty for murder as charged, and sentenced them to death.

The Appeal to the Court of Appeal

In the Court of Appeal, the grounds of appeal pleaded by the appellants mainly focused on the manner in which the trial judge had applied the doctrine of common intention embodied in Section 32 of the Penal Code, particularly in the context that there was no evidence that the second appellant had committed any positive act. The appeal also raised the question of the adequacy of the identification of

the third appellant. The Court of Appeal held with the prosecution and affirmed the conviction and sentence. On the question of identity of the accused, the Court of Appeal observed as follows:-

> "When the evidence of Rasika and Karunasena is taken in conjunction, there remains no doubt that these are the four persons who committed the crime. Therefore, identification of the third accused by Karunasena is in itself sufficient for the purpose of this case."

It is significant that no argument was addressed to the Court of Appeal on the question of the alibi set up by the first appellant in his evidence before the High Court on behalf of his brother and on his own behalf, which was also reiterated by the second appellant in his dock statement.

Special Leave to Appeal

Although special leave to appeal was sought on the basis of several grounds including those considered by the Court of Appeal in the impugned judgment, this Court has on 31st January 2011, granted special leave to appeal only on the question set out in paragraph 16(c) of the petition dated 15th September 2010 filed by the Petitioner to invoke the appellate jurisdiction of this Court, which is as follows:-

> "Did the Court of Appeal fail to appreciate that the observations / findings of the learned Trial Judge referred to at paragraphs 12.2 (a) to (e) above, clearly showed that the learned Trial Judge had misdirected himself on the law and proceeded on the erroneous premise that there was a burden on an accused to prove the defence of alibi and, further, that the learned trial judge had unreasonably – and therefore erroneously – rejected the said defence?"

The observations / findings referred to in paragraph 16(c) quoted above, admittedly occur in the following passage in the judgment of the High Court in which the learned trial judge has considered the alibi set up by these appellants:-

> "1, 2 විත්තිකරුවන් නිවසට පැමිණ ඇතැයි කියනු ලබන්නේ 1997.01.07 වෙනි දිනය. ඔවුන්ට එදින මෙම සිද්ධිය සම්බන්ධයෙන් ඔවුන්ගේ පවුලේ අයගෙන් දැන ගැනීමට ලැබී ඇති බව 1 වන විත්තිකරු කියා සිටි. ඔවුන් නිවැරදිකරුවන් නම්, එදිනම පොලිස් ස්ථානයට ගොස් ඔවුන් එදින පැමිණි බවත්, සිද්ධිය සිදුවූ දිනයේ නිවසේ නොසිටි බවට ප්‍රකාශකොට, පොලිසියේ සහය ඇතිව දුම්රිය ටිකටපත් පරීක්ෂා කරවා ඔවුන්ගේ නිර්දෝශිභාවය ඔප්පු කරන්නට ඉඩකඩ තිබිණි. එහෙත් ඔවුන් එලෙස නොකර අධිකරණයට භාරවී ඇත්තේ 1997.01.15 වෙනි දිනය. එතෙක් ඔවුන් නිහඬව සිට ඇත. පැමිණිල්ලේ උගත් රජයේ අධිනීතිඥ තුමාගේ හරස් ප්‍රශ්ණ වලට පිළිතුරු දෙමින් 1 වන විත්තිකරු පසුව කියා සිටියේ, මූලික සාක්ෂියට අමතර දෙයකි. ඔවුන් අනුරාධපුරයේ සිට දුම්රියෙන් පැමිණ කොළඹින් බැස, කොළඹ සිට බස් රථයේ පැමිණි බවත්, එසේ පැමිණියේ දුම්රියට වඩා ඉක්මණින් බස් රථයෙන් පැමිණීමට හැකි බැවින් බවත්ය. එම ප්‍රකාශය ඔහු විසින් කරනු ලබන්නේ ප්‍රථම වරටය. ඒ අනුව ඔහුගේ ප්‍රකාශය පිළිගත නොහැකිය. ඔවුන් විසින් ජනවාරි 07 වෙනිදා සිට ජනවාරි 15 වෙනිදා තෙක් විත්ති වාචිකයක් නිර්මාණය කොට, අධිකරණය වෙත ඉදිරිපත් වී ඇති බවට නිගමනය කළ යුතුව ඇත. ඔවුන් නිර්දෝශිභාවය සඳහා ඉදිරිපත් කරන මෙම නිර්මාණය

පිළිගැනීමට මම මැළිවෙමි. එබැවින් ඔවුනගේ අන්‍යස්ථානික භාවය පිළිබඳව 1 වන චිත්තිකරු විසින් දෙන ලද සාක්ෂිය පිළිනොගනිමින් ප්‍රතික්ෂේප කරමි." *(page 287)*

These observations and findings of the learned Trial Judge have been summarised in English in paragraphs 12.2(a) to (e) of the petition of appeal dated 15th September 2010, in the following manner:-

"12.2 In the course of his aforesaid judgement the learned Trial Judge held *inter alia* as follows:-

a) That on learning of the incident on 07.01.1997 upon their return from Anuradhapura, the 1st and 2nd Appellants could have gone to the police station, stated the facts, obtained the assistance of the Police to recover their train tickets and 'shown/demonstrate' [i.e. proved] their innocence.

b) That, however, they had not done so but had surrendered to Court to 15.01.1997, having remained silent until then.

c) That the first Appellant has stated that, on their return from Anuradhapura they [he and the 2nd Appellant] alighted from the train at Colombo and returned [home] by bus from there and that this was stated for the first time only in cross examination and therefore his statement could not be accepted.

d) That it should be inferred that they [i.e. the 1st and 2nd Appellants] had 'constructed a defence' from 7th to 15th January and surrendered to court.

e) That [accordingly] he - the learned Trial Judge – was reluctant to accept this 'construction' and, therefore, while not accepting the evidence of alibi given by the 1st Appellant, he was rejecting the same."

The question raised on behalf of the first and second appellants in paragraph 16(c) of the petition filed in this court, relates to the alibi setup by these two appellants, who as noted already, are brothers. Learned President's Counsel for the first and second appellants has submitted that the said observations / findings of the learned trial judge clearly demonstrate that he had misdirected himself in regard to the law applicable to the proof of alibi in a criminal case. Since this is the only question on which special leave to appeal was granted by this Court, the question will now be considered, but it may be noted at the outset that since special leave to appeal was granted only in regard to this question, which does not involve the third appellant, as far as he is concerned, his application for special leave to appeal would stands dismissed.

Proof of Alibi

The primary question that arises for determination on this appeal is whether the Court of Appeal, in affirming the decision of the High Court, failed to appreciate the fact that the learned trial judge had misdirected himself on the law and erroneously placed a burden on the first and second appellants to prove the alibi setup by them, in the context of the observations of the trial judge as summarized in paragraphs 12.2 (a) to (e) of the petition of appeal.

Learned President's Counsel for the Appellant has submitted with great force that the High Court erred in assuming that the law placed a burden on the accused person or persons to establish the truth of the alibi set up by them and thereby prove their innocence. In particular, learned President's Counsel relied on the decisions in *K.D Yahonis Singho v The Queen* 67 NLR 8 and *K.M. Punchi Banda and 2 others v. The State* 76 NLR 293 for the proposition that the burden was on the prosecution to disprove or discredit the alibi, and that if an alibi is neither believed or disbelieved, there arises a reasonable doubt in the prosecution story, and the first and second appellants must be necessarily acquitted.

While the Learned Solicitor General has not disputed the contention of the learned President's Counsel for the appellants on the burden of proof, he has stressed that an alibi is not a defence by itself and that at best it can in the context of the totality of the evidence of the case cast a reasonable doubt about the guilt of the accused. He has placed reliance on the decisions of this court in *Lafeer v Queen* 74 NLR 246, *Mannan Mannan v The Republic of Sri Lanka* 1990 (1) SLR 280 and *Lurdu Nelson Fernando and Others v The Attorney General* (1998) 2 SLR 329 to argue that even if the learned trial Judge had misdirected himself with respect to the plea of alibi, the conviction should stand if it can be reasonably concluded that the accused persons were guilty of the offence beyond any reasonable doubt.

Before examining the question as to whether there has been in the context of this case a failure to discharge the evidentiary burden relating to the alibi, it might be useful to explain the meaning of the term "alibi". As G.P.S de Silva J observed (with Ramanathan J and Perera J concurring) in *Lionel alias Hitchikolla and Another v. Attorney General* (1988) 1 SLR 4 at page 8,

> "An alibi may broadly be described as a plea of an accused person that he was elsewhere at the time of the alleged criminal act. What is important for present purposes and what needs to be stressed is that it is a plea which casts doubt on an essential element of the case for the prosecution, namely that it was the 1st appellant who committed the criminal act charged. In other words, if the jury entertained a reasonable doubt in regard to a constituent element of the offence, namely the criminal act (factum) then the 1st appellant is entitled to an acquittal."

The same principle would apply to a trial without a jury, where an alibi is set up, and it is for the trial judge to consider the plea in the context of all the evidence led at the trial.

It is trite that, in criminal proceedings, the burden of proof is always on the prosecution to establish the guilt of the accused person beyond reasonable doubt, and the burden never shifts to the defence. The prosecution has the duty to prove all, and not merely some, of the ingredients of the offence charged beyond reasonable doubt. Section 5 of the Evidence Ordinance provides that evidence may be given in any suit or proceeding "of the existence or non-existence of every fact in issue, and of such other facts as are hereinafter declared to be relevant *and of no others*."

Section 3 defines 'facts in issue' as "any facts from which, either by itself or in connection with other facts, the existence, non-existence, nature or extent of any right, liability, or disability, asserted or denied in any suit or proceeding, necessarily follows." Thus, as shown in the illustration to Section 5, where A is accused of the murder of B by beating him with a club with the intention of causing his death, whether (a) A beat B with a club; (b) such beating caused B 's death; and (c) A intended to cause B's death, are all facts in issue. Generally, in terms of section 5 only evidence relating to these facts in issue can be led in a murder trial. However, the Evidence Ordinance embodies a number of exceptions

to this general rule of relevance, and particularly section 11 provides that "Facts not otherwise relevant are relevant –

(a) if they are inconsistent with any fact in issue or relevant fact;

(b) if by themselves or in connection with other facts they make the existence or non-existence of any fact in issue or relevant fact highly probable or improbable."

The question that has been raised in appeal by the Appellants is whether the same principle applies with respect to an alibi set up by the defence, and if so, whether the conviction and sentence of the first and second appellants ought to be quashed in appeal. It is noteworthy that illustration (a) to section 11 of the Evidence Ordinance shows that where the question is whether A committed a crime at Colombo on a certain day, the fact that on that day A was at Galle is relevant. This in fact is the type of alibi that has been sought to be established by the first and second appellants in this case.

Learned President's Counsel for the first and second appellants, in the course of his submission at the hearing, stressed the evidence of the first appellant to the effect that he and the second appellant had been in Anuradhapura between 3rd and 7th January 1997, and could therefore not have been in Ambalangoda where the deceased was murdered on 4th January 1997. Admittedly, the first and second appellants disclosed their alibi in the statement made by them to the police on 18th February 1997 at the Galle remand prison, and the first appellant has in the course of his testimony named Rev. Rahula Thera, who was the chief incumbent of the Abhinawaraama Temple in Anuradhapura within the precincts of which he had allegedly taken temporary abode between 3rd to 7th January 1997. It is in evidence that Rev. Rahula Thera had passed away in May 1998, long before the case was taken up for trial, and could not be called upon to testify in court.

Learned President's Counsel, has in these circumstances, invited the attention of court to the matters set out in paragraphs 12.2 (a) to (e) of the petitioner of appeal in support of his argument that the learned High Court judge had misdirected himself on the question of the burden of proof in a case involving an alibi. In particular, he stressed that the observation of the learned trial judge in the above quoted passage at page 287 of the judgment of the High Court to the effect that had the first and second appellants been innocent, they could have gone to the police as soon as they arrived in Ambalangoda on 7th January itself, and proved their innocence (ඔවුන්ගේ නිර්දෝශිභාවය ඔප්පු කරන්නට), showed that he had clearly misdirected himself on the question of the burden of proof of alibi.

However, the observation of the learned trial judge has to be understood in the context of the evidence in this case that the first and second appellants, had on their return to Ambalangoda on 7th January 1997, heard of the murder and the fact that the police were looking for them, and chose not to surrender to the police and explain their absence from Ambalangoda during the time of the murder, but instead admittedly left to Colombo where they allegedly stayed till 15th January, 1997 in their sister's house. In my opinion, the quoted observation did demonstrate the ignorance of the trial judge regarding the procedure adopted at railway stations of collecting the tickets of all passengers at their final destination, but certainly cannot be understood as a misdirection on the burden of proof of alibi, as he was entitled to draw an adverse inference from the unwillingness of the first and second appellants to keep the police informed of their alleged alibi at the earliest opportunity at least to prevent the police being mislead. The conduct of the two appellants, certainly was consistent with their guilt rather than of their innocence, and there can be no doubt that had the appellants gone to the

police on 7th January and explained their position, that would certainly have been of assistance to the police in their investigations.

It is clear from a fuller reading of the judgment of the High Court that the learned High Court judge was conscious of the fact that the burden of proof was on the prosecution to prove its case beyond reasonable doubt and that in particular the judge was mindful of the principles of law applicable to the proof of alibi. It is trite law that in a case where an alibi has been pleaded, the court has to arrive at its finding on a consideration of all evidence led at the trial and on a full assessment of all the evidence. This principle was expounded by Dias J. in *The King v. Marshall* 51 NLR 157 at page 159, where his Lordship stressed that an alibi "is not an exception to criminal liability, like a plea of private defence or grave and sudden provocation" and is "nothing more than an evidentiary fact, which, like other facts relied on by an accused, must be weighed in the scale against the case of the prosecution." As his Lordship observed, if sufficient doubt is created in the minds of the jury, or in a trial by a judge without a jury, in the mind of the trial judge, "as to whether the accused was present at the scene at the time the offence was committed, then the prosecution has not established its case beyond reasonable doubt and the accused is entitled to be acquitted." It is therefore necessary to examine whether in the totality of all evidence led at the trial, a reasonable doubt arises as to the guilt of the first and second appellants in the face of the plea of alibi taken up by them.

Analysis of Evidence

It is in this backdrop that the learned President's Counsel for the first and second appellants sought to assail the testimony of Nishshanka Rasika de Silva and RPC Karunasena, who have stated in evidence that they saw the first and second accused in Ambalangoda on the day of the murder at or in close proximity to the crime scene. In this regard, he has stressed two matters which he described as serious infirmities in the testimony of witness Rasika. Both these matters related to the testimony of Rasika in regard to what happened between 5 and 6 pm on the day of the murder.

The first of these involved the testimony of Rasika as to whether or not the four assailants came to the murder scene on bicycles, and the second matter was the manner in which Raskia proceeded to the Ambalangoda police station after allegedly witnessing the murder at very close range. Before adverting to these alleged infirmities, it may be useful to refer to the testimony of Rasika as to what happened on that fateful evening. It was the testimony of Rasika that when he was in Sampson's shop, which at that time was being looked after by Hasantha Gayan, the deceased met him and asked him to come along with him to go to his house to ask the deceased's father for his motor cycle. When Rasika agreed to join the deceased to go to his house, they borrowed a bicycle from Hasantha Gayan to go to the deceased's house, which bicycle Rasika peddled towards the deceased's residence with the deceased seated on the cross-bar. The testimony of Rasika in regard to the incident was that when he and the deceased were passing the co-operative store near the Ambalangoda Urban Council, suddenly they heard sounds similar to the lighting of crackers, and when Rasika turned back to see, the deceased suddenly jumped off the cross-bar and started running forward. At that point Rasika stopped the bicycle and saw Asela and Asanka, who are respectively the first and second appellants, along with two others, pursue the deceased, and the third appellant, who was ahead of the rest, deal a blow with a sword, which caused the deceased to fall. Rasika has further testified that he also saw Asela shoot the deceased twice on the head. Rasika has stated in evidence that having witnessed this terrible incident, he was terrified, and he proceeded to the Ambalangoda police station as fast as he could.

The first of the two matters stressed by learned President's Counsel for the first and second appellants, related to the manner in which the four assailants came to the murder scene. Rasika's testimony in this regard in the course of his examination-in-chief was as follows:-

ප්‍ර: කොහේ ඉඳලද ඒ අය ආවේ?
උ: හිනටයේ ඉඳලා බයිසිකල් වලින් ආවේ.
ප්‍ර: මොන බයිසිකල් වලින්ද ආවේ?
උ: පුස් බයිසිකල් වලින් ආවේ.
(Page 54-55)

When the witness was confronted under cross-examination by learned Counsel for the appellants with his testimony in the non-summary inquiry in the Magistrates Court to the effect that only two of the assailants came on bicycles, he responded to the questions under cross-examination as follows:-

ප්‍ර: මීට පෙර අධිකරණයට දිවුරුම් දී 4 දෙනෙක් බයිසිකල් වලින් ආවා කිව්ව එක වැරදියි?
උ: හරි
ප්‍ර: එහෙම නම් මහේස්ත්‍රාත් අධිකරණයේදි "මම අද කිව්වා දෙන්නා විතරයි බයිසිකලයකින් ආවේ අනිත් දෙන්නා ආව විදිය දන්නේ නැහැ" කියලා කිව්වාද?
උ: කිව්වා
ප්‍ර: ඒක හරිද?
උ: හරි
ප්‍ර: මේ අධිකරණයට කිව්වා 4 දෙනෙක් බයිසිකල් වලින් ආවා දැක්කා කියලා?
උ: මම කිව්වා බයිසිකල් වලින් 4 දෙනෙක් ආවා කියලා.
ප්‍ර: එහෙම නම් මහේස්ත්‍රාත් අධිකරණයේදි "අනිත් දෙන්නා බයිසිකල් වලින් ආව විදිය දන්නේ නැහැ" කියලා කිව්ව එක හරිද?
උ: ඒක හරි
ප්‍ර: 4 දෙනෙක් බයිසිකල් වලින් ආවා දැක්කා කියන එකත් හරිද?
උ: ඔව්
ප්‍ර: කොයි එකද හරි?
උ: දෙන්නෙක් බයිසිකල් වලින් ආවා.
ප්‍ර: අනිත් දෙන්නා?
උ: දැක්කේ නැහැ බයිසිකලයෙන් ආවාද කියලා.
(page 71-72)

The Learned President's Counsel for the first and second appellants has submitted that witness Rasika has contradicted himself in regard to how two out of the four assailants had arrived at the scene of the murder, in that while testifying at the High Court trial he had said that all four assailants had come on bicycles whereas at the non-summary inquiry he had said that he did not know how two of them came to the scene.

However, I do not see any material contradiction in the testimony of Rasika, as it is clear from his responses at pages 54-55 of the High Court record that Rasika had simply responded in the affirmative to a question of learned State Counsel in the course of his examination-in-chief as to whether the assailants had come on bicycles, but under cross-examination at pages 71-72, he has explained that only two bicycles were used by the assailants, but he was not very sure as to whether all four of the assailants had come on the two bicycles.

In fact, the learned trial Judge has in the course of his Judgment at page 279, expressed the view that this was not a deficiency that affected the essence of the prosecution case (**එම ඌණතාවය මෙම නඩුවේ හරයට කිඳා බසින ඌණතාවයක් නොවන්නේය**), and in my view, the learned trial Judge was quite right, as it is evident that the assailants had come from behind Rasika and the deceased, and Rasika had very little opportunity of observing clearly how they had arrived at the murder scene. Even if, as one would surmise, two of them had come on the cross-bars of the two bicycles, Rasika was unlikely to have seen or noted this through one momentary glance backward when he had heard some sound like crackers being lit, at a time of extreme excitement. The witness was therefore, in my opinion, extremely honest in conceding that he did not know how the other two assailants came to the scene of the murder, although he may have taken it for granted that they were carried on the bicycles by the other two. It appears from the testimony of Reserve Police Constable Karunasena that two of them had intermittently been on foot when they were not riding on the cross-bars of the two bicycles.

ප්‍ර: දැන් ඒ බයිසිකල් වල ආවේ කොහොමද පැදගෙනද? තල්ලුකරගෙනද?

උ: තල්ලුකරගෙන ඉස්සරහට ආවා. ඇවිල්ලා මම ඉන්න තැනට ආවේ නැහැ. බයිසිකල් වලට නැගලා ගියා.

ප්‍ර: එතකොට?

උ: දෙන්නෙක් බැහැලා යනවා. දෙන්නෙක් වාඩිවෙලා යනවා. ඒ නගින අවස්ථාවේදි සංඥාවක් දුන්නා නවත්තන්න කියලා. එතන හිටපු එක්කෙනෙක් මම අඳුරනවා.

(page 108)

The second matter that has been stressed by learned President's Counsel for the first and second appellants was the inconsistency in the testimony of Rasika as to how he proceeded to the Ambalangoda Police Station to report the murder. In the course of his examination in chief, Rasika testified that he dropped the bicycle and ran all the way to the police station. He stated:-

ප්‍ර: ඒ සැරේ තමා මොකද කළේ?

උ: මම පොලිසියට දිව්වා.

ප්‍ර: තමා පොලිසියට බයිසිකලයෙන් ගියේ?

උ: මම බයිසිකලය දාලා ගියා කියලා මම හිතන්නේ.

(page 55)

However, learned President's Counsel for the appellants has submitted that under cross-examination, Rasika was not too certain as to how he went to the police station. Learned President's Counsel relied submitted that in the following responses of the witness, he conceded that he went to the police station by bicycle:-

ප්‍ර: තමා ගියේ වෙඩි තියනවත් එක්කම නම් හරිද? වැරදිද?

උ: වෙඩි තියනවත් එක්කම පාපැදියෙන් මම ආවා.

ප්‍ර: තමා පොලිසියට ගියා කිව්වා නේද?

උ: ඔව්.

(page 77-78)

The Learned President's Counsel for the first and second appellants has stressed that this is a vital contradiction in the testimony of the only eye witness of the murder, which made his testimony totally

unreliable. However, I am satisfied that the cause of the confusion in the mind of the witness was satisfactorily explained by him at the commencement of his testimony, when he stated as follows:-

ප්‍ර: තමන් හැම වෙලාවෙම කියනවා මම හිතන්නේ කියලා. ඇයි එහෙම උත්තර දෙන්නේ?
උ: ඊට පස්සේ වෙච්ච දේවල් මතක නැහැ.
ප්‍ර: දැක්ක දෙයක් ඇයි හිතන්නේ කියලා කියන්නේ සිද්ධිය දැක්කා නම්?
උ: මට මතක නැහැ ඊට පස්සේ වුන දේවල්.
ප්‍ර: තමන්ගෙන් මම මුලින්ම අහනකොට කිව්වා සිද්ධිය තමන් දන්නවා කියලා?
උ: සිද්ධියෙන් පස්සේ වූ දේවල් මට මතක නැහැ.
ප්‍ර: තමන්ට මතක කොයි අවස්ථාවේ වූ දේවල්ද?
උ: වෙඩි තියපු අවස්ථාව වෙනකල් මට මතකයි.
(page 55)

In these responses, witness Rasika has explained that due to the sudden and terrifying nature of the incident, he could not remember clearly what happened after the shooting, although he remembers very well what transpired prior to the shooting. The witness has stated in evidence that he was overcome with fear and he simply wanted to get away from the scene and get to the police station, and to comparative safety. He explained this clearly in responding to cross-examination as follows:-

ප්‍ර: කොයි වෙලාවේද ඔය ස්ථානයේ සිට දුවන්න ගත්තේ?
උ: වෙඩි තියනවත් එක්කම දුවන්න ගත්තා.
ප්‍ර: හිරාන්ට වෙඩි තබනවත් සමගම තමා පැනලා දිව්වා?
උ: ඔව්.
ප්‍ර: ඒ වෙලාවේ තමාට මොන වගේ හැඟීමක්ද ඇති වුනේ?
උ: බයක් වගේ.
ප්‍ර: තමා කොහේටද ගියේ?
උ: කෙලින්ම පොලිසියට ගියා.
ප්‍ර: ඇයි අතරමග නතර නොවුනේ?
උ: මගේ මානසික තත්ත්වය කියන්න බැහැ.
ප්‍ර: තමාට උවමනා වුනේ කොහේට යන්නද?
උ: පොලිසියට.
ප්‍ර: පොලිසියට දිව්වා කියලා කිව්වා තමා?
උ: ඔව්.
(page 82-83)

I am of the view that the trial judge was justified, in all the circumstances of the case, in rejecting the submissions of the learned President's Counsel in regard to the credibility of Rasika, the sole eye witness to the murder, whose testimony has in many material particulars been corroborated by the testimony of other witnesses including Reserve Police Constable Karunasena, who identified the assailants he encountered at Kande Road, and Dr. Athula Piyaratne, who testified as to the nature of the injuries sustained by the deceased.

As Dias J. observed in *The King v Marshall* (1948) 51 NLR 157 at page 159, an alibi "is nothing more than an evidentiary fact, which, like other facts relied on by an accused, must be weighed in the scale against the case of the prosecution. If sufficient doubt is created in the minds of the jury as to whether the accused was present at the scene at the time the offence was committed, then the prosecution has not

established its case beyond reasonable doubt and the accused is entitled to be acquitted." In my opinion, there is overwhelming evidence in this case of the presence of the first and second appellants at the scene of the crime at the time of the murder, and neither the trial judge, who considered the plea of alibi in the context of the totality of the evidence, nor the Court of Appeal, which had affirmed his decision, had entertained any reasonable doubt as to their guilt.

The question of the alibi set up by the first and second appellants was not one of the grounds of appeal to the Court of Appeal in this case, nor were any submissions advanced on behalf of the appellants to that court or any observations made by that court in that regard in its impugned judgment. In these circumstances, I am of the opinion that the question on which special leave to appeal was granted in this case, has to be answered in the negative and against the first and second appellants. I see no reason to interfere with the decision of the Court of Appeal as in my view, on the totality of the evidence led at the trial, the guilt of the first and second appellants has been established beyond any reasonable doubt in the face of the plea of alibi taken up by them.

Conclusions

For all these reasons the conviction of all three appellants is affirmed. No submissions were made in the course of the hearing in regard to the sentence, and hence the mandatory sentence imposed by the trial judge on the appellants in terms of section 296 of the Penal Code will stand.

The appeal is dismissed with costs.

JUDGE OF THE SUPREME COURT

CHANDRA EKANAYAKE, J,

JUDGE OF THE SUPREME COURT

SATHYAA 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 appeal

Hettimudiyanselage Nani Wijesiri Somalatha Menike

Applicant

SC Appeal No. 14/2013
SPLA 62/2012
HC Colombo HCALT 117/2008
LT Colombo 8/940/2000

Vs

Dalugama Multi Purpose Cooperative Society Ltd.

Respondent

And

Hettimudiyanselage Nani Wijesiri Somalatha Menike
Applicant-Appellant

Vs

Dalugama Multi Purpose Cooperative Society Ltd.
Respondent-Respondent

And

Hettimudiyanselage Nani Wijesiri Somalatha Menike
Applicant-Appellant-Petitioner

Vs

Dalugama Multi Purpose Cooperative Society Ltd.
Respondent-Respondent-Respondent

Now Between

Hettimudiyanselage Nani Wijesiri Somalatha Menike
Applicant-Appellant-Petitioner-Appellant

Vs

Dalugama Multi Purpose Cooperative Society Ltd.
Respondent-Respondent-Respondent-Respondent

Before : Eva Wanasundera PC, J
B Aluwihare PC, J
Sisira J de Abrew J

Counsel : Samantha Vithana with Ananda Abeywickrama for the Applicant-Appellant-Petitioner-Appellant
Neville Abeyrathne with Rakitha Abeysinghe for the Respondent-Respondent-Respondent-Respondent

Argued on : 26.5.2014
Decided on : 30.7.2014

Sisira J de Abrew J.

This is an appeal against the judgment of the learned High Court Judge dated 16.2.2012.

The Applicant-Appellant-Petitioner-Appellant (hereinafter referred to as the Applicant-Appellant) who was an employee of the Respondent-Respondent-Respondent-Respondent (hereinafter referred to as the Respondent society) filed an application in the Labour Tribunal of Colombo seeking, inter alia, reinstatement and back wages on the ground that her services were unjustly and unreasonably terminated by the respondent society. After inquiry, learned Labour Tribunal President, by his order dated 4.11.2008, ordered the payment of salary of seven years as compensation but did not order reinstatement. Being aggrieved by the said

order of the learned Labour Tribunal President, the Applicant-Appellant appealed to the High Court. The learned High Court Judge, by his judgment dated 16.2.2012, ordered reinstatement of the Applicant-Appellant but without back wages. Being aggrieved by the said order of the learned High Court Judge, the Applicant-Appellant has appealed to this court. This court granted leave to appeal on the following questions of law.

1. Is the said judgment of the learned Provincial High Court Judge contrary to law and against the weight of evidence adduced at the inquiry before the Labour Tribunal?
2. Has the learned Provincial High Court Judge erred in law as he merely denied the back wages, without a break in service and without giving any reason as to why the Applicant-Appellant is not entitled to reinstatement with full back wages and without break in service?
3. Has the learned Provincial High Court Judge erred in law as he has failed to take into account that the Petitioner was without any salary or income from the date of suspension of services of the Applicant-Appellant which was from 17.7.1997?
4. Has the learned Provincial High Court Judge erred in law when he decided that the Petitioner was not entitled to back wages from 17.8.1997 up to the date of reinstatement?

The Main Contention of learned counsel for the Applicant Appellant was that the learned High Court Judge was wrong when he did not order back wages. When I consider the facts of the case and submission of Counsel, the above questions of law can be summarized into one question which can be set out as follows: Whether the learned High Court Judge was in error when he, having granted reinstatement, did not order back wages of the Applicant-Appellant

Facts of this case may be briefly summarized as follows.

The Applicant-Appellant who was the accountant of the Respondent society prepared a profit and loss account in respect of a New Year Fair conducted by the Respondent society in April 1997. However, the General Manger of the Respondent society, thereafter, requested her to prepare a fresh account reducing certain expenses. As she received written instructions from the General Manager regarding preparation of a fresh account, she submitted a fresh profit and loss account to the respondent society. The Applicant-Appellant too was requested to participate in a meeting of the Board of Directors of the respondent society which was held on 30.7.1997. At the said meeting a dispute arose between the Applicant-Appellant and the Chairman of the respondent society. As a result of the said dispute, the Chairman of the Respondent society pulled the Applicant-Appellant by her hair and chased her away after threatening her with death. She made a complaint to the police regarding the said behaviour of the Chairman of the Respondent society. When the Applicant-Appellant reported for duty on the following day (31.7.1997), the chairman of the Respondent society assaulted her, threatened her with death again and forcibly removed her from the premises of the Respondent society. She again made a complaint to the police regarding the above incident. OIC Peliyagoda Police Station, on the said complaint, filed a case in the Magistrate Court of Colombo against the said Chairman alleging that he committed offences under Sections 314 and 486 of the Penal Code. Later the said Chairman settled the case after paying Rs.10,000/- to the Applicant-Appellant.

At the inquiry before the Labour Tribunal, the Chairman of the Respondent society did not give evidence. The learned Labour Tribunal President, by his order dated 4.11.2008, held that the respondent society unjustly and unreasonably terminated the services of the Applicant-Appellant. The learned High Court Judge,

by his order dated 16.2.2012, too held that the termination of services of the Applicant-Appellant was unjust and unreasonable. The Respondent society did not appeal against the order of the learned Labour Tribunal President nor did it appeal against the judgment of the learned High Court Judge. There is a clear determination by both the President of the Labour Tribunal and the learned High Court Judge to the effect that the termination of services of the Applicant-Appellant by the Respondent society is unjust and unreasonable. When I consider the evidence led at the trial before the Labour Tribunal, I hold the view that there is no ground to interfere with the said determination. Why did the learned President of the Labour Tribunal not order reinstatement of the Applicant-Appellant? Why did the learned High Court Judge fail to order back wages having ordered reinstatement? He has not given reasons for not ordering back wages. The Applicant-Appellant was denied of her salary from 17.10.1997. Due to whose fault did she loose her salary? Certainly it was not due to her fault. It was the Chairman of the Respondent society who assaulted her and forcibly removed her from office. Under these circumstances is it reasonable to deny her back wages? I feel it is not reasonable at all. Learned Counsel for the Respondent society submitted that the society will not be in a position to pay her back wages due to economic conditions. But there is no evidence to support this contention. It has to be noted here that the Applicant-Appellant was only drawing a salary of Rs.3881/- at the time of her termination. Is there any evidence to say that her behaviour in the Respondent society was bad and that it created displeasure among the other employees? The answer is no. There is no evidence to suggest that the Applicant-Appellant had breached the discipline of the Respondent society. In fact it is the Chairman of the Respondent society who violated the discipline of the Respondent society by assaulting her. The Chairman of the Respondent society in fact settled the case

filed against him by the police after paying Rs.10,000/- to the Applicant-Appellant. He did not give evidence before the Labour Tribunal.

In the case of Millers Limited Vs Ceylon Mercantile Industrial and General Workers Union [1993] 1 SLR 179 His Lordship Justice Bandaranayake held thus: "The order must be fair by all parties in the interest of discipline."

When I consider all the above maters, there is no justification to deprive her of her back wages, allowances and increments. In my view, the learned High Court Judge was in error when he, having granted reinstatement, did not grant back wages.

For the above reasons, I order reinstatement of the Applicant-Appellant without a break in service with back wages from the date of termination (17.10.1997). I do not order costs. I allow the appeal.

Appeal allowed.

Judge of the Supreme Court

Eva Wanasundara PC,J

I agree.

Judge of the Supreme Court.

B Aluwihare 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 Article 128 of the Constitution of Democratic Socialist Republic of Sri Lanka

Terrace Linton Percival Tirunayake
No. 7/1, Menerigama Place,
Mt. Lavinia
PLAINTIFF

-Vs-

SC Appeal No. 18B of 2009
Supreme Court Leave to Appeal No. 160/2008
High Court Application No. NWP/HCCA/KUR/141/2001 F
DC Kurunegala Case No. 4694/L

M.S.R. Fernando
No. 222, Puttalam Road
Kurunegala.

DEFENDANT

M George Anthony Fernando
No. 220, Puttalam Road,
Kurunegala.
SUBSTITUTED DEFENDANT

AND BETWEEN

M. George Anthony Fernando
No. 220, Puttalam Road.
Kurunegala.
SUBSTITUTED DEFENDANT

APPELLANT

-vs-

Terrace Clinton Percival Thirunayake
No. 7/1, Menerigama Place.
Mt. Lavinia.

PLAINTIFF RESPONDENT

AND

Terrace Clinton Percival

Thirunayake

No. 7/1, Menerigama Place,
Mt. Lavinia.
PLAINTIFF RESPONDENT

PETITIONER

-Vs-

M. George Anthony Fernando
No.220, Puttalam Road,
Kurunegala.
SUBSTITUTED DEFENDANT
APPELLANT RESPONDENT

Before: Saleem Marsoof PC, J
Sathyaa Hettige PC, J
Rohini Marasinghe J

Counsel: Mr Ranjan Suwandaratne for the Plaintiff-respondent- appellant.
Mr Chula Bandara for the defendant -petitioner- respondent

Argued on: 6/12/2011, 23/03/2012 and 17/02/2014
Decided On: 07.03.2014

SATHYAA HETTIGE P.C. J

This is an appeal from a Judgment of the Civil Appellate High Court of North Western Province holden at Kurunegala delivered on 5th November 2008.

LEAVE TO APPEAL

The Supreme Court granted leave to appeal on the 27th March 2009 on the following questions of law ;

(i) Have the learned High Court Judges of the Civil Appellate High Court erred in law by holding that the petitioner has failed to identify the corpus of the said District Court action in arriving at their final conclusion?

Have the learned High Court Judges erred in law by failing to consider the evidence given by the Surveyor with regard to the identity of the corpus in arriving at their findings?

The plaintiff respondent petitioner (hereinafter referred to as the petitioner) instituted a rei vindicatio action in the District Court of Kurunegala by the plaint dated 06.09.1994 for the following reliefs:

(I) for a declaration of title that the petitioner is the owner of the land morefully described in the second schedule to the plaint

(II) to eject the defendant respondent (hereinafter referred to as the respondent) and his agents occupying a portion of the said land

(III) damages in a sum of Rs.15000/- up to date of the plaint and damages calculated at the rate of Rs 500/ per year until possession is restored to the petitioner.

BRIEF OUTLINE OF FACTS

The position of the appellant is that he has derived title to the land in question from the final decree entered in the year 1965 in DC Kurunegala case No.1798/P (marked 'P6') and became entitled to lots 2A and 2B of Plan No 686 dated 1982.01.08 (marked P'3') and is described in the 1st Schedule to the plaint. In paragraph 5 of the plaint the Appellant has stated that the corpus involved in the case has been sub divided into several other portions bearing assessment numbers 222, 222/1, 222/2, 222/3, and 222/4. The portion of the land subject to the dispute is the sub divided portion of land bearing assessment number 222.

It is also to be mentioned that the appellant took up the position that, as averred in the plaint , the appellant 's predecessor permitted the respondent to construct a carpentry shed on the land on payment of a ground rent, but the respondent disputes the appellant's title and claimed that the property described in the schedule to the plaint belongs to him on the basis of prescription and prevented the appellant from entering the land in suit. The appellant has also testified in the original court that he sold lot 2 A leaving lot 2 B behind.

The Learned Counsel for the respondent submitted that the appellant failed to give any explanation as to why he failed to take steps to obtain possession of the land after the final decree.

DISTRICT COURT TRIAL

The respondent further stated that the corpus as stated in the plaint was different and the land he had been in possession for a long period of time has been described in the schedule to the answer and there were two buildings bearing assessment numbers 220 and 222.

It can be seen from the evidence that has been elicited in the District Court the appellant had produced the final Decree entered in the D.C. Kurunegala case no. 1798/P and testified that by virtue of the final decree he identified the property occupied by the deceased defendant respondent as the property bearing assessment no. 222.

It is pertinent to note that the appellant has filed the present rei vindicatio action No. 4694/L after 29 years from the final decree and also filed separate D.C. action No 4010/L against the other occupants who were residing in lot 2B. The respondent argues that appellant has failed to explain as to why he did not take steps under section 344 of the Civil Procedure Code.

The section 344 of the Civil procedure Code deals with " *all questions arising between the parties to the action in which the decree was passed , or their legal representatives, and relating to the execution of the decree , and not by separate action."*

In the case of **Silva v Sellohamy 25 NLR 113** it was observed by court that " the policy of the Code is where possible, to grant relief in the same action instead of referring parties to a separate action"

The learned District Judge gave judgment in favour of the plaintiff on 29th August. 2001 and held that the appellant was entitled to the property in suit and ordered ejectment of the respondent.

CIVIL APPELLATE HIGH COURT

The respondent appealed the judgment of the District Court to the Civil Appellate High Court on the basis that the appellant has not adduced evidence to establish and identify land in dispute and the respondent has prescribed to the land. The Civil Appellate High Court allowed the appeal and dismissed the judgment of the learned District Judge on the basis that the land in dispute has not been precisely identified and the land described in the schedule to the plaint is different in that the land is a larger land in

extent of 1 rood and 30 perches whereas the respondent was occupying only a premises in extent of 12.05 perches.

At the hearing of this appeal it transpired that the appellant did not call for a commission on a Surveyor to identify the corpus. However, the appellant ` summoned a surveyor , one C. Kurukulasuriya to produce a plan made in 1994 on a commission issued by court in a different case No. 4009/L. The respondent contended that the plan No. 2346 dated 07/01/1994 produced by the appellant in the original court through Mr Kurukulasuriya did not contain the signature of the learned District Judge which is a failure on the part of the appellant to procure the said plan from the original case record marked in a different case. Therefore, the respondent contended that the plan marked P1 has not been accepted by the learned District Judge.
It appears from the evidence in the original court that the title of the land is not in dispute and in fact the respondent has admitted the title of the appellant.(paragraph 3 of the answer). However, the respondent claims that he is entitled to the corpus based on the ground of prescription.

It is also to be noted that when the appellant gave evidence in the original court and testified at page 87 of the brief that the all the lots shown in the 2nd schedule to the plaint belonged to the appellant In that there are 6 lots bearing assessment numbers 221/1, 222/2, 223/3, 224/4, 220 and 222. And what is relevant to the subject matter of this case are the assessment numbers 220 and 222. The respondent is residing in premises No. 222.
However, the appellant has included in the schedule to plaint only assessment No. 222 whereas there are other several lots in total extent of 1 rood and 30 perches including the assessment nos. 220 and 222 in lot 2B in plan no. 686 dated 1982-01-08 within the boundaries shown therein.

It must be stated that in a rei vindicatio action claiming a declaration of title and ejectment it is a paramount duty on the part of the petitioner (Appellant in this case) to establish correct boundaries in order to identify the corpus. (See Peiris v Saunhamy 54 NLR 207) .Therefore, it is obviously clear that the appellant has failed to produce evidence to identify the land in dispute. The land in dispute in the present case forms part of several other lots containing several assessment Nos. and the Respondent has been in exclusive possession of premises No. 222. This being an action *rei vindicatio* there is a greater and heavy burden on the part of the Appellant to prove not only that he has a *dominiun* to the land in dispute but also the specific precise and definite boundaries when claiming a declaration of title. (See also **Abeykoon Hamine Vs. Appuhamy** (1950) 52 NLR

49). Therefore, it is obviously clear that the appellant has failed to produce evidence to identify the land in dispute.

The respondent submitted that the extent of the premises occupied by him is only 12.05 perches and the land is completely different from the land described in the schedule to the plaint which is extent of 1 rood and 30 perches. It was strongly submitted by the counsel for the respondent that the appellant has failed to comply with the provisions contained in section 41 of the Civil procedure Code.
Section 41 of Civil Procedure Code provides as follows:
"*When the claim made in the action for some specific portion of land , for some share or interest in a specific portion of land , then the portion of land must be described in the plaint so far as possible by reference to physical metes and bounds , or by reference to a sufficient sketch , map, or plan to be appended to the plaint , and not by name only.*"

It is to be emphasized that in a claim of title ,the land or premises in suit must be described with precision and definiteness and there should not be any discrepancy as to the identity of the land in dispute.

CONCLUSION
Therefore, I agree with the submissions of the learned counsel for the respondent that the land in dispute has not been precisely and definitely described in the schedule to the plaint in terms of the law and my view on the two questions of law raised by the appellant, is that the Civil Appellate High Court has made no error of law and correctly decided the High Court appeal . In the circumstances I conclude that the appeal of the appellant is without any merit and should fail .
For the reasons set out above, having considered the oral arguments and the written submissions of the counsel for both parties I am not inclined to grant any reliefs to the appellant and I affirm the judgment of the Civil Appellate High Court holden in Kurunegala dated 05.11.2008.
Accordingly, I dismiss the appeal with no costs.

JUDGE OF THE SUPREME COURT

Saleem Marsoof PC.J
I agree

JUDGE OF THE SUPREME COURT

Rohini Marasinghe J
I agree

JUDGE OF THE SUPREME COURT

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

SC.Appeal No. SC/CHC/19/2011

HC. Civil No. 278/2007/MR

In the matter of an Appeal in terms of Sections 5(1) & 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code and Articles 127 & 128 (4) of the Constitution.

MOD TEC LANKA (PVT) LTD,

No.7, Rajagiriya Udyanaya, Rajagiriya.

Defendant-Appellant

-Vs-

FOREST GLEN HOTEL & SPA(PVT) LTD

No.7, Wilson Street, Colombo-12.

Plaintiff-Respondent

BEFORE : **TILAKAWARDANE. J**

HETTIGE. P.C. J &

MARASINGHE. J

COUNSEL : Appellant is absent and unrepresented

Dr. Wickrama Weerasooriya with B.U Jayaweera for the Respondent

ARGUED ON : 13.01.2014

DECIDED ON : 17.03.2014

TILAKAWARDANE. J

The Plaintiff-Respondent (hereinafter referred to as the 'Respondent') instituted action against the Defendant-Appellant (hereinafter referred to as the 'Appellant') in the High Court of the Western Province holden in Colombo exercising civil jurisdiction, seeking inter-alia, the sum of Rs. 28,704,466/= together with legal interest, and in an alternative cause of action, the payment of the sum of Rs. 24,954,466/= with a decreed sum of legal interest. The aforementioned claims were consequent to a terminated contract between the Respondant and the Appellant, for the structural and civil construction of a

hotel in Elk Plain, Nuwara Eliya. The Respondant had advanced the Appellant a sum of Rs. 28,246,400/=however at the time of the termination of the contract, the Defendant had only used a sum of Rs. 3,291,934/=, entitling the Respondent to recover the remaining sum of Rs. 24, 954,466/=.

As per a Motion filed on the 02.09.2009, the Respondents informed the High Court that they will not be calling any other witnesses. When the case was commenced on the 16.12.2009, the Appellant was not ready to proceed with their case and so the trial was fixed for the 04.12.2009. On this given date, neither the Appellant nor their Counsel was present in the High Court, resulting in the Respondent seeking an Ex-parte order, and the matter was fixed for the 15.12.2009. On that date, the Appellant did not call any evidence, and simply relied on the cross-examination of the Respondent's main witness. The Learned Judge of the High Court (Civil) of Colombo thereafter decided in favour of the Respondent, on the 03.11.2010.

The Appellant tendered a Petition of Appeal to the Supreme Court of Sri Lanka, bearing Appeal number 19/2011, dated 31.12.2010 and notices were issued to both the Respondant and the Appellant. However the Notice sent to the Appellant was returned undelivered with the endorsement that they had "Left the place". Consequently, Notice was served to the Appellant by means of Registered Post. The case was called on the 15.02.2013 to fix a date for hearing and Notices were served to this effect, however here too, the Notice sent to the

Appellant was returned undelivered. A subsequent Notice was sent by means of Registered Post.

When the case was heard on the 15.02.2013 the Court was informed that the Instructing Attorney for the Appellant, Mr. Almeida, had passed away and a fresh proxy would be filed. Conversely on the 19.03.2013, the Junior Counsel for the Appellant informed the Court that he was unable to file a fresh Proxy and moved that the matter be re-fixed for hearing, in which time the Junior Counsel would file a new Proxy. The matter was re-fixed, however on this date the Appellant was absent and unrepresented. The Court directed a Notice be sent again to the Appellant, to appear personally.

On this day, the Respondent also informed the Court that the Appellant had changed the name of the Company. He subsequently filed a Motion, informing the Registrar of the new address of the Company on the 17.10.2013 and a Notice was sent to the new address. When the case was heard on the 31.10.2013, the Appellant was absent and unrepresented. An additional Notice was served on the Appellant however neither the Appellant nor their Counsel was present when the case was called on the 13.01.2014.

It is apparent that in both the High Court, and the Supreme Court, the Appellant has employed a variety of tactics to prolong the duration of both proceedings, to the detriment of the Respondant and the respective Courts. What is unfathomable is that in this particular case, it is the Appellant who has failed to act with due diligence in pursuing their claims, after the institution of proceedings. If the Appellant felt the need not to pursue this matter, he should have withdrawn his Appeal, rather than allow it to come before this Court in such an improvident manner. This Court does not take lightly the apparent misuse of the procedures of Court, whether it be calculated or negligent.

As stated ***Rule 34*** of the **Supreme Court Rules 1990**, where a party has failed to show "due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application", the Court is entitled to dismiss the Appeal or Application for non-prosecution. For the purposes of this provision, due diligence is defined in Black's Law Dictionary as "such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances".

In the case before this Court, the Appellant has not acted in a manner which the Court sees fit to satisfy the burden upon him and it is undeniable in that there has been such a failure to show due diligence. No reasonable or prudent

person will instigate such an action in this Court and allow the matter to be neglected to this extent. Such an attitude may be regarded as being disrespectful not only to this Court, but also to the administration of justice and as a result, undermines the judicial process, as was held in **Daniel v. Chandradeva** (1994) 2 SLR 1

With reference to the change of address of the Appellant, the onus to notify Court that a change has been made to a party's address falls on the party who has made the change, if not, the situation will create an undue detriment to the opposing party and will serve as a misuse of the valuable time of the Court. Not only will it cause a loss in time and resources to the opposing party, but it serves as an unnecessary delay in the deliverance of justice. Furthermore, the Court notes that it was the Respondent who informed the Court of the change in address of the Appellant and as expressed by Justice Wijetunga in **Priyani E. Soysa v. Rienzie Arsecularatne** :

> ``*It is inconceivable that a party has to speculate on what the present address of an adverse party is or that he has to 'go on a voyage of discovery' to ascertain such present address.* ``

With regards to the reasons stated above, this case is dismissed. No costs.

Sgd.

JUDGE OF THE SUPREME COURT

HETTIGE. P.C. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

MARASINGHE. J

I agree.

Sgd.

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.

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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.

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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.

Solaimuthu Rasu,
Dickson Corner Colony,
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Petitioner-Appellant

Vs.

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Respondent-Respondents

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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 Appeal against the Judgment of the Provincial High Court of North Central Province dated 11.01.2011 in Case No. NCP/HCCA/ARP/508/2008 (F) DC. Polonnaruwa No.9491/L/2003.

SC. Appeal No. 22/2013

SC/HC(CA)LA No. 56/2011

NCP/HCCA/ARP/508/2008(F)

DC. Polonnaruwa No.9491/L/2003

1. Wickrama Arachchilage Shriyakanthi
2. Hewa Malavige David,

Both of at C.S. 105, Thambala Road, Railroad Junction, Polonnaruwa.

Plaintiffs

Vs.

E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa.

Defendant

And Between

E.R. Podi Nileme of C.S. 105, Thambala Road, Polonnaruwa.

Defendant-Appellant

Vs.

1. Wickrama Arachchilage Shriyakanthi
2. Hewa Malavige David,

Both of at C.N. 105, Thambala Road, Railroad Junction, Polonnaruwa.

Plaintiff-Respondents

SC. Appeal No. 22/2013

And Now Between

E.R. Podi Nileme of C.S. 105,
Thambala Road, Polonnaruwa.

Defendant-Appellant-Appellant

Vs.

1. Wickrama Arachchilage Shriyakanthi
2. Hewa Malavige David,

Both of at C.N. 105, Thambala Road,
Railroad Junction, Polonnaruwa.

Plaintiff-Respondent-Respondents

* * * * *

BEFORE : **Tilakawardane, J.**

Dep, PC.J.

Wanasundera, PC.J.

COUNSEL : Ms. Sudarshani Coorey for the Defendant-Appellant-Appellant.

Senaka De Saram for the Plaintiff-Respondent-Respondents.

ARGUED ON : 18-**11-2013**

DECIDED ON : **17-01-2014**

* * * * *

SC. Appeal No. 22/2013

Wanasundera, PC.J.

Leave to Appeal was granted by this Court on 05.02.2013, in order to enable an Appeal against the judgment of the Civil Appellate High Court of the North Central Province holden in Anuradhapura dated 11.01.2011, on the following questions of law as enumerated in paragraph 9(v), (vi) and (vii) of the Petition dated 21.02.2011:

(9v) Has the Court erred in failing to consider and apply the law laid down in Arunachalam v Mohamedu (1914) 17 NLR 251 which is a judgment referred to in the decision of the Court of Appeal in Jayaratna v. Jayaratna (2002) 3 SLR 331 which was cited by the High Court in its impugned judgment in this Appeal;

(9vi) Has the High Court erred in failing to hold that a Defendant is entitled to rely on a defence which accrued to him prior to filing of his answer although it accrued after the institution of the action by the Plaintiff;

(9vii) Although this action has been instituted as a possessory action, as the Plaintiff has pleaded damages as against the Defendant and as the District Court and the High Court upheld the claim of damages and granted damages, is not the Defendant, entitled to reply on his legal right, based on his permit, to possess the land, as a defence to this action of the Plaintiff.

The facts relating to this Appeal are as follows. The Plaintiff-Respondent-Respondents [hereinafter referred to as the Respondent] claim that on or about 14.08.2002, the Petitioners forcibly entered the land in suit [hereinafter referred to as the land] namely, Lot No. 793 in extent 18.7 perches depicted in F.S.P. No. 3950 and commenced construction of a shop. Distressed by this behavior, the Respondents lodged a Police complaint and legal action by way of Case No.

52472 in the Primary Court was instituted wherein the Petitioners were granted possession of the premises. Aggrieved by this decision, the Respondents instituted action by Plaint dated 09.05.2006 in the District Court of Polonnaruwa, in pursuance of a declaration that the Respondents were the possessors of the abovementioned land. Judgment was entered in favour of the Respondents at the District Court and the Petitioner appealed against this decision to the Civil Appellate High Court of North Central Province where the decision was affirmed. Aggrieved by said judgment, action was instituted in the Supreme Court.

The Respondents stated that Ganepola Aarachchige Gertie Nona, the mother of the 1st Respondent, was in possession of the premises since 1956 while the 2nd Respondent too enjoyed and developed the land from 1956 until his death on 11.06.2003. The 1st Respondent claims to have enjoyed the land from her birth and developed it subsequent to the 2nd Respondent becoming frail. However, due to the actions of the Petitioners, they were dispossessed of their land. The Respondents also claim that the Petitioners have possession of the adjoining land, namely Lot No. 793. Thus, as the Respondents have instituted a possessory action, the Petitioners have moved to present evidence of title to establish ownership and militate against the possessory claim of the Respondents by way of Case No. 800/L instituted in the District Court which made an ejectment order against Gertie Nona and the 2nd Respondent on 19.09.1973. The Petitioners also relied heavily on a permit issued under Section 19(2) of the Land Development Ordinance bearing No. NCP/TK/09/02.06 issued on 06.03.2003 for Lot No. 792 and 793.

Firstly, this Court finds it necessary to ascertain the need for proof of title in a possessory action and observes that Section 4 of the Prescription Ordinance No. 22 of 1871 states the following:

> "It shall be lawful for any person who shall have been disposed of any immovable property otherwise than by the process of law, to institute proceedings against the person dispossessing him at any time ***within one***

year of such dispossession. And on proof of such dispossession within one year before action is brought, the Plaintiff in such action shall be entitled to a decree against the Defendant for the restoration of such possession ***without proof of title.***

Provided that nothing herein contained shall be held to affect the other requirements of the law as respects possessory cases."

Furthermore, in Perera v Perera 39 CLW 100, Gratiaen J. held that "In possessory actions it is not appropriate to investigate title for the purpose of deciding whether or not a party's claim to possession of land is justified in law."

A point of contention, especially arising in terms of whether the Respondents have proof of title, was the Permit bearing No. NCP/TK/09/02/06 obtained by the Petitioners. A question arose as to whether the Defendant-Appellant could rely on this permit which was issued on 06.03.2003, to entitle him a legal right to possess the land, even though action had already been instituted in the District Court of Polonnaruwa on 07.02.2003. This question was answered in the negative by both the District Court and the High Court. Given that neither the Prescription Ordinance nor the case law insists on proof of title in a possessory action, this Court finds that the relevance of the Permit on this point is vitiated.

The Court also finds it imperative to ascertain the accurate extent of the land in suit in order to effectively answer the questions of law posed. In the case No. 800/L referred to by the Petitioner an ejectment order was made to eject Gertie Nona and the 2nd Respondent from the land. The Petitioner has heavily relied on this ejectment order to support his claim that the Respondents had no possession of the land. However, this Court notes that the extent it considers is one of two Roods only whereas the Licensed Surveyor, in evidence indicates that the Plan No. 3950 was derived from the Original Plan No. 472 which has presently been divided into two allotments, namely Lot No. 792 and 793 which in total extent is 2 Roods and 23 Perches. Thus, Case No. 800/L cannot legally be relied upon in relation to the remaining 23 Perches. Furthermore, Lot No. 793 of

Plan F.S.P. No. 3950, marked V2 in evidence, is indicated to be 0.0473 Hectares in extent i.e. 18.7 perches or thereabout which falls comfortably within the remaining 23 Perches, further supporting the contention that the Petitioner can stake claim to only 2 Roods and not the remaining extent envisaged in Plan F.S.P. No. 3950.

The Petitioner also relied heavily on the abovementioned Permit issued on 06.03.2003 in respect of Lot No. 792 and 793 for an extent of 2 Roods and 21.5 Perches, which, given the extent in case No. 800/L, the Petitioner cannot lay claim to the remaining 21.5 Perches. Given this reality, it is clear to this Court that the Petitioner can stake a claim only to 2 Roods but not to any further extent. This Court makes reference to the question posed by the Petitioner as to whether he can rely on his legal right to possess the land based on his permit, as a defence against the plea of damages by the Respondents. I note that as per the judgment in Case No. 800/L, the Petitioner can only claim title to 2 Roods only. Thus, any attempt to use a non-existent legal title with regard to the remaining 23 Perches [which encompasses Lot No. 793] as a defence against a plea of damages, should fail.

The Petitioner further raised the question of whether the High Court erred in failing to consider and apply the law in Arunachalam v. Mohamedu (1914) 17 NLR 251, which states that "A claim in reconvention may be made in respect of a cause of action that accrued at any time before the filing of the answer", as the Answer of the Petitioner was filed much later. However, reference must be made in ascertaining this issue, to Jayaratne v. Jayaratne (2002) 3 SLR 331 where the Court of Appeal in discussing the relevance of the case to a similar situation stated that 'It appears that this decision has been based on the facts peculiar to that case and does not lay down a rule which operates as an exception to the general rule that the rights of the parties are to be determined as at the date of the plaint.' The general rule that the rights of the parties being determined at the date of the plaint is laid down in Silva v. Fernando (1912) 15 NLR 499 and Talagune v. De Livera (1997) 1 SLR 253 and this Court does not

find any extenuating circumstances in the present case that merits an exception to this general rule.

I answer the questions of law enumerated at the commencement of this judgment in the negative, according to the reasons given above. This appeal is therefore dismissed. 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 an Application For Special Leave to Appeal in the Supreme Court under ` Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Arumabadadurage Ariyaratne,
Bolhinda, Weragama,
Ambalantota.

Accused Appellant Petitioner

S.C. Appeal 23A/2009
S.C. (Spl.) L.A. No. 26/2009
C.A. No. 156/2005
H.C. Hambantota 63/99

Vs.

Honouable Attorney General,
Attorney General's Department,
Colombo 12

Respondent.

BEFORE : K. SRIPAVAN, J.
P, DEP ,P.C.,J.
R. MARASINGHE, J.

COUNSEL **:** Dr. Ranjit Fernando for Accused Appellant Petitioner .
Sarath Jayamanne, Deputy Solicitor General for Respondent

ARGUED ON : 29.04.2014

DECIDED ON : 16.05.2014

K. SRIPAVAN, J.

The Accused Appellant Petitioner (hereinafter referred to as the "Appellant") was indicted before the High Court of Hambantota on the following two counts :

Count 1. That he did on the 28th of September, 1977 kidnap one Jayamunigedera Suramya from the lawful custody of her guardian Anulawathie thereby committing an offence contrary to Section 354 of the Penal Code.

Count 2 That he did commit the offence of Rape on the said Jayamunigedera Suramya during the period 28th September 1997 and 26th October 1997 thereby committing an offence contrary to Section 364(2) of the Penal Code.

The High Court found the Appellant guilty on both counts at the trial and sentenced him on 28.09.2005 as follows:-

Count 1 Five years Rigorous Imprisonment.

Count 2 Ten years Rigorous Imprisonment with a fine of Rs. 2500/= and an order for compensation in a sum of Rs. 5000/= with a default term of six months Rigorous Imprisonment.

The Court further ordered that both sentences to run concurrently.

The Appellant preferred an appeal to the Court of Appeal against his conviction and sentence. When the matter came up on 20.09.2006 for support, the Appellant was represented by Dr. Ranjit Fernando and the Respondent was represented by Mr. Nawana, Senior State Counsel. The Argument was fixed for 12.06.2007.

On 12.06.2007, Dr. Ranjit Fernando appeared for the Appellant and State Counsel, Mr. Serasinghe moved for a date on behalf of Senior State Coursel Mr. Nawana on his personal grounds. Accordingly, Argument was re-fixed for 23.10.2007.

On 23.10.2007, too Dr. Ranjit Fernando appeared for the Appellant and the Respondent was represented by Mr. Nawana, Senior State Counsel. However, Argument was re-fixed for 21.05.2008 as the Bench was not properly constituted. The journal entry of 21.05.2008 did not indicate the appearances of any Counsel. It only demonstrates that since there was no time to take up the matter, Argument was re-fixed for 02.06.2008.

Again on 02.06.2008, Argument was re-fixed for 02.02.2009. The appearances of Counsel were not reflected in the Journal Entry. When the matter came up on 02.02.2009, it is minuted as follows :-

> "Accused Appellant absent and unrepresented.
>
> Sarath Jayamanne D.S.G. For the Respondent. Appeal dismissed"

Thus, it is apparent that the Court of Appeal proceeded to hear the matter exparte on 02.02.2009 and dismissed the Appeal. It is against the Judgment made on 02.02.2009, the Appellant sought this Special Leave to Appeal. The learned Senior State Counsel who appeared for the Respondent did not object to Special Leave to Appeal being granted, considering the special circumstances of the case. Accordingly, on 07.05.2009, Special Leave was granted on three questions of law. However, both Counsel confined their argument only on the following question of law:-

> "Should the Court of Appeal in the interest of fair play and justice given an opportunity to the Appellant to be heard by himself or by his Counsel on record, at the hearing of the appeal."

It is to be noted that the journal entries of 21.05.2008 and 02.06.2008 did not indicate the appearances of any Counsel. The said journal entries as appear in the case record is reproduced below for convenience.

"21.05.2008

Before : Sisira de Abrew, J. and
Eric Basnayake, J.

C.A. 117/2003 is to be taken time.

No time.

Case is re-fixed for argument.

Argument on 2/6/2008.

Sgd./

02.06.2008

Before : Sisira de Abrew, J
Eric Basnayake, J.

C.A. No. 135 is taken up for argument.

No time.

Case is re-fixed for argument on 02.02.2009.

Sgd./ "

However the learned Counsel for the Appellant indicated that on 02.06.2008 when the matter was re-fixed for argument he had taken down the date as 18.01.2009 instead of 02.02.2009. In fact, Dr. Ranjit Fernando had filed an Affidavit dated 16.02.2009 in this Court indicating, inter alia, the reason for not being present in Court in the following manner.

"8. In fact after the last occasion, way back on the 2nd of June 2008 I had erroneously intimated to my client the Accused Appellant , that the matter is coming up for Argument on the 18th of Jan. 2009 and to ensure his presence in Court on that day. This had been done by me, as is the usual practice, without realizing that I had

bona fide and by mistake taken down the wrong date of Argument which in fact was the 2nd of February, 2009.

9. In the circumstances I take full responsibility for the absence of the Accused Appellant and him not being represented on the date of the Argument viz. 2nd Feb. 2009 which was due to an inadvertent omission on my part which I admit and humbly tender my unreserved apology.

10. Consequently my inadvertence and omission had resulted in the Accused not being able to prosecute his Appeal against his conviction and sentence thus causing him irreparable harm and damage."

Having taken down the date of argument as 18.01.2009 (which was a Sunday as submitted by Counsel) Counsel should have taken the precaution of ascertaining from the Registry, the correct date of hearing thereafter on a working day. He has however failed to do so until the case was dismissed on 02.02.2009. The Court of Appeal too had failed to direct the Appellant to be present in Court on 02.02.2009 with no indication on record that he had been noticed to appear, when in fact Counsel had appeared for him on three occasions previously.

From the contents of the affidavit, I do not think that Counsel had the intention to offend the dignity of the Court or to abuse the process of Court. It is not always possible to lay down any rigid, inflexible or invariable rule which would govern all cases of default by Counsel. Each case has to be considered on its own merits. If, however, the default was in fact accidental and committed without any evil or ulterior motive, latitude has to be given to Counsel to plead his case.

The legal profession is a noble one and the mark of nobility includes the straightforward habit of owning mistakes or errors and apologizing to the opposite party and/or to Court once such mistakes or errors are realized. When

Counsel tenders an unreserved apology and explained to the satisfaction of Court, the circumstances under which the mistakes or errors were committed, it may be appropriate for the Court to accept it. Once the Counsel regrets his act, it is the duty of Court to make him feel that he is an essential link in the administration of justice and that his apology is accepted with a view that he will henceforth uphold the highest tradition with due diligence and thereby uphold the prestige of the Court.

No Counsel in my view, should be punished for bona fide mistakes. The learned Counsel frankly admitted his default on 02.02.2009 for reasons adduced in his affidavit. It appears to me that it was really a slip on his part not to have taken the date of hearing correctly. Slips of Counsel have been held to be sufficient to set aside decrees or dismissal for default. The following remarks made by Sir George Jessel M.R. In the case of *Burgoine* vs. *Taylor* (1878) 9. Ch. D. 1 at 4 may be useful to be quoted here.

> "*We think that the order asked for by the defendant ought to be made. Solicitors cannot any more than other men, conduct their business without sometimes making slips; and where a Solicitor watches the list, and happened to miss the case, in consequence of which it is taken in his absence, it is in accordance with justice and with the course of practice to restore the action to the paper on the terms of the party in default paying the costs of the day ……"*

It is absolutely basic to our system that justice must not only be done but manifestly be seen to be done. If justice was so clearly not seen to be done, the foundation of justice would ultimately suffer.

The Court has an inherent power by virtue of its duty to do justice between the parties before it. When the learned Deputy Solicitor General was asked whether

he had any doubt about the contents of the affidavit dated 16.02.2009 filed by Dr. Ranjit Fernando, Counsel emphatically answered in the negative. The fear expressed by the learned Deputy Solicitor General was that if this application is allowed it would lead to floodgates in future applications. While I agree with the submission of learned Deputy Solicitor General, I must emphasize that cases have to be considered on their merits and this order will not create a precedent to future cases. The consequence that would follow by reason of default by the Counsel is a matter falling within the discretion of the Court, to be exercised after careful consideration of the nature of the default as well as the excuse or explanation therefore in the context of the particular case. In the matter of exercise of its discretion, one of the relevant factors the Court had to consider is whether there is likelyhood of the combat being unequal entailing a miscarriage or failure of justice and a denial of a real and reasonable opportunity for defence by reason of Appellant being pitted against a competent State Counsel who is trained in law. The right to legal representation is lucidly stated by Lord Denning MR in *Pett* Vs. *Greyhound Racing Association Ltd.* (1968) 2 All E.R. 545 at 549 in the following words :

> "*It is not every man who has the ability to defend himself on his own. He cannot bring out the points in his own favour or the weaknesses in the other side. He may be tongue-tied or nervous, confused or wanting in intelligence; He cannot examine or cross-examins witnesses. We see it every day. A Magistrate says to a man: "You can ask questions you like"; whereupon the man immediately starts to make a speech.* ***If justice is to be done he ought to have the help of someone to speak for him; and who better than a lawyer who has been trained for the task?*** *……..." (emphasis added).*

The aforesaid observation re-iterates that legal representation before a Court is an elementary feature of the fair dispensation of justice. The pure foundation of justice must not only remain unsullied from within but must also even on the outside appear to remain, unsullied so that confidence of the citizens in the judicial administration may remain unshaken.

Before parting with the judgment, I must mention that it had been a long standing practice to file papers in the same Court which delivered the order to set aside same which was made exparte. This rule of practice has become deeply ingrained in our legal system. The affidavit dated 16.02.2009 had been filed in this Court by Dr. Ranjit Fernando explaining the default of his appearance before the Court of Appeal on 02.02.2009. The Court of Appeal thus, did not have the opportunity of considering the affidavit and then to decide whether the judgment dated 02.02.2009 be set aside with notice to the Hon. Attorney General. Dr. Ranjit Fernando argued that once judgment is delivered by the Court of Appeal, it becomes ".functus officio" and cannot set aside its own judgment. Learned Deputy Solicitor General on the other hand, submitted that the matter be sent back to the Court of Appeal to consider whether the judgment made on 02.02.2009 be set aside. I do not wish to make any pronouncement on this issue. Credibility in the functioning of the justice delivery system and the reasonable perception of the affected parties are relevant considerations to ensure the continuance of public confidence in the credibility and impartiality of the judiciary. This is necessary not only for doing justice but also for ensuring that justice is seen to be done.

For the reasons stated and considering the undue and long time period that had been taken in this Court, I am of the view that ends of justice would be met if the Appellant's appeal be considered afresh by the Court of Appeal after noticing the

parties concerned. The question of law on which special leave was granted is answered in the affirmative. Accordingly, the judgment of the Court of Appeal dated 02.02.2009 is set aside and the matter is sent to the Court of Appeal to be heard afresh on the merits after affording the Appellant an opportunity of being heard either by himself or through a Counsel.

The Registrar is directed to communicate this order to the Registrar of the Court of Appeal forthwith.

JUDGE OF THE SUPREME COURT.

P.DEP, P.C.,J.

I agree.

R. MARASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT.

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

G P de Silva & Sons International
(Pvt) Limited
Plaintiff

SC CHC Appeal No.28/2009
HC (Civil) 74/2006 (1)

Vs

Union Assurance Limited
Defendant

And now Between

G P de Silva & Sons International
(Pvt) Limited
Plaintiff-Appellant

Vs

Union Assurance Limited
Defendant-Respondent

BEFORE : PRIYASATH DEP PC, J
SISIRA J DE ABREW J
SARATH DE ABREW J

Counsel : MA Sumanthiran with Eranga Tegal for the Plaintiff-Appellant
Nihal Fernando PC with Rajindra Jayasinghe for the Defendant-Respondent

Argued on : 16.6.2014
Written Submission
filed on : 18.7.2014 by the Plaintiff-Appellant
8.8.2014 by the Defendant-Respondent

Decided on : 3.10.2014

SISIRA J DE ABREW J.

This is an appeal against the judgment of the learned High Court Judge of Colombo dated 29.7.2009 wherein she dismissed the claim of the plaintiff-appellant who claimed 68,605/63 USD [later reduced to 16,217/63 USD] from the defendant-respondent on the basis of a marine insurance policy.

The plaintiff-appellant is an export company which carries on business of cinnamon export. The defendant-respondent is also a company engaged in business of insurance.

On or about 22nd of December 2003, the plaintiff-appellant obtained a marine insurance policy (open cover) No ABCCQO/001 from the defendant-respondent. The defendant-respondent, by its letter dated 3.2.2004 marked P5, confirmed that the said cover includes 'loss of cargo in container whilst inland transit, theft or burglary from shipper's warehouse to the buyer's warehouse at destination'. On or about 10.3.2005, a consignment of 587 bales cinnamon quills worth USD 62,368/15 was shipped to the buyer on vessel Peking Senator with freight paid up to the buyer's warehouse in Mexico City. Subsequently, the office of the plaintiff-appellant in United States of America informed the plaintiff-appellant that the container carrying 587 bales cinnamon quills worth USD 62,368/75 had been lost whilst it was being transported by a truck from the port of discharge (Manzamillo in Mexico City) to the buyer's warehouse. Plaintiff-appellant thereafter submitted an insurance claim of USD 68,605/63 to the defendant-respondent. The defendant-respondent, by its letter dated 22.12.2005

addressed to the Managing Director of the plaintiff-appellant, marked P17, repudiated the claim on the grounds which are reproduced below.

1. The shipment had been effected by you on CIF terms and the shipment had been discharged in Mexico on or about 13.4.2005 and you therefore have no insurable interest to claim under policy.
2. The purported buyer had defaulted payments due on 10th of April 2005 and 10th of May 2005 and the Marine Contract of Insurance is not designed to cover eventualities of this nature. It is noted that you have communicated to us the alleged theft by means of your fax message dated 13.05.2005 received by on 16.05.2005 i.e. the date of transmission of the message.
3. Hanjin Shipping Company had confirmed delivery of the Cargo to the Consignee on or about 6.5.2005.
4. The consignees have breached the principles of utmost good faith applicable to Marine Insurance.
5. The consignees had failed to comply with the instructions given in the "Important Clause" attached to the policy.
6. The consignees have failed to establish a loss within the meaning of the policy.
7. There is no valid contract of sale and the purported buyer had not signed the same nor have you complied with the terms given therein.

Although the plaintiff-appellant, in its plaint, claimed USD 68,605/63, it later reduced its claim to USD 16,217/63 on the basis that its consignee in Mexico City had remitted a sum of USD 52,388 which sum the consignee had received from its insurer in Mexico.

The learned High Court Judge after trial dismissed the action of the plaintiff-appellant on the basis that it did not have insurable interest at the time of the loss of goods. Being aggrieved by the said judgment of the learned High Court Judge, the plaintiff-appellant has appealed to this court.

The main contention of the plaintiff-appellant was that the insurance cover which he obtained from the defendant-respondent includes the loss of cargo in container whilst inland transit, theft or burglary from the shipper's warehouse to the buyer's warehouse at destination. Learned counsel for the plaintiff-appellant therefore contended that the defendant-respondent should pay the claim of the plaintiff-appellant. I now advert to this contention. The Marine Insurance-Open Cover Policy No.ABCCQ/00C marked P1 on which the plaintiff-appellant based its claim states as follows:

> "In order to recover under this insurance the assured must have an insurable interest in the subject matter insured at the time of the loss."

When I consider the above material the most important question that must be decided in this case is whether the plaintiff-appellant had an insurable interest in the consignment of cinnamon at the time of the loss. If the buyer in Mexico City has collected the consignment, can the seller who is the plaintiff-appellant have an insurable interest in it? This question, in my view, has to be answered in the negative. If the buyer has already collected the consignment, the buyer has to make the payment to the seller. After the goods were handed over to the ship, if the goods are lost in the sea, the buyer is still bound to make the payment to the seller. This view is supported by the following legal literature. In the book titled "The sale

of goods by PS Attiyah, John N Adams and Hector MacQueen" 11th edition pages 430 and 431 under the heading of 'Passing of property and risk' reads as follows:

> "In c.i.f contracts the risk once again passes on shipment, and if the goods are lost at the sea the buyer is still bound to pay the price, although he will as a rule have the benefit of the insurance policy. The law is the same even if the seller knows that the goods have been lost when he tenders the shipping documents. So also, the inability of the buyer to have the goods discharged at the port of destination (because, for instance, he cannot obtain an import licence) is of no concern to the seller, and cannot be a frustrating event. The delivery of the goods on board the vessel, followed by the delivery of correct documents, is a complete performance by the seller of his duties under a c.i.f contract; what happens after that is of no concern to him, subject to some special cases (for instance, where the goods are shipped in an undivided bulk)."

Has the buyer collected the goods in Mexico City? What does the Managing Director of the plaintiff-appellant say in evidence on this point? I will reproduce below his evidence on this point.

Q. I am suggesting to you in this case the buyer has collected the goods from the port and the goods are supposed to have got lost whilst it was being in transshipment from the port to the buyer's warehouse?

A. Yes.

(Vide page 330 of the brief)

Thus the plaintiff-appellant clearly admits that the buyer has collected the consignment from the port of discharge. Thus can the plaintiff-appellant have any insurable interest in the consignment? The answer is no.

The master of the ship or the shipping agent is obliged to deliver the goods only to the person who has the title to the goods namely the person who has the original bill of lading. As I pointed out earlier buyer had collected the goods. This shows that he was in possession of the original bill of lading. In fact the Managing Director of the plaintiff-appellant, in his evidence, admitted that buyer was in possession the original bill of lading. I will reproduce his evidence on this point.

Q. At that point of time the buyer had the original bill of lading and the insurance policy and all the shipping documents were with him.

A. Yes.

If the buyer had the original bill of lading it is equivalent, in law, to possession of the goods. In this connection it is relevant to consider a passage from the book titled "Payne & Ivamy's Carriage of Goods by Sea 13th edition page 92. The learned Author, at page 92, states as follows. "For many purposes possession of a bill of lading is equivalent in law to possession of goods. It enables the holder to obtain delivery of the goods at the port of destination and, during the transit, it enables him to 'deliver' the goods by merely transferring the bill of lading. These rules are particularly important in c. i. f contracts."

In Clements Horst Co Vs Biddel Bros [1912] AC18 "a contract was made for the sale of hops to be shipped from San Francisco to London, c i f net cash. The buyer refused to pay for the goods until they were actually delivered.

Held, that possession of bill of lading was in law equivalent to possession of goods, and that under c i f contract the seller was entitled to payment on shipping the goods and tendering to the buyer the documents of title."

In the present case the buyer was in possession of the goods and as well as the bill of lading. Thus the title of the goods has already passed to the buyer. Thus the seller did not have any insurable interest in the goods at the time of the loss.

In fact the Managing Director of the plaintiff-appellant admitted in evidence that he is not entitled to make a claim as the title to the goods had already passed to the owner. His evidence on this point is as follows.

Q . So I am suggesting to you if you don't have in your possession the original bill of lading you are not entitled to make a claim in a marine policy because the title to the goods is with the owner or a person who has the original bill of lading.

A. Yes. (Vide page 314 of the brief)

Q. I am suggesting to you that the moment you packed goods and carried it from your warehouse to the port in Colombo and put the goods on board the vessel and post or sent the shipping documents, you passed the shipping documents, sent them to the consignee, title to the goods passed to the buyer.

A. Yes.

It is important to state here that the plaintiff-appellant reduced his claim from USD 68,605/63 to USD 16,217/63 on the basis that the consignee in Mexico had remitted a sum of USD 52,338 which sum the consignee claims to have received from its insurer in Mexico. This evidence establishes the fact that buyer's insurer in Mexico had accepted the fact that the title to the goods had passed to the buyer. This too shows that that the plaintiff-appellant did not have an insurable interest in the goods at the time of the loss. When I consider all the above matters, I hold that the plaintiff-appellant did not have any insurable interest in the consignment of cinnamon at the time of its loss and as such the plaintiff-appellant is not entitled to claim any amount in the present case under the marine insurance (open cover)

policy from the defendant-respondent. In my view the leaned High Court Judge was correct when he dismissed the plaintiff-appellant's action.

For the above reasons I refuse to interfere with the judgment of the learned High Court Judge and dismiss the appeal of the plaintiff-appellant with costs.

Appeal dismissed.

Judge of the Supreme Court.

PRIYASATH DEP PC, J

I agree.

Judge of the Supreme Court.

SARATH DE ABREW J

I agree.

Judge of the Supreme Court.

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

In the matter of an Application for Leave to Appeal in terms of Section 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 to the Supreme Court from an Order of the Provincial High Court under and in terms of section 31DD of the Industrial Disputes Act (as Amended) .

Peoples' Bank, Head Office,
12th Floor,
Sri Chittampalam A. Gardiner Mawatha,
Colombo 02.

Respondent – Appellant- Petitioner

SC Appeal No. 33/2012
SC (HC) LA 93/2011
UVA/HCCA/BD/52/2009
LT No. 05/18458/02

Vs.

H.L. Ariyapala
No. 85/2, Bandarawela Road,
Badulla.

Applicant-Respondent-Respondent

Before	:	Priyasath Dep, PC. J Sarath de Abrew, J & Priyantha Jayawardana, PC J
Counsel	:	Ms. Manoli Jinadasa with Tharanga Ambepitiya for Respondent-Appellant-Petitioner Geoffery Alagaratnam, PC with Subashini Samaraarachchi for Applicant-Respondent-Respondent.
Argued on	:	05.06.2014
Decided on	:	10.12.2014

Priyasath Dep, PC, J

The People's Bank , the Respondent -Appellant-Appellant (hereinafter referred to as the 'Appellant Bank') filed a leave to appeal application and obtained leave against the judgment dated 27th July 2011 of the Provincial High Court of Uva held in Badulla in Case No. HCA/LT 52/2009.

The Applicant-Respondent-Respondent (hereinafter referred to as the 'Applicant') was a Branch Manager of Passara Branch of the Appellant Bank. The Applicant was interdicted on 23-11- 2000 and a domestic inquiry was held against him and was found guilty of all charges and his services were terminated with effect from on 23.-11-2002.

The Applicant filed an application in the Labour Tribunal of Badulla in Case No. LT/ 05/18458 /02 alleging that his services were unlawfully terminated by the Appellant Bank and claimed reinstatement with back wages ,compensation and statutory benefits. The Learned President of the Labour Tribunal held that the Applicant was guilty of count 2 of the charge sheet but held that the termination was unlawful and unjustified. The Learned President did not order reinstatement due to the fact that the Applicant had already passed the retirement age. At the time of termination of the Applicant's employment he had only 9 ½ months to reach his retirement age and the Labour Tribunal ordered the Appellant Bank to pay 9 ½ months salary amounting to Rs. 2,57, 475/- as compensation without any prejudice to his statutory benefits.

The Applicant appealed against the finding of the Labour Tribunal which held that the Applicant was guilty of Count 2 of the charges framed against him and also claiming pension rights which was not granted by the Labour Tribunal. The Appellant Bank also appealed against the findings of the Labour Tribunal that the Applicant was not guilty on acts of misconduct alleged in Counts 1,3 and 4 of the charge sheet and the finding of the Labour Tribunal that the termination of the employment is unlawful and unjustified.

The High Court consolidated both appeals and after hearing the submissions of both parties and considering the written submission filed by the parties held that the Applicant was not guilty of all counts and made order to pay back wages up to the date of retirement and also held that the Applicant is entitled to pension rights in addition to other statutory benefits. The

Appellant Bank appealed against this order to the Supreme Court and obtained leave. The Court granted leave on following questions of law.

1. Did the Provincial High Court err in law in granting relief by way of pension, which has not been prayed for in the Application to the Labour Tribunal and which is not supported by sufficient evidence ?

2. Did the Provincial High Court and the Labour Tribunal err in law in the evaluation of evidence with respect of charges 2 and 3 ?

This appeal was argued on 05-06-2014 and order was reserved and both parties were given time to file written submissions in addition to written submissions already filed. Accordingly both parties filed written submissions.

Second Question of Law

I will first deal with the second question of law as to whether the High Court and the Labour Tribunal erred in law in evaluating evidence pertaining to charges 2 and 3.

It is the position of the Appellant Bank that there was sufficient evidence to find the Applicant guilty of misconduct and those acts of misconduct are considered to be serious or grave acts of misconduct that justified the termination of his employment.

The question that arises is whether Appellate Court in reviewing the orders of the Labour Tribunal could disturb the facts and substitute its findings. This matter was considered by Sharvananda J. (as he then was) in the *Caledonian (Ceylon) Tea and Rubber Estates Ltd. vs. J.S. Hilman* (1977) 79(1) NLR 421. It was held

> " that in as much as an appeal lies from an order of a Labour Tribunal only on a question of law an Appellant who seeks to have a determination of facts by the Tribunal set aside, must satisfy the Appellate Court that there was no legal evidence to support the conclusion of facts reached by the Tribunal, or that the finding is not rationally possible and is perverse even with regard to the evidence on record".

This judgment was followed in Jayasuriya vs Sri Lanka State Plantation Corporation (1995) Sri.L.R 379 and several other cases.

Therefore it is necessary to consider the charges and the evidence led to establish the charges to ascertain whether the conclusions of the Labour Tribunal was based on legal evidence.

The following charges were framed against the Applicant.

1. The Applicant contrary to the bank circular No 533/99 without prior approval or covering approval of the regional manager granted temporary over draft facilities to 24 customers amounting to Rs. 9, 729,831/86 and thereby placed the Bank funds at a great risk.

2. The Applicant contrary to bank circular No 541/99 granted temporary overdrafts to 4 customers whose accounts are not satisfactory maintained and thereby risking Bank funds amounting to Rs. 1, 363,029/55.

3. The Applicant contrary to the Bank circulars No 388/84 and 541/99 in 11 instances had granted sum of Rs. 2,530,691.91 as loans without adequate security to settle temporary over drafts and thereby placing Bank funds at a great risk.

4. The Applicant contrary to the above circulars by giving over draft facilities failed to safe guard bank funds which resulted in overdrafts to extend of Rs 9,729,831/86 rendering overdue and not recoverable and thereby causing losses to the Bank and making the Bank Branch unprofitable .

5. By committing the acts mentioned in Counts 1 - 4 the Applicant placed the bank funds amounts to Rs. 12, 260,523.77 at a risk.

In order to justify termination the Appellant Bank relied on the evidence of A.N.S.Amaraweera, Senior Manager, Audit Inspection Department. This witness inspected and conducted an audit of the accounts of the Passara Branch of People's Bank, where the Applicant was the manager during the relevant period. He submitted the audit report to the Bank and the Bank framed charges against the Applicant based on the audit report.

Thereafter a domestic inquiry was held and the applicant was found guilty of all charges and his services were terminated.

The witness Amaraweera filed an affidavit and produced the audit report marked R1. The relevant documents were annexed to the audit report. This witness was cross examined at length by the learned Counsel for the Applicant. He admitted that in respect of over draft facilities given by the Applicant referred to in charge 1, though the Applicant did not obtain the prior approval of the Regional Manager he had obtained covering approval by submitting a prescribed form No.593. The Regional Manager had given the covering approval. He has not made adverse remarks nor given warnings to the Applicant. Both the learned President of the Labour Tribunal and Learned High Court Judge held that this charge was not proved.

The witness Amaraweera gave evidence in relation to the 2nd charge and stated that the Applicant had given over draft facilities to 4 customers referred to in the schedule whose accounts are not satisfactorily maintained. These accounts are also referred to in charge 1. The unsatisfactory Accounts referred to in the charge sheet are accounts within the preceding six months had debit balances or cheques issued by the account holder were returned. This witness gave evidence to the effect that there were four accounts where the applicant had granted over draft facilities in spite of the fact that the accounts were not satisfactorily maintained.

The charge No.2 mentioned above refers to 4 accounts under account numbers 2672, 2588, 2601 and 2590 . In account No. 2672 during the relevant period had two dishonored cheques and during the period the account was in operation 12 cheques were dishonored. In account No. 2588 there were 32 cheques dishonoured during the preceding six months and in the entire period 55 cheques were dishonoured. In account No. 2601 there were 13 cheques dishonoured during the relevant period and 21 cheques during the entire period. In account No. 2590, 2 cheques were dishonoured during the relevant period and 16 cheques were dishonoured during the entire period.

The learned President of the Labour Tribunal held that even if overdraft facilities were granted to such accounts with or without approval there is a violation of bank circulars. In respect of count 2 the learned President of the Labour Tribunal held that the Applicant had violated the circulars

when overdraft facilities were given to the Account holders whose accounts were not satisfactorily maintained

The Learned President held that the Applicant is guilty of charge 2. However, the learned High Court Judge found the accused not guilty of charge 2 on the basis that that the Regional Manager and Deputy/Assistant Regional Manager has given covering approval for granting of over draft facilities to the accounts which were not satisfactorily maintained. He observed that there was lack of supervision and control on the part of higher authorities. There was a dereliction of duties by the regional manager and the bank management had failed to take appropriate action against them.

I disagree with the findings of the learned High Court Judge. I agree with the findings of the Labour Tribunal that the Applicant is guilty of charge 2. The fact that the regional manager granted covering approval will not absolve the Applicant as the accounts referred to in the charge were not satisfactorily maintained.

In charge 3 it was alleged that the Applicant had given loan facilities without sufficient security to over drawn accounts which were used by some account holders to settle overdrafts taken by the them. However it was revealed that the approval was granted by the Loan Committee of the Passara Branch. Therefore, it was held that Applicant alone is not responsible for granting of such loans. Further the main witness admitted that there is no bar/prohibition in the circulars to grant loans to customers to settle over drafts. The learned President of the Labour Tribunal as well as the Learned High Court Judge found the Applicant not guilty of this charge.

The learned President of the Labour Tribunal having come to the conclusion that the Appellant Bank had proved charge 2 against the Applicant proceeded to consider what is the appropriate punishment that could be imposed on the Applicant. According to the circulars, if the Bank Manager exceeded the limit and grants over draft facilities which he should not have granted in terms of the circular , following punishment could be meted out to such a violator.

a) He could be transferred out from the branch as a disciplinary action .

b) His financial limit regarding overdraft facilities to be reduced and permitted to remain in the branch until 50% of such over drafts are recovered.
c) His financial limit to be reduced until he recovers 75% of the over draft facilities.

The Learned President of the labour Tribunal held that the termination of employment is a severe form of punishment and in the circumstances of this case the termination of the services of the Applicant was unreasonable and unjust. When arriving at this conclusion he considered the cases of similar nature where Bank Managers who had given over draft facilities in similar circumstances were allowed to retire with back wages and also given retirement benefits. Witness Jayaratne, former Bank Manager who was summoned by the Applicant gave evidence to the effect that he was interdicted for granting over draft facilities in excess of his limit and was allowed to retire with back wages.

The learned President of the Labour Tribunal held that termination was unlawful and unjustified but did not order reinstatement as the Applicant had already passed his retirement age and ordered the bank to pay compensations computed on the basis of his salary from the date of termination up to the date of retirement. This order is without prejudice to the statutory rights of the Applicant. I agree with the findings of the Labour Tribunal that the termination of employment of the Applicant is unlawful and unjustified. The finding is based legal evidence and on proper evaluation of evidence placed before the Labour Tribunal.

First Question of Law

I will now deal with the first question of law regarding the legality of the order of the Provincial High Court in granting relief by way of pension which has not been prayed for in the application and not supported by evidence. The learned Counsel for the Appellant Bank strenuously argued that as the Applicant did not pray for pension rights, the tribunal has no power to grant pension rights. The learned counsel for the Applicant submitted that in the course of the inquiry at page19, the Applicant pleaded for pension rights and in his evidence at page 284, he testified to the effect that he had opted to join the pension scheme and he produced his letter of appointment marked X1 to show that that he is entitled to

pension rights according to the contract of employment. In the course of the inquiry, the Applicant as a settlement suggested that he will forego reinstatement and back wages if he is given his Pension. Appellant Bank was not amenable to a settlement.

The learned Counsel for the Appellant Bank relied on the case of *People's Bank Vs. Gilbert Weerasinghe* 2008 BLR pages 133- 135. In that case it was held that

> 'in terms of 31C, the Labour Tribunal has jurisdiction to inquire into only in respect of the matters stated in that application. The Labour Tribunal under the said Act does not have the jurisdiction to determine the matters that have not been pleaded and sought in the Application'**.**

It is appropriate at this stage to draw a distinction between a plaint in a civil case and an application in the Labour Tribunal. Civil cases are regulated by the Civil Procedure Code and has provisions regarding contents/requisites of plaint, answer and replication and provisions to amend pleadings. It is settled law that in civil cases the court could not grant relief not prayed for. In case of Labour Tribunals there is no procedure prescribed and the Tribunal has the power to adopt a suitable procedure. Therefore Labour Tribunal is not fettered by stringent and a rigid procedure as in a civil cases. The learned President's Counsel for the Applicant in support of his position cited the case of *Associated News Papers Ceylon Ltd vs National Employees Union* 71NLR 69. It was held that:

> 'that the statements filed by the parties in applications before a Labour Tribunal are not pleadings in a civil action and it is the duty of the President to consider all the facts relative to the dispute placed in evidence before him at the inquiry even though those facts may not be expressly referred to in the statements'

In the circumstances the question that will arise is as to whether it is permissible for the Applicant to pray for a relief in the course of the inquiry(not specifically pleaded in the application) which is relevant to the scope of the application and falling within the just an equitable jurisdiction of the Tribunal. I am of the view that there is no such impediment .

The learned counsel for the Applicant distinguished between the facts of this case and the facts in Peoples Bank vs Gilbert Weerasinghe (supra). In that case the learned President of the Labour Tribunal while justifying termination ordered the People's Bank to pay the pension. In other words the Labour Tribunal awarded pension rights to a dismissed employee who was at the time of dismissal was 48 years of age which is contrary to the criteria in the Pension Scheme. The criteria for granting pension was discussed in that case. According to the People's Bank's Pension Scheme, pension is granted to an employee who is in service at the age of 55 years. Pension will not be granted to an employee who is under the age of 55 years except on recommendation of a Medical Board approved by the General Manager. Employees who leave the Bank before reaching the age of 55 and those who are dismissed from service are not entitled to pension under the pension rules.

In the case before us , the Applicant was not dismissed from the Bank .The Labour Tribunal and the High Court both held that the termination is unlawful and unjustified. He was not reinstated for the reason that he had passed the retirement age. The effect of the orders are that he had retired upon reaching the age of 55 years.

The main issue is whether the order of the High Court granting pension is contrary to law. The Applicant prayed for reinstatement with back wages. If reinstatement is prayed for and granted by the Tribunal does it includes retirement benefits.? It is necessary to consider the definition of reinstatement. In L.B. Curzon – Dictionary of Law 6th Edition Page 360, reinstatement was defined as

> "Restoring of an employee to the position he occupied prior to the dismissal. An order for reinstatement, stating that employer shall treat the former employee in all respects as if he had not been dismissed may be made after hearing a complaint against unfair dismissal."

In his written submissions the learned Counsel for the Applicant drew our attention to section 33 (1) (e) of the Industrial Disputes Act as amended and emphasis the fact that the Labour Tribunal has wide powers to grant pension even if it is not specifically pleaded. The Section 33 (1) reads thus;

> Without prejudice to the generality of the matters that may be specified and any award under this Act or in any order of a

> labour tribunal, such award or such order may contain decisions.
> (a) ----------
> (b) ----------
> (c) ----------
> (d) ----------
> (e) as to the payment by any employer of a gratuity(except where a gratuity is payable under the Payment of Gratuity Act, 1983) or pension or bonus to any workman, the amount of such gratuity or pension or bonus and the method of computing such amount, and the time within which such gratuity or pension or bonus shall be paid.

In the instant case reinstatement was not ordered due to the reasons that the employee had passed the retirement age when the order was made. The dismissal was held to be unlawful and unjustified and according to the order of the Labour Tribunal his salary to be paid by way of compensation and by the High Court as back wages up to the date of retirement. He had retired upon reaching 55 years and he is entitled to the retirement benefits provided he had joined the Bank's Pension Scheme and had contributed to the scheme and he had satisfied the other criteria. I am of the view that if the Applicant has satisfied the criteria the Bank is obliged to pay the pension even without an order of the Tribunal.

I find that according to letter of appointment marked X1 employer has to contribute 10% to the Pension Fund and the employee has to contribute 5%. As he had opted to join the Pension Scheme he is not entitled to the Provident Fund. The Bank's allegation that the applicant has caused loss to the bank was not established in the inquiry. The Labour Tribunal and the Provincial High Court held that there is no evidence to establish that the Applicant acted fraudulently or misappropriated Bank's funds. This Court granted Special Leave in respect of findings regarding charges 2 and 3 and according to the findings financial loss was not established.

I agree with the findings of both the Labour Tribunal and the Provincial High Court that the termination is unlawful and unjustified. In the circumstances back wages should be paid up to the date of retirement as ordered by the Provincial High Court as opposed to compensation ordered by the Labour Tribunal.

The next question is whether the Applicant is entitled to pension rights. In the course of the inquiry the Applicant had prayed for pension rights and produced his letter of appointment. However the Applicant had failed to produce the rules of the Pension Scheme to enable the Labour Tribunal to decide whether he has satisfied the requirements or criteria pertaining to the granting of pension rights. The Applicant has failed to establish to the satisfaction of the Tribunal that he is entitled to pension rights. In view of that fact the order of the Provincial High Court to the effect that the Applicant is entitle to pension rights is wrong in the absence of proof and for that reason I amend that part of the order of the Provincial High Court to read thus 'the Applicant is entitled to pension rights if he had satisfied the requirements/criteria laid down in the Pension Scheme'.

The Appellant Bank should consider the Applicant as a person who had retired from service upon reaching the age of retirement and there were no findings against him for cheating or misappropriating Bank's funds. If the Applicant satisfy the requirements/ criteria he is entitle to his pension and the Bank is legally and morally obliged to pay the Pension.

Subject to the above variation Appeal dismissed.

No Costs.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, 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 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 DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for special leave to Appeal against the judgement of the High Court of Province, Kegalle dated 08.12.2010.

1. Dissanayake Rallage Ranasingha
   Karuppattiya, Nelundeniya

2. Dissanayake Rallage Wijesinghe
   Karuppattiya, Warakapola

SC Appeal No. 39/2011 &39^{A}/11
HC, Kegalle Case No. 3452/Appeal
MC. Warakapola Case No. 28467

1st and 3rd Accused-Appellant-Appellant

Vs.

1. Officer-in-Charge
   Police Station,
   Warakapola

Complainant 1st Respondent-Respondent

2. Hon. Attorney General
   Attorney General's Department
   Colombo 12.

2nd Respondent-Respondent

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

Counsel : Sunil Abeyrathne for the 1st Accused-Appellant-Petitioner

Shanaka Wijesinghe, SSC for AG

Argued on : 05.07.2013

Decided on : 02-04.2014

Priyasath Dep, PC, J

This appeal is against the judgment of the Provincial High Court of Sabaragamuwa holden in Kegalle which affirmed the conviction and sentence imposed by Magistrate Court of Warakapola in Case No. 28467.

The Accused-Appellants namely (1) D.R. Ranasinghe alias Ukkun , (2). D.R. Amarasinghe alias Bandara and (3). D.R. Wijesinghe were charged in Magistrate's Court of Warakapola for committing the following offences:

1. That on or about 7th December 2003 at Nelundeniya you did cause grievous hurt to Lal Anura Kumara by cutting him with a sword an offence punishable under section 317 read with section 32 of the Penal Code.

2. That at the time and place aforesaid and in the course of the same transaction you did cause hurt to A.R. Rathnasena by assaulting with a club an offence punishable under Section 314 read with section 32 of the Penal code.

3. That at the time and place aforesaid and in the course of the same transaction did cause injury to A.R. Rathnasena by stabbing him, an offence punishable under section 315 read with 32 of the Penal Code.

4. That at the time and place aforesaid and in the course of the same transaction you did commit robbery of a gold chain worth Rs. 23,000/- in the possession of A.R. Rathnasena an offence punishable under section 380 read with 32 of the Penal Code.

The prosecution led the evidence of the injured Anura kumara and Rathnasena who are two brothers. According to them on the day in question at about 5.30p.m. both of them with one Susantha Pieris went towards the house of Jagath to call him to repair their house which was destroyed by fire. Susantha went to Jagath's house to bring Jagath. These two witnesses were staying near a rock waiting for Jagath. This place is about 30-40-meters from the house of the 2nd Accused Amarasinghe alias Bandara. Susantha returned stating that Jagath is not at home. These witnesses then decided to go to their homes along the road passing the house of Amerasinghe alias Bandara when this incident took place.

Witness Anura Kumara in his evidence stated that 2nd Accused Amerasinghe (Bandara) came running towards them and threw stones at them. Thereafter Bandara stabbed his brother Rathnasena and the 3rd Accused cut him with a sword. When the commotion was taking place neighbours rushed to the scene and took the witness to their homes and thereafter dispatched them to the hospital .He was in hospital for five days. In his evidence this witness did not refer to the presence of the 1st accused Ranasinghe. His medical legal report was maked as P2. According to the medical legal report of A.R. Lal Anurakumara he had an incised wound on the left side of the forehead which had fractured the frontal bone of the skull. Injury was regarded as a grievous injury caused by the sharp cutting weapon.

Witness Ratnasena while giving evidence stated that the 2A Amerasinghe alias Bandara stabbed him and robbed his gold chain. He stated that1A assaulted him with a pole. 3rd Accused cut his brother Anura kumara with a sword. According to the medical report which was marked as P2, he had a lacerated wound located on the left side of the forehead which was caused by a blunt weapon and an incised wound located on the left side of the chest caused by a sharp cutting weapon

Prosecution thereafter led the evidence of the investigating officer Inspector Karunathileke who gave evidence regarding the visit to the scene of the crime, recording of statements and investigations carried out by him. The defence suggested to this witness that he was a partial witness and did not carry out the investigations properly and he did not inquire into the complaint made by 2nd Accused Amerasinhe against the prosecution witnesses.

The prosecution did not call witness Susantha Pieris who was with the injured at the time of the incident. Susantha Pieris is a person of criminal disposition and his evidence will not add any weight to the evidence given by the other prosecution witness . According to section 134 of the Evidence Ordinance particular number of witnesses are not required to establish a fact. Therefore it is not possible to draw an adverse inference under section 114 (F) of the Evidence Ordinance for the failure on the part of the prosecution to call Susantha Peiris as a witness. This question was considered in *Walimunage John v. The State* 76 NLR 488.

When the trial was proceeding the 2nd Accused Amarasinghe alias Bandara died and the case proceeded against 1st and 3rd Accused.

After the close of the case for the prosecution, the learned Magistrate called upon the Accused for their defence. 1st and 3rd Accused gave a evidence under oath and they were cross examined at length by the learned Counsel appearing for the prosecution. The 1st Accused stated that on the day of the incident he went to see his father-in-law who had an eye surgery and when he returned home he came to know that an incident had taken place near his brother's (Bandara's) house. He stated that he was falsely implicated because he took his brother to the hospital.

The 3rd Accused in his evidence stated that he was in the village but was not involved in the incident. 2nd accused Amarasinghe's wife Podi Menike gave evidence. She stated that witnesses Anura kumar, Rathnasena and Susantha Pieris who were passing her house inquired about her husband Amarasinghe. She had stated that Amarasinghe had gone to Society Hall which is about 100 meters from her house. After about half an hour her husband returned home. Susantha Pieris Rathnasena and Anurakumar came to the compound of their house. Susantha Pieris had a knife and Rathnasekera carried a club. A person whom she could not identify attacked Amarasinghe with a club. Amarasinghe had bleeding injuries. She raised cries and thereafter she took Amarasinghe to the Police station in a three wheeler . On the way they met 1st Accused Ranasinghe who also came along with them to the Police station. Amerasinghe made a statement to the Police and he was admitted to the hospital and was in the hospital for two days. She stated that at the time of the incident 1st Accused and the 3rd Accused were not there. She stated that Susantha Pieris is angry with her family because they made a complaint against Susantha Pieris for stealing goods worth Rs. 23,000/- from her mother's house. After

leading the evidence of 1st and 3rd Accused and of Podimenike the defence closed its case.

The learned Magistrate convicted the accused on all four counts. The learned Magistrate imposed a sentence of 2 years rigorous imprisonment and a payment of Rs. 3000/- as compensation on count one . On count 2 and 3 six months rigorous imprisonment was imposed which was suspended and the Accused were ordered to pay a fine of Rs. 1500 /- as compensation in respect of each count. On count 4, 2 years rigorous imprisonment and a fine of Rs. 1500/- was imposed.

Being aggrieved by the judgment of the learned Magistrate,the accused filed an appeal to the High Court. The High Court dismissed the appeal and affirmed the conviction and sentence. The accused filed a Special leave to Appeal application and obtained leave.

The main grounds of appeal are:

1. Whether the learned Magistrate and the Hon Judge of the High Court failed to properly evaluate the evidence led in the trial ?

2. Did the learned Magistrate and Hon. Judge of the High Court fail to give reasons for rejecting the defence evidence. ?

3. Did the learned Magistrate and the Hon. Judge of the High court had erroneously apply the Ellenborough dictum in the absence of a strong prima facie case ?

The main issue in this case is whether the learned Magistrate properly considered the evidence against 1st and 3rd accused or not. The 2nd accused Amarasinghe's involvement is established. The question is whether the 1st and 3rd accused were involved in the incident or not, or whether they were falsely implicated because of the involvement of their brother Amerasighe. Witness Anura Kumara in his evidence did not refer to the 1st Accused. There are several infirmities and contradictions in the prosecution case.

The evidence indicates that that injured Anura kumara, Rathnasena, Susantha Pieris and Chamida gathered near the house of Amarasinghe and went in front of Amerasighe's house to confront him and a fight ensued and in the course of which 2nd accused Amarasinghe and two prosecution witnesses received injuries.

1st accused and the 3rd accused gave evidence under oath and stated that they were elsewhere at the time of the incident. This plea of alibi was supported by the wife of Amarasinghe. The question is whether the learned Magistrate examined their evidence carefully. In a long line of authorities starting from Yahonis Singho v. Queen 67 NLR8, followed by Chandradasa vs Queen 72 NLR 160, Punchi Banda v.State 76 NLR 293, the Supreme Court referred to the matters that should be considered by a trial judge when dealing with a plea of alibi. They are:

1. If the alibi is true the accused is entitled to an acquittal

2. If it is probably true or probably untrue it raises a reasonable doubt in the prosecution case and the accused is entitled to an acquittal.

3 Even if the alibi is rejected, the prosecution has to establish its case beyond reasonable doubt.

The learned Magistrate and the learned High Court judge failed to properly evaluate the plea of alibi put forward by the Accused. I am of the view that the evidence of the accused raises a reasonable doubt in the prosecution case. Therefore they should be acquitted of all charges.

Learned Magistrate applied the dictum of Lord Elenborough in *Rex v. Cochrane, Garney's Reports,* page479. Ellenboroughs dictum states:

> " No person accused of crime is bound to offer any explanation of his conduct or of circumstances of suspicion which attach to him; but, nevertheless, if he refuses to do so where a strong prima facie case has been made out, and when it is in his own power to offer evidence, if such exist, in explanation of such suspicious circumstances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest".

This dictum was applied in several cases including *The King Vs. L. Seeder de Silva* 41 NLR page 337, *The King Vs. Geekiyanage John Silva* 46 NLR 73, *Queen Vs. Seetin* 68NLR 316, Re*public Vs. Illangathilaka* 1984 2 SLR page 38, *ChadradasaVs. Queen* 72 NLR page 160.

This dictum could be applied in cases where there is a strong prima facie case made out against the Accused and if he refrains from explaining suspicious circumstances attach to him when it is in his own power to offer evidence. In such a situation an adverse inference can be drawn against him,

In this case one cannot say that there is a strong prima facie case for the accused to offer any evidence. However 1st and 3rd Accused gave evidence and put forward a plea of alibi which raises a reasonable doubt in the prosecution case. There is a reasonable doubt regarding the involvement of the 1st and 3rd Accused as there is a possibility of falsely implicating them in view of the involvement of their brother Amerasighe who is the 2rd Accused.

In *James Silva v. the Republic of Sri Lanka* (1980) 2 Sri.l R p167 at176 following the Privy Council case of *Jayasena v. The Queen* 72 NLR 313 (PC) stated;

> A satisfactory way to arrive at a verdict of guilt or innocence is to consider all the matters before the Court adduced whether by the prosecution or by the defence in its totality without compartmentalizing and, ask himself whether as a prudent man, in the circumstances of the particular case, he believes the accused guilty of the charge or not guilty.

I am of the view that the learned Magistrate had failed to properly evaluate the evidence led in the trial and erroneously applied the Ellenborough Dictum to the facts of this case which was unwarranted. Therefore the Accused –Appellants are entitled to an acquittal.

For the reasons set out above, I quash the conviction and the sentence imposed on 1st and 3rd accused and acquit them of all charges.

Judge of the Supreme Court

Shiranee Tilakawardena, J.
I agree.

Judge of the Supreme Court

Eva 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 41/2013

SC(HC) CALA. Application No. 68/12
WP/HCCA/Kal/84/2002(F)
D.C. Matugama No. 710/Spl.

Hewage Don Piyasena
Owitigala,
Matugama.

Plaintif

Vs.

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

Defendant

And Between

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

Defendant-Appellant

Vs.

Hewage Don Piyasena
Owitigala,
Matugama.

Plaintif-Respondent
(Deceased)

a. Hewage Don Aruna Nishantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

b. Yakdehige Dona Somawathie,
No. 35, Sirikandura Road,
Badugama,
Matugama.

c. Hewage Don Lalith Susantha,
No. 34, Sirikandura Road,
Badugama,
Matugama.

d. Hewage Don Sandya Malkanthi,
Owitigala,
Matugama.

e. Hewage Don Nayana Priyantha
No. 34, Sirikandura Road,
Badugama,
Matugama.

f. Hewage Don Yamuna Irangani,
No. 34, Near Police Station,
Baduraliya.

g. Hewage Dona Ganga Priyanthi,
No. 35, Sirikandura Road,
Badugama,
Matugama.

h. Hewage Don Sanjeeva Prasanna,
No. 35, Sirikandura Road,
Badugama,
Matugama.

i. Hewage Don Sujeewa Nilantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

Substituted-Plaintiff-Respondents
of Deceased Plaintiff-Respondent

And

a. Hewage Don Aruna Nishantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

b. Yakdehige Dona Somawathie,
No. 35, Sirikandura Road,
Badugama,
Matugama.

c. Hewage Don Lalith Susantha,
No. 34, Sirikandura Road,
Badugama,
Matugama.

d. Hewage Don Sandya Malkanthi,
Owitigala,
Matugama.

e. Hewage Don Nayana Priyantha
No. 34, Sirikandura Road,
Badugama,
Matugama.

f. Hewage Don Yamuna Irangani,
No. 34, Near Police Station,
Baduraliya.

g. Hewage Dona Ganga Priyanthi,
No. 35, Sirikandura Road,
Badugama,
Matugama.

h. Hewage Don Sanjeeva Prasanna,
No. 35, Sirikandura Road,
Badugama,
Matugama.

i. Hewage Don Sujeewa Nilantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

Substituted-Plaintiff-Respondents-Petitioners

Vs.

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

Defendant-Appellant-Respondent

And Now Between

a. Hewage Don Aruna Nishantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

b. Yakdehige Dona Somawathie,
No. 35, Sirikandura Road,
Badugama,
Matugama.

c. Hewage Don Lalith Susantha,
No. 34, Sirikandura Road,
Badugama,
Matugama.

d. Hewage Don Sandya Malkanthi,
Owitigala,
Matugama.

e. Hewage Don Nayana Priyantha
No. 34, Sirikandura Road,
Badugama,
Matugama.

f. Hewage Don Yamuna Irangani,
No. 34, Near Police Station,
Baduraliya.

g. Hewage Dona Ganga Priyanthi,
No. 35, Sirikandura Road,
Badugama,
Matugama.

h. Hewage Don Sanjeeva Prasanna,
No. 35, Sirikandura Road,
Badugama,
Matugama.

i. Hewage Don Sujeewa Nilantha,
No. 35, Sirikandura Road,
Badugama,
Matugama.

Substituted-Plaintiff-Respondents-Petitioners-Appellants

Vs.

Karunasena Hathurusinghe,
Rannagala, Naboda,
Matugama.

Defendant-Appellant-Respondent –Respondent

*** * * * ***

SC. Appeal 41/2013

Before : **Eva Wanasundera, PC.J.**

Aluwihare, PC, J. &

Sarath de Abrew, J.

Counsel : Wijedasa Rajapakse, PC. with Sanjeewa Jayawardena, PC., Dasun Nagashena and Rakitha Rajapakse for the Plaintiff-Respondents-Petitioners-Appellants.

Ranjan Gooneratne with Sarath Walgamage for the Defendant-Appellant- Respondent-Respondent.

Argued On : **27-05-2014**

Decided On : **01-09-2014**

*** * * ***

Eva Wanasundera, PC.J.

In this matter Leave to Appeal was granted on the questions of law set out in paragraphs 56(a) to (k) in the petition dated 22.02.2012 filed by the Petitioner, as follows:-

(a) Has the High Court erred by misinterpreting the provisions of Section 83 of the Trust Ordinance, read in line with established principles of Law?

(b) Has the High Court fallen into substantial error by unduly restricting and limiting the scope and application of the provisions of Section 83 of the Trust Ordinance?

(c) Has the High Court fallen into grave and substantial error by misinterpreting and limiting the scope and application of Section 83 of the Trust Ordinance read in light of Section 91 of the Evidence Ordinance?

(d) Has the High Court misdirected itself by failing to consider and evaluate the evidence produced at the trial, especially the evidence of the Defendant?

(e) Has the High Court fallen into substantial error by failing to consider the "attendant circumstances" surrounding this transaction, including the comparison of the prices of the several other lands located within the vicinity?

(f) Has the High Court fallen into substantial error by failing to appreciate and give due weightage to the fact that the Defendant never enjoyed possession of the said land nor had the original of the Deed bearing No. 3329?

(g) Has the High Court misdirected itself by failing to consider that the deed marked "V-2" by the Defendant and on which the Defendant relies on to establish that he had obtained the purchase consideration for the land in issue, is numbered 209 when in fact, the Defendant is purporting to rely on deed bearing No. 4347?

(h) Did the High Court fail to appreciate that the learned District Judge was in the best position to adjudicate upon matters of fact and further, that when overruling the trial Judge's conclusion, it was incumbent upon their Lordships to evaluate the evidence comprehensively, before varying the same?

(i) Did the High Court err in law when failing to identify that in the special circumstances of this case, it would be most unreasonable and arbitrary to hold that the purported transaction was an outright sale and not a constructive trust created for the benefit of the Plaintiff?

(j) Can the judgment and the findings contained in the 2nd judgment of the High Court be reconciled with the previous judgment of the same two Judges who have held that there was indeed a constructive trust?

(k) In the totality of the foregoing circumstances, did the High Court fall into grave and substantial error by setting aside the judgment of the Learned District Judge and holding that the transaction in issue, was an outright sale and not the creation of a Constructive Trust?

Two more questions of law was raised on behalf of the Defendant-Appellant-Respondent and allowed by Court to read as follows:-

(1) Had the plaintiff proved the attendant circumstances to establish the trust ?

If it is shown,

(a) that at the time the conveyance was entered into, the beneficial interest had passed to the Defendant and

(b) that the Defendant thereafter had been in possession of the property in question,

Can the Plaintiff maintain this action?

Even though the questions of law set out above are formed in different ways, I find that, in summary, the question before this Court is “whether the deed transfer No. 3344 dated 17.11.1987 created a trust or whether it was an outright transfer of property”?

Facts pertinent to this application can be summarily narrated in this way. The original Plaintiff in the District Court case of Mathugama No. 710/Spl. Was Hewage Don Piyasena. He filed this action on 13.11.1997 praying that ‘the property in the schedule to the plaint, [i.e. ½ share of a land in extent of 1A 3R 37P which is equal to ½ share of 317 perches] be transferred back to him on payment of Rs.40,000/- as the Defendant is legally bound to do so’. The basis

of the plaint was that Deed 3344 created only a trust and it was not meant to be an outright sale.

The District Judge, at the end of the trial delivered judgment on 05.11.2002, holding that Deed 3344 created a trust and granted the relief prayed for by the Plaintiff. The Defendant appealed to the Provincial High Court of the Civil Appeals of the Western Province holden at Kalutara against the judgment of the District Court and the appeal was dismissed and the judgment of the District Court was affirmed on 19.10.2010 by 2 Judges, namely Judge A and Judge B. The Defendant appealed again to the Supreme Court being aggrieved by the judgment of the Civil Appeal High Court under case No. SC. HC. CA. LA. No.379/2010. At the commencement of this case in the Supreme Court, it was revealed that the Plaintiff had died when the case was pending in the Civil Appellate High Court and no substitution order had been made even though papers were filed in the High Court for substitution. Then, on 25-04-2011, under Case No. SC. HC. CA. LA. 379/2010, the Supreme Court held that all proceedings after the death of the Plaintiff was void and invalid in law and therefore the judgment dated 19-10-2010 was invalid in law. The Supreme Court sent the case back to the High Court for substitution and directed the High Court to deliver a fresh judgment.

The same Civil Appellate High Court Judges namely Judge A and Judge B who heard the appeal and delivered judgment on 19.10.2010, heard it again for the second time and delivered judgment on 12.10.2012, setting aside the judgment of the District Judge dated 05.11.2002. It is from that second judgment of the Civil Appellate High Court that the Appellants are before the Supreme Court once again.

Incidentally I observe that when the judgment was sent back to the Civil Appellate High Court to correct an oversight on a technical procedural matter such as substitution when the parties are consenting to the substitution, the case should have gone back only for that limited purpose and returned back to the

Supreme Court with the amended caption and the same judgment intact. If it was so done, the prevailing absurd situation of two contradicting judgments on the same matter by the same two Judges A and B would not have arisen. Yet, keeping this controversy aside, I proceed to look into the questions of law on which leave was granted in this case after considering the submissions made by Counsel to this Court representing the substituted Plaintiff-Respondent-Petitioners-Appellants (hereinafter referred to as 'Appellants') as well as submissions made by Counsel representing the Defendant-Appellant-Respondent-Respondent (hereinafter referred to as the 'Respondent').

Sections 91 and 92 of the Evidence Ordinance prevents leading evidence to prove or disprove a written document. But Section 83 of the Trusts Ordinance provides that if one can prove that in the attendant circumstances that if the donor did not intend to transfer the beneficial interest, even though the written document appears to speak otherwise, a constructive trust will be formed.

In the instant case I have to look deep into the High Court Judges' analysis of the evidence considered by the District Judge to decide whether any attendant circumstances were present to prove that the transferor did not intend to transfer the beneficial interest to the transferee in Deed 3344 aforementioned.

The evidence of the Plaintiff was that his father was Hewage Ago Singho. The land in question was donated to Piyasena (the Plaintiff) and Sirisena in equal shares. Plaintiff's brother Sirisena was unmarried. Plaintiff had 8 children and the Plaintiff was in possession of the whole land. The brother of the Plaintiff was living when he obtained a loan of Rs.40,000/- from the Defendant in 1987. The brother Sirisena died in 1992. Plaintiff uprooted the rubber cultivation prior to getting a loan from the Defendant as he planned to put in a new plantation. Plaintiff had known the Defendant over 15 years or so. He used to get loans from the Defendant who was a rice-trader. The loans were on interest and trustworthiness. Even prior to this transaction of obtaining Rs.40,000/- on the transfer of the land by Deed 3344 as security for the loan, the Plaintiff had sold

another different land to the Defendant. Even though the transfer deed was executed, possession was not given. The said transfer was just a formality. The Defendant promised to transfer the land back to the Plaintiff when Rs. 40,000/- was returned. The loan was on interest 5% per month. The Plaintiff kept on paying Rs.2500/- per month to the Defendant who used to come to the Plaintiff's shop to collect the interest. After a few years of paying regular interest every month, the Plaintiff requested the Defendant to re-transfer the property on payment of Rs.40,000/-. The Defendant was reluctant to do so. He put it off for future and never did it. So the Plaintiff stopped paying interest. Then he came to know that the Defendant was looking for buyers to sell the land. It is only then that the Plaintiff filed the District Court case to get the land back from the Defdendant.

The Defendant's evidence was that he did not know the Plaintiff at all till the deed was executed. He never charged any interest. He demarcated the land and arranged a fence around. He paid rates and taxes. He bought the land to try to get his children into schools in the town. He was not a money lender. He further said that he planned to build a house but could not do so. In cross examination he admitted that his children were already admitted to the schools in town as he had got a house on rent in town prior to buying this land. This land had no house in it to show school authorities regarding residence on the land. In cross examination he further admitted that he bought another land from the Plaintiff 3 months after the disputed transaction. He admitted that he had visited the Plaintiff's shop twice. The District Judge had found his evidence not credible due to his answers when cross examined. He did not have the original deed of his purchase either. He failed to produce his deed of sale of another land which he claimed to have sold to raise funds to buy the land mentioned in deed No. 3344.

The analysis of the deeds produced in evidence by the Defendant and the Plaintiff show that the price for one perch of land in that area at that time was between Rs.595/- and Rs.1000/-. The price Rs.40,000/- for 158 perches sets

down the price for a perch around Rs.260/- which is less than half the minimum price of one perch of land in that area at that time. Furthermore, the evidence in the District Court shows that the Plaintiff had never given up the beneficial interest to the property which is the subject matter of this case.

I am of the view that the attendant circumstances suggest that there was no intention whatsoever of the Plaintiff who is the Appellant in this case to truly transfer the land in question to the Defendant who is the Respondent. In all the circumstances of the case, I am of the view that the High Court Judge has erred in holding that the deed of transfer No. 3344 dated 17-11-1987 did not create a trust.

I allow the appeal and set aside the judgment of the Provincial High Court of Kalutara dated 12-01-2012 and affirm the judgment of the District Judge of Matugama dated 05-11-2002 in case No. 710/Spl. I order Rs.90,000/- as costs to be paid by the Defendant-Appellant-Respondent-Respondent to the Nine Substituted –Plaintiff-Respondents-Petitioners-Appellants.

Judge of the Supreme Court

Aluwihare, PC, J.

I agree.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court

IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C. Appeal No. 45/11
S.C. HC. CA. LA. No. 266/10
High Court of Appeal Leave to Appeal Application No. 111/2009
D.C. Colombo Case No. DLM/328/08

In the matter of an application for Leave to Appeal under and in terms of the provisions of Section 5(c) of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read together with the provisions of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the order of Their Lordships of the High Court of Appeal of the Western Province holden at Colombo delivered on 30.06.2010.

A. Arangallage
No. 3/3, Rajakeeya Mawatha,
Colombo 7.
Plaintiff-Petitioner-Petitioner-Appellant

Vs.

1. Pauline Herath
   No.24B, Alfred Place,
   Colombo 3.

2. Bank of Ceylon
   Bank of Ceylon Building,
   No. 4, Lanka Banku Mawatha, Colombo 1.
   Defendant-Respondent-Respondent-Respondents

BEFORE : **TILAKAWARDANE, J**
MARASINGHE, J &
ALUWIHARE, PC, J

COUNSEL : S. Parathalingam, PC with Kushan D' Alwis, PC, and Kaushalya Navaratne for Plaintiff-Petitioner-Appellant.
Chandana Prematillake with Gration Perera instructed by Michael Fernando for 1st Defendant-Respondent-Respondent.
Ms. S. Nanayakkara for 2nd Defendant-Respondent – Bank.

ARGUED ON : 10/02/2014

DECIDED ON : 04.04.2014

HON. SHIRANEE TILAKAWARDANE, J

Leave to Appeal was sought by the Plaintiff-Petitioner-Petitioner via the Petition dated 10.08.2010 in Application S.C. (CHC) CALA No. 266/10, in order to enable an Appeal against the Judgment in Case No. WP/HCCA/COL/111/2009/LA by the Provincial High Court of Civil Appeal of the Western Province. Having heard the submissions of the respective Counsel, this Court granted Leave to Appeal on 26.04.2011 on the questions of law set out in paragraph 14(i), 14(iii) of the Petition as modified as follows:

14(i). Does the Plaintiff-Petitioner-Petitioner have ex facie disclosed a prima facie case against the 1st Defendant-Respondent-Respondent?

14(iii). In any event and without prejudice to the aforesaid, does the passage quoted in paragraph 335 in page No. 329 of Law of Contracts by C. G. Weeramantry from Voet 18.5.16, have no application in the backdrop of development of Modern Law?

Furthermore, Leave was also granted on the question of law set out in paragraph 14(ii) of the Petition, amended as follows:

14(ii). Is the auction sale in question an ordinary sale by public auction which attracts the doctrine of laesio enormis?

On 10.02.2014, it was decided to treat the above ground of appeal i.e. 14(ii) as the main point for determination in the Appeal.

The narrative relevant to this case is unfolded as follows: the Plaintiff-Petitioner-Petitioner (hereinafter referred to as the Petitioner) and his wife, by virtue of Deed No. 1129 dated 19.06.1985, became owners of the property more fully described in the Schedule to the Plaint marked P1.

The Petitioner proceeded to obtain a loan of Rs. 2, 550, 000/- from the 2nd Defendant-Respondent-Respondent (hereinafter referred to as the 2nd Respondent) by mortgaging the premises in suit by Mortgage Bond No. 799 dated 10.05.1988.

On 10.10.1983, the 1st Defendant-Respondent-Respondent (hereinafter referred to as the 1st Respondent) instituted action against the Petitioner via D.C. Colombo Case No. 2327/SPL and was later transferred to the Commercial High Court. By judgment delivered by the Commercial High Court on 31.10.2000, the Petitioner was order to pay the 1st Defendant a sum of Rs. 3, 215, 586.48 along with interest on the said sum from 31.10.1986. Though the Petitioner appealed against this decision to the Supreme Court in S.C. (CHC) 26/00, he was unable to pay the brief fees and be present in Court on the day the case was heard (allegedly due to a bona fide mistake). As a result, on 11.10.2004, the Supreme Court dismissed the case.

As the Petitioner did not abide by the determination of the Commercial High Court, the 1st Respondent then obtained a writ on 25.02.2005, seized the abovementioned property and took steps to auction the said half share of the Petitioner. However, on 26.08.2005, the Petitioner filed a Petition and Affidavit in the High Court and the High Court Judge directed him (the Petitioner) to deposit a sum of Rs. 4 million in order to stay the sale but neither the Petitioner nor his Attorneys were present in Court on this date nor was the direction complied with.

Therefore the auction took place on 02.09.2005, as there were no circumstances impeding it, and the 1st Respondent purchased the half share held by the Petitioner for Rs. 8, 025, 000/-. No objections were raised by the Petitioner within thirty days of receiving the Fiscal's Report and accordingly, the Court confirmed the sale. No objections were raised by the Petitioner within 30 days and the Court confirmed the sale on 08.11.2005. The Fiscal Conveyance No. 2179 was written on 13.02.2006.

Though no objections were raised by the Petitioner at this stage, in 2008, the Petitioner instituted D.C. Colombo Case No. 328/08/DLM against the 1st and 2nd Respondents praying for a declaration that Conveyance No. 2179 dated 13.02.2006 is void on the principle of *laesio enormis* and further prayed for an Interim Injunction restraining the 1st Defendant from transferring, mortgaging and alienating the alleged rights of the 1st Defendant. The Learned Additional District Judge of Colombo, on 22.09.2009, refused the Application for an Interim Injunction.

Aggrieved by this Order, the Petitioner sought Leave to Appeal from the High Court by instituting WP/HCCA/COL/LA Application No. 111/2009 but Leave was refused on 30.06.2010. The present case before this Court is an Appeal against the Order in Case No. 111/2009 and where as adverted to above, Leave to Appeal was granted on the abovementioned questions of law on 26.04.2011.

This Court will first deal with the main ground on which this case was argued by the counsel which was the contention whether the auction sale in question is an ordinary sale by public auction which attracts the doctrine of laesio enormis.

The principle of *laesio enormis* is succinctly summarised by *C. G. Weeramantry* in **The Law of Contracts**, *Volume I, p. 332* as follows:

> *"A contract may be avoided by Court on the ground of laesio enormis either when the purchaser pays more than double the true value of the thing or the vendor sells the thing for less than half its value…. Where the consideration is less than half (or more than twice) the true value of the property, the sale is voidable on the ground of laesio enormis unless there is some special consideration present in the case which bars the application of the principle".*

Keeping this principle in mind, it becomes clear that its conditions bear some resemblance to the facts of the present case. Prior to the auction, a valuation of the premises in suit was

obtained. In the Valuation Report of W. M. Wickremaratne (P10), the property was valued at Rs. 88, 576, 000/-. Accordingly, half share of the said property was then valued at Rs. 44, 000, 000/-. Consequently, in D.C. Colombo Case No. 328/08/DLM instituted by the Petitioner, it was alleged by him that the value of the said property, at the time of the conveyance (No. 2179) according to the Valuation Report of K. Arthur Perera was Rs. 209, 275, 000/- and therefore, half share of the said property was valued at Rs. 104, 637, 5000/-.

In light of such facts, the Counsel argued that the alleged consideration tendered in the execution of Conveyance No. 2179 is less than one fifth of the value of the half share of the said land contained in the said valuation report. It was further argued that in light of the Valuation Report marked P12, the consideration tendered was grossly below the true value of the property, thus attracting the principle of laesio enormis. As a result, the Counsel averred that Conveyance No. 2179 is void in law and in fact due to the operation of the said principle.

In light of this argument, this Court notes that the principle of *laesio enormis* has been recognized and applied by Superior Courts previously. However, in the present case, it is imperative to ascertain whether the facts of the case fall within any of the accepted exceptions to this rule as it has been strongly argued that the principle does not apply to sales made under the authority of the Court.

In support of this contention, several authorities have been cited. *J. W. Wessels* in **The Law of Contracts in South Africa (1937)** (*Vol. II at p. 1345*) stated that

> *"In Holland, the remedy was not allowed when a sale had been made by public auction under a judicial decree in execution of a judgment".*

As per Voet in **The Selective Voet being the Commentary on the Pandects**, *Volume III* (Paris Edition of 1829), *XVIII. 5. 16 (p. 350),*

> *"Remedy does not apply to sales in execution – nor again does the remedy apply if the sale has taken place by public auction on the Order of a judge with a view to the execution of a judgment".*

In view of this, *C. G. Weeramantry* in **The Law of Contracts**, *Volume I, p. 335*, citing Voet, specifically states that

"Laesio enormis does not lie in the following cases:-

3. *The remedy does not lie in the case of sales made under authority of Court but it lies in ordinary sales by public auction".*

Similarly, in **Law of Property**, *Volume III (2nd Edition), Wijeyadasa Rajapakshe P.C. at p. 312* expressly states that

"Enormis laesio does not apply to a sale made by Order of a Court or when directions had been given to an heir by a testator to sell property at a certain price."

Given this exception, this Court must ascertain whether Conveyance No. 2179 was executed subsequent to *an ordinary sale by public auction* or *a public auction conducted under the authority of the Court.* It must be made clear that if the present case falls within the parameters of the former, the principle of laesio enormis will apply whilst if is consistent with the latter, the applicability of the principle is negated.

In order to distinguish whether the auction itself was an ordinary sale by public auction, the facts pertinent to the case are important. The chain of events that preceded the auction can be summarised as follows: the Petitioner, not having satisfied the judgment and decree given by the Commercial High Court on 30.10.2000 in Case No. 73/97/01, even after the Supreme Court had dismissed the Appeal against the aforementioned judgment, the 1st Respondent obtained a writ on 25.02.2005 and consequently seized the property on 06.04.2005. Subsequently, the date for the sale of the premises in suit by auction was set on 02.09.2005. Though the Petitioner filed a Petition to stay the sale, due to non-appearance of the Petitioner and non-compliance of the condition laid out by the High Court Judge (who directed that Rs. 4 million be deposited to stay the sale), the sale progressed and the only bid (by the 1st Respondent) of Rs. 8, 025, 000/- was accepted. The Petitioner did not object to the sale, in terms of **Section 282** of the *Civil Procedure Code* and accordingly, the Court confirmed the sale on 08.11.2005 and the Fiscal Conveyance was written on 13.02.2006.

Given the above facts, especially the Writ obtained by the 1st Respondent on 25.02.2005, the confirmation of the sale by the Court on 08.11.2005 and the Fiscal Conveyance written on 13.02.2006, it becomes abundantly clear that the sale did take place under the authority of the Court and therefore, clearly does not attract application of laesio enormis.

However, this Court must also reflect upon the argument made by the Counsel for the Petitioner who stated that the comments made by *C. G. Weeramantry* in **The Law of Contracts**, *Volume I, p. 335* indicates that the principle of laesio enormis lies against ordinary sales by public auction ***even*** *if the said auctions are conducted under the authority of the Court*. This Court strongly disagrees with this contention for the following reasons.

The exception states that *"The remedy does not lie in the case of sales made under authority of Court but it lies in ordinary sales by public auction".* Therefore, it indicates that the principle is indeed applicable in an ordinary sale by public auction: this fact is not in dispute.

However, this Court notes the present case does not qualify as an *ordinary sale.* The auction conducted subsequent to which Conveyance No. 2179 was concluded, was one that was done under *the authority of the Court*: in other words, it is a sale conducted in execution of the judgment in Case No. 73/97/01 as the Petitioner did not satisfy the judgment nor pay the brief fees as directed by the Commercial High Court. The sale was made subsequent to an auction facilitated by a Writ of Execution granted by Court, the auction was conducted by the Fiscal of the Commercial High Court, and further the auction was confirmed by the Court, and therefore, clearly a ***sale*** *made under authority of the Court*, which clearly brings the present case within the ambit of the exception.

Another factor that disallows the applicability of the principle arises from the fact that the 1st Respondent was not a *mala fide purchaser. C. G. Weeramantry* in **The Law of Contracts**, *Volume I, p. 335*, citing Voet, states that

> *"The action is a personal one and only lies against the guilty party or a mala fide purchaser from him".*

The 1st Respondent cannot be termed a *guilty party* in any sense of the word: the 1st Respondent instituted legal action against the Petitioner, obtained Judgment in her favour in Case No. 73/97/01, the auction was conducted by means of a legally obtained Writ, and the Court finally obtained a legal order which confirmed the Sale. In no way can the 1st Respondent be considered a participant in bad faith and as such, the principle of *laesio enormis* cannot be applied to the present case.

Furthermore, the Petitioner's prayer to set aside the Conveyance No. 2179 on the basis of laesio enormis could not be granted for additional reasons. Relevant here is **Section282 (2)** of the *Civil Procedure Code* which states that

> *"The decree-holder, or any person whose immovable property has been sold under this Chapter, or any person establishing to the satisfaction of the court an interest in such property, may apply by petition to the court to set aside the sale on the ground of a material irregularity in publishing or conducting it; but no sale shall be set aside on the ground of irregularity unless the applicant proves to the satisfaction of the court that he has sustained substantial injury by reason of such irregularity, and unless the grounds of the irregularity shall have been notified to the court within thirty days of the receipt of the Fiscal's report".*

It is abundantly clear that though the Petitioner had the legal right to apply by Petition to Court to set aside the sale on the basis of *laesio enormis*, he chose not to do so within the stipulated time period. Instead, this Court notes that Case No. 328/08 DLM was filed in the District Court of Colombo against the 1st and 2nd Respondents on 15.12.2008. In this case, an ex parte enjoining order was obtained but the order was challenged in the High Court. The High Court proceeded to reject the Appellant's Application for an interim injunction. In light of **Section 282 (2)** of the *Civil Procedure Code*, Court notes that "*no sale shall be set aside on the ground of irregularity…..unless the grounds of the irregularity shall have been notified to the Court within* ***thirty days of the receipt of the Fiscal's Report****".* The Registrar's Report clearly recounted the manner in which the auction was conducted and was dated 06.09.2005. However, the Petitioner instituted action to set aside the sale in 2008, three years later.

Furthermore, **Section 282(1)** states that

> *"The Fiscal shall report to the court every sale of immovable property made by him or under his direction within ten days after the same shall have been made. And no sale of immovable property; shall become absolute until thirty days have elapsed subsequent to the receipt of such report, and until such sale has been confirmed by the court".*

In the present case, having received no objections to set aside the sale, the Court confirmed the sale on 08.11.2005 in accordance with the abovementioned provision. Thus, in accordance with **Section 282 (1)** and **Section 282 (2)**, the sale cannot be set aside.

The Court further notes the unnecessary delays and the failure of the Petitioner to take action when essential. Having appealed against the judgment of the Commercial High Court in Case No. 73/97/01 to the Supreme Court in Case No. S.C. (CHC) 26/2000, the Petitioner was absent and unrepresented causing the Supreme Court to abate the case. Further, while the judgment in

Case No. 73/97/01 was given in 2000, the Petitioner did not satisfy the decree, prompting the 1st Respondent to obtain a Writ of Execution in 2005. The Petitioner had ample time to satisfy the decree but made no attempt to settle the matter. The Petitioner also filed a Petition to stay the sale of the premises by auction on 26.08.2005, but failed appear in Court and pay the Rs. 4, 000, 000/- as ordered by the High Court Judge to stay the sale. Therefore, there was no bar for the sale to take place. The Petitioner further did not object to the sale nor attempt to have it set aside within thirty days as provision is made by **Section 282** of the *Civil Procedure Code*. Cumulatively, these material facts indicate that the Petitioner does not have a prima facie case against the 1st Respondent.

The Court also finds it relevant to assess whether the application for an Interim Injunction can be supported if action was instituted within the required time period in accordance with **Section 282** of the *Civil Procedure Code.* In this regard, **Silva v. Dias et al. (1910)** *(13 NLR 125)* is pertinent. In this case, it was held that

> *"A person seeking to set aside a Fiscal's sale on the ground of material irregularity must lead direct evidence to prove that the sale of the property at an under value was due to the irregularity…"*

In the present Supreme Court case, no such irregularity is alleged by the Petitioner. The only assertion made is restricted to the fact that the property sold for an inadequate price. As stated in the above case, *"….**a mere allegation of inadequacy of price without proof that it was the effect of the irregularity**, on the ground of which the sale is impeached, **is not sufficient evidence of substantial damage caused** by such irregularity*". (Emphasis added).

Furthermore, in **Tasadduk Rasul Khan v. Ahamad Husain (1893)** *(ILR. 21. Cal. 66),* the Privy Council held that there must be *direct evidence* to prove that the low price was the result of the alleged irregularity and this reasoning was affirmed in **Muttukumaraswamy v. Nannitamby (1904)** *(4 Tam. 34).* The present case clearly lacks such direct evidence indicating that the low price was the result of an irregularity.

Therefore, this Court must agree with Lord Hutchinson in **Silva v. Dias et al. (1910)** *(13 NLR 125)* where he stated that

"When the Court is satisfied that he things sold have been sold for much less than their market value, it does not necessarily follow that the low price was in consequence of an irregularity; for we all know that absurdly low prices are common at Fiscals' sales which are conducted quite regularly".

Thus, a property being sold at an inadequate price alone does not infer the existence of an irregularity nor is it always the direct result of a material irregularity. What is important in such a situation is to consider the nature of the property as well as that of the alleged irregularity.

Under these circumstances, the Appeal is dismissed and the decision of the High Court in WP/HCCA/COL/LA/111/2009 and that of the District Court in Case No. 328/08/DLM is affirmed. The Court also order Costs in a sum of Rs 100.000/- against the Appellant.

Sgd.

JUDGE OF THE SUPREME COURT

MARASINGHE, J

I agree

Sgd.

JUDGE OF THE SUPREME COURT

ALUWIHARE, PC, J

I agree

Sgd.

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

S.C. Appeal No. 51/2011
SC/HCCA/LA 406/2010
WP/HCCA/Mt/129/07 [F]
D.C. Mt. Lavinia No. 998/98/L

In the matter of an Application for Leave to Appeal.

Nurun Anberiya Hanifa, No. 10, 4th Lane, Rajagiriya.

Plaintiff

Vs.

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.
2. Weliweriya Tholka Mudalige Kulasiri [deceased], No. 1173, 3rd Maradana, Borella, Colombo 8.

2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants

And

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.

2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants-Appellants

Vs.

Nurun Anberiya Hanifa, No. 10, 4th Lane, Rajagiriya.

Plaintiff-Respondent

And Between

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.

2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants-Appellants-Petitioners

Vs.

Nurun Anberiya Hanifa, No. 10, 4th Lane, Rajagiriya.

Plaintiff-Respondent-Respondent

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S.C. Appeal No. 52/2011
SC/HCCA/LA 415/2010
WP/HCCA/Mt/130/07 [F]
D.C. Mt. Lavinia No. 998/98/L

Mohommed Faizal Subiyan of No. 56/16, Dharmarama Road, Colombo 6.

Plaintiff

Vs.

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.

2. Weliweriya Tholka Mudalige Kulasiri [deceased], No. 1173, 3rd Maradana, Borella, Colombo 8.

2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants

And

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.

2A. Muttettuwage Violet Perera, No. 24/4, Janatha

Mawatha, Mirihana, Kotte.

Defendants-Appellants

Vs.

Mohommed Faizal Subiyan of No. 56/16,
Dharmarama Road, Colombo 6.

Plaintiff-Respondent

And Between

1. Mahapatunage Thilak Perera, No. 45/12, Swarna Road, Colombo 6.

2A. Muttettuwage Violet Perera, No. 24/4, Janatha Mawatha, Mirihana, Kotte.

Defendants-Appellants-Petitioners

Vs.

Mohommed Faizal Subiyan of No. 56/16,
Dharmarama Road, Colombo 6.

Plaintiff-Respondent-Respondent

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

COUNSEL : Rohan Sahabandu, P.C., with Ms. Hasitha Amerasinghe for the 1st and 2A Defendant-Appellant-Petitioner-Appellants.
Farook Thahir with A.L.N. Mohamed for the Plaintiff-Respondent-Respondent-Respondent.

ARGUED ON : 11.09.2013.

DECIDED ON : 18.02.2014

TILAKAWARDANE.J

Leave was granted on 02.05.2011 on the questions of law set out in paragraph 16 [a], [b], [c] and [d] of the Petition of the 1st and 2A Defendant-Appellant-Petitioner-Appellants dated 13.12.2010. However, at the commencement of arguments, the parties agreed that the only issue that they wished to make submissions on was regarding the question of whether the Defendant-Appellant-Petitioners had established their claim of prescription to the corpus.

The Plaintiff-Respondent-Respondent [hereinafter referred to as the Respondent] instituted action seeking a Declaration of Title to the lands described in Schedules 2 and 3 of the Plaint dated 25.02.1998, and a further order of ejectment.

This case (S.C. Appeal No. 51/2011) relates to a block purchased by the Plaintiff-Respondent, an adjacent block of land was purchased by her brother who was the Plaintiff-Respondent-Respondent in S.C. Appeal No. 52/2011 and both lots were depicted in Plan No. 3434 prepared by P. Sinnathamby, Licensed Surveyor dated 08.07.1983, and had been produced as P5 in evidence. The lots claimed by the Plaintiff-Respondent had been depicted as Lot A2, in Plan 3434 and Lot 2, in Plan No. 3424 prepared by P. Sinnathamby dated 22.06.1983. The brother, the Plaintiff Respondent in SC Appeal 52/2011 also claimed Lot A1 in the Plan 3434 and Lot 1 in the Plan 3424, and both further sought damages as set out in prayer [c] of the aforesaid Plaint. Parties agree that as the only ground for Appeal was on prescription, and as the relevant facts were identical, the decision given in S.C. Appeal No. 51/2011 would bind the case S.C. Appeal No. 52/2011.

The Plaintiff Respondent in this case claimed Lot A2 and Lot 2. During the proceedings, the Counsel conceded that there was no dispute with regard to the identity of the corpus which is referred to as “Wella Ambalanwatte” which was in extent 5.45 Perches and referred to as Lot A2 in Plan No. 3434 dated 08.07.1983 prepared by P. Sinnathamby, Licensed Surveyor and Lot 2 in Plan No. 3424 prepared by P. Sinnathamby, Licensed Surveyor on 22.06.1983 in extent 7 Perches. It is to be noted that though the question of the identification of the corpus

was taken up in the original Court, these arguments were not pursued in this Court, and in any event, upon a perusal of the Deed No. 2389 [P1] attested by M.A.M. Faizal dated 06.03.1990, the Deed from which the Plaintiff obtained the title had not been challenged**.**

The case of both the Respondents in the two cases was that; in Case No. 51/2011, the claim was by Deed No. 2389 dated 06.03.1990 attested by M.A.M. Faizal, Notary Public, one Luxman Panditharatne who had sold and transferred the two allotments described above and contained in Schedules 2 and 3 of the Amended Plaint. It is also pertinent to note that subsequently a Deed of Rectification bearing No. 3742 dated 01.06.1995 attested by M.A.M. Faizal, Notary Public of Colombo was also executed in respect of Lot A2 more fully described in the 2nd Schedule to the Plaint. In S.C. Appeal No. 52/2011, by Deed No. 1935 dated 24.04.1985 attested by C. Ranjith Kumara, Notary Public, Luxman Perera Panditharatne had sold and transferred the two allotments of lands to one Nazeer Mohamed Aziz, who in turn, by Deed No. 2278 dated 07.10.1989 attested by M.A.M. Faizal, Notary Public, had transferred the two lands described in the 2nd and 3rd Schedules to the Respondents. It is significant to note that during the trial, the 2nd Defendant – Appellant - Petitioner's predecessor in title, the father-in-law, died and his mother-in-law was substituted for the deceased party.

The 1st Defendant – Appellant - Petitioner claimed his prescriptive rights from his father, Mahapatunage Elaris Perera, who claimed to have been in possession of the land from 1971 for more than 10 years, and he further stated that after the death of his father in 1989, the 1st Defendant – Appellant – Petitioner had been in uninterrupted possession by a Deed of Declaration bearing No. 3683 dated 06.12.1992 attested by D. H Liyanage, Notary Public. He therefore claimed that from 1971, that is, from the time of his father Elaris Perera's possession, up to the time of the action, he had been in exclusive uninterrupted and adverse possession of the land. He also claimed that his rights set out in the Deed of Declaration which was written on 06.12.1992 was gifted by him to his father-in-law who was the 2nd Defendant – Appellant - Petitioner in the original case, by Deed of Gift bearing No. 23 dated 01.05.1993 attested by S. V. G. Guruge. It is noteworthy that when the trial was proceeding, several issues were raised, but two of the issues, namely, Issues 18 and 19, were not

accepted by the Judge who was hearing the case, and therefore, such issues were struck off, and the District Judge made an Order on 25.11.2004 stating that it was not clear as to what land was purported to have been claimed by the 1st and 2nd Defendants, that is, the 1st and 2A Defendant – Appellant – Petitioners, hereinafter referred to as the Appellants in this case.

First and foremost, there is no doubt in this case that the pedigree upon which title was claimed by the Respondents in this case had been clearly established and the corpus had been identified. No objections had been raised with regards to the Deeds that were admitted in evidence.

It is then pertinent to ascertain whether possession can be proved for the period of time the Appellants allege that they have been in possession. In this case, it is noteworthy that when Luxman Panditharatne, who was a witness called by the Appellant in the case, gave evidence, he categorically stated that when he sold the lands to the Respondents it was a bare land and at the time the land was handed over after the execution of the deed, exclusive possession was given to the Plaintiff-Respondent. The Appellants in their evidence clearly stated that Mohamed Faizal Subain, the Respondent in S.C. Appeal No. 52/2011, had inspected the property and there were no buildings on the land at the time and that the Respondent in S.C. Appeal 51/2011, had inspected the land in 1991, and at that time the land was visited, nobody had been on the property. It appears that the delay in taking over possession had arisen due to the Appellant in S.C. Appeal 52/2011 being informed by her younger brother that she was receiving threatening calls, which at the time, she had taken very seriously as one of their brothers was murdered earlier over a land dispute. The evidence of the Plaintiff Respondent in this case was that in 1992, when the Respondent in S.C. Appeal No. 52/2011 had gone to visit the land, he had noticed that there was a hut made out of asbestos sheets and that he had been threatened that if he came inside the property, he would be murdered. He had subsequently made a complaint to the Wellawatte Police Station on 06.11.1992 with regard to this incident.

Tilak Perera, the 1st Defendant – Appellant Petitioner in this case, sought to claim the land by

pursuing a prescriptive claim to the corpus. However, when he gave evidence he had to concede that the Deed of Declaration was in 1992 and that he was not in possession of the land prior to that but as previously noted, claimed purported possession of the said land by his father Elaris Perera from 1971. It is important in this context that when one considers the evidence of Malkanthi Ranaweera who was a Chief Assessing Inspector of the Colombo Municipal Council, when she was shown V1 which was Deed No. 3683 dated 06.12.1992, she asserted that at that time, the premises had not been assessed. It is significant to note that though the Appellants claim that their predecessors in title had been on the premises bearing Assessment No. 45/12, Swarna Road, the rates had been only paid by them from 1992 and that prior to 1992 no payments had been made. Furthermore, the marriage certificate produced in the case of the 1st Defendant - Appellant - Petitioner discloses another address and militates against the parties having been residents of the premises at the time of their marriage. These factors do not support the contention of the Appellants as the payment of rates alone does not establish that they had been in possession for well over 10 years. It is clear that the Appellants' predecessor in title, his father, had never paid any rates for the land and that therefore, this Court holds that he would have been a licensee who had merely been in occupation of the land.

Another witness, Kankanamlage Nishantha, who was an officer from Elections Office in Rajagiriya, has stated that the electoral register shows that they had been registered to this address only from 1992 and therefore, the documents marked D14 to D19 would not in any way prove or support the claim for prescription made by the Appellants. Indeed, the documents merely prove that the 1st Defendant – Appellant - Petitioner had been registered as a voter at the premises bearing No. 45/12, Swarna Road for the first time in 1994. What is more significant is that prior to that date, he and his family, including his sister, had been registered as voters in some other premises bearing No. 16/6, Athula Place, Kirulapone.

Another document marked D20 was strongly relied upon by the Appellants to show that their father had been in possession of the disputed land. The document was a letter dated 22.06.1981 and it refers to the sale of two cows by Elaris Perera of No. 45/12 Swarna Road,

Colombo 6.However the witness was unable to state as to whether Elaris Perera was a permanent resident and in continuous occupation of the disputed land and if not, in which capacity he was there, except to say that the cows were feeding on the grass of the land. The contention of the counsel who appeared for the Respondents were that there was no permanent residence or occupation by Elaris Perera but that he merely kept his cows from time to time to graze on the land.

Three other documents, marked V27, V28 and V29 that were produced by a Veterinary Physician, were presented in evidence, but the documents were not challenged as they did not contribute to establishing the capacity in which Elaris Perera was in occupation of the said land. Indeed, it is significant that the 1st Defendant – Appellant – Petitioner himself was unable to say with certainty in which capacity his father had come into occupation, nor was he able to say how or the exact date on which such occupation commenced. Therefore, from 1971 to 1989, had the father been in occupation of this land as its owner, in order to prove adverse possession, there should have been some official documents to show that he was occupying the said land in the capacity of an owner.

The 1st Defendant – Appellant - Petitioner could only produce a Deed of Declaration bearing No. 3683 dated 06.12.1992 and this Deed did not set out the manner in which such title was obtained by him. The Plaintiff-Respondents clearly led the evidence of the purchase of 2 blocks of bare lands which was corroborated by the Notary Public who sold this land. In 1992, they had realized that somebody had put a hut on that land and this problem had arisen. Thus, if at all, the 1st Defendant – Appellant - Petitioner-Appellants could claim prescription only after 1992, after having allegedly surreptitiously entered the land. The case was filed in 1998 and therefore, in the time frame from 1992 to 1998, they have not been in possession for a period of 10 years. Hence, this evidence accrues to the benefit of the Plaintiff-Respondent-Respondent.

When all the above evidence is considered cumulatively, this Court finds that the Appellants have been unable to establish their claim on prescription.

Under these circumstances, both Appeals [S.C. Appeal No. 51/2011 and 52/2011] are dismissed with costs in a sum of Rs. 50, 000/- to be paid by each of the 1st and 2A Defendant-Appellant-Petitioner-Appellants to the two Plaintiff-Respondent-Respondents and the decisions of the District Judge and Judges of the Appellate High Court of Mount Lavinia are affirmed.

Sgd.

JUDGE OF THE SUPREME COURT

DEP. P.C. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

WANASUNDERA. P.C.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

MK

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

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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

SC Appeal No. 67/2013
SC (SPL) LA Application No. 24/2013
CA (Writ) Application No. 411/2012

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

-Vs-

Dr. Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake,
Residence of the Chief Justice of Sri Lanka
No. 129, Wijerema Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive,
Colombo 08.

PETITIONER - RESPONDENT

1. Chamal Rajapakse,
   Speaker of Parliament,
   Parliament of Sri Lanka,
   Sri Jayawardenepura, Kotte.

2. Anura Priyadarshana Yapa,
   Eeriyagolla,
   Yakawita.

3. Nimal Siripala de Silva,
   No. 93/20, Elvitigala Mawatha,
   Colombo 08.

4. A. D. Susil Premajayantha,
   No. 123/1, Station Road,
   Gangodawila, Nugegoda.

5. Rajitha Senaratne,
   CD 85, Gregory's Road,
   Colombo 07.

6. Wimal Weerawansa,
No. 18, Rodney Place,
Cotta Road, Colombo 08.

7. Dilan Perera,
No. 30, Bandaranayake Mawatha,
Badulla.

8. Neomal Perera,
No. 3/3, Rockwood Place,
Colombo 07.

9. Lakshman Kiriella,
No. 121/1, Pahalawela Road,
Palawatta, Battaramulla.

10. John Amaratunga,
No. 88, Negambo Road,
Kandana.

11. Rajavarothiam Sampathan,
No. 2D, Summit Flats,
Keppitipola Road,
Colombo 05.

12. Vijitha Herath,
No. 44/3, Medawaththa Road,
Mudungoda, Miriswaththa,
Gampaha.

Also of
Parliament of Sri Lanka,
Sri Jayawardenepura, Kotte.

13. W.B.D. Dassanayake,
Secretary General of Parliament,
Parliament Secretariat,
Parliament of Sri Lanka,
Sri Jayawardenapura, Kotte.

RESPONDENT - RESPONDENTS

Before **:** Hon. Saleem Marsoof, PC., J,
Hon. Chandra Ekanayake, J,
Hon. Sathyaa Hettige, PC., J,
Hon. Eva Wanasundera, PC., J and
Hon. Rohini Marasinghe, J.

Counsel	**:**	Palitha Fernando, PC, Attorney General with Shavindra Fernando, DSG., Sanjay Rajaratnam DSG., Dilip Nawaz, DSG., Janak De Silva, DSG., Nerin Pulle, SSC., and Manohara Jayasinghe, SC, for the Petitioner-Appellant. Petitioner-Respondent is absent and unrepresented. M.A. Sumanthiran with Viran Corea and Niran Ankatell for the 11th Respondent-Respondent. J.C. Weliamuna with Sunil Watagala, Pulasthi Hewamanne and Mevan Bandara for the 12th Respondent - Respondent.
Argued on	**:**	28.11.2013
Written Submissions:		12.12.2013 (Petitioner-Appellant) 12.12.2013 (12th Respondent-Respondent) 17.12.2013 (11th Respondent-Respondent)
Decided on	**:**	21.02.2014

SALEEM MARSOOF J.

By its orders dated 30th April 2013 and 28th June 2013, this Court has granted special leave to appeal against the judgment of the Court of Appeal dated 7th January 2013 on two questions of "public or general importance" within the meaning of the proviso to Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as "the Constitution of Sri Lanka" or "the Constitution").

These questions concern the ambit of the writ jurisdiction of the Court of Appeal, in particular, whether the Court of Appeal had the power to issue a writ of *certiorari* in terms of Article 140 of the Constitution with respect to proceedings and actions of Parliament or of a Parliamentary Select Committee within the process of impeachment of a Chief Justice of Sri Lanka under Article 107 of the Constitution. Before considering these questions in greater detail, it will be useful to outline the material facts and circumstances from which they arise for determination.

Impeachment Motion and the Report of the Select Committee

On or about 1st November 2012, a notice of a resolution for the removal of the Petitioner-Respondent, the 43rd Chief Justice of Sri Lanka, prepared in terms of the proviso to Article 107(2) of the Constitution, signed by 117 Members of Parliament, setting out therein, 14 charges pertaining to alleged misbehavior on the part of the Petitioner-Respondent, was presented to the 1st Respondent-

Respondent, who is the Speaker of the House of Parliament. The 1st Respondent-Respondent entertained the said motion, placed it on the Order Paper of Parliament on 6th November 2012, and acting in terms of Order 78A(2) of the Standing Orders of Parliament, made by Parliament pursuant to powers conferred by Articles 74(1)(ii) and 107(3) of the Constitution, proceeded to appoint on 14th November 2012, a Parliamentary Select Committee consisting of the 2nd to 12th Respondent-Respondents, to consider the same.

The said Select Committee, investigated 5 of the 14 charges contained in the motion, and by its undated report, allegedly prepared on 8th December 2012, a copy of which was produced by the Petitioner-Respondent marked 'P17' with her petition filed in the Court of Appeal dated 19th December 2012, found the Petitioner-Respondent guilty, by majority decision, of charges 1,4, and 5, which were considered by the Select Committee to be "of such a degree of sufficiency and seriousness as to remove" the Petitioner-Respondent from the office of Chief Justice of Sri Lanka. The said report was signed by only the 2nd to 8th Respondent-Respondents, since the 9th to 12th Respondent-Respondents had staged a walk out from the Select Committee on 7th December 2012, after the Petitioner-Respondent herself walked out midway through the proceedings before the Select Committee on 6th December 2012, but the Committee had nonetheless proceeded with its business without their participation.

On 19th December 2012, the Petitioner-Respondent filed an application for orders in the nature of writs of *certiorari* and prohibition in the Court of Appeal, citing the Speaker of the House of Parliament, the Chairman and members of the aforesaid Parliamentary Select Committee, and the Secretary General of Parliament as respondents, but except for the 11th and 12th Respondent-Respondents, none of the other respondents had responded to the notice issued by the Court of Appeal. However, the 11th and 12th Respondent-Respondents appeared in the Court of Appeal and through their Counsel informed court that they are instructed to accede to the jurisdiction of court and inform court that they do not intend to file any objections in the case, but would assist court.

While the said writ application was pending before the Court of Appeal, the Speaker of the House reported the findings of the Select Committee contained in the report marked "P17" to Parliament, which debated the resolution to impeach the Petitioner-Respondent on 11th January 2013, and passed the same with 155 Members of Parliament voting for it, and 49 voting against it. This paved the way for an address of Parliament for the removal of the Chief Justice to be presented to the President of Sri Lanka as required by Article 107(2) of the Constitution and Order 78A(9) of the Standing Orders of Parliament, and thereupon, on or about 12th January 2013, the President made order in terms of Article 107(2) of the Constitution removing the Petitioner-Respondent from the office of Chief Justice of Sri Lanka.

The Decision of the Court of Appeal

By the application filed by her in the Court of Appeal dated 19th December 2012, the Petitioner-Respondent sought the following substantive relief:-

(a) a mandate in the nature of writ of *certiorari* quashing the findings and / or the decision of the report of the 2nd to 8th Respondent-Respondents marked 'P17' and or quashing the said report marked 'P17';

(b) a mandate in the nature of writ of prohibition, prohibiting the 1st and / or 2nd to 13th Respondent-Respondents from acting on or and / or taking any further steps based on the said purported report marked 'P17';

The aforesaid relief were prayed for on the basis of the alleged procedural irregularities in the manner in which the Select Committee was constituted and / or conducted its affairs. It was also contended that the exercise of judicial power by the Select Committee was unconstitutional, and alternatively, that the functioning of the 2nd to 8th Respondent-Respondents as the Select Committee even after the withdrawal of the 9th to 12th Respondent-Respondents was wrongful, unlawful and *ultra vires* the Standing Orders of Parliament, and that the Petitioner-Respondent was deprived of a fair hearing. It was further contended that in the aforesaid circumstances, the 2nd to 8th Respondent-Respondents failed to adhere to the rule of law, breached the rules of natural justice, acted unreasonably, and / or capriciously and / or arbitrarily, and had prejudged matters.

It is significant that neither the 1st Respondent-Respondent, who is the Speaker of the House of Parliament, nor the 2nd to 8th Respondent-Respondents, who were the members of the Parliamentary Select Committee, responded to the summons issued by the Court of Appeal. Only the 11th and 12th Respondent-Respondents appeared in the Court of Appeal, and acceded to the jurisdiction of court and further informed court that they do not intend to file any objections in the case. The Court of Appeal, first disposed of the applications made by two persons, namely, Don Chandrasena and Sumudu Kantha Hewage, to intervene into the case. By its order dated 3rd January 2013, the Court of Appeal refused the applications for intervention, and by the same order it decided to invite the Petitioner-Appellant, who is the Attorney-General of Sri Lanka, to assist court as *amicus curiae*.

At the hearing of the Court of Appeal into the substantive application held on 7th January 2013, learned Counsel for the Petitioner-Respondent and the 11th and 12th Respondent-Respondents made submissions, and the learned Attorney-General also assisted Court as *amicus curiae*. It is noteworthy that the learned Attorney-General, in the course of his submissions, stressed that the Court of Appeal is devoid of jurisdiction to hear and determine the application as the jurisdiction of that court conferred by Article 140 of the Constitution, is "subject to the provisions of the Constitution", which excluded judicial review of the process of impeachment of Judges of the Supreme Court and the Court of Appeal.

By its judgment dated 7th January 2013, the Court of Appeal held that since its power to exercise judicial review on findings or orders of persons "exercising authority to determine questions affecting the rights of subjects" is wide, and has been conferred by the Constitution of the Democratic Socialist Republic of Sri Lanka, it cannot be "abridged by the other arms of the government, namely the Legislature or the Executive." In arriving at this conclusion, the Court of

Appeal sought to follow the principle enunciated by this Court in *Atapattu and others v People Bank and others* [1997] 1 Sri LR 208 at pages 221 to 223. The Court of Appeal reasoned as follows:-

> "The Constitution in Article 80(3), 81 and 124 expressly ousts the jurisdiction of courts. If the legislature had intended that the jurisdiction of the court should be ousted under Article 107 of the Constitution to impeach judges, it ought to have specifically provided for such an eventuality. As such, in my opinion the Legislature has clearly placed no such obstacle either directly or by necessary implication in the way of entertaining the present application."

Having thus taken a considered decision to exercise jurisdiction in the case, the Court of Appeal purported to apply the determination of this Court in SC Reference No. 3/2012, which was made in terms of Article 125 of the Constitution on a question of constitutionality that was considered to have arisen in CA (Writ) Application No. 358/2012. In SC Reference No. 3/2012, a Bench consisting of 3 judges of the Supreme Court, had determined that-

> ".....it is *mandatory under Article 107(3) of the Constitution for the Parliament to provide by law* the matters relating to the forum before which the allegations are to be proved, mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity". (*Emphasis added*)

The Court of Appeal considered itself bound by the said determination, and upheld the submission of the learned President's Counsel for the Petitioner-Respondent that by reason of the aforesaid determination, "a Select Committee appointed under and in terms of Standing Order 78A has no power or authority to make a finding *adversely affecting the legal rights of the judge* against whom the allegation made in the resolution moved under the proviso to Article 107(2) is the subject matter of its investigation." The Court of Appeal accordingly concluded that the power "to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or body, *only by law and by law alone*", and went on to hold that the finding and / or the decision or the report of the 2nd to 8th Respondent-Respondents marked as 'P17', "has no legal validity, and as such this court has no alternative but to issue a writ of *certiorari* to quash 'P17', thus giving effect to the determination of the Supreme Court referred to above."

It is significant to note that the Court of Appeal did not make any findings on any of the other allegations, including those of impropriety and non-conformity with rules of natural justice, made by the Petitioner-Respondent in her petition, and it also declined to grant a mandate in the nature of writ of prohibition as prayed for by the Petitioner-Respondent. The Court of Appeal expressly stated in the impugned judgment that insofar as the Petitioner-Respondent had failed to cite as party respondent to her writ petition, the 117 Members of Parliament who had signed and presented to the 1st Respondent-Respondent the impeachment motion under consideration, "the quashing of the impugned decision will not affect the members who subscribed to the impeachment motion, as it does not prevent the Parliament from proceeding with the said motion to impeach the petitioner [the present Petitioner-Respondent]".

The Application for Special Leave to Appeal

The Petitioner-Appellant, in his capacity as the Attorney-General of Sri Lanka, applied to this Court on 15th February 2013 seeking special leave to appeal against the decision of the Court of Appeal dated 7th January 2013 on the basis of several substantive questions of law. The Petitioner-Respondent responded to the notice issued on her by the Registrar of this Court by way of motion dated 16th March 2013, in which the said Respondent has stated as follows:

> "The Court of Appeal gave its Order on 7th January 2013. The Court of Appeal Order was not followed and / or was not adhered to by most of the Respondent-Respondents.
>
> The Petitioner-Respondent has at all times maintained that her impeachment is null and void and is of no force or effect in law and will continue to be so. Consistent with the Petitioner-Respondent's position, the Petitioner-Respondent will not participate in these proceedings.
>
> Thus the Petitioner-Respondent's view is that her purported removal as Chief Justice is of no force or effect in Law. In any event, the Petitioner-Respondent fails to see how a party invited to assist Court could appeal against the said order."

This Court, after hearing submissions of the learned Attorney-General who appeared in support of the application for special leave to appeal, made order on 30th April 2013, granting special leave to appeal against the impugned judgment of the Court of Appeal in terms of the proviso to Article 128(2) of the Constitution on two substantive questions of law. Court also fixed the appeal for hearing on 29th May 2013 after the filing of written submissions.

The 11th and 12th Respondent-Respondents thereafter filed motions dated respectively 21st May 2013 and 22nd May 2013, informing the Court that they could not file *caveat* or appear in this Court on 30th April 2013 for the purpose of objecting to the grant of special leave to appeal against the judgment of the Court of Appeal as they had not received any notice from this Court requiring them to do so. After examining the contents of the aforesaid motions, the supporting affidavit affirmed to by the 12th Respondent-Respondent, and all other relevant material, this Court made order on 29th May 2013 that the Attorney-General had duly taken out notice on all parties cited as respondents, and that there has been substantial compliance by the Petitioner-Appellant of the Supreme Court Rules, 1990.

However, in view of the position taken up by the 11th and 12th Respondent-Respondents that they had not in fact received the notices sent out through the Registry of this Court, it was considered necessary to permit the 11th and 12th Respondent-Respondents, in the interests of Justice, "an opportunity to participate in the proceedings for the grant of special leave to appeal." Accordingly, Court set aside its own order granting special leave to appeal with respect to the 11th and 12th Respondent-Respondents, to enable them to file *caveat* within one week, and fixed the case for consideration of special leave to appeal against these respondents for 10th June 2013, on which date the Court also considered certain preliminary objections that had been taken up by the 11th and 12th Respondent-Respondents against the maintainability of the application for special leave to appeal.

In view of certain submissions made by learned Counsel in the course of the hearing of this appeal, it may be opportune to mention that one of the preliminary objections raised by the 11th and 12th Respondent-Respondents was that the Attorney-General, who had not been a party to the writ application before the Court of Appeal, and was invited by that court to assist court as *amicus curiae*, was not entitled to appeal against the decision of the said Court. This Court dealt with this and the other objections raised by the said respondents in its unanimous order dated 28th June 2013, by which all of the objections of the 11th and 12th Respondent-Respondents were overruled. In particular, this Court followed its decision in *Bandaranaike v Jagathsena* (1984) 2 Sri LR 397, and held that the Supreme Court has a wide discretion under Article 128(2) of the Constitution to entertain an application for special leave to appeal *from a person who was not a party to the proceedings before the Court of Appeal*, where it is of the opinion that the question or matter in issue is "fit for review by the Supreme Court". This Court further held that where, as in this case, the Court is satisfied that "the question to be decided is of public or general importance", the *Court has no power to refuse leave to appeal* in view of the proviso to Article 128(2) of the Constitution.

Accordingly, this Court granted leave to appeal against the 11th and 12th Respondent-Respondents on the same two substantive questions of law on the basis of which special leave to appeal was previously granted on 30th April 2013 against all respondents. The two substantive questions of Law on which special leave to appeal was granted by this Court, are as follows:-

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?

In my view, it is convenient to consider these questions in converse order, and hence I would prefer to consider Question 2) ahead of Question 1). In any event, though formulated as two separate questions, in the context of the factual settings of this case, the essence of the substantive questions of law on which this Court has granted leave to appeal is whether the Court of Appeal was possessed of jurisdiction to issue an order in the nature of a writ of *certiorari* in terms of Article 140 of the Constitution with respect to proceedings and actions of Parliament or of a Parliamentary Select Committee, within the process of impeachment of a Chief Justice of Sri Lanka under Article 107 of the Constitution, and I would prefer to adopt a general approach towards these questions.

The Submissions of Counsel

As already noted, the two questions on which this Court has granted special leave to appeal relate to the ambit of the writ jurisdiction of the Court of Appeal. We have heard extensive submissions of learned Counsel on the substantial questions of law on which special leave to appeal has been granted, and have considered these as well as the additional written submissions filed by the learned Counsel as directed by this Court on 28th November 2013. It will be useful to begin with a

summary of the submissions of learned Counsel. The learned Attorney General has submitted that the Court of Appeal exceeded the jurisdiction vested on it by Article 140 of the Constitution in entertaining the application filed by the Petitioner-Respondent and making its several orders including the judgment dated 7th January 2013 which sought to quash the report of the Parliamentary Select Committee. He has premised these submissions primarily on the *sui generis* nature of the power of impeachment conferred on the President and Parliament by Articles 4 and 107 of the Constitution based on a system of checks and balances inspired by the doctrine of separation of powers.

He has submitted that historically, the power of removal of superior court judges has been vested in the legislative and executive branches of the State, and the courts had no role to play in the process, which position is also reflected in the present Constitution. He has highlighted the limitations placed on the jurisdiction and powers of the Court of Appeal by reference to various provisions of the Constitution of Sri Lanka including Article 140 itself, and stressed that the Court of Appeal has not only overlooked other relevant provisions of the Constitution but also has paid scant respect to the exclusive jurisdiction of Parliament in regard to its own proceedings and decisions. In particular, he relied on what he described as a "constitutional ouster" of the jurisdiction of Court which arises from the incorporation by reference of Section 3 and other provisions of the Parliamentary (Powers and Privileges) Act into Article 67 of the Constitution.

It was the submission of the learned Counsel for the 11th Respondent-Respondent that the Court of Appeal had acted within its jurisdiction in entertaining the application of the Petitioner-Respondent and making the several orders it did, and in doing so, it had acted objectively and with due difference to the legislative arm of government. He argued that the contention of the Attorney General that Article 67 of the Constitution had the effect of elevating the provisions of the Parliamentary (Powers and Privileges) Act into a "constitutional ouster" of the jurisdiction of the Court of Appeal is not supported by the text of that article, by decided authority, or by the principles of constitutional theory. He emphasised that the express provisions of the Constitution conferring on the Court of Appeal its jurisdiction to issue orders in the mature of writs, and the presumption in favour of jurisdiction entail that in the absence of contrary provisions in the Constitution, the jurisdiction of that court would be preserved. Relying on the decision of *Stockdale v Hansard* [1839] EWHC QB J21, 112 ER 1112 (1839), he stressed that while Parliament could regulate its own affairs, where the rights of a third party was concerned, the Courts would not be denuded of jurisdiction, and that in any event, the scope of the ouster did not affect the material subject matter of this case.

Learned Counsel for the 12th Respondent-Respondent has submitted that the impugned judgment of the Court of Appeal is well conceived in law and is an affirmation of the independence and dignity of that court and a manifestation of the willingness of that court to defend the Rule of Law and the independence of the judiciary, whereas the very grounds of appeal relied on by the Attorney General are an attack on these fundamental concepts. He submitted that in terms of Article 3 of the Constitution, sovereignty is in the hands of the People, and that in Sri Lanka, unlike in the United Kingdom, Parliament is not supreme and it is only the Constitution that is supreme. Referring to certain observations of this Court in *Heather Therese Mundy v Central Environmental Authority*, SC 58-60/2003 (SC Minutes of 20th January 2004), he submitted that the scope and ambit of writs have

been extended from time to time through judicial activism, and that "orders in the nature of writs" issued in terms of Article 140 of the Constitution constitute one of the principal safeguards against excess and abuse of executive powers. He submitted citing *Kesavananda Bharathi v State of Kerala and Anr* (1973) that the safeguarding of the basic structure of the constitution is the task of the courts, but the validation of the removal of the Chief Justice is not a function that falls within the jurisdiction of the Supreme Court of Sri Lanka.

I take this opportunity, to thank all the learned Counsel, for the assistance rendered to this Court in the hearing of this appeal, particularly for all their efforts in making available to this Court in a timely manner, the relevant authorities, some of which were hard to find, and I do so, on my own behalf as well as on behalf of the other members of this Bench.

The Writ Jurisdiction of the Court of Appeal

It is convenient to first consider Question 2), on which special leave to appeal has been granted by this Court, which is whether the Court of Appeal erred 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. In answering this question, it is necessary to examine Article 140 of the Constitution, which provides as follows:-

> "Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of *certiorari,* prohibition, *procedendo, mandamus* and *quo warranto* against the judge of any Court of First Instance or tribunal or other institution or any other person:
>
> Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal."

It is noteworthy that there have been some instances in which the jurisdiction of the Court of Appeal to grant and issue "orders in the nature of writs" in terms of Article 140 of the Constitution has been vested in the Supreme Court by legislation, and that the jurisdiction of the Court of Appeal to issue the specific writs enumerated in Article 140 as well as orders in the nature of *habeus corpus* under Article 141 are concurrently vested in the High Court of the Provinces by virtue of Article 154P(4) of the Constitution. These provisions do not concern us in this appeal.

The learned Attorney General has submitted that the words "or any other institution" occurring in Article 140 of the Constitution have to be read *ejusdem generis*, and has invited our attention to two early decisions of this Court, namely, *In the Matter of an Application for a Writ of Habeas Corpus on the Body of Thomas Perera alias Banda* 29 NLR 52 (SC) and *In re Goonesinha* 43 NLR 337 (SC), which show that this Court has, following the common law of England, held that the phrase "other institution" does not include a superior court. He has argued that though in terms of Article 4(c) of

the Constitution, the judicial power of the People may be directly exercised by Parliament in regard to matters relating to the privileges, immunities and powers of Parliament, neither Parliament nor a Select Committee thereof appointed as contemplated by Article 107(3) of the Constitution read with Order 78A(2) of its Standing Orders, is a court of first instance or inferior court within the meaning of Article 140 of the Constitution.

Learned Counsel for the 11th Respondent-Respondent has, on the other hand, relied on the presumption in favor of jurisdiction adverted to by this Court in *Atapattu v People's Bank* (1997) 1 Sri LR 208 at page 222, and contended that since the 2nd to 8th Respondents-Respondents, who signed the impugned report of the relevant Select Committee of Parliament, fall within the words "or other person" used in Article 140 of the Constitution even if they may not be a "judge of the any Court of First Instance or tribunal or other institution" within the meaning of that article, they were amenable to the writ jurisdiction of the Court of Appeal.

Learned Counsel for the 12th Respondent-Respondent has invited our attention to the decision of this Court in *Mundy v Central Environmental Authority and Others* SC Appeal 58/2003 (SC Minutes dated 20.1.2004), where this Court has noted that orders granted and issued by the Court of Appeal under Article 140 of the Constitution "constitute one of the principal safeguards against excess and abuse of executive power, mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents." He has also submitted, citing recent decisions of our courts such as *Harjani and Another v Indian Overseas Bank and Another* (2005) 1 Sri LR 167, that the dynamism of law has driven the traditional remedy of *certiorar*i away from its "familiar moorings by the impetus of expanding judicial review".

The six mandates in the nature of writs mentioned in Article 140 of the Constitution of Sri Lanka had their origins in the common law of England which recognized the prerogative power of the Crown to grant and issue writs initially through the Star Chamber, and after its abolition in 1642, through the Court of King's Bench to ensure that inferior courts and authorities acted within their jurisdiction. After Sri Lanka came under British rule, the prerogative powers of the British Crown were recognized by the local courts as a consequence of annexation, which applied the English common law in issuing mandates in the nature of writs, and Section 42 of the Courts Ordinance, No. 1 of 1889, which may safely be regarded as the predecessor to Article 140 of the present Constitution, provided that-

> "The Supreme Court or any Judge thereof, at Colombo or elsewhere shall have full power and authority to inspect and examine the records of any Court, and to grant and issue, according to law, mandates in the nature of writs of mandamus, *quo warranto*, *certiorari,* procedendo and prohibition, against any District Judge, Commissioner, Magistrate or other person or tribunal".

The learned Attorney General has submitted that the writ jurisdiction of the Court of Appeal is confined in its purview to courts of first instance and tribunals and other institutions exercising judicial or *quasi-judicial* powers, and do not extend to the Parliament or a Select Committee of Parliament, which are part of the legislative arm of State. In interpreting Article 140 of the Constitution, this Court has to give impetus to the words "subject to the provisions of the

Constitution", which in the present context would take us to Articles 3 and 4 of the Constitution, the implications of which will be considered later on in this judgment, and before doing so, it is desirable to deal with the learned Attorney General's submissions on the applicability of the *ejusdem generis* rule.

The learned Attorney General has argued that the words "or any other institution" must be read *ejusdem generis*. These Latin words literally mean "of the same kind", and it is generally accepted that the *ejusdem generis* rule is applicable when particular words pertaining to a class, category or genus are followed by general words, and that unless there is something in the context that suggests otherwise, the general words are construed as limited to things of the same kind as those specified. The rule reflects an attempt to reconcile incompatibility between the specific and general words in view of the other rules of interpretation, which require that all words in a statute are given effect to, that a statute be construed as a whole, and that no words in a statute are presumed to be superfluous.

As Lord Wright observed in National *Association of Local Government Officers v. Bolton Corp.* (1943) AC 166, "the *ejusdem generis* rule is often useful or convenient, but it is merely a rule of construction, not a rule of law". Craies on *Statute Law* 7th Edition, has stressed at page 181 that-

> "…….to invoke the application of the *ejusdem generis* rule, there must be a *distinct genus or category*. The specific words must apply not to different objects of a widely differing character but to something which can be called a class or kind of objects. Where this is lacking, the rule cannot apply."(*Emphasis added*)

Farwell L.J., has explained in *Tillmanns and Co. v. SS. Knutsford* 1908 2 KB 385 at pages 402 to 403 that "there is no room for the application of the *ejusdem generis* doctrine unless there is a genus or class or category – perhaps category is the better word….", and as Lord Thankerton put it in *United Towns Electric Co. Ltd. v. Attorney General for Newfoundland* 1939 1 All ER 423 at page 428, the "mention of a single species – for example, water rates, does not constitute a genus". Hence the question that arises here is whether we can identify a genus or category within the words that are used in Article 140 in setting out or identifying the bodies that were sought to be conferred "full power and authority" to inspect and examine records and grant and issue orders in the nature of writs. The key words in Article 140 are "*any Court of first instance or tribunal or other institution*" which are used in relation to the power to examine records, and "*the judge of any court of first instance, or tribunal, or other institution or any other person*" when it comes to the power to grant and issue orders in the nature of writs. We are here concerned with the second set of words in the context of the power of the Court of Appeal to grant and issue orders in the nature of writs, but should also be mindful of the first set of words in order not to lose sight of the objectives of that article.

In interpreting these words, it is important to consider how our courts exercised writ jurisdiction prior to the present Constitution. I note that the language of the first paragraph of Article 140 of the present Constitution seems to follow the words of section 42 of the Courts Ordinance No. 1 of 1889, which vested the jurisdiction in the Supreme Court. It is noteworthy that while the phrase "court of first instance" is not found in section 42 of the Courts Ordinance, this Court has examined the ambit of that section in several celebrated decisions. However, before adverting to the Sri Lankan decisions interpreting these provisions, I would like to commence my examination of the ambit of the writ

jurisdiction of our courts with an analysis of the English common law, which is the source from which the six mandates in the nature of writs mentioned in section 42 of the Courts Ordinance originated.

One of the oldest cases that explored the writ jurisdiction of the old English courts was that of *Ex parte Jose Luis Fernandez* (1861) 142 ER 349, in which the Court of Common Pleas (Earl CJ., Willes J., and Byles.J) concluded, after careful examination of early authorities on the point, that it had no jurisdiction to issue a writ of *habeus corpus* for the release of a witness who had been convicted by the Court of Assize for contempt of court for his refusal to answer questions put. In separate judgments, Earl C.J., observed that "the jurisdiction to try in the country all the civil cases that ought otherwise to have been tried in the Superior Courts of Westminster" was devolved upon the justices of assize by the Statute of Westminster enacted in 1285, and that "there are direct authorities for affirming that the court of assize is entitled to the authority of a court of *a superior degree*."

It is noteworthy in the context of this appeal that Willis J., in his concurring judgment, noted that Judges of Assize "belonged to that *superior class* to which credit is given by other Courts for acting within their jurisdiction, and to whose proceedings the presumption *omnia rite esse acta* applies *equally as to those of the Supreme Court of Parliament itself.*"

In later decisions such as *Queen v. The Judges and Justices of the Central Criminal Court* 11 QBD 479 (writ of mandamus refused) and *Regina v. Boaler* 67 L.T.354 (writ of *certiorari* refused) a similar reasoning was followed, and in the latter case, Lord Coleridge C.J. stressed that-

> "…….there is no authority for saying that this writ can go at all to the Central Criminal Court, which is a Superior Court. It is a court at least as high as the assizes, as the criminal court on the circuit; and it has been held, expressly with regard to those courts, that no *certiorari* will go *to bring up a conviction obtained at the Assizes,* for the purpose of being quashed here." (*Emphasis added*)

The rationale behind these decisions may be discerned from the following *dictum* of Justice Willis in *R. v. Parke* [1903] 2 K.B. 442 –

> "This Court exercises a vigilant watch over the proceedings of *inferior Courts*, and successfully prevents them from usurping powers which they do not possess, or otherwise acting contrary to law."(*Emphasis added*)

Similarly, in *Rex v. Woodhouse* (1906) 2 KB 501, Fletcher Moulton L.J. observed that the writ of *certiorari* –

> "is a very ancient remedy, and is the ordinary process by which the High Court brings up for examination the acts of bodies of *inferior jurisdiction*. In certain cases the writ of certiorari is given by statute, but in a large number of cases it rests on the common law." (*Emphasis added*)

The learned Attorney General has relied on two decisions of this Court which have followed the wisdom of the English common law in regard to the ambit of the writ remedy. The first of these was the decision of the Supreme Court in *In the Matter of an Application for a Writ of Habeas Corpus on the Body of Thomas Perera alias Banda* 29 NLR 52 (SC), in which dealing with the question whether *habeus corpus* would lie to review a warrant of commitment issued by a Commissioner of Assize remanding a prisoner to custody, Schneider A.C.J observed at page 56 of his judgment that –

> "The *writ of certiorari* is *a writ issued out of a superior Court and directed to the Judge or other officer of an inferior Court of record*, requiring the record of the proceedings in some cause or

matter depending before such inferior Court to be transmitted into the superior court to be there dealt with."(*Emphasis added*)

Similarly, when considering the question whether a writ of *certiorari* would lie against a judge of the Supreme Court who is nominated by the Chief Justice under Article 75(1) of the Ceylon (State Council Elections) Order in Council, 1931, for the purpose of trying an election petition, Howard C.J. in the case of *In re Goonesinha* 43 NLR 337, examined section 42 of the Courts Ordinance, and observed at page 342 that-

"The Supreme Court does not require a special provision of law for authority to inspect and examine its own records. Moreover, if "any Court" included the Supreme Court, the words "Judge of the Supreme Court" would be included in the latter half of the paragraph. In my opinion therefore, "any Court" in this paragraph does not include the Supreme Court. From the fact that a Judge of the Supreme Court is not specifically mentioned in the paragraph, the inference is of necessity drawn that *the writs mentioned can only be issued to inferior Courts*. The words "other person or tribunal" in this context cannot, in accordance with the *ejusdem generis* rule, be understood to include a Judge of the Supreme Court". (*Emphasis added*)

The correctness of this decision was confirmed on appeal by the Privy Council in *Goonesinha v The Honourable O.L.De Kretser* 46 NLR 107, in which Lord Goddard, after examining a large number of authorities observed at page 109 that their Lordships are of opinion that the true view is that cognisance of the election petitions "is an extension of, or addition to, the ordinary jurisdiction of the Supreme Court, and consequently *certiorari* cannot be granted to bring up an up any order made in the exercise of that jurisdiction."

These decisions no doubt are relevant in interpreting Article 140 of the Constitution, which only confers on the Court of Appeal the power and authority to grant and issue orders in the nature of the specified writs "according to law". This Court will also take into account the judicial hierarchy in existence in Sri Lanka and be guided by the provisions of the Judicature Act No 2 of 1978, which specifically declares in its preamble that it has been enacted *inter alia* "to provide for the establishment and constitution of a system of Courts of First Instance in terms of Article 105(1) of the Constitution". Section 2 of the Judicature Act identifies as "the Courts of First Instance", the High Court of the Republic of Sri Lanka, the District Courts, the Family Courts, the Magistrates' Courts and the Primary Courts. It is easy to see that these are all *inferior* courts, just as much as the District Judge, Commissioner and Magistrate's Court mentioned in section 42 of the Judicature Act were. It is therefore clear from the forgoing analysis that the courts mentioned in Article 140 of the Constitution belong to one genus or category, namely that of *inferior courts*. Hence, when construed *ejusdem generis*, not only the words "or tribunal" but also the words "or other institution or other person" refer to tribunals, institutions and persons *which are inferior* to the court that are possessed of jurisdiction to issue the writs, which in the context of this case, is the Court of Appeal which purported to issue the writ of *certiorari*.

In view of certain submissions made by all the learned Counsel who appeared in this appeal, it may be material to mention that following the famous *dictum* of Lord Atkin in *R v Electricity Commissioner, ex parte London Electricity Joint Committee Co. Ltd.,* [1924] 1 KB 171, which made amenability to the writ of *certiorari* dependent on the existence of "a duty to act judicially", in decisions such *Dankoluwa Estates Co. Ltd., v The Tea Controller* 42 NLR 197 and *Nakkuda Ali v Jayaratne* 51 NLR 457, our courts had refused relief where the decision or order challenged by the writ was purely administrative.

However, the celebrated decision of the House of Lords in *Ridge v Baldwin* [1964] AC 40 exploded the restrictive reasoning adopted in earlier decisions, and simply laid down that the mere fact that the exercise of power affects the rights or interests of any person would make it "judicial" and requires compliance with natural justice. As Lord Reid observed at page 114 of his judgment -

> "No one, I think, disputes that three features of natural justice stand out, (*i*) the right to be heard by an unbiased tribunal, (*ii*) the right to have notice of charges of misconduct, and (*iii*) the right to be heard in answer to these charges."

The reasoning in the decision in *Ridge v Baldwin* was adopted by our Courts, which have progressively expanded the scope of judicial review of administrative action, expanding its benevolent protection to various authorities and bodies of persons which are not courts, on the basis that they too exercised judicial or quasi judicial power. These developments triggered further horizontal expansion of the parameters of the writ jurisdiction in Sri Lanka as elsewhere, and it has been held in decisions such as *Harjani and Another v Indian Overseas Bank and Another* (2005) 1 Sri LR 167 that even private bodies exercising public functions are amenable to the writ of *certiorari*. Learned Counsel for the 11th and 12th Respondent-Respondents, have not been able to cite any local or foreign authority in support of the proposition that there has been a similar expansion of the writ jurisdiction on a vertical plain on an upward direction, to enable review of decisions and actions of superior or even equal ranking courts and bodies.

Having thus concluded that on an application of the *ejusdem generis* rule, not only the words "or tribunal" but also the words "or other institution or other person" found in Article 140 of the Constitution can only refer to tribunals, institutions and persons *which are inferior* in status to the court that issues the order in the nature of a writ in any case, the question whether the Court of Appeal in fact was possessed of the jurisdiction to grant or issue an order in the nature of the writ of *certiorari* to Parliament or a Select Committee of Parliament needs to be considered. It is in this context that I wish to examine in turn (a) whether Parliament, and in particular, a Select Committee thereof, is in the constitutional setting of Sri Lanka, inferior to the Court of Appeal, and (b) in any event, whether the powers, privileges, and immunities of Parliament would preclude the grant of such a remedy.

The Court of Appeal and Parliament in Sri Lanka's Constitutional Setting

The learned Attorney General as well as the learned Counsel for the 11th and 12th Respondent-Respondents highlighted the words "subject to the provisions of the Constitution" found at the very commencement of Article 140 of the Constitution. They have all referred to Articles 3 and 4 of the Constitution, in the light of which they sought to interpret Article 107(2) and (3) of the Constitution which established a process for impeachment of Superior Court Judges in terms of which the Petitioner-Respondent was sought to be removed from the office of Chief Justice.

Learned Counsel for the 11th and 12th Respondent-Respondents have emphasized that in Sri Lanka Parliament is not supreme but the Constitution is, and have cited before us certain *dicta* from the several judgments in the celebrated decision in *Stockdale v Hansard* [1839] EWHC QB J21, 112 ER 1112, and the learned Attorney General has done likewise. However, while the *dicta* quoted by the learned Counsel dealt with questions relevant for the considering of issues relating to the parliamentary privilege, which I shall advert to later on in this judgment, what I found helpful in regard to the question of relative superiority now being considered was from the judgment of Coleridge J. at page 1196, where his Lordship observed as follows:-

"*Vastly inferior as this court is to the House of Commons, considered as a body in the state, and amenable as its members may be for ill conduct in their office to its animadversions, and certainly are to its impeachment before the Lords,* yet, as a Court of law, we know no superior but those courts which may revise our judgments for error; and in this respect there is no common term of comparison between this Court and the House. In truth, the House is not a court of law at all, in the sense in which that term can alone be properly applied here; neither originally, nor by appeal, can it decide a matter in litigation between two parties: it has no means of doing so; it claims no such power: *powers of inquiry and of accusation it has, but it decides nothing judicially, except where it is itself a party, in the case of contempts*."(*Emphasis added*)

It is important to remember that the English common law which regulates the relationship between the Crown, the legislature and the judiciary is the product of centuries of struggle between these organs of State, details of which it is unnecessary to recount for the purposes of this appeal. Suffice it would be to refer to Erskine May, who in his monumental work *Parliamentary Practice* (21st Edition) at page 145 observes that "after some three and a half centuries, the boundary between the competence of the law courts and the jurisdiction of either House *in matters of privileges* is still not resolved." Hence, when dealing with the comparative superiority or otherwise of Parliament *vis-à-vis* Parliament within the constitutional hierarchy of Sri Lanka, judicial decisions emanating from other jurisdictions can only be of persuasive authority, and it is more important to examine our own constitutional structure and consider local decisions.

It is important, in this context, to remember that the present Constitution of Sri Lanka, which was enacted in 1978, derives its validity from, and was enacted in conformity with, the provisions of the Republican Constitution of Sri Lanka, proclaimed in 1972, which in every sense was an "autochthonous" constitution having decisively broken away from the constitutional regime of the Ceylon (Constitution) Order-in-Council, 1946 and other enactments together collectively known as the "Soulbury Constitution", and derived its authority entirely from the will of the People of Sri Lanka. It is therefore significant that Chapter I of the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, headed "the People, the State and Sovereignty" commences with Article 1 which declares that Sri Lanka is "a Free, Sovereign, Independent and Democratic Socialist Republic". Article 2 states that Sri Lanka is a Unitary State, and Article 3 enacts that-

"In the Republic of Sri Lanka sovereignty is in the People and inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise".

Article 4 of the Constitution outlines the manner in which the Sovereignty of the People shall be exercised and enjoyed, and expressly provides that –

"(a)the legislative power of the People shall be exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum;

(b) the executive power of the People, including the defence of Sri Lanka, shall be exercised by the President of the Republic elected by the People;

(c) the judicial power of the People shall be exercised by Parliament through courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law, except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law……."

A Bench of Seven Judges of this Court, in the course of its determination in *Re the Nineteenth Amendment to the Constitution* [2002] 3 Sri LR 85, had no hesitation in characterizing Article 4, when read with Article 3, as enshrining the doctrine of separation of powers, and at pages 96 to 97 went on to elaborate that-

> "The powers of government are separated as in most Constitutions, but unique to our Constitution is the elaboration in Articles 4 (a), (b) and (c) which specifies that each organ of government shall exercise the power of the People attributed to that organ. To make this point clearer, it should be noted that sub-paragraphs (a), (b) and (c) not only state that the legislative power is exercised by Parliament; executive power is exercised by the President and judicial power by Parliament through Courts, but also specifically state in each sub-paragraph that the legislative power "of the People" shall be exercised by Parliament; the executive power "of the People" shall be exercised by the President and the judicial power "of the People" shall be exercised by Parliament through the Courts. This specific reference to the power of the People in each sub-paragraph which relates to the three organs of government demonstrates that the power remains and continues to be reposed in the People who are sovereign, and its exercise by the particular organ of government being its custodian for the time being, is for the People."

Further clarifying our constitutional provisions, this Court also observed at page 98 of its determination that-

> "This balance of power between the three organs of government, as in the case of other Constitutions based on a separation of powers is sustained by certain checks whereby power is attributed to one organ of government in relation to another."

It will also be seen that the legislative power and judicial power of the People is vested in Parliament, subject to certain qualifications, which are worthy of elaboration. Article 4(a) is carefully worded to vest in Parliament, consisting of elected representatives of the People, the legislative power of the people which it can directly exercise, that is to say, to the exclusion of the legislative power of the People that has to be exercised by the People at a Referendum in terms of the Constitution. Similarly, according to Article 4(c) of the Constitution, the judicial power of the People is vested in Parliament to be exercised through the courts, tribunals and institutions as specified therein, except in regard to matters relating to the privileges immunities and powers of Parliament and of its Members, which may be exercised directly by Parliament according to law. Article 4(b) vests the executive power of the People directly on the President, who too is elected by the People.

It is significant that the legislative, executive and judicial power of the People is vested either on Parliament or the President, both being elected by the People, so as to maintain accountability and transparency, and the courts and other like tribunals and institutions which are not elected by the People, are accountable and responsible to the People through Parliament, which does exercise the kind of superintendence and accountability envisaged by Coleridge J. in the above quoted *dictum* from *Stockdale v Hansard, supra.* All this is no different from the constitutional structure that exists in England, and as Lord Mustill observed in the *Fire Brigades Union* case [1995] 2 AC 513 at 567-

> "It is a feature of the peculiarly British conception of the separation of powers that Parliament, the executive and the courts have each their distinct and largely exclusive domain. Parliament has a legally unchallengeable right to make whatever laws it thinks fit. The executive carries on

the administration of the country in accordance with the powers conferred on it by law. The courts interpret the laws, and see that they are obeyed"

I conclude that, in the light of the constitutional arrangements contained in Article 4 and other provisions of our Constitution, there is no room for doubt that Parliament including its select committees cannot be regarded as *inferior to our Court of Appeal* when it exercises its writ jurisdiction conferred by Article 140 of the Constitution, and would therefore not be amenable to such jurisdiction. Accordingly, I would answer Question 2) on which special leave to appeal has been granted in this case in the affirmative, and hold that the Court of Appeal erred in concluding 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 Parliament or a Committee of Parliament.

The Impeachment Process

It may now be appropriate to consider Question 1), on which special leave to appeal was granted by this Court, namely, the question 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 when it performs its constitutional function under Article 107(2) and (3) of the Constitution and Order 87A of the Standing Orders of Parliament. For this purpose, it would be necessary to examine in depth the provisions of Article 107(2) and (3) of the Constitution, which set up a mechanism for the removal of a Chief Justice, Judge of the Supreme Court, President of the Court of Appeal and Judge of the Court of Appeal.

Before looking at the provisions of the relevant provisions of the Constitution in greater detail, it may be useful to mention that Section 52(2) of the Ceylon (Constitution) Order in Council, 1946 provided that-

"Every Judge of the Supreme Court shall hold office during good behaviour and shall not be removable except by the Governor General on an address of the Senate and the House of Representatives."

Similar provisions were found in Section 122 of the Republican Constitution of 1972, which provided as follows:

"(1) The Judges of the Court of Appeal, of the Supreme Court or of the Courts that may be created by the National State Assembly to exercise and perform powers and functions corresponding to or substantially similar to the powers and functions exercised and performed by the aforesaid courts, shall be appointed by the President.

(2) Every such Judge shall hold office during good behaviour and shall not be removed except by the President upon an address of the National State Assembly"

It is significant that the Constitution of the Democratic Socialist Republic of Sri Lanka, 1978, went beyond the simple system of removal of Superior Court Judges upon an address made by the Head of State to the legislature, and introduced a more elaborate mechanism for the impeachment of Superior Court Judges in Article 107 as follows:-

"(1) The Chief Justice, the President of the Court of Appeal and every other Judge of the Supreme Court and Court of Appeal shall be appointed by the President by Warrant under his hand.

(2) Every such Judge shall hold office during good behaviour and shall not be removed except by an order of the President made after an address of Parliament supported by a majority of the total number of Members of Parliament (including those not present) has been presented to the President for such removal on the ground of proved misbehaviour or incapacity:

Provided that no resolution for the presentation of such an address shall be entertained by the Speaker or placed on the Order Paper of Parliament, unless notice of such resolution is signed by not less than one-third of the total number of Members of Parliament and sets out full particulars of the alleged misbehaviour or incapacity.

(3) Parliament shall *by law or by Standing Orders* provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative." (*Emphasis added*)

As noted by Wansundera J. in *Visuvalingam and others v. Liyanage and Others No. (1),* (1983) 1 Sri LR 203 at pages 248 to 249 and Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309 at page 331, the process outlined in Article 107(2) and (3) is the "only method of removal" of a superior court judge found in the Constitution, and is not vested exclusively in Parliament or the President, and requires Parliament and the President, to act in concurrence. In other words, neither the President of Sri Lanka, nor Parliament, can by himself or itself remove the Chief Justice, a Judge of the Supreme Court or the President of the Court of Appeal or a Judge of the Court of Appeal, and the Constitution requires *two organs of State*, *both elected by the People*, *to act together* in the important process of impeaching a superior court judge.

The learned Attorney General as well as the learned Counsel for the 11th and 12th Respondent Respondents have, in the course of their submissions before this Court, highlighted the words "subject to the provisions of the Constitution" found at the very commencement of Article 140 of the Constitution, and they have all invited our attention to Articles 3 and 4 of the Constitution in the light of which they sought to interpret Article 107(2) and (3) of the Constitution in terms of which the Petitioner-Respondent was sought to be impeached.

Learned Counsel for the 11th and 12th Respondents have stressed that there is no reference to Article 107 in Article 4(c) of the Constitution, and submitted that if it was intended to include within the purview of the "judicial power of the People" that can be exercised directly by Parliament the impeachment power contained in Article 107(2) and (3), it would have been easy to include expressly in Article 4(c), some provision to that effect in the same way as "matters relating to the privileges, immunities and powers of Parliament and of its Members" have been therein expressly adverted to. They have contended that since the process of impeachment outlined in Article 107(2) and (3) is not expressly excluded from Article 4(c), the necessary inference is that the power can be exercised by Parliament only "through the courts, tribunals, and institutions created and established, or recognized, by the Constitution, or created and established by law."

The learned Attorney-General has attempted to meet this submission by arguing that powers of Parliament include not only such powers that are legislative and judicial in nature, but other powers in a general sense, and he has sought to illustrate his argument by adverting to respectively Articles 38(2) dealing with the removal of the President, Article 104E(7)(e) read with Article 104E(8) dealing with the removal of the Commissioner-General of Elections and Article 107(2) and (3) dealing with the removal of a Judge of the Superior Courts including the Chief Justice. In my view none of these

powers are exclusively powers of Parliament or the exclusive province of any other governmental organ, as all those provisions adverted to by the learned Attorney General seek to create mechanisms which are unique and are *sui generis* in the sense that they are the only mode of removal of the incumbents of those offices known to the Constitution. The power of removal of the President of Sri Lanka, the Chief Justice and other Judges of the Supreme Court, the President and other Judges of the Court of Appeal and the Commissioner General of Elections in terms of the aforesaid provisions of the Constitution, have to be exercised by one organ of State in concurrence with one or more governmental organ or organs, and *this feature constitutes a system of checks and balances which is essential for the preservation of the Rule of Law*.

The power of removal of the President of Sri Lanka, for instance, consists of a meticulous procedure which could be initiated by a Member of Parliament with specified number of Members required to sign the relevant notice of resolution, with the Speaker of the House of Parliament, the Supreme Court and the Parliament itself play important roles. It is noteworthy that Article 38(2)(c),(d) and (e) provide that after a resolution to impeach the President is passed in Parliament with the specified majority, the Speaker shall refer the allegations contained in the resolution to the Supreme Court for inquiry and report. If and when the Supreme Court reports to Parliament that in its opinion the President is permanently incapable of discharging the functions of his office, or has been guilty of any of the other allegations contained in such resolution, Parliament may, by a resolution passed by a specified number of Members voting in its favour, remove the President from office.

Likewise, the power of removal of the Commissioner General of Elections consists of a mechanism in which Members of Parliament, the Speaker, the Election Commission constituted under Chapter XIVA of the Constitution and Parliament itself, play important roles, just as much as the procedure for the removal of a Judge of the Supreme Court including the Chief Justice or a Judge of the Court of Appeal envisages initiation by specified number of Members of Parliament, with the Speaker of the House and the Parliament itself and the President of Sri Lanka discharging important functions. None of these powers are vested *exclusively* in one single organ of government, and *one or more organs of government are required to act in concurrence*, providing a system of checks and balances as envisaged by Charles de Montesquieu and William Blackstone, who gave the doctrine of Separation of Powers its initial momentum. Here lies the explanation as to why there is no mention of the process of impeachment of the President, the Commissioner of Elections or the Chief Justice and the Judges of the Superior Courts of Sri Lanka in Article 4(a),(b) or (c), all of which seek to vest the legislative, executive or judicial power of the People *exclusively* in one elected entity or the other.

In the context of the appeal at hand, it is also significant that the procedure for the removal of the President of Sri Lanka outlined in Articles 38(2) of the Constitution, contemplates certain findings in regard to the capacity of the President to hold office or of his guilt in regard to allegations set out in the impeachment resolution to be made by the Supreme Court as a pre-condition for the passing of the resolution to remove the President from office. This may be contrasted with the procedure for the removal of the Commissioner General of Elections, which does not envisage any role to be played by the Supreme Court in regard to the proof of the alleged misbehavior or incapacity of the Commissioner-General of Elections, and Article 104E(8)(b) of the Constitution provides that-

> "Parliament shall *by law or by Standing Orders*, provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of the Commissioner-General of Elections to appear and to be heard in person or by representatives."(*Emphasis added*)

It is significant that a similar system has been prescribed by the Constitution with respect to the impeachment of a Judge of the Supreme Court including the Chief Justice and of a Judge of the Court of Appeal including its President. Article 107(3) of the Constitution, as already noted, provides that-

> "Parliament shall *by law or by Standing Orders* provide for all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative." (*Emphasis added*)

The provisions of Article 104E (8)(b) and Article 107(3) of the Constitution may perhaps be contrasted with Article 40(3) of the Constitution which provides for the procedure for electing a new President from amongst Members of Parliament who are qualified to be elected to the office of President, in the eventuality of a vacancy arising in the office of President prior to the expiration of the term of office of a President who was elected at a Presidential Election. It is significant that Article 40(3) provides that:-

> "Parliament shall *by law* provide for all matters relating to the procedure for the election of the President by Parliament and all other matters necessary or incidental thereto its Members who is qualified to be elected to the office of President."(*Emphasis added*)

Here, Parliament has no option but to provide for all required matters by law, and law only, unlike in the situations contemplated in Article 104E (8)(b) and Article 107(3) of the Constitution, *where Parliament has been expressly conferred a discretion whether to provide the required matters by law or Standing Orders of Parliament*.

It is also obvious that the makers of the Constitution had considered whether the procedure of reference to the Supreme Court of the task of examining the justifiability of the resolution for the removal of the Chief Justice and other Judges of the Supreme Court in the lines of Article 38(2) of the Constitution, and decided against it perhaps in view of the very same reasons that moved Rehnquist CJ., to observe in *Nixon v. United States* 506 U.S. 224(1993) at page 234 that-

> "….judicial review would be inconsistent with the [Constitution] Framers' insistence that *our system be one of checks and balances. In our constitutional system, impeachment was designed to be the only check on the Judicial Branch by the Legislature*…..Judicial involvement in impeachment proceedings, even if only for purposes of judicial review, is counterintuitive because it would eviscerate the "important constitutional check" placed on the Judiciary by the Framers. See id., No. 81, p. 545. Nixon's argument would place final reviewing authority with respect to impeachments *in the hands of the same body that the impeachment process is meant to regulate*." (*Emphasis added*)

Furthermore, there can be little doubt that any arrangement which enables the Supreme Court to play any role in the impeachment of the Chief Justice or a Judge of the very same Court, would go against the maxim *nemo judex in causa sua,* which was explained succinctly by Browne-Wilkinson, L.J. in *In Re Pinochet* (1999) UKHL 52, in the following words:-

> "The fundamental principle is that a man may not be a judge in his own cause. This principle, as developed by the courts, has two very similar but not identical implications. First it may be applied literally: if a judge is in fact a party to the litigation or has a financial or proprietary interest in its outcome then he is indeed sitting as a judge in his own cause. In that case, the mere fact that he is a party to the action or has a financial or proprietary interest in its outcome is sufficient to cause his automatic disqualification. The second application of the

principle is where a judge is not a party to the suit and does not have a financial interest in its outcome, but in some other way his conduct or behavior may give rise to a suspicion that he is not impartial, *for example because of his friendship with a party*. This second type of case is not strictly speaking an application of the principle that a man must not be judge in his own cause, since the judge will not normally be himself benefiting, but providing a benefit for another by failing to be impartial."(*Emphasis added*)

These are pointers as to the thinking of the framers of our Constitution, who have in Article 107(3) of the Constitution, left it to the good sense of Parliament to decide whether all matters relating to the presentation of the address relating to the removal of the Chief Justice and other Judges of the Superior Courts, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative, should be provided for "by law or by Standing Orders" in the lines of Article 104E (8)(b) of the Constitution, and in both situations, Parliament has decided to do so by Standing Orders.

It is the *constitutionality of this decision made by Parliament* that came in for consideration on references that had been made in terms of Article 125(1) of the Constitution to this Court in the wake of the proceedings before the Court of Appeal that gave rise to the impugned judgment. No reference was made by the Court of Appeal in CA (Writ) Application No. 411/2012 from which this appeal arises, but the Court of Appeal in its impugned judgment dated 7th January 2013 considered itself bound by the determination of this Court in SC Reference No. 3/2012 in which the question referred to this Court in the course of CA (Writ) Application No. 358/2012, was formulated as follows:-

"Is it mandatory under Article 107(3) of the Constitution for the Parliament to provide for [by law] matter (sic) relating to the forum before which the allegations are to be proved, the mode of proof, burden of proof, standard of proof etc., of any alleged misbehavior (sic) or incapacity in addition to matters relating to the investigation of the alleged misbehavior (sic) or incapacity?" (*Words within Square Brackets added by me to make the question meaningful*)

A Bench consisting of three judges of this Court, in its determination dated 1st January 2013, observed that –

"In a State ruled by a Constitution based on the rule of Law, *no court,* tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a person unless such court, tribunal or body has the power conferred on it by law to make such finding or decision.* Such legal power can be conferred on such court, tribunal, or body by an Act of Parliament which is "law" and not by Standing Orders which are not law but are rules made for the regulation of the orderly conduct and the affairs of the Parliament. The Standing Orders are not law within the meaning of Article 170 of the Constitution which defines what is meant by "law".

A Parliamentary Select Committee appointed in terms of Standing Order 78A derives its power and authority solely from the said Standing Order which is not law. Therefore a Select Committee appointed under and in terms of Standing Order 78A has no legal power or authority to make a finding adversely affecting the legal rights of a Judge against whom the allegations made in the resolution moved under proviso to Article 107(2), is the subject matter of its investigation. *The power to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal, or a body, only by law and by law only."*(*Emphasis added*)

With the very greatest of respect to the honorable Judges of this Court constituting the said Bench, the above quoted observation has the effect of deleting or rendering nugatory the words "*or by Standing Orders*" found in Article 107(3) of the Constitution, purportedly for the preservation of the rule of Law. It is unfortunate that the Divisional Bench of this Court failed to realize that when Article 107(3) was formulated, the makers of the Constitution were fully conscious that they were providing a mechanism for the removal of the Chief Justice and other Judges of the Superior Courts by an order of the President made pursuant to an address of Parliament supported by a specified majority which is presented to the President for such removal on the ground of proved misbehavior or incapacity, and *chose to delegate to Parliament the function of providing for by law or Standing Orders*, "all matters relating to the presentation of such an address, including the procedure for the passing of such resolution, the investigation and proof of the alleged misbehaviour or incapacity and the right of such Judge to appear and to be heard in person or by representative". The words "by law *or by Standing Orders*" clearly conferred the discretion for Parliament to decide whether the matters required to be provided for by that article should be provided for by law or by Standing Orders.

By so deleting or rendering nugatory clear words of the Constitution, the Divisional Bench has flouted the concept of Sovereignty of the People enshrined in Article 3 of the Constitution and the basic rule reflected in Article 4(a) of the Constitution that the legislative power of the People may be "exercised by Parliament, consisting of elected representatives of the People and by the People at a Referendum". The determination of this Court in SC Reference No. 3/2012 does not offer any acceptable reasons for ignoring basic provisions of the Constitution, except for the observation that "no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a* person unless such court, tribunal or body has the power conferred on it *by law* to make such finding or decision". The "person" envisaged by the Court of Appeal in the above quoted observation in its factual setting was the Petitioner-Respondent, who had to face impeachment proceedings contemplated by Article 107(2) and (3) of the Constitution read with Standing Order 78A, for which the makers of the Constitution had expressly provided in Article 107(3) that the necessary procedures may be formulated by Parliament "*by law or by Standing Orders*".

It is significant that Article 107(3) of the Constitution does not contain any words indicating that *only certain matters* contemplated by that provision may be provided for by Standing Orders *and certain other matters* must be provided for by law. If that was the intention of the makers of the Constitution, they would probably have adopted language sufficient to convey such a meaning, and used, for instance, the formula "by law *and* Standing Orders". They would also have indicated clearly *what matters should necessarily be provided for by law.* Thus, in my view, the determination of this Court in SC Reference No. 3/2012 is not only erroneous but also goes beyond the mandate of this Court to interpret the Constitution, and intrudes into the legislative power of the People.

In my opinion, to conclude, as this Court did, in SC Reference No. 3/2012, that it is mandatory for Parliament to provide for the matters in question by law, and law only, not only does violence to the clear language of Article 107(3), but also takes away from Parliament, a discretion expressly conferred on it by the Constitution itself. In my opinion, this Court has no authority, whether express or implied, to do so. As this Court observed in *Attorney General v Sumathipala* (2006) 2 Sri LR 126, at page 143,

> "A judge cannot under a thin guise of interpretation usurp the function of the legislature to achieve a result that the judge thinks is desirable in the interests of justice. Therefore the role of

the judge is to give effect to the expressed intention of Parliament as it is the bounden duty of any court and the function of every Judge to do justice within the stipulated parameters."

It is my considered opinion that the determination of this Court in SC Reference No. 3/2012 manifestly exceeded the mandate conferred on this Court by Article 125(1) of the Constitution to interpret the Constitution, and was made in disregard of the clear language of Article 107(3) and other basic provisions of the Constitution. The determination is a blatant distortion of the law, and is altogether erroneous, and must not be allowed to stand. This Court hereby overrules the said determination of this Court in SC Reference No. 3/2012.

As already noted, the power to remove the Chief Justice, Judges of the Supreme Court, the President of the Court of Appeal and Judges of the Court of Appeal through the process outlined in Article 107 of the Constitution and Standing Orders made thereunder, is not a power exclusively vested in either the President or the Parliament, but is a power that is unique and is *sui generis* in the sense that it is vested jointly in the Parliament and the President. These are both governmental organs that are elected by the People, and when they act in concurrence, they act in the name of the People of Sri Lanka. It is unthinkable that a court such as the Court of Appeal, which derives its jurisdiction from Article 140 of the Constitution, which is expressly made subject to other provisions of the Constitution such as Article 107, and whose jurisdiction is further limited, as we have seen, by the requirement to grant and issue orders in the nature of writs "according to law", by which is meant the common law of England as developed by our own courts, which confines the ambit of these writs to inferior courts and tribunals, would seek to impeach a decision taken with the walls of Parliament by a Parliamentary Select Committee, or to quash the same by *certiorari.*

It may now be appropriate for me consider, in some detail, the writ jurisdiction of the Court of Appeal, in the context of the privileges, immunities and powers of Parliament.

Parliamentary Powers and Privileges

The learned Attorney-General has relied on Section 3 of the Parliament (Powers and Privileges) Act No 21 of 1953, as subsequently amended, which he submitted, ousted the jurisdiction of the Court of Appeal to grant any order in the nature of writ against Parliament or a Select Committee of Parliament. Section 3 of the Parliament (Powers and Privileges) Act proclaims that –

"There shall be freedom of speech, debate and proceedings in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament."

It is noteworthy that although the said Act which was enacted in 1953 and has since been amended several times, section 3 of the Act, which is relied upon by the learned Attorney General, has not been amended after its original enactment, and in fact echoes section 1 art. 9 of the English Bill of Rights, 1689, which provided that –

"……the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."

In view of the citation before this Court of several decisions and authorities from England and other common law jurisdictions, it is necessary to mention at the outset that as Erskine May, in *Parliamentary Practice*, (22nd Edition) at page 65 observes, the privileges of Parliament are "the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of

Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals." However, as Dr. D.M. Karunaratna has pointed out in his valuable work, *A Survey of the Law of Parliamentary Privileges in Sri Lanka* (2nd Revised Edition), page 8-

> "The privileges of Parliament are also considered part of the common law of England. They are part of the common law not in the sense that they are judge-made, but in the sense that the courts recognize their existence and claim jurisdiction to keep the House within the limits of the recognized privileges. *On the other hand, some of the privileges have been enacted (for example, article 9 of the Bill of Rights) and hence*, *the entire law of parliamentary privileges cannot be regarded as part of the common law*". (*Emphasis added*)

The present appeal involves the nature and ambit of the privilege relating to the impeachment outside Parliament of parliamentary proceedings, particularly those that transpired before a Select Committee of Parliament constituted for the purpose of considering a resolution for the removal of a Judge of the Supreme Court or the Court of Appeal in terms of Article 107(2) and (3) of the Constitution read with Order 87A(2) of the Standing Orders of Parliament, in the context of the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution.

At the hearing of this appeal, the learned Attorney General has stressed that the word "Parliament", as used in Section 3 of the Parliament (Powers and Privileges) Act, included a Select Committee of Parliament, and has invited our attention to Section 2 of the Act, which defined "Parliament" to mean "the Parliament of Sri Lanka, and includes a committee", and further defined a "committee" to mean "any standing, select or other committee of Parliament". This is in line with the decisions of English courts in cases such as *Dingle v Associated Newspapers Ltd., and Others* [1960] 2 QB 405, *Rost v Edwards* [1990] 2 QB 460 and *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, and there can be no doubt that proceedings of any standing, select, or other committee of Parliament is as sacrosanct as proceedings of Parliament itself.

While there is no definition of the term "proceedings in Parliament" used in Section 3 of our Act or the term "proceedings in parliament" found in section 1 art. 9 of the English Bill of Rights, there seems to be some ambiguity in the language used in both statutes, and the courts have been concerned with the question whether the words were intended to mean that *the freedom* of debates or proceedings in Parliament ought not to be impeached or questioned, or whether they meant, in a wider sense, that *debates or proceedings in Parliament* ought not to be impeached or questioned. William Blackstone, adopted the wider approach when he observed in his *Commentaries on the Laws of England, (*17th Edition, 1830), vol. I, page 163, that "whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere".

Much has been said in the course of argument about the celebrated decision in *Stockdale v Hansard,* [1839] EWHC QB J21, 112 ER 1112, and much of its *dicta* quoted by learned Counsel, but it must be noted, as the learned Attorney General has stressed, that *Stockdale v Hansard* was not a case in which whatever was said or done in the House of Commons was being sought to be impeached. That case involved an action for defamatory libel instituted by one Stockdale against James Hansard and three other members of his family, who were responsible for publishing the contents of a prison inspector's report ordered to be printed and published by the House. It is noteworthy that in deciding this case, the court adopted the wider interpretation of the Bill of Rights, as when Lord Denman observed at page 1156 that "whatever is done within the walls of either assembly must

pass without question in any other place", and Patterson J. said at page 1191 that "whatever is done in either House should not be liable to examination elsewhere". In the same case, Coleridge J observed at page 1199 that –

> In point of reasoning, it needed not the authoritative declaration of the Bill of Rights to protect the freedom of speech, the debates or proceedings in parliament, from impeachment or question in any place out of parliament; and *that the House should have exclusive jurisdiction to regulate the course of its own proceedings, and animadvert upon any conduct there in violation of its rules, or derogation from its dignity, stands upon the clearest grounds of necessity*. (*Emphasis added*)

Learned Counsel for the 11th and 12th Respondent-Respondents have invited our attention to the following passage that appears at page 1192 of the judgment of Patterson J:-

> Where then is the necessity for this power? Privileges, that is, immunities and safeguards, are necessary for the protection of the House of Commons, in the exercise of its high functions. All the subjects of this realm have derived, are deriving, and I trust and believe will continue to derive, the greatest benefits from the exercise of those functions. All persons ought to be very tender in preserving to the House all privileges which may be necessary for their exercise, and to place the most implicit confidence in their representatives as to the due exercise of those privileges. *But power, and especially the power of invading the rights of others, is a very different thing: it is to be regarded, not with tenderness, but with jealousy; and, unless the legality of it be most clearly established, those who act under it must be answerable for the consequences.* (*Emphasis added*)

It was the contention of learned Counsel that insofar as in the case at hand the rights of the Petitioner-Respondent, who is not only a citizen of this country but also at the relevant time, its Chief Justice, have been seriously affected by what transpired before the Parliamentary Select Committee, the powers, privileges and immunities of Parliament must give way.

I have several difficulties in agreeing with this contention of leaned Counsel for the 11th and 12th Respondent-Respondents. Firstly, the appeal before us does not relate to all what transpired before the Parliamentary Select Committee. In fact, the Court of Appeal in its impugned judgment, refrained from going into the allegations of procedural irregularities and bias that had been made by the Petitioner-Respondent in the proceedings that had taken place before the Select Committee, and was content to hold that the appointment by the Speaker of the House of Parliament of the said committee, purportedly in terms of Article 107(3) read with Order 87 A (2) of the Standing Orders of Parliament, was invalid, and that in consequence, the Select committee was not properly constituted. That was the only justification offered by the Court of Appeal for quashing the report of the said committee, and from that perspective, the challenge, was not to what transpired before the committee, but was to what was done by the Speaker of the House within the walls of Parliament to constitute the committee in terms of the Constitution and applicable Standing Orders.

Secondly, unlike in *Stockdale v Hansard*, *supra,* what was sought to be impeached in this case was not a publication of the contents of a report of some public official such as the prison inspector, but the proceedings of the Select Committee of Parliament, which took place within the walls of Parliament, and the report of the said Select Committee. Thirdly, the provisions of Article 107(2) and (3) are, as already noted by me, unique to our Constitution, and to which there was no parallel in the common law of England as it stood at the time *Stockdale v Hansard* came to be decided. Furthermore, the process outlined in Article 107(2) and (3) read with the relevant Standing Orders of Parliament, constitute the only mechanism found in our Constitution for removing a Chief Justice

and other Judges of the Superior Courts of Sri Lanka, and envisage Parliament, which is an elected body vested with legislative power, to act in co-ordination with the President, being the elected Head of the Executive. As I have already observed, the power of judicial review, which applies to courts of first instance and like tribunals, institutions and persons, cannot extend to Parliament, in which the judicial power of the People is theoretically vested.

Coming back to the analysis of judicial decisions emanating from England relating to parliamentary privileges, I note that almost forty-five years later, in *Bradlaugh v Gossett* (1884) 12 QBD 271, Lord Coleridge CJ endorsed the views expressed by the judges in *Stockdale v Hansard, supra*, and reiterated at page 275 of his judgment in that case, that what "is said or done within the walls of Parliament cannot be inquired into in a court of law". After another seventy-four years, In 1958, the wider view of privilege once again found favor with Viscount Simonds, who when deciding *In re Parliamentary Privilege Act 1770* [1958] AC 331, at page 350 noted that "there was no right at any time to impeach or question in a court or place out of Parliament a speech, debate or proceeding in Parliament".

I would like to pause for a moment in time, at *Dingle v Associated Newspapers Ltd. and Others* [1960] 2 QBD 405, in which in the course of an action for damages for libel, it was sought to impugn the validity of a report of a select committee of the House of Commons on the ground that the procedure of the committee was defective. In refusing permission for any party to mount such an attack on the validity of the report, Pearson J. explained the reasons for his decision at page 410 of his judgment in the following manner:-

> ".....in my view, it is quite clear that to impugn the validity of the report of a select committee of the House of Commons, specially one which has been accepted as such by the House of Commons by being printed in the House of Commons Journal, would be contrary to section 1 (art. 9) of the Bill of Rights. No such attempts can properly be made outside Parliament.
>
> The next point was that the Solicitor-General and Mr. Cumming-Bruce made a submission or a request that no comment on the report should be permitted in the course of the trial. That, as a matter of construction of the relevant provision in the Bill of Rights might have raised a more debatable question, but it seemed quite clear at the time, and still is clear, to my mind, that it was easy to give effect to that request because, *once the question of the validity of the report had been excluded as outside the scope of the court's inquiries, any comment on the report, or how it was obtained, and the proceedings leading up to it, would have little or no materiality:* indeed, to a large extent, any such comment would not be relevant at all."(*Emphasis added*)

Twelve years later, in *Church of Scientology of California v Johnson Smith* [1972] 1 QB 522 at page 529 Browne J acknowledged the correctness of the broader view of parliamentary privilege, and stated that "what is said or done in the House in the course of proceedings there cannot be examined outside Parliament for the purpose of supporting a cause of action even though the cause of action itself arises out of something done outside the House". In the same vein, in *British Railways Board the Pickin* [1974] AC 765 at page 799 Lord Simon of Glaisdale observed as follows:-

> "I have no doubt that the respondent . . . is seeking to impeach proceedings in Parliament, and that the issues raised . . . cannot be tried without questioning proceedings in Parliament".

In *R v Secretary of State for Trade, ex p Anderson Strathclyde Plc* [1983] 2 All ER 233 at page 239, Dunn LJ noted that it could not examine an extract from *Hansard* in order to determine what were the proper inferences to be drawn from them, since this-

"……..would be contrary to [section 1] art 9 of the Bill of Rights. It would be doing what Blackstone said was not to be done, namely to examine, discuss and adjudge on a matter which was being considered in Parliament. Moreover, it would be an invasion by the court of the right of every member of Parliament to free speech in the House with the possible adverse effects referred to by Browne J."

In short, judicial authority up to the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] AC 593 clearly reflected the wider meaning of the words used in Article 9 of the Bill of Rights. However, it is noteworthy that the House of Lords in Pepper *(Inspector of Taxes) v Hart* overruled more than two centuries of precedent when it decided that courts could refer to and rely on *Hansard* to aid in construing enacted laws. Since then, there have been many decisions that took a more liberal view in regard to the use of legislative history for the interpretation of legislation, which is an aspect of the law that is not relevant to the question arising on this appeal, and on which I shall not make any further comment. The decision in this case did not in any way impinge on the traditional position that had prevailed for centuries, that the proceedings of Parliament are sacrosanct, as would become clear from the following observation of Lord Browne Wilkinson in *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321 at page 332:-

"In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles*. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges*: *Burdett v. Abbott* (1811) 14 East 1; *Stockdale v. Hansard* (1839) 9 Ad. & E.C. 1; *Bradlaugh v. Gossett* (1884) 12 Q.B.D. 271; *Pickin v. British Railways Board* [1974] A.C. 765; *Pepper v. Hart* [1993] A.C. 593. As Blackstone said in his *Commentaries on the Laws of England,* 17th ed. (1830), vol. 1, p. 163: 'the whole of the law and custom of Parliament has its origin from this one maxim, "that whatever matter arises concerning either House of Parliament, ought to be examined, discussed and adjudged in that House to which it relates, and not elsewhere."

In *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, the House of Lords followed the aforesaid line of authorities, and dismissed an application for judicial review of a decision of the Parliamentary Commissioner on the grounds that such matters were properly within the exclusive cognizance of Parliament. In the course of his opinion in this case Lord Browne Wilkinson referred to his above quoted *dictum* in *Prebble v. Television New Zealand Ltd., supra,* and observed at page 407 that--

"The normal impact of parliamentary privilege is to prevent the court from entertaining any evidence, cross-examination or submission which challenge the veracity or propriety of anything done in the course of parliamentary proceedings. *Thus it is not permissible to challenge by cross-examination in a later action the veracity of evidence given to a parliamentary committee*." (*Emphasis added*)

In the more recent decision in *Jackson v. Attorney-General* [2005] UKHL 56 [2006] 1 A.C. 262, the House of Lords had the opportunity of reviewing the validity of certain English Acts of Parliament. The decision involved a challenge to the validity of the Hunting Act of 2004, which had been passed in the House of Commons but not in the House of Lords. The challenge was on the ground that the Parliament Act of 1949, which permits a Bill which has not been passed in the House of Lords to become an Act under certain conditions, was itself not validly enacted. A unanimous nine-member House of Lords Appellate Committee agreed with a unanimous Court of Appeal (and before that, the

Divisional Court) that the 1949 Act was not invalid, and on that basis, upheld the validity of the Hunting Act 2004.

What is of some significance in the context of what is in issue before this Court in this appeal is that the Attorney-General did not oppose in *Jackson's* case the courts entering into judicial review, and the lower courts and the House of loads justified their decisions, by holding that they were not considering the mode of passing Bills but engaging simply in a matter of statutory interpretation, namely, whether the 1949 Act was permitted by the terms of the 1911 Act. The decision of the House of Lords contains interesting but inconclusive *obiter dicta* impinging on the concept of Supremacy of Parliament, and on one end of the spectrum was Lord Bingham, who at paragraph 9 of the opinion, described the supremacy of the Crown in Parliament as the "bedrock" of the British constitution, observing that then as now "the Crown in Parliament was unconstrained by any entrenched or codified constitution", and at the other end of the spectrum was Lord Steyn, who at paragraph 102 of the opinion, noted that the "classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom". It is noteworthy that the following comment of Lord Steyn in the same paragraph has generated much speculation as to what the future holds for the United Kingdom:

> *"*Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish. It is not necessary to explore the ramifications of this question in this opinion. No such issues arise on the present appeal."

Nor is it necessary for the purpose of this appeal to go into these concepts, as we are here interpreting and applying the principles of our own Constitution, which differs in many ways from the British constitution. As far as Sri Lanka is concerned, under the Republican Constitution of 1972 as well as the Constitution of the Democratic Socialist Republic of Sri Lanka 1978, Sovereignty is expressly, and manifestly vested in the People, and Article 4 of the Constitution outlines very clearly the manner in which the "Sovereignty of the People" is to be exercised and enjoyed, particularly by the legislative, executive and judicial organs of government.

Let me at this stage turn to the only local decision in point, which has been referred to by the learned Attorney General in the course of his submissions before us. In *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412 two members of the House of Representatives were noticed by this Court, on an application by the Attorney General, to show cause as to why they should not be punished for offences of breach of privilege of Parliament. On a question of conflict of jurisdiction between this Court and the House of Representatives having being raised by learned Counsel for the respondents, this Court had no hesitation in holding that, even if the conduct complained of was disrespectful, it was not justiciable by the Supreme Court, as the conduct in question fell within the scope of sections 3 and 4 of the Parliament (Powers and Privileges) Act and could not therefore be questioned or impeached in proceedings taken in the Supreme Court under section 23 of the Act. After examining the English authorities and relevant Standing Orders of the House, H.N.G. Fernando J. observed as follows at page 427 of his judgment:-

"The jurisdiction to take cognisance of such conduct was exclusively vested in the House of Representatives. The respondents are accordingly discharged from the notices served on them."

It remains for me to consider the submissions made by learned Counsel on the question as to whether Section 3 of the Parliament (Powers and Privileges) Act amounts to a constitutional ouster of the writ jurisdiction of the Court of Appeal conferred by Article 140 by reason of its embodiment in Article 67 of the Constitution. Article 67 enacts as follows:-

"The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, shall, *mutatis mutandis,* apply."

While the learned Attorney General has forcefully contended that Article 67 brought about a constitutional ouster of the writ jurisdiction of the Court of Appeal, learned Counsel for the 11th and 12th Respondent-Respondents have argued with equal force that the mere reference to the Parliament (Powers and Privileges) Act in Article 67 of the Constitution does not elevate section 3 of the said Act into a constitutional ouster of jurisdiction, and that a jurisdiction conferred by the Constitution cannot be denuded by an ordinary "law" which has not been enacted in the manner set out in Chapter XII of the Constitution. For this proposition, they have relied on the decision of this Court in *Attapattu and Others v People's Bank and Others* (1987) 1 Sri LR 208, in which this Court dealt with an apparent conflict between the ouster clause found in section 22 of the Interpretation Ordinance, as amended by Act No. 18 of 1972, and the power of judicial review conferred principally on the Court of Appeal by Article 140 of the Constitution, and expressed the view at pages 222 to 223 that-

"Apart from any other consideration, if it became necessary to decide which was to prevail - an ouster clause in an ordinary law or a Constitutional provision conferring writ jurisdiction on a Superior Court, "subject to the provisions of the Constitution" - I would unhesitatingly hold that the latter prevails, because the presumption must always be in favour of a jurisdiction which enhances the protection of the Rule of Law, and against an ouster clause which tends to undermine it (see also *Jailabdeen v. Danina Umma* 64 NLR. 419, 422). But no such presumption is needed, because it is clear that the phrase "subject to the provisions of the Constitution" was necessary to avoid conflicts between Article 140 and other Constitutional provisions - such as Article 80(3), 120, 124, 125, and 126(3). That phrase refers only to contrary provisions in the Constitution itself, *and does not extend to provisions of other written laws, which are kept alive by Article 168(1)*." (*Emphasis added*)

The learned Attorney-General has submitted that at best the above passage is an *obiter dictum* having no binding effect on this Court, as the case was decided on the basis that upon the death of an applicant for relief in proceedings for the redemption of land under section 71 of the Finance Act, No. 11 of 1963, as subsequently amended, a "specified heir" or a testate heir may be substituted, and whether the application was duly constituted, or whether the Bank ought to exercise its discretion, to vest the premises, in favor of the substitute, should not be considered at the stage of substitution, but only after a substitute has stepped into the shoes of the deceased and has acquired the necessary status to present his case.

However, I do not have to go into this question as Article 67 of the Constitution incorporates into that article *mutatis mutandis* all the provisions of the Parliament (Powers and Privileges) Act that were in force at the time of the enactment of the Constitution in 1978, and the effect of such incorporation by reference is to write into that article the provisions of the aforesaid Act as if they

were part of the Constitution. As Lord Esher M.R. observed in *In Re Woods Estate* (1886) 31 Ch.D 607 at 615 –

> "If a subsequent Act bring into itself by reference some of the clauses of a former Act, the legal effect of that, as has often been held, is to write those sections into the new Act just as if they had been actually written in it with the pen, or printed in it, and the moment you have those clauses in the later Act, you have no occasion to refer to the former Act at all. For all practical purposes therefore, those section of the Act of 1840 are to be dealt with as if they were actually in the Act of 1855".

Learned Counsel for the 11th and 12th Respondent-Respondents have stressed that Article 67 itself has empowered Parliament to determine and regulate "by law" its privileges, immunities and powers, and that since the word "law" as used in that article envisages an ordinary Act of Parliament that may be enacted with a simple majority in Parliament, the provisions of the Parliament (Powers and Privileges) Act including section 3 thereof cannot be regarded as constitutional provisions. However, I find that there are several provisions in our Constitution such as Article 12(4), the proviso to Article 13(5), Articles 15, 74(2), 101(2), 154A (3) and 154G (3)(a) that are expressly permitted to be varied or amended by an ordinary majority, and in my view, the simple fact that variation is permitted by an ordinary majority in Parliament, would not deprive the provision of its constitutional status.

It is in this context important to note that Article 67 does not stand alone and must be read with Article 4(c) of the Constitution which makes express reference to "the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised by Parliament according to law". The direct vesting of the judicial power of the People with respect to the privileges, immunities, and powers of Parliament and its Members in Parliament, by Article 4(c) of the Constitution means, as has been explained in the judgments of this Court in decisions such as *Stockdale v Hansard,* [1839] EWHC QB J21, 112 ER 1112, *Bradlaugh v Gossett* (1884) 12 QBD 271, *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412, *Dingle v Associated Newspapers Ltd. and Others* [1960] 2 QBD 405, *Prebble v. Television New Zealand Ltd.* [1995] 1 A.C. 321 and *Neil Hamilton v Mohammed Al Fayed* [2001] 1 AC 395, that no Court can exercise any supervision of that power. I therefore hold that section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953 read with Articles 4(c) and 67 of the Constitution would have the effect of ousting the writ jurisdiction of the Court of Appeal in all the circumstances of this case.

I accordingly answer Question 1) on which special leave to appeal had been granted by this Court in the affirmative, and hold that 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 which performs its constitutional function in terms of Article 107(2) and (3) of the Constitution read with Order 87A of the Standing Orders of Parliament.

Conclusions

For the foregoing reasons, I would conclude that the Court of Appeal possessed no jurisdiction in terms of Article 140 of the Constitution to review a report of a Select Committee of Parliament, which was constituted in terms of Article 107(3) of the Constitution read with Order 87A(2) of the Standing Orders of Parliament, or to grant and issue an order in the nature of a writ of *certiorari*

purporting to quash the report and findings of the Parliamentary Select Committee on the basis that it was not properly constituted.

I would accordingly, allow the appeal and set aside the impugned judgment of the Court of Appeal dated 7th January 2013. The application filed by the Petitioner-Respondent in the Court of Appeal shall stand dismissed due to lack of jurisdiction.

In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J,

I agree.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasundera, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Rohini 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 proceedings after granting of Leave to Appeal by the Provincial High Court of Western Province Colombo Under provisions of Article 128 of the Constitution and S.9 of the High Court of Western Province Act No. 9 of 1990

SC Appeal 70/2010
Provincial High Court /Application No. H.C.M.C.A. 1108/2006
Magistrates Court of Colombo
Case No 19993/3

Subramaniam Sivapalanathan
No. 115 Kotahene Road,
Colombo 13.
Currently of No. 285 Mahawatte Road
Colombo 14.

Accused-Appellant-Appellant

Vs.

1. The Attorney General
   Attorney General's Department
   Colombo 12

2. The Officer-in-Charge
   Police Station
   Kotahena

Respondent-Respondent-Respondents

Before : Tilakawardane, J.
Marsoof, PC, J.
Dep, PC, J.

Counsel : M.A.Q.M. Ghazzali with Laksiri Silva and Mallika Somasundaram for the Appellant

Ms. P. Munasinghe, SC for AG

Argued on : 13.10.2011

Decided on : 26.03.2014

Priyasath Dep, PC, J.

This is an appeal against the judgment of the Provincial High Court of Western Province held in Colombo dated 24.06.2010 affirming the conviction and sentence imposed by Magistrate's Court of Colombo in Case No. 19993/3 . The High Court granted leave to Appeal to the Accused-Appellant – Appellant (hereinafter referred to as the "Accused").

The Officer in charge of Kotahena Police filed two charges against the Accused in the Magistrates Court of Colombo under section 400 and section 386 of the Penal Code. The contents of the charges are briefly given as follows:

1. The Accused did tender a cheque for Rs. 42500/- being the balance due to the Complainant (tenant) out of the one year's rent paid in advance by the Complainant and thereby fraudulently or dishonestly induced the Complainant to vacate the premises which she would not have done, if she was not so deceived as a result of the cheque being dishonored due to lack of funds and thereby committed an offence of cheating under section 400 of the Penal Code.

   In the alternative

2. The accused did misappropriate Rs 42500/- which is the balance some due to the Complainant in respect of the advance payment of rent for one year and thereby committed an offence of misappropriation punishable under 386 of the Penal Code.

At the trial Complainant Selvadorai Sellamma, Sub-Inspector Kaluarachchi ((Investigating Officer), L. Karunarathne, Deputy Manager of Bank of Ceylon, Kotahena gave evidence for the prosecution. The Learned Magistrate call upon the accused for the defence and the Accused gave evidence on his behalf and he was examined and cross examined at length. After the conclusion of the case the learned Magistrate convicted the accused on both counts and imposed a sentence of one year's rigorous imprisonment.

The facts of the case are briefly as follows:

The Complainant Selladorai Sellamma entered into an agreement with the Accused and rented out a room belonging to the Accused at No. 115, Kotahena, Colombo 13 for a period of one year and paid sum of Rs. 72,000/- being the total sum of monthly rentals of Rs. 6000/-. The agreement was marked as P1. According to the agreement, if the tenant intends to leave the premises before the expiry of one year she is required to give one month's notice. The Complainant came into occupation on or about 19th August 1998 and resided in the premises for a period of 3 months and she vacated the premises due to various problems she encountered with the Accused (the landlord). She states that she gave a letter to the landlord (accused) indicating her intention of vacating the premises. Thereafter, she vacated the premises and requested the accused to return the balance sum of Rs. 54000/-. She met the accused on several occasions and in November the accused gave a cheque drawn on Bank of Ceylon bearing No.285991-7010-663 for a sum of Rs. 42500/-. It was a post dated cheque bearing

the date 10.01.99. The cheque was marked as P2. The Complainant tendered the cheque to the bank on 12.1.99 and the cheque was returned with the endorsement 'account closed'. In the course of the investigations, police obtained details of the bank account maintained by the wife of the accused. According to the statement given by the bank, the account was closed on 30.12.98. This statement was marked as P3.

The Accused gave evidence and admitted that he received Rs. 72,000/- being a rent for one year from the Complainant. He admitted that he entered into an agreement with the complainant which was marked P1. He had stated that in terms of the agreement the tenant is required to give one month's written notice to him. Hence as the tenant failed to give one month's written notice as agreed upon he is not required to return the balance amount and thereby the money belongs to him. He stated that the Complainant came to his house with three unknown persons armed with weapons and threatened him and his wife and obtained Rs. 11,000/- in cash and forced his wife to issue a cheque for Rs. 42,000/-. (This position was not suggested to the Complainant when she gave evidence)He stated that almost two years after the incident the complainant made a complaint to the Kotahena Police against him and thereafter he was arrested and produced in Court as he did not agree to return the money to the Complainant.

After the conclusion of the case the learned Magistrate convicted the Accused on both counts and sentenced him to one year's rigorous imprisonment. The learned Magistrate had refused bail and he was in remand prison for nearly six months pending granting of Bail by the High Court.

The accused appealed to the High Court and his appeal was dismissed. The learned High Court Judge in his judgment had stated that the prosecution had proved the charges made against the accused beyond reasonable doubt and that he has no reason to disturb the findings of the learned Magistrate.

The learned High Court Judge granted leave on following questions of law submitted by the Counsel for the Appellant.

Questions of Law:

1. Is the conviction of the Accused by the trial Judge in the above case, the result of serious misreading of the evidence before Court.

2. Did the trial Court make serious error of law by failing and or neglecting to identify the ownership and entitlement of the parties in the above case to the involved sum of Rs. 42,500/-, before proceeding to convict the Accused for the charges of 'Cheating'(s.398 of the Penal Code) and 'misappropriation' (s.386 of Penal Code).

3. Is the contention of the trial court in the above case, that the contesting claims of the Accused and the virtual complainant to the said sum of Rs. 42500/-, a matter for the Civil Court.

   a) erroneous in law;

   b) has led to wrongful and unlawful conviction of the Accused.

4. Is the finding of the trial judge that the Accused in the above case had issued cheque No. 285591 for a sum of Rs. 42,500/- to Sellamma, the Complainant, on account No. 37024, with knowledge of the closure of the said Account contrary to evidence led in this case.

5. Was the misreading of evidence as aforesaid, a serious error that had led to the Conviction of the Accused in the above case unlawfully and wrongfully on the charges against him.

6. On a proper, correct and impartial reading of the evidence in this case has the prosecution fallen short of establishing the charges against the Accused in all their ingredients and totally.

When examining the facts and circumstances of this case, I find that the most important question of law is whether the established facts are sufficient to prove the essential elements of charges of cheating and misappropriation.

The learned Magistrate and the High Court Judge both accepted the evidence of the Complainant as reliable and trustworthy. The learned High Court Judge held that there is no reason to disturb the findings of facts. Therefore, we are left with the main issue to decide whether or not the established facts are sufficient to prove the necessary ingredients of the charges preferred against the accused. As far as the 1st charge is concerned it is necessary to examine whether 'deception' the essential ingredient of the charge of cheating was established. The main question is whether the accused by tendering the cheque deceived the complainant and induced her to vacate the premises. The evidence is that the Complainant on her own vacated the premises after three months in occupation as she found it difficult to live in that premises due to the prevailing situation. The cheque was issued by the accused after she left the premises and when she demanded the repayment of the money. Therefore, by issuing a cheque without funds the Accused did not deceive the Complainant and induced the Complainant to vacate the premises. I am of the view that the cheating charge was not established and therefore I set aside the conviction on cheating count and acquit the accused on count one. If there was a charge under section 25 of the Debt Recovery Act for issuing a cheque without funds, on the available evidence there is a possibility of convicting the Accused for that offence.

The next question is whether the misappropriation charge in count two could be maintained or not. It is an established fact that the accused accepted Rs. 72,000/- as advance rent. The complainant was in occupation of the premises for a period of three months. The Complainant after vacating the premises demanded the balance money from the Accused and a cheque was issued for Rs. 42500/- which was subsequently dishonoured due to the fact that the Account was closed. The position of the Accused is that he did not return the money due to the reason that the Complainant did not give one month's written notice in terms of the agreement marked P1. But the Complainant stated that she gave written notice to the Accused. In any event the complainant vacated the premises after three months and that fact is known to the accused as the accused was living in the same premises and also from the fact that after vacating the premises the Complainant demanded from the Accused to return the balance sum. Even assuming that the complainant did not give one months notice, if at all the accused can retain one month's rent only and required to return the balance sum. Therefore he had misappropriated the balance sum due to the Complainant which was part of the advance rent. Therefore I affirm the conviction on count two.

The next question is what is the appropriate sentence that should be imposed on the accused. The learned Magistrate had given a custodial sentence due to the fact that there was a previous conviction against the accused for a similar offence committed in 2005. The learned Counsel had submitted to the High court that this conviction was for an offence committed long after the offence which is the subject matter of this appeal. Therefore, the learned Magistrate should not have considered that fact as a bar for the imposition of a suspended sentence.

This offence was committed in 1998 and the accused was 54 years old at the time of giving evidence in 2004. Considering the above facts, I am of the view that a custodial sentence will not be appropriate in the circumstances of this case. Therefore, sentence of one year's rigorous imprisonment imposed by the learned Magistrate on Count 2 (misappropriation) which was affirmed by the High Court is suspended for 5 years. Subject to the above variations the Appeal is dismissed.

This Order to be dispatched by the Registrar to the Magistrate Court for the imposition of the suspended sentence. High Court record along with this order to be dispatched to the High Court without delay.

Judge of the Supreme Court.

Shiranee Tilakawardena, J.
I agree.

Judge of the Supreme Court

Saleem 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 Appeal from a judgment of the Court of Appeal.

1. Yuni Motors (Pvt.) Ltd.,
   No. 105, New Bullers Road,
   Colombo 4.

2. Yasasiri Kasturiarachchi,
   Chairman/Managing Director,
   Yuni Motors (Pvt) Ltd.,
   No. 34, Vajira Road,
   Colombo 5.

PETITIONERS

S.C. Appeal No. 79/2006

S.C.Spl. LA No. 163/2006
C.A.Application No. 2314/2004

Vs.

1. S.A.C.S.W. Jayatillake
   Director General of Excise (Special Provisions), 3rd Floor,
   Bristol Street, Paradise Building,
   Colombo 1.

2. Sarath Amunugama,
   Minister of Finance,
   Ministry of Finance,
   Colombo 1.

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

RESPONDENTS

AND NOW BETWEEN

1. Yuni Motors (Pvt) Ltd.,
   No. 105, New Bullers Road,
   Colombo 4.

2. Yasasiri Kasturiarachchi,
   Chairman/Managing Director,
   Yuni Motors (Pvt) Ltd.,
   No. 34, Vajira Road,
   Colombo 5.

PETITIONER – PETITIONERS

Vs.

1. S.A.C.S.W. Jayatilleke,
   Director General of Exercise,
   (Special Provisions)
   3rd Floor, Bristol Paradise Building,
   Colomnbo 1.

2. Sarath Amunugama,
   Former Minister of Finance,
   Ministry of Public Administration,
   Independence Square,
   Colombo 7.

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

RESPONDENT-RESPONDENTS

BEFORE : **Eva Wanasundera, PC. J**

Buwaneka Aluwihare, PC.J. &

Sisira J.de Abrew, J.

COUNSEL : L.M.K. Arulanandam, PC. With R.Y.S. Jayasekara and Manoj Uduwana for the Petitioners-Appellants.

Janak de Silva, DSG. For the Respondents.-Respondents.

ARGUED ON : **22.09.2014**

DECIDED ON : **03.12.2014**

* * * * * *

EVA WANASUNDERA, PC.J.

In this matter special leave to appeal was granted on 13.09.2006 from the judgment of the Court of Appeal dated 22.05.2006 in respect of questions of law set out in paragraph 29 (a), (c), (d) and (e) of the Petition dated 30. 06. 2006. The said questions are :-

29 (a) Did the Court of Appeal err by its failure to arrive at a finding that any provision imposing a tax on a person has to be strictly construed in favour of the person against whom it is purported to be directed?

(c) Did the Court of Appeal err by arriving at a finding that the said provision under HS Code 8703.32.12 " did not exclude new cars" and that," therefore the Petitioners cannot argue that the description given under the said HS Code does not cover the cars manufactured in Sri Lanka?

(d) Did the Court of Appeal err by failing to consider the bearing the words "not more than three years old" in the said provision had on the pivotal Issue in the application before it which was whether the said provision was applicable to the new cars manufactured by the 1st Petitioner in Sri Sri Lanka?

(e) Did the Court of Appeal err by acting on the presumption that the Legislature intended to impose excise duty on new locally manufactured cars?

Facts pertinent to this Appeal are as follows:

The first Petitioner-Appellant (hereinafter referred to as the 1st Appellant), is a company duly incorporated in Sri Lanka. The second Petitioner - Appellant (hereinafter referred to as the 2nd Appellant), is the Chairman of the company. This company is engaged in the business of assembling new motor cars out of new parts imported from Hindustan Motors Limited of India under a license from the Hindustan Motors Ltd. After assembling the parts the product is a new motor car. So, the 1st Appellant becomes a manufacturer of motor cars.

On or about 14.11.2003 the 1st Appellant received a letter from the 1st Respondent, Director General of Excise (Special Provisions) directing it to register itself under Sec. 14 of the Excise (Special Provisions) Act N0. 13 of 1989.The Appellants state that such registration was required only if the 2nd Respondent, the Minister made order under Sec. 3 of the said Act, declaring the type of vehicle manufactured by the 1st Appellant as an item upon which Excise Duty was to be levied.

The 1st Respondent continued to send letters to the 1st Appellant to register under Sec. 14 and pay the excise duty but as it did not do so, a final notice dated 26.08.2004 was sent to the 1st Appellant. The Appellants made an application to the Court of Appeal to quash the decisions of the Respondents and interim relief was granted in favour of the Appellants on 30.11.2004 but at the conclusion of the case, the Court of Appeal dismissed the application of the Appellants on 22.05.2006.

I observe that by an order made by the Minister under Sec. 3 of the said Act, published in the Gazette Extraordinary No. 1228/14 of 22.03.2002, certain categories of vehicles were included as excisable items in terms of Sec. 3. In the said order under HS Code 8703.32.12, the description of which reads as “motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than three years old” was subjected to an excise duty of 65%.

The Appellants are now before this Court against the said judgment. The 1st and 2nd Appellants contend that “ the motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc ” , which are manufactured by them are new cars

and therefore they cannot be taken as cars coming under HS Code 8703.32.12 for which excise duty can be levied and as such the 1st Appellant Company need not be registered under Sec. 14 of the Act. Furthermore they state that there is no express provision in the said Gazette notification for the levy of Excise Duty on locally manufactured motor vehicles.

Sec. 3(1) of the Excise (Special Provisions) Act No. 13 of 1989 reads:-

> " There shall be charged, levied and paid **on every article manufactured or produced or imported into Sri Lanka,** an excise duty at such rate or rates as may be specified by the Minister, by order published in the Gazette. Every such article in respect of which an order is made under this Section is hereafter referred to as **an excisable article**"

Sec. 14(1) of the Excise (Special Provisions) Act No. 13 of 1989 reads:-

> "On and after the expiration of a period of two months from the date on which any article becomes **an excisable article** in pursuance of an order made under Sec. 3, **no person shall,** unless registered for the purpose of this Act with the Director General **engage in the production** of any such excisable article…"

I observe **that if the article is mentioned** in the order of the Minister in the Gazette, the manufacturer is by law bound to pay the excise duty and within two months from the date of the gazette, the manufacturer should register with the Director General of Excise if he/it wants to engage in the production of that article. The question to be decided is whether the newly manufactured motor cars could be recognized as an article mentioned in the order of the Minister under Sec. 3. Does that article come under the category described in HS Code 8703.32.12 in the Gazettes marked as P4 , P6 an P7? The said Gazettes which bear the orders of the Minister are Nos. 1228/14, 1341/28 and 1356/11.

In the said orders under Sec. 3 published in the Gazettes, the excisable articles are classified primarily by HS Headings and then sub classified as HS Codes under each HS Heading. This is done in accordance with the Harmonized Commodity Description and Coding System, commonly known as HS Codes based on the International

Convention on the Harmonized Commodity Description and Coding System to which Sri Lanka is a party. I understand that depending on national requirements, a commodity can be sub-divided at national level from time to time which too may be changed from time to time based on national requirements.

In the Court of Appeal, the 2nd Respondent-Respondent filed an affidavit with many documents and the document marked 2R3 is the Gazette No. 1119/5 dated 14.2.2000 containing the Minister's order under Sec. 3(1) of the Excise (Special Provisions) Act No.13 of 1989 as amended. Quite interestingly, this order contained the same article/item, namely, " motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc" under HS Code allocated to that category at that time, i.e. 8703.32.06. The rate of excise duty was 65%.

It is reproduced as follows:-

I	II	III	IV
HS Heading	HS Code	Description	Rate of Excise Duty
87.03	8703.32.06	Motor cars including Station Wagons and Racing Cars of a Cylinder capacity exceeding 2000 cc	65%

It is clear to me that according to this order of the Minister in the year 2000, published in the Gazette that all the manufacturers and importers of the said item/article became liable to pay the excise duty of 65% at that time, according to law. The qualifying words "not more than three years old" did not appear therein. **The article /item on which excise duty was payable at the rate of 65%, in the year 2000, namely, "motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc" was for manufacturers as well as importers.**

This fact is full proof of the fact that the Director General of Excise had been levying excise duty from manufacturers of the specific item in question from the year 2000. There could be no good reason or rationale for the government to decide against charging the manufacturers in later years. It is observed that no such policy decision was made by the government to that effect after the year 2000 and that is why the

Director of Excise continued to include the same item/article in the latter years only dividing the item into two sections, namely ‘ motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc **not more than three years old ‘** and ‘motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc **more than three years old’** but continued to charge **the same excise duty at the rate of 65% for both categories**.

When it is simplified, all the motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc, without any difference of age are subject to an excise duty at the rate of 65% from the manufacturers as well as from the importers. It is evident from the wording in Gazettes P4 and P6. I wish to reproduce the portion containing the said item in both gazettes as follows:-

P4

The Gazette of the Democratic Socialist Republic of Sri Lanka
Extraordinary
No. 1228/14 – Friday, March 22, 2002
Government Notifications

EXCISE (SPECIAL PROVISIONS) ACT No. 13 OF 1989
ORDER UNDER SECTION 3

By virtue of the powers vested in me by Section 3 of the Excise Duty (Special Provisions) Act No. 13 of 1989, I, Kairshasp Nariman Choksy, Minister of Finance, do by this Order declare that with effect from 23rd March, 2002, Excise Duty on every Article specified in Column III of the Schedule hereto shall be payable at the rate specified in the Corresponding entry in Column IV of that Schedule. Orders made under Section 3 of the Act and published in Gazette No. 1119/5 of 14 th February, 2000 are hereby rescinded.

Kairshasp Nariman Choksy.
Minister of Finance.

I	II	III	IV
HS Heading	HS Code	Description	Rate of Excise Duty
87.03	8703.32.12	Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than three years old	65%
	8703.32.13	Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc more than three years old	65%

P6

GAZETTE EXTRAORDINARY OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA NO 1341/28 - 20.05.2004.

EXCISE (SPECIAL PROVISIONS) ACT No. 13 of 1989

Order under Section 3

By virtue of the powers vested in me by Section 3 of the Excise (Special Provisions) Act No. 13 of 1989, I , Sarath Amunugama, Minister of Finance, do by this order declare that with effect from 19th May, 2004, Excise Duty on every Article specified in Column III of the Schedule hereto shall be payable at the rate specified in the Corresponding entry in Column IV of that Schedule. Orders made under Section 3 of the Act and published in Gazette No. 1228/14 of 22nd March, 2002, Gazette No. 1283/15 of 09th April, 2003, Gazette No. 1299/12 of 31st July, 2003 and Gazette No. 1303/7 of 25th August, 2003 are hereby rescinded.

Ministry of Finance
Colombo 01.
19th May, 2004.

Dr. Sarath Amunugama
Minister of Finance

I	II	III	IV
HS Heading	HS Code	Description	Rate of Excise Duty
87.03	8703.32.12	Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than three and a half years old	65%
	8703.32.13	Motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000cc more than three and a half years old	65%

Furthermore, I would like to analyze the wording in Gazette P7, namely No. 1356/11 dated 01.09.2004. By this order of the Minister, the local manufacturers of vehicles are given a concessionary rate of 32.5%, which is exactly half of the rate of 65% mentioned in earlier gazettes for a period of two years from the date of commencement of the production of such vehicles. **I find that only HS Codes are mentioned in this order without a description and those codes which are related to locally manufactured vehicles are given the concessionary rate.**

The counsel for the Appellants argued that "no HS Code or Heading can be related to the vehicles manufactured anew" in the said Gazette with which I totally disagree because the wording is quite clear that the local manufacturers have to pay excise duty on motor cars exceeding 2000 cc cylinder capacity which are manufactured anew with locally manufactured components or imported components according to this Gazette notification. I reproduce the said gazette P7 below:-

P7

The Gazette of the Democratic Socialist Republic of Sri Lanka
Extraordinary
No. 1356/11 – Wednesday, September 01, 2004.
Government Notifications

EXCISE (SPECIAL PROVISIONS) ACT No. 13 OF 1989
ORDER UNDER SECTION 3

By virtue of the powers vested in me by Section 3 of the Excise (Special Provisions) Act, No. 13 of 1989, I, Sarath Amunugama, Minister of Finance, do by this Order specify that with effect from 01st September, 2004, the rate of excise duty payable on all locally manufactured motor vehicles falling within the HS Heading, HS Code specified in Column I and Column II respectively of the Schedule hereto, **in so far as such Heading and Code can be related to locally manufactured vehicles,** shall be as specified in the corresponding entry in Column III of that Schedule, subject to the following conditions:--

(a) Over fifty percent of the cost of production of the motor vehicles shall be on locally manufactured components as recommended by the Minister in Charge of the subject of Industries, verified by a certificate issued by such Minister to that effect: and

(b) The payment of excise duty on locally manufactured motor vehicles at the rate specified by this Order is granted to each such manufacturer only for a period of two years from the date of commencement of the production of such vehicles.

The excise duty rates imposed by Order published in Gazette No. 1341/28 of May 20th, 2004 shall not apply in respect of locally manufactured vehicles referred to in paragraph (b) of this Order.

The Ministry of Finance
Colombo 01.
01st September, 2004.

Dr. Sarath Amunugama
Minister of Finance

SCHEDULE

I	II	III
HS Heading	HS Code	Rate of Excise Duty
87.03	8703.32.12	32.5%.

Incidentally, It seems nothing but rational for anyone to wonder why the Minister has not specifically made order under Sec. 3 mentioning clearly, that 'newly manufactured motor cars ' within Sri Lanka should be imposed 65% excise duty or a lesser duty.

The reason is that he is not empowered to do so according to the wording of Sec. 3 of the Act. The wording of the Act is in compliance with the obligations that Sri Lanka has undertaken in terms of the General Agreement on Tariffs and Trade (GATT). Article III of GATT specifies that "The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products". Therefore it is obvious that the wording of Sec. 3 has been put in place accordingly. The power of the Minister to make an order under this Section is limited to specifying the article and the rates at which the excise duty is to be charged, levied and paid. The Minister does not have the power, in terms of the section to make a distinction between articles manufactured or produced in Sri Lanka and articles imported into Sri Lanka when specifying the excise duty rate.

For example the Minister cannot by any order under Sec 3 specify an excise duty rate only on imported articles and exempt similar articles manufactured or produced in Sri Lanka. Once the Minister makes order specifying the article and the rate, excise duty has to be charged, levied and paid on all such excisable articles manufactured or produced in Sri Lanka or imported into Sri Lanka at the rate specified. The non – discrimination between imported and domestic like products is an obligation undertaken by Sri Lanka under GATT 1947.

It is an accepted rule of law, that the interpretation given to orders made under section 3 should be consistent with the ambit of the section or else it is ultra vires. In this appeal, the Appellants argue that the rules made under section 3, to quote, "motor cars not more than three years old" does not include newly manufactured cars.

I hold that it is a matter of interpretation of the subordinate legislation in compliance with the Statute. May I quote Bindra's Interpretation of Statutes, 8th Edition, at page 744:

> " The rule of interpretation is that if subordinate legislation is directly repugnant to the general purpose of the Act which authorizes it, or indeed repugnant to any well established principle of statute…, it is either ultra vires altogether, or must, if possible, be so interpreted as not to create an anomaly ".

It is explicitly clear that the manufacturers should pay excise duty according to section 3. The contention is that new cars are not mentioned per se in the rules containing the rates of duty and therefore the manufacturer is not legally bound to pay. There is an anomaly created in such an interpretation. Should the rule be interpreted to exclude them from liability to pay any excise duty or should it be interpreted to include them to be liable to pay the duty? When the statute states that excise duty should be paid, then only the article /item and the rate of the duty is decided by the rules.

The rule under which excise duty can be paid, to fall in line with Section 3, under classification HS Code 8703.32.12, is described as "motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than 3 years old". How old is a car manufactured on the date of manufacture? At the end of

the day, it is one day old. Is it less than 3 years of age. Yes, it is. When cars are manufactured for the first time, under section 14 of the Act, within two months from the date of manufacture, the manufacturer has to register with the Director General of Excise and be ready to pay excise duty. All the cars on this island have an age whether they are imported or manufactured. On a simple reading itself, the manufacturer of new cars fit into the category of "motor cars including station wagons and racing cars of a cylinder capacity exceeding 2000 cc not more than 3 years old". If it is interpreted otherwise only, an anomaly is created. As such, according to the rules of interpretation also, the newly manufactured cars are liable to be charged for excise duty.

I find that the Court of Appeal after having given interim relief which continued to be effective for two years, has considered the facts and the law quite correctly at the end of the hearing and given judgment dismissing the application made by the Appellants to quash the orders of the 1st and 2nd Respondents contained in the documents referred in their application. I answer the questions of law enumerated at the beginning of this judgment in the negative. I find no reason to interfere with the said judgment of the Court of Appeal. I affirm the said judgment dated 22.05.2006.

For the reasons set out above, I dismiss this appeal with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Sisira J.de Abrew, 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 after grant of Special Leave under Article 128 of the Constitution.

Gusthinggna Waduge Somasiri
No. B/14, Jayanthipura-Yaya 11

Accused-Appellant-Petitioner

SC (Appeal) 79/2009
SC (SPL) .L.A. No. 190/2008
CA Case No. 75/2002
HC Anuradhapura 31/2000

Vs.

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

Respondent -Respondent

Before	:	Mohan Pieris, PC, CJ Ekanayake, J & Dep, PC J
Counsel	:	Dr. Ranjith Fernando for Accused-Appellant-Appellant Dappula de Livera , DSG for Respondent-Respondent
Argued on	:	29.04.2013
Decided on	:	11.07.2014

Priyasath Dep, PC, J

This is an Appeal against the judgment of the Court of Appeal which affirmed the conviction and sentence imposed by the High Court of Anuradhapura in Case No. 31/2000.

The Accused-Appellant was indicted in the High Court of Anuradhapura by the Attorney General alleging that on or about 12th July 1998 in Jayanthipura he did commit rape on Devika Iranganie, an offence punishable under section 364(2)(e) of the Penal Code as amended by Act No. 22 of 1995.

I shall refer to the facts of this case briefly. According to the prosecutrix , the accused appellant is a distant relative of her family and with the knowledge of her parents, the accused used to visit her house and helped her in her studies. She was at that time 15 years of age and was preparing for the Ordinary Level Examination. On 12th July 1998 when she was studying in the room , the accused came to the room and closed the door and after removing her clothes forcibly had intercourse with her. She raised cries and the accused threatened her stating that he will throw acid on her and prevent her from attending school in the future. At that time her parents were away at work and her younger brothers were playing in the school playground. After the accused left the premises she had a bath and washed her clothes. She did not tell her parents about this incident. Few days after the said incident on 19th July 1998 when she was ironing her clothes, the accused came to the house and placed a letter on the top of her school books. Her brother took the letter and gave it to her mother. Two days later her parents having read the contents of the letter and questioned her. She narrated the whole incident. Her parents took her to the police station and she made a complaint.

The brother of the prosecutrix Dinesh gave evidence to the effect that the accused had given a letter to her sister and he in turn gave his mother. The mother of the prosecutrix, Malkanthi Karunaratne in her evidence stated that the accused is a distant relative of the family and he used to come to the house to help her daughter in her studies. They trusted him as the accused had a daughter of the same age and that he will not harm her. She stated that her son Dinesh gave a letter to her stating that it was given by the accused to his sister and she read the letter and discussed the contents of the letter with her husband and decided to question her daughter. Her daughter narrated the incident that took place. Thereafter a complaint was made to the police.

Dr. Wilson who examined the prosecutrix found that there is a tear in the hymen and it was partly healed. He gave evidence to the effect that the injury is consistent with the history given by the prosecutrix. The Medical Legal Report was marked as P2. The letter was produced and marked as P3. In the letter the accused had expressed his attachment towards the prosecutrix and the sexual relationship he had with her. He regretted that the prosecutrix since of late had changed her mind and was avoiding him.

Police Sergeant Leelaratne and Chief Inspector of Police Kottearachchi gave evidence regarding the investigations carried out by them.

After the close of the case, the learned High Court Judge called upon the accused for his defence. The accused elected to make a statement from the dock. In his statement he denied the allegation made against him and stated that he was falsely implicated. He stated that he had financial transactions with prosecutrix's family which resulted in disputes among the families and due to this he was falsely implicated. He denied giving a letter to the prosecutrix.

The learned High Court Judge rejected the dock statement and held that the prosecution had proved the case beyond reasonable doubt and convicted and sentenced the accused. The High Court sentenced the accused to a term of 10 years rigorous imprisonment and ordered the accused to pay Rs. 10,000/- to the prosecutrix as compensation and imposed a fine of Rs. 2,000/-. In default of payment of compensation and the fine , a further two years RI each was imposed.

Being aggrieved by the judgment of the High Court, the Accused appealed to the Court of Appeal. In the Court of Appeal the learned counsel for the defence submitted that the honourable High Court Judge failed to properly consider the dock statement. The approach adopted by the honourable High Court Judge is erroneous and contrary to the principles referred to in the judgments of the Supreme Court. The Court of Appeal accepted the position that the honourable High Court Judge did not adopt the proper approach in evaluating the dock statement. However, the Court of Appeal applied the proviso to section 334(1) of the Criminal Procedure Code and the proviso to Section 138 of the Constitution and held that there was no miscarriage of justice. The Court of Appeal dismissed the appeal and affirmed the conviction and the sentence.

Being aggrieved by the judgment of the Court of Appeal, the Accused filed a special leave to appeal application and obtained leave on two substantial questions of law. I will deal with the questions of law separately.

First Question of Law

Did the Court of Appeal grievously err in Law by applying the "Proviso" to section 334 of the Code of Criminal Procedure Act read together with Article 138 of the Constitution notwithstanding the fact that the Court of Appeal was firmly of the view that the Trial Judge misdirected himself when he evaluated the dock statement stating that " a dock statement does not become evidence although it has some evidential value. The failure of the Accused to give reasons for his defence bolsters and strengthens the prosecution case. If there was any truth in the allegation of fabrication he should have given evidence on oath and not doing so ensures to the benefit of the prosecution".

It is appropriate at this stage to consider the approach adopted by the learned High Court Judge in the light of the decisions of the Supreme Court. In Queen V. Kularatne 71 NLR 529 at page 531it was held that:-

> ' when an unsworn statement is made by the accused from the dock, the jurors must be informed that such statement must be looked upon as evidence, subject however to the infirmity that the accused had deliberately refrained from giving sworn testimony. But the jury must also be directed that (a) if they believe the unsworn statement it must be acted upon, (b) if it raises a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and (c) that it should not be used against another accused. The dock statement of the 1st accused was dealt with in such a manner in the present case that it was likely that the jury thought that they were not called upon to pay any attention at all to that statement.

This decision was followed in cases Somasiri Vs. AG- 1983 (2) SLLR 225,Lionel Vs. AG- 1988 (1) SLLR 4, Gunapala Vs. Republic of Sri lanka- 1994 (3) SLLR 180.

In view of the above judgments it is abundantly clear that the learned High Court Judge failed to adopt the correct approach in evaluating the dock statement. The Court of Appeal held that the approach adopted by the learned trial judge is erroneous nevertheless applied the "Proviso" to section 334 of the Code of Criminal Procedure Act

read with the proviso to Article 138 of the Constitution and proceeded to dismiss the appeal.

The learned Counsel for the Appellant submits that when there is a serious error of this nature, the Court of Appeal should not have applied the proviso to section 334 of the Criminal Procedure Code and the proviso to Article 138 of the Constitution. The learned Counsel for the Appellant further submits that these provisos are applicable only for technical and procedural errors and not for serious misdirections or errors on fundamental matters of law.

I agree that the trial judge failed to adopt the correct approach in relation to the dock statement. The question that arises is when there is a wrong decision on a question of law of this nature is it proper for the Court of Appeal to apply the proviso to section 334 of the Criminal Procedure Code and the proviso to Article 138 of the Constitution.

At this stage it is necessary to refer to the provisos. The Section 334(1) of the Criminal Procedure Code and its proviso read thus:

Proviso to 334(1)

> The Court of Appeal on any appeal against conviction on a verdict of a jury shall allow the appeal if it thinks that such verdict should be set aside on the ground that it is unreasonable or cannot be supported having regard to the evidence, or that the judgment of the Court before which the Appellant was convicted should be set aside on the ground of a wrong decision of any question of any law or that on any ground there was a miscarriage of justice, and in any other case shall dismiss the appeal;
>
> Provided that the court may, not withstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if it considers that no substantial miscarriage of justice has actually occurred.

(Section 334 of the Code of Criminal Procedure Act No 15 of 1979 is identical to section 5 of the Court of Criminal Appeal Ordinance No.23 of 1938 which was repealed by section 3 of the Administration of Justice Law No. 44 of 1973. The corresponding section of the Administration of Justice Law is section 350)

Proviso to Article 138(1) of the Constitution reads thus:

The Court of Appeal shall have and exercise subject to the provisions of the Constitution or of any law, an appellate jurisdiction for the correction of all errors in fact or in law which shall be committed by any Court of First Instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and *restitutio in integrum*, of all causes , suits, actions, prosecutions, matters and things of which such Court of First Instance, tribunal or other institution may have taken cognizance:

Provided that no judgment, decree or order of any court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.

The applicability of the proviso to section 334(1) of the Criminal Procedure Code was exhaustively dealt with in *Mannar Mannan v. The Republic of Sri Lanka* 1990. 1 SLR (Page 280).It reads thus:

> "1. The enacting part of the sub-section (1) of section 334 'mandates' the court to allow the appeal where –
>
> (a) the verdict is unreasonable or cannot be supported having regard to the evidence; or
>
> (b) there is a wrong decision on any question of law; or
>
> (c) there is a miscarriage of justice on any ground.
>
> The proviso clearly vests a discretion in the court and recourse to it arises only where the appellant has made out at least one of the grounds postulated in the enacting part of the sub-section. There is no warrant to the view that the court is precluded from applying the proviso in any particular category of 'wrong decision' or misdirection on questions of law as for instance, burden of proof.
>
> There is no hard and fast rule that the proviso is inapplicable where there is non direction amounting to a misdirection in regard to the burden of proof. What is important is that each case, falls to be decided on a consideration of (a) the nature and intent of the non-direction amounting to a misdirection on the burden of proof (b) all facts and circumstances of the case, the quality of the evidence adduced and the weight to be attached to it."

In the above case the trial judge failed to direct the jury that if the dock statement created a reasonable doubt in the prosecution case, the accused is entitled to an acquittal. The learned Counsel who appeared for the Appellant strenuously argued that if there is an error in relation to a fundamental matter such as burden of proof, the Court should not apply the proviso and dismiss the Appeal. However the Supreme Court held that non direction did not cause miscarriage of justice and dismissed the appeal.

The main question in the case before us is whether the wrong approach adopted by the learned trial judge in evaluating the dock statement has the effect of vitiating the conviction. Though the learned trial judge adopted a wrong approach in relation to the dock statement, he had rejected the dock statement as false and thereafter considered the prosecution case and held that the prosecution had proved the case beyond reasonable doubt. When considering the facts of this case there is credible and sufficient evidence to convict the accused.

Second Question of Law:

Did the Court of Appeal err by applying the aforesaid "Proviso" to section 334 of the CPC and the relevant Article in the Constitution, in a Non Jury Trial where there was

grievous misdirection on a material concepts of Law - which were not mere procedural /technical irregularity/omission/error or defect.

The learned counsel for the Appellant submitted that the proviso to section 334(1) applies only for jury trials and not applicable for non jury trial. There are numerous instances where the Court of Appeal had considered the applicability of this proviso in non jury trials.

In Sheela Sinharage (1985) 1 Sri L.R. 1 the Court of Appeal held that the proviso applies only to non jury trials. However H.S.Yapa J expressed the contrary view in *Moses v. State* 1999 – 3 SLR 401when he held:

> "Though Section 334(1) refers to cases of trial by jury, it is reasonable and proper to assume that the intention of the legislation must necessarily be the same, whether it is a trial before a Jury or Judge sitting alone. The deciding factor being that there should be evidence upon which the accused might reasonably have been convicted."

The Supreme Court bench which consist of five judges who heard the appeal in a Trial at Bar before the High Court in Wijerathne and others v. The Attorney General 2010 (B.L.R.)169 at page177 considered the proviso in section 334(1) and applied the principle therein to that case which is a non jury case. The Supreme Court in that case held 'it is quite clear that the principles embodied in the proviso to s.334 (1) are equally applicable to an appeal under s.335(1)

In *Mannar Mannan v. The Republic of Sri Lanka* (supra) as there was overwhelming evidence against the accused the Supreme Court applied the proviso in spite of the fact that there was an error on a fundamental matter such as burden of proof and dismissed the appeal. The proviso to section 334(1) of the Code of Criminal Procedure Act is based on sound reasoning that in a case where there is overwhelming evidence the court should not allow the appeal if there is no miscarriage of justice. I am of the view that there is no impediment to apply the same rationale in non jury trials.

Section 334 of the Code of Criminal Procedure Act as set out in the marginal note deals with 'determination of appeals in cases where trial was by jury'. It sets out the grounds where the Court of Appeal could set aside the verdict of the Jury. These grounds are common grounds considered by Appellate Courts when dealing with appeals from lower courts and not peculiar to jury trials.

Section 335 (1) of the Code of Criminal Procedure Act dealing with ' determination of appeals in cases where trial was without a jury' does not refer to any ground whatsoever. It reads thus:

> 'In an appeal from a verdict of a judge of the High Court at a trial without a jury the Court of Appeal may if it considers that there is no sufficient grounds for interfering dismiss the appeal.'

It necessarily follows that if there are sufficient grounds court shall allow the appeal. However this section does not refer to sufficient grounds as it is drafted in the negative. Hence there is no need to have a proviso. Therefore the Court of Appeal should take into

account the general practice adopted by the appellate courts over the years. If the judgment is unreasonable and cannot be supported having regard to the evidence, the judgment shall be set aside. This is a general principle adopted by appellate courts setting aside judgments on the basis of unreasonableness or inadequacy of evidence. When there is a wrong decision on any question of law or miscarriage of justice it may be a ground to set aside the judgment. However before doing so the court should consider what effect the wrong decision or miscarriage of justice had on the judgment. If it has no impact on the judgment, the appellate court could disregard those factors and affirm the judgment. In cases though there was a wrong decision on a question of law or miscarriage of justice, the appellate court if satisfied that the prosecution case was proved beyond reasonable doubt it could affirm the judgment instead of ordering a retrial which entails delay and expense. There is 'no substantial miscarriage of justice' or ' which has not occasion a failure of justice' are the concepts adopted to justify this course of action.

For the reasons stated above I hold that the Court of Appeal correctly dismissed the Appeal as there was no substantial miscarriage of justice. There is credible and sufficient evidence to establish the case beyond reasonable doubt. Therefore I see no reason to disturb the findings of the High Court and the judgment of the Court of Appeal which affirmed the judgment of the High Court. For the aforesaid reasons the conviction and sentence affirmed. The appeal is dismissed.

Registrar is directed to send copies of this judgment to the Court of Appeal and also to the High Court of Anuradhapura. If the original record is in the Supreme Court or in the Court of Appeal, Registrar of the relevant court is directed to forward the same to the High Court.

Judge of the Supreme Court

Mohan Peiris, PC.,CJ.
I agree

Chief Justice

Chandra Ekanayake, J.
I agree

Judge of the Supreme Court

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

In the matter of an 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 an appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 83/2012

SC/HCCA/LA 163/2010
SP/HCCA/RAT/122/2007(F)
D.C. Embilipitiya No. 6166/L

Rygamage Dona Kamalawathie
Diwrumpola, Godakawela.

Plaintiff

Vs.

Godakawela Kankanamge Sirisena
No. 17, Diwrumpola,
Godakawela.

Defendants

And

Rygamage Dona Kamalawathie
Diwrumpola, Godakawela.

Plaintiff-Appellant

Vs.

Godakawela Kankanamge Sirisena
No. 17, Diwrumpola,
Godakawela.

Defendant-Respondent

And Now Between

Rygamage Dona Kamalawathie
Diwrumpola, Godakawela.

Plaintiff-Appellant-Appellant

SC. Appeal 83/2012

Vs.

Godakawela Kankanamge Sirisena
No. 17, Diwrumpola,
Godakawela.

Defendant-Respondent-Respondent

* * * * * *

BEFORE : **Chandra Ekanayake, J.**
Eva Wanasundera, PC.J. &
Buwaneka Aluwihare, J.

COUNSEL : S.N. Vijith Singh for the Plaintiff-Appellant-Appellant.

W. Dayaratna, PC. with Ms. R. Jayawardena and Ms. D.N. Dayaratna for Defendant-Respondent-Respondent.

ARGUED ON : **16-06-2014**

DECIDED ON : **17-10-2014**

*** * * * ***

Eva Wanasundera, PC.J.

Leave to Appeal was granted on 10.05.2012 on questions of law set out in paragraph 26(i), (iii), (v), (vi) and (vii) of the petition dated 31.05.2012 . They are as follows:-

26(i) Did the High Court of Civil Appeal err in law by failing to take into account the issue raised by the Petitioner claiming a right of way by way of necessity?

(iii) Did the High Court of Civil Appeal misdirect itself by not taking into consideration the evidence adduced by the Petitioner in relation to the right of way by way of necessity?

(v) Whether the Petitioner has adduced sufficient evidence pertaining to her claim for the right of way by virtue of prescriptive user?

(vi) Did the High Court of Civil Appeal misdirect itself by coming to a conclusion that the Petitioner was not entitled to a plea of prescription as the Petitioner has filed the District Court action in 1988?

(vii) Did the High Court of Civil Appeals err in law by failing to consider the evidence led that three sides of the Petitioner's land was surrounded by the lake and that there is no alternative route for the Petitioner to have access to her land which were not challenged by the Respondent?

In this case the Plaintiff-Appellant-Appellant (hereinafter referred to as the "Appellant") filed action in the District Court of Embilipitiya against the Defendant-Respondent-Respondent (hereinafter referred to as the "Respondent") seeking a declaration of a right to the use of a 10 feet wide road, over the land of the Respondent as access to his land and house thereon.

It was common ground that from 1983 there was a right of way but it was only a foot path along the boundary of the land of the Respondent. In 1988 there was a Primary Court case filed due to the Respondent trying to obstruct the right of way and a Court order was given to use a road way 3 feet wide. The length of the roadway was 169 feet. In 1983, the Appellant used the roadway with the consent of the Respondent, when he started building his house on this land. The District

Court refused to grant a 10 feet wide road but granted a 3 feet wide road. This road as it was used, according to a sketch done by the Grama Sevaka, was about 3 feet wide at the beginning and 8 and 10 feet wide in some parts of the road along the roadway. At no time of the case, quite surprisingly, was a survey done by any order of court with regard to this matter. The Appellant appealed to the Civil Appellate High Court from the judgment of the District Court dated 25.09.2003. The High Court dismissed the appeal on 07.04.2010. Thereafter the Appellant appealed to the Supreme Court on the aforementioned questions of law to be decided by this Court.

Starting from the District Court up to the Supreme Court the parties were advised to enter into a settlement which never happened. The Appellant has failed to show with evidence that there was a road way 10 feet wide at any time. The evidence showed that it was only after the Appellant bought a car that the 10 feet road was necessitated, to run the car over the road from the Godakawela-Ratnapura main road up to the doorstep of the house. It is at this time that the Appellant had filed the District Court action.

The Appellant claims that the land and property he is living on, is land-locked and she has prescribed to a roadway of 10 feet wide and as such the right of way is one of necessity used under 'adverse possession' against the Respondent for over ten years.

The Appellant had filed action in the District Court on 10.07.1998. She had stated that she became the owner of the land in 1983. Even though she claimed that she used a 10 feet wide road to reach her land, evidence was not to that effect. Evidence in Court established that a roadway 3 feet wide was used from 1983. The Appellant had used a 3 feet wide road for over 10 years by the time she filed a District Court action in 1998. The High Court Judge had erroneously taken the date of filing the action as 1988 instead of 1998 and said that prescription was not proven. I observe that the Appellant had proved a right of way by prescription for a 3 feet wide road over 10 years. Even though there was no proper plan drawn during the proceedings of the District Court case, a sketch

had been produced through the Grama Sevaka marked ' P2' as a document. By this document, it is seen that this land of the Appellant is water- locked by three sides and land locked by one side. So, a road way through the Respondent's land to reach the Appellant's land and premises is of necessity. There seems to be no alternate road available for the Appellant to reach her house.

I observe that the High Court Judge has gone wrong in dismissing the appeal regarding prescription and necessity. I answer the questions of law aforementioned in the affirmative. I hold that the Appellant has got the right to use a 3 feet wide road of a length of 169 feet, out of sheer necessity and prescription by user for over ten years. I further hold that this 3 feet wide road be demarcated from the Godakawela-Ratnapura main road up to the land and premises of the Appellant.

For the reasons set out above, I answer the questions of law in favour of the Appellant. I set aside the judgment of the High Court of Civil Appeal of Ratnapura dated 27.04.2010 and the judgment of the District Court of Embilipitiya dated 25.09.2003, subject to the reliefs granted as aforementioned. Thus, I allow the appeal. I order no costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

Buwaneka Aluwihare, 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 No. 85/2011

SC. (Spl)LA. No. 30/2011
CA(Writ) No. 928/08

Sarath Dharma Siri Bandara,
No. 86, Hewaheta Road, Galaha.

Petitioner

Vs.

1. Sarath Ekanayake,
   Chief Minister and the Minister in Charge of the Local Authorities-Central Province,
   No. 126, Secretarial Office,
   Kandy.

2. Pradeshiya Sabha Pathahewaheta,
   Thalathu Oya.

3. Abubakar Mohomadu Subuhan,
   Acting Chairman,
   Pradeshiya Sabha Pathahewaheta,
   Thalathu Oya.

4. Election Officer- Pathahewaheta,
   Election Office, Kandy.

5. Gamini S. Wathegedara,
   Inquiring Officer,
   No. 4, 3rd Lane, Right Circular Road,
   Kurunegala.

Respondents

And Now Between

SC. Appeal 85/2011

Sarath Ekanayake,
Chief Minister and the Minister in Charge of the Local Authorities-Central Province,
No. 126, Secretarial Office,
Kandy.

Respondent-Petitioner

Vs.

Sarath Dharma Siri Bandara,
No. 86, Hewaheta Road, Galaha.

Petitioner-Respondent

1. Pradeshiya Sabha Pathahewaheta,
   Thalathu Oya.

2. Abubakar Mohomadu Subuhan,
   Acting Chairman,
   Pradeshiya Sabha Pathahewaheta,
   Thalathu Oya.

3. Election Officer- Pathahewaheta,
   Election Office, Kandy.

4. Gamini S. Wathegedara,
   Inquiring Officer,
   No. 4, 3rd Lane, Right Circular Road,
   Kurunegala.

Respondent-Respondents.

* * * * *

SC. Appeal 85/2011

Before : **Saleem Marsoof, PC. J.**
Chandra Ekanayake, J. &
Eva Wanasundera, PC.J.

Counsel : Nerin Pulle, DSG. With Ms. Yuresha de Silva, SSC. for the Respondent- Petitioner.

Chula Bandara with S.L. Samarakoon for Respondents.

Argued On : **03-07-2014**

Decided On : **10-09-2014**

*** * * ***

Eva Wanasundera, PC.J.

In this application for Special Leave to Appeal, on 28.06.2011 this Court granted special leave on the questions of law set out in paragraph 19 (a, b, c, d and e) of the Petition dated 25.02.2011. The said questions are as follows:-

(a) Did the Court of Appeal err in law in holding that an inquiry that is held in terms of Section 185(2) of the Pradeshiya Sabha Act (as amended) should be concluded within a period of 3 months?

(b) Did the Court of Appeal err in law in holding that the duration of the inquiry as stipulated in Section 185(2) of the Act cannot be extended?

(c) Did the Court of Appeal err in law in holding that Section 185(2) of the Pradeshiya Sabha Act (as amended) is mandatory in nature?

(d) Did the Court of Appeal err in law in holding that the extensions of time given beyond the period stipulated in Section 185(2) of the Pradeshiya Sabha Act was ultra vires?

(e) Did the Court of Appeal err in law in holding that the report submitted by the Inquiring Officer was ultra vires and illegal in view of the extensions of time granted to the Inquiring Officer?

The Court of Appeal judgment from which special leave was granted is marked X3 dated 18.01.2011. By the said judgment the Court of Appeal issued a Writ of Certiorari to quash the order of the Chief Minister and the Minister in Charge of the Local Authorities, Central Province published in the Gazette notification dated 17.10.2008. The said order of the Minister was made in terms of Section 185(1) (a) of the Pradeshiya Sabha Act No. 15 of 1987 whereby the Petitioner-Respondent(hereinafter referred to as the "Respondent") was suspended from holding the office as Chairman of the Pathahewaheta Pradeshiya Sabha in terms of Section 185(3) of the Pradeshiya Sabha Act No. 15 of 1987. He was subject to an inquiry held under Section 185(2) of the said Act which reads:-

> "The Minister shall before making an order under Sub Section (1), appoint, for the purpose of satisfying himself in regard to any of the matters referred to in sub section (1), a retired judicial Officer to inquire into and report upon such matter within a period of three months, and such Officer shall in relation to such inquiry have the powers of a Commission of Inquiry appointed under the Commissioner of Inquiry Act"

The Court of Appeal quashed the Order of the Minister on the basis that (a) the Inquiring Officer was given four extensions to conclude the inquiry even though the aforementioned Section 185(2) specifically states that it should be concluded within three months which is mandatory and therefore the report submitted by the Inquiring Officer is illegal and ultra-vires; (b) the Minister has acted on this illegal report and removed the Chairman of the Pradeshiya Sabha for mismanagement and incompetency; and (c) the Minister's decision to remove the Chairman is illegal and therefore should be quashed.

The question to be determined is whether Section 185(2) stipulates that the Inquiring Officer should conclude the inquiry within three months. Section 185(1) states that if the Minister is satisfied at any time that there is sufficient proof of incompetence and management, he may remove the Chairman from Office. Under Section 185(2) he

appoints the Inquiring Officer to get a report to satisfy himself regarding incompetence and management. When he appoints such Officer, the Minister may suspend the Chairman and when he receives the report he can either remove the Chairman or revoke the suspension. As such the report of the Inquiring Officer is necessary for the Minister to satisfy himself regarding the decision. The Officer once appointed by the Minister acquires the powers of a Commission of Inquiry appointed under the Commission of Inquiry Act No 17 of 1948 as amended.

In interpreting the provisions of a statute, one must ascertain the intention of the Legislature. It is trite law that "it is necessary to know the intent of the legislature that make it, in order to construe the meaning". As per N.S. Bindra's Interpretation of Statutes – 9th Edition; "It is elementary that the primary duty of a Court is to give effect to the intention of the legislature as expressed in the words used by it and no outside consideration can be called in aid to find that intention. A statute must be construed in a manner which carries out the intention of the legislature. The intention of the legislature must be gathered from the words of the statute itself. If the words are unambiguous or plain, they will indicate the intention with which the statute was passed and the object to be obtained by it. When the language of the law admits of no ambiguity and it is very clear, it is open to the Courts to **put their own gloss** in order to squeeze out some meaning which is not borne out by the language of the law".

In the instant case, the intention of the legislature in having introduced Section 185(2) seems to be, to provide a mechanism to ensure good governance. It enables the Chief Minister to act in a transparent manner when he decides to remove the Chairman, as in this case. At any time that he is dissatisfied with the Chairman's actions regarding competence and management, he cannot remove the Chairman on his own. Instead he has to appoint an Inquiring Officer out of the retired Judicial Officers who are well versed with such inquiries, to hold an inquiry and report before he takes a step to remove the Chairman. In the plain reading of Section 185(2), the appointment of the Officer and the reporting should be done within 3 months.

The purpose of such a report is to decide on the removal, i.e. whether to remove or not. What could happen, if the Inquiring Officer cannot conclude the inquiry within

that period? If the report is not considered due to the fact that it is submitted after 3 months to the Minister, on a strict interpretation of the Section, taking the words as mandatory, the Minister can reject the report and act on his own ignoring the report, on one hand. On the other hand, he can accept the report, go through the material and then decide on the matter. Which would the Legislature have intended? Is it the rejection of the report or consideration of the report? Then again, the parties to the inquiry can purposely delay the proceedings of the inquiry by all kinds of methods, so that the end result would be, for the report to reach the Minister after 3 months. Was that the intention of the Legislature?

In the instant case, neither of the situations discussed above arose. Both parties to the inquiry never complained when the Inquiring Officer asked for extensions, four times after the expiry of three months from the date of the appointment. They conveniently participated at the inquiry without objecting to the extensions. They have acquiesced in the proceedings. How could they have complained about the inquiry going beyond three months, as illegal and ultra vires? The facts in this case amply show that the person appointed by the Respondent to defend the Respondent at the inquiry had requested the Inquiring Officer to hold the inquiry only once a week as he was unable to come for the inquiry otherwise and on that account the extensions of time were granted to facilitate the conclusion of the said inquiry.

In the case of ***Nagalingam Vs. Lakshman de Mel, Commissioner of Labour 78 NLR 237***, it was observed that "Further the Petitioner, having participated in the proceedings without any objection and having taken the chance of the final outcome of the proceedings, is precluded from raising any objection to the jurisdiction of the Commissioner of Labour to make a valid order after the zero hour. The jurisdictional defeat, if any has been cured by the Petitioner's consent and acquiescence". The subject matter of that case was the time stipulated in Section 2(2) (c) of the Termination of Employment of Workman (Special Provisions) Act No. 45 of 1971. It was observed in that case, again, that "It could not have been intended that the delay should cause a loss of jurisdiction that the Commissioner had, to give an effective order of approval or refusal. A failure to comply literally with the said provision does not affect the efficacy or finality of the Commissioner's order made thereunder'.

The determination of the question whether a provision of law is mandatory or directory would depend upon the intent of the law maker. The intent of the law maker should not be gathered only from the phraseology of the provisions but by considering the consequence which would follow from construing it in one way or the other.

Section 185(2) of the Pradeshiya Sabha Act facilitates the Minister to make a decision. If the facilitator, who was the Inquiring Officer in this case delays the report, there is nothing that the Minister can do other than making the decision when the report is submitted. Of course, the Minister can try to get it fast by making a request to the Inquiring Officer but when the affected parties are also acquiescing in the process of the delay due to whatever reasons, then, the Minister has to consider the report only when it is submitted. This is exactly what has happened in this case. The Minister has given the time extensions as requested and then considered the report submitted thereafter. Such action of the Minister is not ultra-vires or illegal.

I note that in ***Mohamed Ishak Vs. Morais 1996, 1 SLR 145*** , the Court of Appeal has observed that "Section 185 of Act No. 15 of 1987 is directory and not mandatory and therefore the inquirer is not bound to deliver the order within 3 months". In ***Mohamed Vs. H Jayaratne 2002, 3 SLR 169*** and ***others*** also, in similar circumstances, the Court of Appeal has held that "the time limit of two months set out in the proviso to Section 63(1) of the Provincial Councils Act is directory and not mandatory".

I further observe that the Court of Appeal in the instant case has dismissed the submission of the Petitioner in the case before the Court of Appeal, namely that "there is no basis for the decision of the Inquiring Officer". The Court of Appeal Judge has thus accepted that there is good reasoning and a good basis for the decision of the Inquiring Officer. While accepting the report he has wrongly decided that it was illegal and ultra-vires solely on the basis that the decision of the Inquiring Officer was made after the lapse of three months. In other words the Court of Appeal has accepted that the Minister had made a decision on the merits of the case produced by the Inquiring Officer and that decision taken alone is legal and not ultra-vires. The Court of Appeal has quashed the Minister's decision only on the ground that the Minister's granting of extensions were ultra vires the powers of the Minister

and therefore the report submitted by the Inquiring Officer after 3 months, which is the mandatory period, is ultra vires and illegal.

I am of the opinion that any interpretation of Section 185(2) of the Pradeshiya Sabha Act No15 of 1987 on the basis that the time period of 3 months is mandatory, would defeat the intention of the legislator who intended to ensure good governance based on a transparent system.

I set aside the judgment of the Court of Appeal delivered on 18.01.2011. I dismiss the Writ application bearing No. CA. (Writ) 928/2008 in the Court of Appeal. I order costs fixed at Rs.50,000/- payable by the Petitioner-Respondent to the Respondent-Petitioner, the Chief Minister and Minister in Charge of the Local Authorities, Central Province.

I allow the appeal subject to the costs as aforementioned.

Judge of the Supreme Court

Saleem Marsoof, PC. J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

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

SC. Appeal 87/2010

S.C.H.C.C.A.L.A. No. 80/2010
Mallakam District Court
Case No. Land/293/05
Civil Appellate High Court
Jaffna Case No. 39/08

1. Sangarapillai Navaratnarajavel
2. Wife Kangadevi

Both of Puttur East, Puttur.

Plaintiffs

Vs.

1. Kandiah Naganathan
2. Wife Baskaradevi,

Both of Punkadi, Puloli South, Puloli.

3. Arunasalam Varnadevid
4. Wife Santhanayaki
5. Jesudasan Santhirabose

All three of Selvavalavu,
Chunnakam.

Defendants

AND NOW

1. Kandiah Naganathan
2. Wife Baskaradevi,

Both of Punkadi, Puloli South, Puloli.

3. Arunasalam Varnadevid

4. Wife Santhanayaki
5. Jesudasan Santhirabose

All three of Selvavalavu,
Chunnakam.

Defendants-Appellants

Vs.

1. Sangarapillai Navaratnarajavel
2. Wife Kangadevi

Both of Puttur East, Puttu.

Plaintiffs-Respondents

AND NOW BETWEEN

In the matter of an application for Leave to Appeal in terms of Article 154P of the Constitution in the exercise of its jurisdiction granted by Section 5A of the High Court of the Provinces [Special Provisions] Act, No. 54 of 2006.

1. Sangarapillai Navaratnarajavel
2. Wife Kangadevi

Both of Puttur East, Puttu.

Plaintiffs-Respondents-Petitioners

Vs.

SC. Appeal 87/2010

1. Kandiah Naganathan
2. Wife Baskaradevi,
   Both of Punkadi, Puloli South, Puloli.
3. Arunasalam Varnadevid
4. Wife Santhanayaki
5. Jesudasan Santhirabose
   All three of Selvavalavu,
   Chunnakam.

Defendants-Appellants-Respondents

BEFORE : **MOHAN PIERIS PC. CJ.**
SATHYAA HETTIGE PC. J &
EVA WANASUNDERA PC. J

COUNSEL : M.A. Sumanthiran for the Plaintiffs-Respondents-Petitioners.

S. Ruthiramoorthy for the Defendants-Appellants-Respondents.

ARGUED ON : **12.09.2013**

DECIDED ON : **31.03.2014**

* * * * * *

EVA WANASUNDERA, PC.J.

This appeal arises from the Provisions in the Thesawalamai Pre-Emption Ordinance No. 59 of 1947 which is an Ordinance to amend and consolidate the law of Pre-Emption relating to lands affected by the “Thesawalamai”.

Section 4 of the said Ordinance reads:-

> "The right of pre-emption shall not be exercised except in a case where the property which is to be sold consists of an **undivided share** and interest in immovable property, and shall in no case be permitted where such property is held **in sole ownership** by the intending vendor".

Section 2 [1] of the said Ordinance explains that the right of pre-emption over any immovable property subject to the Thesawalamai means "the right in preference to all other persons whomsoever to buy the property for the price proposed or at the market value", given to a class of persons specifically mentioned in that Section. It is a preferential right to buy a property when another person is wanting to sell his or her land. Precisely if A wants to sell his land he has to give notice and/or inform those specific persons who have a preferential right over any others to buy the said land.

Section 2 [1] reads:-

> "When any immovable property subject to the *Thesawalamai* is to be sold, the right of pre-emption over such property, that is to say, the right in preference to all other persons whomsoever to buy the property for the price proposed or at the market value, shall be restricted to the following persons or classes of persons:-
>
> (a) the persons who are co-owners with the intending vendor of the property which is to be sold, and
> (b) the persons who in the event of the intestacy of the intending vendor will be his heirs.

The wording in Section 4 plays an important role.

The right of pre-emption applies only when the property proposed to be sold is an **"undivided share".** The right of pre-emption should not apply if such property is held in **"sole ownership by the intending vendor".**

In this case the Plaintiff-Respondent-Appellants [hereinafter referred to as Appellants] claim to enforce an alleged right of pre-emption against the 1st and 2nd Defendant-Appellant-Respondents [hereinafter referred to as 1st and 2nd Respondents] as vendors of 'a sale of land' and against the 3rd, 4th and 5th Defendant-Appellant-Respondents [hereinafter referred to as 3rd, 4th and 5th Respondents] as vendees of that land.

This Court granted leave to appeal on the questions set out in paragraphs 8 (a), (b), (e) and (f) of the Petition dated 10.3.2010. They are as follows:-

8 [a] Have the Learned High Court Judges erred in law in coming to a finding that the Southern part of the land identified as item 4 in the Schedule to the Plaint is divided?

8 [b] Have the Learned High Court Judges erred in law by failing to take cognizance of the fact that the Southern part of the land identified as item 4 in the Schedule to the Plaint is a co-owned land?

8 [e] Have the Learned High Court Judges erred in law by coming to a finding that the Survey Plan bearing the No. 201 surveyed on 3rd July 2004, has divided the co-owned land identified as item 4 of the Schedule to the Plaint?

8 [f] Have the Learned High Court Judges erred in law by failing to take cognizance of the legal authority ***Githohamy Et Al vs. Karanagoda et al*** **56 NLR 250**, which expressly states that, "A plan made at the instance of a co-owner purporting to cause a division of the common land of which the other co-owners apparently had no notice does not form the basis of divided possession. Exclusive possession on the footing of such a plan does not terminate the co-ownership of the land, and no presumption of an ouster can be inferred from such possession"?

The facts pertinent to this appeal are as follows:-

The Appellants instituted action in the District Court of Mallakam against the Respondents to enforce a right of pre-emption under the Thesawalamai Preemption Ordinance after the sale of a land by the 1st and 2nd Respondents to the 3rd, 4th and 5th Respondents. The 2nd Appellant Kangadevi was the owner of the land described in Item 4 of the Schedule in Deed No. 3592 dated 19.3.1983. Paragraph 4 of the said deed imposed a condition on the 2nd Appellant Kangadevi, i.e. that she should transfer the Southern Half of the land described in Item No. 4 of the Schedule to the Deed No. 3592 to her younger sister, the 2nd Respondent Baskaradevi when she becomes of age. On the 2nd Respondent Baskaradevi marrying, the 2nd Appellant Kangadevi transferred "the Southern Half" of the property by way of dowry to the 2nd Respondent under dowry deed 7240 dated 29.08.1988. Thereafter the 1st and 2nd Respondents transferred the said land to the 3rd, 4th and 5th Respondents by Deed No. 3208 dated 19.07.2004. It is this sale of land by Deed No. 3208 which is challenged by the Appellants as a transaction which is subject to pre-emption in Thesawalamai under Ordinance No. 59 of 1947.

I observe that until 29.08.1988, the 2nd Appellant Kangadevi, the sister of the 2nd Respondent Baskaradevi, was holding the "Southern half" of the property in question in trust for and on behalf of the 2nd Respondent Baskaradevi, as stipulated in Deed No. 3592 dated 19.3.1983. Five years thereafter, when the 2nd Respondent Baskaradevi changed her civil status, the elder sister, 2nd Appellant, Kangadevi transferred the "Southern Half" of the property to 2nd Respondent Baskaradevi, quite correctly and dutifully, with specific reference in the Schedule to the Deed No. 7240, **defining the boundaries** to the North, South, East and West and with specific reference to the extent as 14 lachchams. It is observed that this portion of land is registered in a new folio, i.e. Volume/Folio H 677/272 and not in the Volume/Folio as the main land, i.e. H 616/14. For all purposes, the intention of the 2nd Appellant was to pass on a specific area with defined boundaries and a definite extent to the 2nd Respondent. The fact that

a plan was not drawn at the time of the execution of this deed 7240, was not an impediment to the identification of the land conveyed. The 2nd Appellant and the 2nd Respondent, both knew for certain, the portion of land specifically granted by the deed 7240. I am satisfied that the parcel of land conveyed could be clearly identified. It was held in ***Nagaratnam and wife Vs. Sunmugam and Others*** **69 NLR 389** that "an action for pre-emption on the basis of co-ownership is not maintainable in respect of a share of a land which has been possessed and dealt with in divided lots by amicable partition among the share-holders, with each other's knowledge and consent. The absence therefore of a deed or plan of partition is not "decisive". In that case too, the shareholders knew in their minds which portion belonged to them as they had amicably agreed to possess separate parcels of land without any inconvenience of common ownership, even though it was not on paper on a plan or even on a deed.

When a land is co-owned, the Volume/Folio in the registers ordinarily will be the same as attributed to the whole land and maintained continuously for all the transactions of undivided shares of the whole land, at all times. The deeds mention that it is "undivided shares". In the instant case, the land was specifically divided as the "northern half" and the "southern half" and gave boundaries to this specific area mentioning that it is bounded on the north by the 'rest of the land' belonging to the donor the 2nd Appellant.

These facts clearly show that the 2nd Appellant notarially executed a deed of gift declaring that the southern half of the entire land as a separate distinct and divided allotment of land described with metes and bounds belong to the 2nd Respondent and that the northern half is owned by the 2nd Appellant. Both the donor and the donee knew the specific parcel of land given and received and consequently proceeded to register in a different folio in the Land Registry as a separate block of land. It is thus clear that the land was not co-owned any longer after 29.9.1988, the date on which the deed No. 7240 was executed.

Significantly, this separate parcel of land was leased out thereafter by the 2nd Respondent to an outsider by deed No. 3116 dated 8.10.1998 and that was registered in the same new folio H 677/272 followed by another lease executed in 2000 by deed

No. 4079 of 19.7.2000 which again was registered in the new folio H 677/272. The resultant position was that by the year 2000, the said conveyance was understood, accepted and acknowledged as a conveyance specifically dividing the said block of land from the main land in question. It is only in 2004 that the 2nd Respondent sold the land by deed 3208 dated 19.7.2004 to the 3rd, 4th and 5th Respondents and this time too this deed was registered in the same folio H 677/272. The only difference was that the 2nd Respondent prepared a plan to more specifically depict the land in the Schedule of the deed prior to the sale. It is also significant to note that in this survey, that the Northern half of the land belonging to the 2nd Appellant was 17 lachchams in extent and the Southern half of the land belonging to the 2nd Respondent was 16 lachchams.

It is my considered view that there has been no co-ownership at all from the very beginning i.e. from 1988. In the case of ***Sivagurunathan Vs. Visaladchi*** **[1954] 56 NLR 376**, it was held by Justice Gratien that "every co-owner in a co-owned undivided property should be able to exercise or be entitled to exercise plenum dominium over the entirety of the common property". In this case neither the 2nd Appellant nor the 2nd Respondent exercised any dominium on each other's portions of land and therefore there was no co-ownership at all from 1988. At the time the sale was executed in 2004, there was no co-ownership with the "intending vendor".

I therefore answer the questions of law in the negative and conclude that the Appellants did not have a right to exercise the right of pre-emption under Section 2 [1] of the Pre-emption Ordinance No. 59 of 1947 against the 2nd Respondent, the vendor. I dismiss the appeal and confirm the judgment of the Civil Appellate High Court of the Northern Province in Appeal Case No. 39/08 dated 19.2.2010. However I order no costs.

JUDGE OF THE SUPREME COURT

MOHAN PIERIS. PC. CJ.

I agree.

CHIEF JUSTICE

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 matter of an Application for Special Leave to Appeal in terms of Section 31D of the Industrial Disputes Act No. 43 of 1950 as amended by Industrial Disputes (Amendment) Act No. 32 of 1990, read with Supreme Court Rules 1990.

S.A.D.T. Jayathilaka
25, Alehiwatta Road
Welisara, Ragama.

SC Appeal 92/2011
SC(HCCA) LA No. 07/2011
WP/HC Colombo HCRA.216/08
LT Application No. 2/1512/

Presently residing at 90/2, Palliyawatte, Hendala, Wattala.

Applicant-Petitioner-Appellant

Vs

1. Peoples' Bank,
2. General Manager,
3. Chief Manager- Human Resources,
4. Assistant General Manager-Human Resources,
5. Chief Manager-Audit

All of People's Bank
No. 75, Chittampalam A. Gardiner Mawatha
Colombo 02.

Respondent-Respondent-Respondents

Before : Hon. Tilkawardane, J.
Hon. Dep, P.C. J.
Hon. Wanasundera, P.C. J.

Counsel	:	Upul Ranjan Hewage with S.H.G. Amarawansa for the Applicant-Petitioner-Appellant Manoli Jinadasa with Janath Jayasundere for the Respondent-Respondent-Respondent
Argued on	:	05.10.2012
Decided on	:	02.04.2014

Priyasath Dep, PC. J.

The Applicant-Petitioner-Appellant (hereinafter referred to as the Applicant) filed a Application in the Labour Tribunal under section 31B of the Industrial Disputes Act alleging that his services were terminated unlawfully and unjustly by the People's Bank which is the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) to this Application.

The Respondent objected to the Application filed in the Labour Tribunal on the basis that the Application is time barred. The tribunal directed both parties to file written submissions and accordingly written submissions were filed. The learned President of the Labour Tribunal after considering the submissions filed by the parties, in his order dated 14-11-2008 upheld the objections and dismissed the Application on the basis that the Application was filed out of time.(time barred/prescribed)

Being aggrieved by the order of the Labour Tribunal, the Applicant filed a Revision Application to the High Court of the Western Province holden in Colombo. The Respondent raised the following objections in the Revision Application.

(a) The application is bad in law as the Applicant had failed to mention in the Caption the correct section under which the revisionary jurisdiction of the High Court was invoked.

(b)The Applicant had failed to annex all the relevant and material documents which is necessary to determine this Application

(c)The Applicant failed to appeal against the order which is the remedy specified by law.

(d) The Applicant had failed to establish exceptional circumstances to invoke the revisionary jurisdiction of the Court.

(e)The Application was filed out of time and it is time barred (prescribed) .

The High Court proceeded to deal with the main issue as to whether the application to the Labour Tribunal was filed out of time or not. By its order dated 06.01.2010, the High Court affirmed the order of the Labour Tribunal which held that the application is filed out of time.

Being aggrieved by the judgment of the High Court, the Applicant filed a Special Leave to Appeal Application in SC (HC) LA 7-2011 and obtained leave on the following questions of law.

(1) Did the High Court of Western Province err in law in not giving effect to the amendment to section 31B.(7)of the Industrial Disputes Act by the amending Act No. 21 of 2008, by which the time limit was increased to six months. (suggested by learned Counsel for the Petitioner)

(2) Was the revisionary jurisdiction of the Provincial High Court properly invoked by the Petitioner ? (Suggested by learned Counsel for the Respondent.)

I will first deal with the substantial question of law raised by the learned Counsel for the Respondent as to whether the revisionary jurisdiction of the Provincial High Court was properly invoked by the Petitioner or not. The Respondent submits that the Revision Application is defective and for following reasons, the High Court should have dismissed the Application in limine:

i. The caption in the revision application is defective as it failed to state the correct provision under which the jurisdiction was invoked.

ii. The Petitioner has failed to annex all the relevant and material documentation which is necessary to determine the application.

iii The Application for revision is not accompanied by a duly prepared affidavit;

iv. There is an alternative remedy specified by law against the order of the Labour Tribunal which the Petitioner has failed to resort to ;

v. The Petition does not disclose any exceptional circumstances which justifies the invocation of the revisionary jurisdiction which is a discretionary remedy;

In the caption to the Revision Application filed in the High Court it was stated that Revision Application is made under section 7(2) of the Industrial Disputes(Amendment) Act No. 32 of 1990. Section 7 (2) deals with the time limit within which the appeals to be concluded by the High Court, Court of Appeal and the Supreme Court respectively (as the case may be.) The Revision Application does not refer to the correct section of the amending Act. It is to be observed that the correct section is the section 4 of the amending Act . The section 4 repealed section 31D of the principal enactment and substituted a new section which gives a right of appeal to the High Court and confers jurisdiction on the High Court to hear and determine

appeals on questions of law from the orders of the Labour Tribunal and lays down the procedure for the appeal. It appears that the Petitioner instead of citing section 4 of the amending Act No.32 of 90 had inadvertently referred to section 7 (2) of the said Act. I am of the view that this defect was a curable defect. The application was filed under the amending Act, which is the applicable law and in the proper forum. Therefore the Application should not be dismissed.

The Counsel for the Applicant cited *Peiris v. the Commissioner of Inland Revenue* 65 NLR 457. It was held that:

> " It is well-settled that an exercise of a power will be referable to a jurisdiction which confers validity upon it and not to a jurisdiction under which it will be nugatory. This principle has been applied even to cases where a Statute which confers no power has been quoted as authority for a particular act, and there was in force another statute which conferred that power".

This case was followed in *Kumarathunge v. Samarasinghe* 1983 2SLLR 63 and *Edirisuriya V. Navarathnam* (1985) 1SLR 100and in several other cases.

It is settled law that quoting a wrong section will not render an act illegal so long as there is authority, jurisdiction or power given by the same statute or by another statute.

The Respondents had taken up the position that the Applicant should have filed an appeal rather than a revision application. It is the submission of the learned Counsel for the Respondent that when there is an alternative remedy available, the Applicant had failed to resort to that remedy.

The question is whether the order made by the Labour Tribunal is a final or an interlocutory order. The Labour Tribunal did not go into the merits of the case and dismissed the Application on the basis of preliminary objection raised by the Respondent . If the objection was overruled inquiry could proceed and the order made in the inquiry will be the final order. The learned President of the Labour Tribunal referred to the order as a Preliminary Order. Therefore, order made in respect of the preliminary order in a strict sense is not a final order disposing the case. In such a situations revision applications are filed to revise such orders. The approach adopted in *Ranjith v. Kusumawathi* 1998 3 SLR 232 applicable to this case

In civil cases where Civil Procedure Code applies Leave to Appeal /Revision Applications are filed against the orders which are not final. Although Appeal is available against orders of Labour Tribunal , filing a revision application in respect of an order which is not final is not repugnant to the established practice in our courts.

Assuming for the purpose of argument the appeal is the proper remedy, a question will arise as to whether a party could invoke the revisionary jurisdiction of the High Court. The Courts have held that even in cases where appeal is available if exceptional circumstances are present Court could act in revision. Revisionary jurisdiction is a is a

discretionary remedy invoked by the parties and as a rule exceptional circumstances should be there for the court to act in revision. On the other hand court also has a wide discretion to entertain applications for revision even in the absence of exceptional circumstances pleaded by the party invoking the jurisdiction of the Court if there is an important question of law to be considered. In the present application deals with interpretation of a statute which has general and public importance and not confined to the particular application. The Learned Counsel for the Applicant cited the cases *Rustom v. Hapangama*(1978-79) 2SLLR 225 and *Rasheed Ali Vs. Mohamad Ali* 1988 SLLR 262 in support of his argument.

In *Rustom v. Hapangama* (supra) it was held -

> ' The powers by way of revision conferred on the Appellate Court are very wide and can be exercised whether an appeal has been taken against an order of the original Court or not. However, such powers would be exercised only in exceptional circumstances where an appeal lay and as to what such exceptional circumstances are dependent on the facts of each case.
>
> 'Considering the facts and circumstances of the present case there were no such exceptional circumstances disclosed as would cause the Appellate Court to exercise its discretion and grant relief by way of revision. Unless there was something illegal about the order made by the trial Judge which has deprived the Petitioner of some right, the justice of the cause required that the Appellate would not in the circumstances of this case grant the Petitioner the indulgence of exercising its revisionary powers and the preliminary objection must therefore be upheld.'

In the case *Ameed Vs. Rasheed* (1936) 6 C.L.W. 8.the Supreme Court refused to exercise its discretion. Abrahams, C.J. said at page 9

> " It has been represented to us on the part of the petitioner that even if we find the order to be appealable, we still have a discretion to act in revision. It has been said in this court often enough that revision of an appealable order is an exceptional proceeding, and in the Petition no reason is given why this method of rectification has been sought rather than the ordinary method of appeal".

Finally in the case of *Alima Natchair Vs. Marikar et al,* (1945) 47 N.L.R. 81. Keuneman, S.P.J. said in a short judgment of six lines –

> "In the circumstances we should be slow to exercise our discretion to allow an application in revision in view of the fact that no appeal has been taken in this case".

Referring to series of cases including the cases cited above, Vythialingam J in *Rustom v. Hapangama (supra)* held that-

> "This Court has the power to act in revision even though the procedure by appeal is available, in appropriate cases. The question which has now to be decided is whether the instance case is an appropriate case in which we should exercise our discretionary powers of revision. In his petition and affidavit the Petitioner has not set out the reasons for his seeking this method of rectification of the order rather than the ordinary method of appeal. Nor has he set out any exceptional circumstances as to why we should grant him the indulgence of exercising our revisionary powers when he could have appealed against the order with leave".

In the instant case the Applicant is challenging the order made by the President of the Labour Tribunal for the reason that the Tribunal misinterpreted the applicability of Act No 20 of 2008 and deprived him of the extended period of time given by the amending Act to challenge the termination of his services by the Respondent Bank. As there is an important legal issue involved in the Revision Application the Learned High Court judge correctly disregarded the preliminary objections and made order regarding the Applicability of Industrial Disputed(Amendment) Act No 21 of 2008.

The other important preliminary objection raised by the Counsel for the Respondent is that the Applicant had failed to comply with the Court of Appeal Rules, especially Rule 3. These Rules are made applicable to High Court exercising appellate and revisionary jurisdiction. Rule 3 reads thus:

> (a) Every Application made to the Court of Appeal for the exercise of the powers vested in the Court of Appeal by Articles 140 or 141 of the Constitution shall be by way of petition, together with an affidavit in support of the averments therein, and shall be accompanied by the originals of documents material to such application (or duly certified copies thereof) in the form of exhibits. Where a petitioner is unable to tender any such document, he shall state the reason for such inability and seek the leave of the Court to furnish such document later. Where a petitioner fails to comply with the provisions of this rule the Court may, ex mero moto or at the instance of any party, dismiss such application.
>
> (b) Every application by way of revision or restitutio in integrum under Article 138 of the constitution shall be made in like manner together with copies of the relevant proceedings(including pleadings and documents produced), in the Court of First instance, tribunal or other institution to which such application relates.

The applicant in this case had filed the order of the Labour Tribunal and few documents which are not certified. According to the learned Counsel for the Respondent, the Applicant had failed to submit all material and relevant documents including the written submissions filed by the Respondents.

In this case the main issue is the interpretation of section 31D7 of the Industrial Disputes Act as amended by Act No. 21 of 2008. Therefore, the most important document is the Order of the Labour Tribunal which was annexed to the Petition and

affidavit of the applicant. Other documents are not essential documents . Therefore, there is no prejudice caused to the Respondent.

The Respondent has cited the case of the *Ceylon Electricity Board and nine others v. Ranjith Fonseka* 2008(BALR) Part ii page 155. In that case there were so many defects and irregularities and for that reason the action was dismissed. The Supreme had observed that :

> " it is quite evident that the petition filed before this Court is teeming with mistakes and irregularities".

This Revision Application that was filed in the High Court cannot be compared with that case. Therefore the High Court is correct in not rejecting the application for non compliance of the above rule.

I will now deal with the following substantial question of law raised by the learned Counsel for the Applicant.

Did the High Court of Western Province err in law in not giving effect to the amendment to section 31B.(7)of the Industrial Disputes Act by the amending Act No. 21 of 2008, by which the time limit was increased to six months?

In order to answer the above question of Law it is necessary to refer to the facts of this case .According to the facts of this case, the Respondent by its letter dated 05.12.2007 terminated the services of the Applicant. The Applicant stated that he received the letter of termination only on 10.01.2008. (The first letter was send to a wrong address and it was returned to the Bank.) The Respondent Bank , in its answer stated that the Bank had delivered the letter on 14.01.2008.(in addition to posting of the letter) At the time of the receipt of the letter of termination the Industrial Disputes (Amendment) Act No 11 of 2003 was in force and an Application to the Labour Tribunal shall be made within three months. Three months period lapsed on 10.04.2008. The Application to the Labour Tribunal was filed on 04.06.2008, that is more than three months and less than six months after the receipt of the letter of termination. Industrial Disputes (Amendment) Act No. 21 of 2008 which came into force on 28.03.2008 extended the time limit to six months and the Applicant claimed that he is entitled to the benefit of the Amendment as his Application was filed before six months and his Application is within time. Applicant's position is that the law applicable is the law in force at the time of filing of the Application. The Respondent on the contrary argued that the law applicable is the law in force at the time of the termination of services of the Applicant. As the Applicant failed to file the Application within three months, it was out of time and for that reason the learned President of the Labour Tribunal and the High Court were correct in holding that the Application is time barred/ prescribed.

The Industrial Disputes (Special Provisions) Act No. 53 of 1973 which introduced section 31B. (7) placed a time limit for filing of Applications. Section 31B7 states thus "every application to a Labour Tribunal under paragraph (a) or (b) of sub section(1)

of this section in respect of any workman shall be made within a period of six months from the date of termination of the services of that workman." The Act No. 11 of 2003 reduced the time limit to three months. This time limit was again changed by Act No. 21 of 2008 by increasing the time limit to six months.

This position could be summarized in the following manner:

(a) From 1973 to 31.12.2003 under Act No 53 of 1973 the time limit was six months.

(b)From 1.1. 2004 to 27.03.2008 under Act 11 of 2003 the time limit was three months

(c)From 28.03.2008 under Act No 21 of 2008 the time limit was extended to six months.

It is an admitted fact that at the time of the termination of the Applicant's services the time limit for filing of an application is three months. The question that arises is whether the Applicant could get the benefit from the amendment which came into force on 28.03.2008. The learned Counsel for the Respondent both in the labour Tribunal and in the High Court argued that the Industrial Disputes (Amendment) Act No. 21 of 2008 is prospective and applies to Applicants whose services were terminated after the coming into force of the amending Act. It was further submitted that nowhere in the amendment it was stated that it has retrospective effect.

On the other hand the learned Counsel for the Applicant argued that procedural laws could be retrospective in effect. By enacting Act No. 21 of 2008 the legislature had considered the fact that three months time given to the workman is not sufficient and extended the time limit by reverting back to the position prevailed under Act No. 53 of 1973. It is the intention of the legislature to give relief to the workmen. In those circumstances the Court should adopt a liberal interpretation rather than a restrictive interpretation to give effect to the intention of the legislature.

Both parties in their written submissions cited numerous authorities from the text books on Interpretation of Statutes. The learned Counsel for the Applicant quoted several cases referred to in N.S. Bindra ,Interpretation of Statues(10^{th} edition, editors M.N Rao and Amitha Danda, pp 1486-1488) Among the authorities cited the following authorities are relevant to this case.

In *State of Bihar vs. Mhd Ismail* AIR 1966 Pat 1, *Kiran Devi Vs. Abdul Wahid* AIR 1966 ALL 105 it was held –

> "The law of limitation is, however, an artificial mode to terminate justifiable causes and has to be construed strictly with a leaning on the benefits to the suitor"

In *Usman Yusuf Kamani Vs. Foreign Exchange Regulation Appellate Board, New Delhi* (1980) MAH LJ 316 it was held-

> "Rules of limitation as distinct from rules of prescription are regarded and classified as matters pertaining to procedure"

Bindra by quoting the above cases remarked that-

> "As a rule statute of limitation being procedural laws must be given a retrospective effect in the sense they must be applied to all suites filed after they came into force. (NS Bindra-Interpretation of statutes 10th edition page 1486).

In *Belgaum District School Board Vs. Mohammad Mulla* (AIR 1958 Bom.377, p380) it was held that-

> " This general rule has got to be read with one important qualification, and that is ,if the statute of limitation if given a retrospective effect, destroy a cause of action which was vested in a party or makes it impossible for that party for the exercise of his vested right of action , then the courts would not give retrospective effect to the statute of limitation. The reason for this qualification is that it would inflict such hardship and such injustice on parties that the courts would hesitate to attribute to the legislature an intention to do something which was obviously wrong."

In *Jethmal Anor v Ambsingh AIR* 1955 Raj 97)referred to in Bindra's-Interpretation of Statutes Page 1487 (supra) it was stated-

> "Although a law of limitation is primarily a law relating to procedure and as such, comes into effect right from the moment it has been enacted and governs all proceedings instituted thereafter and thus has retrospective operation , when a subsequent law curtails the period of limitation previously allowed and such law comes into force at once it should not be allowed to have retrospective effect ,which it otherwise have so as to destroy pre-existing rights or suit, because the giving of such retrospective effect amounts to not merely a change in procedure but a forfeiture of the very right to which the procedure relates.

The learned Counsel for the Respondent submitted that the three months period lapsed before the coming into force of Act No. 21 of 2008. Therefore, Applicant is not entitled to claim extension of time given by the new amendment. According to the learned Counsel for the Respondent effective date of termination is 05-12-2008 the date of the letter of termination. The three months period lapsed on 05.03.2008 before the amending Act came into force on 28.03.2008. In support of this argument she cites section 31B.(7) Act No 11 of 2003 which reads thus:

> 'every application to a Labour Tribunal under paragraph (a) or paragraph (b) of sub section(1) of this section in respect of any workmen shall be made within a period of three months from the date of termination of the services of that workman.'

According to the wording of that section three months run from the date of termination. No where it is stated that three months period is reckoned from the date of the letter of termination. A question that would arise as to what is the effective date of termination. In other words whether the date given in the letter of termination or the date of receipt of the letter of termination.

According to the section 31B.(7) application shall be filed within three months from the date of termination. In the letter dated 5th December 2010 the services were terminated with effect from 08.03.2007, nearly nine months prior to the date of the letter of termination. If literal meaning is given Applicant's action was prescribed long before the sending of the letter of termination. Therefore, for the purpose of filing action the effective date should be the date on which the Applicant received the notice of termination. It is the practice that pending a domestic inquiry the services of the workman is suspended and he does not report for work and if his services are terminated employer should inform the workman.

In this case the Applicant in his application stated that he received the letter on 10-01-2008 and he filed the application on 04.06.2008.The Respondent- Bank in its answer had taken up the position that the letter was delivered on 14.01.2008. In the circumstances, if any of the dates mentioned above are taken as the date of receipt of the letter, the Applicants action was not prescribed on the date the Act No. 21 of 2008 came into force. In the labour Tribunal and in the High Court, the Bank had taken up the position that the Amending Act No. 21 of 2008 has no retrospective effect and the Applicant is required to file the application within three months and he had failed to file the Application within three months. The learned Counsel for the Respondent has taken up a completely a different stance and taken up the position that date of the letter of termination has to be considered as the effective date of termination. The learned Counsel for the Applicant countered this argument by stating that if the employer gives an earlier date in the letter or dispatch the letter long after the date of the letter, a grave prejudice will be caused to the Applicants Therefore, date of receipt of the letter has to be taken as the effective date. The Applicant states that the letter was received by him on 10.01.2008 and the Respondent Bank admitted that the letter was delivered on 14.01.2008. In the Labour Tribunal the date of the letter of termination was not taken as the date from which the time period should be counted.

The learned Counsel for the Applicant submits that the judgments given in Fundamental Rights cases are relevant for the purpose of deciding whether the action is time barred or not. In Fundamental Rights cases application shall be made within one month from the date of violation of the fundamental rights. The Court had accepted applications filed after 30 days if it is proved that the applicant came to know of the violation on a subsequent date or a later time. It is to be noted that in a Court of law judgments or orders are delivered in open court after notice to the parties. Therefore the date of delivery of the judgment/order is taken as the effective date. But in respect of executive or administrative decisions, decisions taken by individuals or entities in certain cases will come to the knowledge of the persons affected when it is communicated to them or they become aware of such decisions. The Supreme Court in

Fundamental Rights applications held that the date of receipt of the communication or the acquiring of knowledge is the effective date. The Learned Counsel for Applicant submits that the approach adopted by the Supreme Court in Fundamental Rights applications are relevant and applicable to this case. In support of his argument the learned Counsel for the Applicant cited the decision in *Gamaethige v Siriwardena* (1988) 1 SLR 384 where Mark FernandoJ held'

> "Three principles are discernible in regard to the operation of the time limit prescribed by Article (126(2). Time begins to run when the infringement takes place ; if knowledge of the part of the Petitioner is required (e.g. of other instances by comparison with which the treatment meted out to him becomes discriminatory), time begins to run only when both infringement and knowledge exist. The pursuit of other remedies judicial or administrative, does not prevent or interrupt the operation of the time limit. While the time limit is mandatory, in exceptional cases on the application of the principle *lex non cogit ad impossibilia*, if there is no lapse, fault or delay on the part of the petitioner, this Court has a discretion to entertain an application made out of time.

This judgment was followed by Tilakawardena J in *De Silva vs Wickramarathne and others* 2011 (2) BLR 360

Therefore I hold that at the time the amending Act came into force, the Applicant's action was not time barred. The next question is whether the Applicant could avail himself of the extended time limit provided by the amending Act No21 of 2008. The cursus curie is to the effect that at the time the amending act came into force, if the action is not prescribed, a party is entitled to the extended period of time

In Attorney General v. Uplands Bus Company Ltd (56 NLR248) Gratien J held that-

> " Section 28 of the Wages Boards (Amendment) Act No. 5 of 1953, which alters the time-limit for prosecutions from one year to two years in regard to offences punishable under section 39(1) of the Wages Boards Ordinance No. 27 of 1941, applies not only to prosecutions for offences committed after the amending Act No. 5 of 1953 passed into law, but also to prosecutions for earlier offences other than those which had already become barred by limitation under the provisions of the principal Ordinance

The judgment of Gratien J in the above case was followed in *Hadji Omar v. Bodhidasa* 1994 2 SLLR P 191and *De Silva vs Weerasinghe* 1978-79-80-1 SLLR p334 and several other cases.

I find that a passage from Justice G.P. Singh's -Principles of Statutory Interpretation (5th Edition) at page 303 cited by the learned Counsel for Respondent is relevant to this case.

It was stated that "Statutes of Limitation are regarded as procedural and law of limitation which applies to a suit is the law in force at the date of the institution of the suit

irrespective of the date of accrual of the cause of action. The object of a statute of limitation is not to create any right but to prescribe periods of a statute of limitation within which legal proceedings may be instituted for enforcement of rights which exist under the substantive law. But, after expiry of the period of limitation, the right of suit comes to an end, therefore, if a particular right of action had become barred under an earlier Limitation Act, the right is not revived by a later Limitation Act even if it provides a larger period of limitation than that provided by the earlier Act.

For the reasons set out above, I hold that the Application filed in the Labour Tribunal is not time barred. Therefore I set aside the Judgment of the High Court of Colombo dated 06-01-2010 and the order dated 14-11-2008 of the Labour Tribunal of Colombo. The Labour Tribunal is directed to hold an inquiry under section 31C of the Industrial Dispute Act and make a just and equitable order.

Appeal allowed. No Costs.

Judge of the Supreme Court

Shiranee Tilakawardena, J.

I agree.

Judge of the Supreme Court

Eva Wanasudera, PC. J.

I agree.

Judge of the Supreme Court

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

SC. Appeal No. 93A/2011

SC.(Spl) LA. No. SC(HC)CA.LA. 271/10
CA. Appeal No. 805/99(F)
D.C. Panadura No.695/L

Kapila Warnasooriya
No. 285/2, Idama,
Moratuwa.

(Acting through Attorney holder Patabendi Mahakariyakarawanage Rahal Warnasooriya of the same address)

Plaintiff

Vs.

Dayawathi Sellahewa
No. 13/2, Mendis Lane,
Idama, Moratuwa.

Defendant

And

Dayawathi Sellahewa
No. 13/2, Mendis Lane,
Idama, Moratuwa.

Defendant-Appellant

Vs.

Kapila Warnasooriya
No. 285/2, Idama,
Moratuwa.

(Acting through Attorney holder Patabendi Mahakariyakarawanage Rahal Warnasooriya of the same address)

Plaintiff-Respondent

And

SC. Appeal 93A/2011

Dayawathi Sellahewa
No. 13/2, Mendis Lane,
Idama, Moratuwa.

Defendant-Appellant-Appellant

Vs.

Kapila Warnasooriya
No. 285/2, Idama,
Moratuwa.

(Acting through Attorney holder Patabendi Mahakariyakarawanage Rahal Warnasooriya of the same address)

Plaintiff-Respondent-Respondent

* * * * *

Before : **Saleem Marsoof PC.J.**

Sathyaa Hettige PC. J. &

Eva Wanasundera, PC,J.

Counsel : Mahinda Ralapanawa with Nisansala Fernando and Lalani Hettiarachchi for the Defendant-Appellant-Appellant.

Dr. Sunil F.A. Coorey with Sudarshani Coorey for the Plaintiff-Respondent-Respondent.

Argued On : **05.02.2014**

Further Written Submissions filed : By the Appellant on : 18.02.2014
By the Respondent on: 18.02.2014

Decided On : **25.03.2014**

* * * *

Eva Wanasundera, PC.J.

This Court granted Special Leave to Appeal with regard to this appeal on three questions of law on 29.6.2011. The said three questions of law are as follows:-

1. Did the Court of Appeal err when it failed to take note that Deed No. 6517(P5) (V4) was a conditional transfer as more than 50% of the transfer price had not been settled as at the date of execution of the said Deed No. 6517 (P5) (V4)?

2. In any event, could the Plaintiff-Respondent-Respondent have succeeded in an action for declaration of title, in the absence of proper conveyance of title?

3. Did the Court of Appeal err when it concluded that it does not intend to make an order with regard to payment of balance purchase price as issue No. 8 had been answered in favour of the Defendant-Appellant and failed to appreciate that it is not possible to obtain any payment from the Bank?

A further question of law was raised by this Court on 05.02.2014 at the hearing of this appeal on 05.02.2014, as follows:-

4. In all the circumstances of this case, did the mere execution of P5 (Deed 6517) and delivery of that deed to the Respondent suffice to pass dominium over the property to the Respondent?

The facts are pertinent to understand the decision and as such I lay down bare facts at the beginning itself. The Defendant –Appellant-Appellant (hereinafter referred to as the 'Defendant-Appellant') Dayawathie Sellahewa agreed to sell her house and land at No. 13/2, Mendis Lane,Idama, Moratuwa to the Plaintiff-Respondent-Respondent (hereinafter referred to as the 'Plaintiff-Respondent'), Kapila Warnakulasooriya of No. 285/2, Galle Road, Idama, Moratuwa on 27.11.1990 for a price of Rs.4,45,000/-.

The Plaintiff-Respondent paid Rs.100,000/- on 27.11.1990 to the Defendant-Appellant when she signed the document, "agreement to sell". The Plaintiff-Respondent agreed to pay the balance money within 6 months i.e. on or before 27.05.1991. He applied for a loan from the State Mortgage & Investment Bank (hereinafter referred to as 'SMI Bank') to pay the balance to the Defendant-Appellant. On 23.04.1991, the Plaintiff-Respondent paid another Rs.105000/-to the Defendant-Appellant as part of the balance

money to be paid for the purchase of the property. Therefore the balance money due to be paid to the Appellant by the Plaintiff-Respondent to complete the purchase price as agreed was only Rs.240000/-. Before the SMI Bank granted the loan to the Plaintiff-Respondent, he went abroad but he gave the Power of Attorney to Rahal Warnasooriya. The Appellant wanted to buy a house at No. 552, Mihindu Mawatha, Malabe to live in, when she sells the house in Moratuwa. Incidentally, she paid Rs.7500/- to Mr. S.P. Perera the owner of that house and entered into another agreement to buy that house for Rs. 300.000/-.

The SMI Bank wanted the transfer deed signed by the Appellant transferring the property to the Respondent and the mortgage deed signed by the Respondent mortgaging the same to the SMI Bank and agreeing the loan to be paid within 5 years. On 23.04.1991 the Appellant signed the deed of transfer P5 (deed 6517). The Appellant trusted that the balance money of Rs.240000/- would be paid to her on or before 27.05.1991 as agreed by the Respondent. But the Respondent had failed to submit the registered deeds and extracts to the Bank as duly undertaken to be done on time and as such the SMI Bank did not release the money to the appellant on or before 27.05.1991, the date agreed for balance money to be paid by the Respondent to the Appellant. Then the Defendant-Appellant informed the SMI Bank that she is unable to hand over vacant possession of the property as the balance purchase price was not paid to her on time and as a result she lost the chance of buying the house at Malabe.

The Plaintiff- Respondent filed action in the District Court praying that the Defendant-Appellant be ejected from the premises, that a declaration be granted to the effect that the Plaintiff-Respondent is the owner of the property and that the Defendant-Appellant be ordered to pay damages at the rate of Rs.5000/- per month. The Defendant-Appellant filed answer praying for the dismissal of the plaint, for a declaration that the Plaintiff-Respondent is holding the property on trust and for damages in a sum of Rs.240,000/- with interest and for a transfer of the land back to the Defendant-Appellant on payment of Rs.195000/- according to the terms of the sale agreement. At the end of the trial, judgment was given in favour of the Plaintiff-Respondent. The Defendant-Appellant appealed from that judgment to the Court of Appeal and the Court

of Appeal varied the judgment of the District Judge only to the extent of leaving out the damages to be paid by the Defendant-Appellant to the Plaintiff-Respondent. So, the record remains that the Plaintiff-Respondent is entitled to be the owner and eject the Defendant-Appellant from the premises.

I observe that Deed 6517 (P5) was signed by the Defendant-Appellant without getting the balance Rs.240,000/- into the hand for completion of the sale. She did so because the SMI Bank would not give a loan without mortgaging the land belonging to the borrower. The borrower was the prospective buyer, the Plaintiff-Respondent. The moment the deed 6517 (P5) was signed by the seller, the Defendant-Appellant, that act of signing facilitates the SMI Bank's procedure to write a mortgage binding the buyer to the Bank to repay, with the property taken as security. As of today in 2014 the procedure in all the banks granting loans happens to be different. At the time the deed of transfer is signed by the seller to the buyer, the Bank gets the buyer to sign the mortgage. The task of getting the sale deed and the mortgage deed both registered at the Land Registry rests in the hands of the Bank. Then and there the Bank releases the cheque for the balance money due to the seller. In the year 1990, it seems that the buyer had to get the deeds registered and bring the extracts to prove that they were registered, back to the Bank, for the Bank to release the cheque in favour of the seller. I feel that the delay on the part of the Plaintiff-Respondent, who was physically abroad and who had burdened the power of Attorney holder to do the needful on his behalf, has triggered this problem in our hands now, altogether.

I am of the view that the Defendant-Appellant wholeheartedly trusted that the SMIB would give the money soon, hardly knowing that a delay would be caused by inaction on the part of the Plaintiff-Respondent. It is in evidence that the Defendant-Appellant visited the Power of Attorney holder of the Plaintiff-Respondent and the Bank many times; wrote letters to the Plaintiff-Respondent abroad personally with regard to the problem and finally wrote to the Bank that she will not be able to hand over possession as the money was not paid to her within the time frame granted according to the "agreement of sale". As it is, the balance Rs.240,000/- was not paid to the seller by the SMI Bank but the Bank has a mortgage of the property from the buyer. The SMI Bank did not give any money to the buyer or the seller. So the loan asked for was never in

fact given but there is a mortgage in favour of the Bank registered at the Land Registry. In the same way there is a deed of transfer registered at the Land Registry in favour of the buyer who has not paid the balance due on the purchase price to the seller. The SMI Bank is not going to file action or cannot in fact file action against the borrower who is the Plaintiff-Respondent because he in fact did not borrow any money. No consideration passed for that mortgage. Then that transaction is null and void. The registered 'mortgage bond' is a nullity.

In the same way, the transfer deed 6517(P5) does not hold water as the full consideration has not passed. The consideration was partly paid but not fully paid. The seller was made to believe that she will be paid by the SMI Bank on behalf of the buyer on time. The time agreed between the parties to conclude the transaction lapsed. The balance money was never paid. I am of the opinion that the mere signing of the deed of transfer does not convey the title to the buyer without having the full consideration passed to the seller.

If I may draw an example; 'A' agrees to sell the property to 'B'. 'B' pays two instalments as part of the selling price to 'A'. 'A' is made to believe that after signing the deed of transfer he will be paid the balance. 'A' signs the transfer deed. But the balance was not paid. Then is the deed of transfer valid? Answer would be 'No'. The mere fact that the Defendant-Appellant signed the deed of transfer 6517(P5) does not by itself give the right title and interest in the property to the Plaintiff-Respondent for the reason that both in the mind of the Defendant-Appellant and in the mind of the Plaintiff-Respondent, the intention to convey or to receive the right title and interest in the property was absent, at the moment of signing. Both parties knew that the conveyance would take place when the balance money is given and possession is handed over. The stake in the hands of the Defendant-Appellant was the 'possession of the property' and the stake in the hands of the Plaintiff-Respondent was "the balance money Rs. 240,000/-". The signing was conditional on those two factors. Neither party bond fide believed that the conveyance was done and concluded. Either party trusted each other. Deed 6517(P5) was signed on 23.04.1991.

The conditions in the agreement to sell stated that payment of the balance money should be done on or before 27.05.1991. Even after the lapse of this date the Defendant-Appellant had written an air-mail to the Plaintiff-Respondent on 04.06.1991 explaining her predicament in not being able to buy a place in Malabe due to the fact that she did not receive the money due to be given to her by the SMI Bank on behalf of the Plaintiff-Respondent.

I am of the view that since the balance money was not in actual fact given to the Defendant- Appellant before 27.05.1991 the Defendant-Appellant was not bound in law to hand over possession of the house to the Plaintiff-Respondent. At no time was the Defendant-Appellant legally bound to hand over possession of the house and property before receiving the balance money. There was no agreement to do so in the signed 'agreement to sell' or any undertaking to leave the house given by her 'to leave before the payment is received'. The agreement to sell came to an end on 27.05.1991. As such the Defendant-Appellant informed, the same in writing to the SMI Bank on 10.06.1991, by 'V2' requesting the SMI Bank to cancel the deed of transfer and explaining in detail the reasons. The SMI Bank in turn wrote to the Plaintiff-Respondent on 20.06.1991 with a view to resolving the matter which the Plaintiff-Respondent failed to do. Instead he filed action in the District Court against the Defendant-Appellant to eject the Defendant-Appellant, taking advantage of the fact that the deed of transfer was signed and registered in his name as the owner, fully well knowing that he did not pay the balance money on time before 27.05.1991.

Since counsel for both parties, the Appellant as well as the Respondent have quoted the following three cases for consideration amongst many other cases they referred to in their written submissions. I am of the opinion that consideration of these three cases would suffice to deal with the problem in hand. They are, *Appuhamy Vs. Appuhamy* 1 880 3 SCC 61, *Gunatillake Vs. Fernando* 1919 21 NLR 257 & 1921- 22 NLR 385 and *Baiya Vs. Karunasekera* 1954 56 NLR 265.

All these cases are well analysed in a lecture delivered in 1969 by R.K.W. Goonesekere and reproduced as an article in the Journal of Ceylon Law published by the Incorporated Council of Legal Education Volume 1 No. 2 of December 1970 which was reproduced recently in the Bar Association Law Journal 2012 Vol. XIX at page 182. This article is titled "Transfer of Land –Some Controversial Questions" and the aforementioned three cases come under the sub title 'Tradition in the Modern Law'.

In *Appuhamy Vs. Appuhamy* 1880 3 SCC 61, the question which was considered took this form, i.e. "was a transferee by notarial deed entitled to bring a *rei vindicatio* action although he never had possession". Berwick J. laid down the Roman-Dutch Law applicable in Ceylon thus :- "Under our law, the affixing of the vendor's signature to the conveyance does not automatically operate to pass title. Delivery of the deed is the 'Minimum pre-requisite' (as constituting constructive delivery of the land itself) to the creation of a title which is sufficient even to enable the purchaser to maintain an action to recover the property from a third person in possession, without or under a weak title".

In *Gunatileke Vs. Fernando* 1919 21 NLR 257 & 1921- 22 NLR 385 confirmed the view in our law that "delivery of possession in the form of delivery of the deed is essential to transfer title".

In *Baiya Vs. Karunasekera* 1954- 56 NLR 265 where facts were somewhat similar to the instant case, it was held that "a deed may be delivered on condition that it is not to be operative until some event happens or some condition is performed. In such a case it is until then an escrow only".

I am of the view that in the present case, that the deed having been signed on an implied and understood condition that it is not to be operative until the balance purchase price was paid by the SMI Bank to the seller (the Defendant-Appellant) the deed being signed and delivered was on escrow only. No dominium of the property passed by the mere execution of the transfer deed and delivery of the deed to the buyer.

I am of the view that in the circumstances of this case the mere execution of P5 (Deed 6517) and delivery of that deed to the Plaintiff-Respondent does not suffice to pass dominium of the property to the Respondent. Therefore, I answer the questions of law raised by this Court in favour of the Defendant-Appellant and state further that, as such, the Deed 6517(P5) should be cancelled and such cancellation be registered thus leaving the ownership to the Defendant-Appellant. The monies given as an advance, to the Defendant-Appellant i.e. Rs.205000/- should be returned to the Plaintiff-Respondent at the time of the cancellation of the said deed. I also answer the 1st and 3rd questions of law mentioned at the beginning of this judgment in the affirmative. As regards the 2nd question of law aforementioned, I state that, the Plaintiff-Respondent could not have succeeded in an action for declaration of title in the absence of proper conveyance of title, because it is admitted by both parties that only signing of deed 6517(P5) was done and possession did not pass as the full amount of consideration was not paid as agreed within the agreed time. By having signed the deed (P5), no title was properly conveyed.

Accordingly, I direct that a sum of Rupees Two Hundred and Five Thousand (Rs.205,000/-) be deposited in the District Court by the Defendant-Appellant in favour of the Plaintiff-Respondent within a period of six months from date hereof. No interest on the said sum of money is granted since the Defendant-Appellant has sustained a loss of Rs. 75,000/- at that time which was forfeited by the vendor for non-compliance of the conditions of the sale agreement by the Defendant-Appellant with regard to the land she was going to buy in Malabe. When the money is deposited, I direct the Registrar of the District Court of Panadura to execute a deed of cancellation, cancelling the deed of transfer at the instance of the Defendant-Appellant and the same be registered at the Land Registry. I hold further that the deed of mortgage executed by the State Mortgage and Investment Bank is null and void. Thus I allow the appeal of the Defendant-Appellant.

I make no order for costs.

Judge of the Supreme Court

Saleem Marsoof, PC.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

Jayantha Liyanage
Petitioner-Appellant

SC Appeal 96/2011
SC (Spl) LA No.150/2010
CA (Writ) Application 448/2008

Vs

Commissioner of Elections
Election Secretariat
No.2, Sarana Mawatha,
Rajagiriya

Respondent-Respondent

Before : K SRIPAVAN J
SISIRA J DE ABREW J
SARATH DE ABREW J

Counsel : Manohara de Silva PC with Harsha Munasinghe for the Petitioner-Appellant.
Indika Demuni DSG for the Respondent-Respondent
Argued on : 30.7.2014 and 11.9.2014
Decided on : 17.12 .2014

SISIRA J DE ABREW J.

This is an appeal to set aside the judgment of the Court of Appeal dated 2.7.2010. The Petitioner-Appellant(hereinafter referred to as the Petitioner), who is the

Secretary of Sinhala Jathika Peramuna (hereinafter referred to as the SJP), on 12.8.2010 made an application marked P16 to the Respondent-Respondent(hereinafter referred to as the Respondent) under the provisions of Parliamentary Election Act No.1 of 1981 to recognize his party as a political party. The Respondent by his letter dated 25.8.2000 marked P18, refused the application. Thereafter the Petitioner, by application dated 25.1.2006 marked P34 made the same request to the Respondent but the Respondent ,by letter dated 27.12.2006, again refused the said application. Thereafter the Petitioner, by letter dated 10.12.2007 marked P38, once again made an application to the Respondent under the provisions of Parliamentary Election Act No.1 of 1981 to recognize his party as a political party. But the Respondent this time too by letter dated 21.1.2008 marked P43, refused the said application. Being aggrieved by the said decision of the Respondent, the Petitioner filed a petition in the Court of Appeal seeking, inter alia, the following relief.

1. A mandate in the nature of a writ of certiorari quashing the order referred to in the Respondent's letter sent to the Petitioner dated 21.1.2008 marked P43.

2. A mandate in the nature of a writ of mandamus on the Respondent compelling him to recognize SJP and assigning the symbol Crown as depicted in P17.

The Court of Appeal, by its judgment dated 2.7.2010, dismissed the petition of the petitioner. Being aggrieved by the said judgment of the Court of Appeal the Petitioner has appealed to this Court. This Court by its order dated 8.7.2011, granted special leave to appeal on the following questions raised by the Petitioner.

1. Did the Court of Appeal err in refusing the Petitioner's application challenging the order of the Commissioner of Elections rejecting the

Petitioner's application for recognition as a political party when sufficient material was available before the Commissioner of Elections?

2. Did the Court of Appeal err and/or misdirect itself in holding that the finality clause in Section 9(7) of the Parliamentary Election Act as final.

I will first deal with the 2nd question of law. The Court of Appeal, by its judgment dated 2.7.2010, observed that the decision of the Commissioner of Elections made in terms of Section 7(5) of the Parliamentary Election Act No.1 of 1981 is final and cannot be questioned in any court of law. The Court of Appeal further observed that the relief sought by the Petitioner cannot be granted since the impugned decision of the Commissioner of Elections (hereinafter referred to as the Commissioner) had been taken after an inquiry and giving an opportunity to the Petitioner and as such the impugned decision of the Commissioner was not amenable to judicial review.

The Court has to consider whether the decision of the Court of Appeal with regard to the ouster clause is correct? Section 7(7) of the Parliamentary Election Act No.1 of 1981 reads as follows:

"*The order of the Commissioner on any application made under subsection (4) shall be final and shall not be called in question in any court.*"

In this connection I would like to consider Section 22 of the Interpretation Ordinance which reads as follows:

"Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court" or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any

order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal:

Provided, however, that the proceeding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 140 of the Constitution in respect of the following matters, and the following matters only, that is to say-

(a)where such order, decision, determination, direction or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and

(b)where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred, is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Court of Appeal is satisfied that there has been no conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this section shall not apply to the Court of Appeal in the exercise of its powers under Article 141 of the Constitution of the Republic of Sri Lanka to issue mandates in the nature of writs of habeas corpus."

The writ jurisdiction is conferred to the Court of Appeal under Article 140 of the Constitution of the Republic which reads as follows:

Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person:

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal.

According to Article 140 of the Constitution, the Court of Appeal shall have power and authority to grant and issue, according to law, orders in the nature of writ of certiorari, prohibition, procedendo, mandamus and quo warrento. The Court of Appeal must issue orders always according to law. But this does not mean that the writ jurisdiction conferred on the Court of Appeal by the Constitution can be ousted by the ordinary legislation. Thus the Court of Appeal assumes writ jurisdiction under the provisions of the Constitution of the Republic which is the supreme law of the country.

It is an accepted principle in law that ordinary legislation cannot supersede the Constitution of the country. When the Court of Appeal assumes writ jurisdiction under the provisions of the Constitution, the ordinary legislation cannot supersede the powers conferred on the Court of Appeal by the Constitution and

oust the jurisdiction of the Court of Appeal. This view is supported by the judgment of the Supreme Court in the case of B Sirisena Coory Vs Tissa Dias Bandaranayake [1999] 1SLR 1 wherein His Lordship Justice Dheeraratne held thus: "*The writ jurisdiction of the Superior Courts is conferred by Article 140 of the Constitution. It cannot be restricted by the provisions of ordinary legislation contained in the ouster clauses enacted in sections 9 (2) and 18A of the SPCI Law or section 22 of the Interpretation Ordinance. In fact the first proviso to section 18A (2) specifically confers writ jurisdiction on the Supreme Court. That jurisdiction is unfettered."*

When I consider the above matters, I hold that the writ jurisdiction of the Superior Courts is unfettered and the ouster clause in the Parliamentary Election Act cannot ouster the writ jurisdiction of the Court of Appeal. I further hold that the impugned decision of the Commissioner is subject to the writ jurisdiction of the Court of Appeal and the Court of Appeal has the power to quash the impugned decision of the Commissioner by way of writ of certiorari. Therefore I conclude that the judgment of the Court of Appeal is wrong and should be set aside on this ground alone.

I will now examine the reasons given by the Commissioner (1st Respondent) to reject the application of the Petitioner. The reasons although not given to the petitioner when his application was rejected were produced along with the objection filed in this Court by the Commissioner. They are as follows.

1. The members of the party at certain times have acted independently and not as a party.

2. There is no increase of members since 1999 and the petitioner has a false notion that only a political party can get its members increased.

3. The Petitioner has formed an opinion that in order to engage in political activities it is necessary that his party should be a recognized political party.

4. Although they consider themselves as a party, only a limited number of persons are engaged in their activities.

5. At no stage since 1999, has the petitioner's party contested at an election as an independent party.

6. The petitioner's party is not a breakaway group of a recognized political party.

I would first like to comment on ground No.6 given by the Commissioner. According to him the party making an application to be recognized as a political party, should be a breakaway group of a recognized political party. Does the Commissioner, in order to recognize a party as a political party, advocate the breakaway of recognized political parties? Hence, ground No.6 given by the Commissioner is unacceptable and cannot be permitted to stand. In my view the Commissioner's decision should be quashed on this ground alone.

I now advert to ground No.5 above. Although the Petitioner's party did not contest at an election as an independent group, the National organizer of his party in 1988 contested Sabaragamuwa Provincial Council election under the symbol of Mahajana Eksath Peramuna [vide P8(a) and P8(b)] and the petitioner himself contested at the general election held in the year 2000 under the symbol of Sihala Urumaya [vide documents marked P20(a), P20(b) and P20(c)]. There is no necessity for a political party to contest as an independent group to get recognition

of a political party. This is clear when one considers Section 7(5) of the Parliamentary Election Act. It is unnecessary to comment on each and every ground given by the Commissioner. It is seen that the grounds given by the Commissioner are unacceptable. The Court of Appeal has not considered these matters.

Section 7(5) of the Parliamentary Election Act reads as follows:

Upon the receipt of an application duly made under subsection (4) on behalf of any political party, the Commissioner shall, after such inquiry as he may deem fit,

(a) if in his opinion such party is a political party and is organized to contest any election under this Act, make order

(i)that such party shall be entitled to be treated as a recognized political party for the purpose of elections, subject however, to the provisions of this Act; and

(ii)allotting an approved symbol to such party, being the approved symbol specified in the application or any other approved symbol determined by him in his absolute discretion, but not being the approved symbol of any other political party which is entitled to be so treated; or

(b) if in his opinion, such party is not a political party and is not organized to contest any election under this Act, make order disallowing the application.

Under Section 7(5) of the Act in order for the Commissioner to recognize a party as a political party he must form an opinion on the following two criteria. They are:

1. The party making the application to be recognized must be a political party.

2. Such party must be organized to contest any election under the Act.

As I pointed out earlier the National Organizer of the Petitioner's party has contested a Provincial Council Election in 1998 under the symbol of Mahajana Eksath Peramuna and the Petitioner has contested general election held in 2000 under the symbol of Sihala Urumaya. The Petitioner's party has supported the candidature of Dr.Harischandra Wijetunga at the Presidential Election held in 1999(vide document marked P10 and P11). When the above matters are considered it appears to Court that the Respondent had sufficient material to arrive at a finding that the Petitioner's party is a political party and is organized to contest any election under the Parliamentary Election Act.

When I consider all the above matters I am therefore of the view that the impugned decision of the Commissioner is wrong and the Court of Appeal has failed to consider the above matters. For the above reasons, I quash the decision of the Respondent dated 21.1.2008 marked P43 and set aside the judgment of the Court of Appeal dated 2.7.2010.

In view of the above conclusion reached by me, I answer the questions of law in the affirmative. Accordingly I issue a writ of Mandamus directing the Respondent (Commissioner of Elections) to recognize SJP as a political party and to assign an appropriate symbol to SJP.

JUDGE OF THE SUPREME COURT

SARATH DE ABREW J

I agree.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I have had the advantage and privilege of reading in draft the judgment prepared by my brother, Sisira J. de Abrew. J. I am in agreement with the conclusion reached by my brother on the two questions of law on which special leave to appeal was granted. However, I wish to express my view on the failure of the Commissioner of Elections to communicate reasons when several applications of the Petitioner were rejected.

Any act of the repository of power, whether administrative or quasi-judicial, is open to challenge if it is in conflict with the governing Act or the general principles of law of the land or is arbitrary and unreasonable that no fair minded authority could ever had made it. The **r**ecording and giving of reasons therefore ensures that the decision of the repository of power is reached according to law and not on the basis of caprice, whim or fancy. A person seeking to register his party as a recognized political party is ordinarily entitled to know the grounds on which the Commissioner of Elections has rejected his claim. If the decision of the Commissioner of Elections is subject to appeal or judicial review, the necessity to give reasons is greater, for without reasons, firstly, the persons aggrieved by the decision of the Commissioner of Elections would not be in a position to formulate the legal basis on which he could challenge such decision by way of appeal or judicial review. Secondly, the appellate authority would not have any material on which it may determine whether the facts were properly ascertained, the relevant law was correctly applied and the decision was within the parameters of the Commissioner of Elections.

A speaking order containing the reason will at its best be a reasonable one and ensures fairness and equality of treatment in administrative or quasi-judicial

actions. It may be stated here that by a pronouncement of the Indian Supreme Court in *Seimans Engineering* Vs. *Union of India* , A I R (1976) S.C. 1785 it was observed by Bhagawatti, J. at page 1789 as follows :-

> "*.....It is essential that administrative authorities and tribunals should accord fair and proper hearing to the persons sought to be affected by their orders and give sufficiently clear and explicit reasons in support of the orders made by them. Then alone administrative authorities and tribunals exercising quasi-judicial function will be able to justify their existence and carry credibility with the people by inspiring confidence in the adjudicatory process. The rule requiring reasons to be given in support of an order is, like the principle of audi alteram partem, a basic principle of natural justice which must inform every quasi-judicial process and this rule must be observed in its proper spirit and mere pretence of compliance with it would not satisfy the requirement of law.*

In view of the expanding horizon in the sphere of judicial review the necessity of recording and communicating reasons therefore becomes an indispensable part of a sound system of administrative authorities and tribunals exercising administrative and / or quasi-judicial functions.

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.

In the matter of an Application for Leave to Appeal to the Supreme Court under and in terms of Section 31DD of the Industrial Disputes Act (as amended).

S.C. Appeal No. 99/2012
S.C. H.C. L.A. No. 38/2012
HCALT No. 118/10
L.T. No. 08/425/2010

The British High Commission,
No. 389, Bauddhaloka Mawatha,
Colombo 07.

Respondent-Respondent-Appellant

Vs.

Ricardo Wilhelm Michael Jansen
No. 62, Perakumba Mawatha
Kolonnawa.

Applicant-Appellant-Respondent

BEFORE : **MOHAN PIERIS. P.C.,CHIEF JUSTICE**

PRIYASATH DEP P.C., J

EVA WANASUNDERA P.C., J

COUNSEL	:	Nigel Hatch PC with Ms. S. Illangage for the Respondent-Respondent-Appellant. Thushani Machado with C. Hettiarachchi for the Applicant-Appellant-Respondent.
ARGUED ON	:	14.05.2013
DECIDED ON	:	10.07.2014

The case at bar raises issues of state immunity and the facts and circumstances that led to the instant appeal to this Court from the order of the Provincial High Court, Colombo could be adumbrated presently.

The Applicant-Appellant-Respondent (hereinafter referred to as "the Respondent") was employed by the Respondent-Respondent-Appellant the British High Commission, Colombo (hereinafter referred to as "the Appellant"), as a Security Assistant with effect from 02.04.2001. The Respondent was initially employed for a period of two years subject to performance. At the expiry of the said two years the services of the Respondent were extended for a further two years with effect from 02.04.2003. At the conclusion of this two year period the Respondent was made a permanent employee of the Appellant. By letter dated 03.02.2010 the services of the Respondent were terminated for alleged misconduct as it was found by the High Commissioner to be asleep whilst on guard duty. The said letter dated 3rd February 2010 further stated that the Respondent was in breach of the employment contract and Clause 36 of the Post Security Regulations/Instructions which declares that sleeping on duty is strictly forbidden.

The document marked by the Appellant as X brings forth the following. It was a condition of the Respondent's employment that his services may be terminated at any time without notice on grounds of willful misconduct and/or disobedience, neglect of duties or breach of any express or implied term of employment (paragraph 7 at page 26 of "X" and paragraph 13 at page 32 of "X").

The Respondent filed an application in the Labour Tribunal seeking relief against the alleged unlawful termination of his services.

It is apparent from the answer filed by the Appellant–**the British High Commission** that the position of the Appellant before the Labour Tribunal has been that "the British High Commission looks after the interests of the United Kingdom in Sri Lanka" and Sri Lankan laws do not apply to it. This averment makes clear that the plea was one of state immunity and not diplomatic immunity. Without prejudice to the jurisdictional objection, the Appellant further pleaded that the Respondent had had a bad prior record of service and the termination of the Respondent's services were justified and that he was not entitled to any reliefs. The Respondent sought to traverse the plea in bar of jurisdiction in his replication. The Replication filed by the Respondent, whilst admitting that the British High Commission looks after the interests of the United Kingdom in Sri Lanka, denied that Sri Lankan Laws do not apply to the Appellant and further averred that the contract of employment stipulated that the Appellant High Commission was subject to Sri Lankan Labour Law. Although the Appellant High Commission filed answer before the Labour Tribunal taking up the jurisdictional plea, it did not participate in the proceedings which were consequently held ex parte.

I wish to point out at the very outset that the traversal in bar of jurisdiction before the Labour Tribunal was premised on State Immunity rather than Diplomatic Immunity but it would appear that diplomatic immunity has been the bone of contention in both the Labour Tribunal and the Provincial High

Court of Colombo. It has to be noted that whilstthe Labour Tribunal upheld the objection on the mistaken assumption of diplomatic immunity, the Provincial High Court rejected it and proceeded to hold that the Labour Tribunal possesses the requisite jurisdiction to hear and determine the application filed by the Respondent.

It is pertinent to highlight the salient features of the respective judgments which seek to justify their reasoning.

Labour Tribunal Order dated 29th October 2010

The order dated 29th October 2010 of the President, Labour Tribunal sets out the following reasons for the holding that it is denuded of jurisdiction to hear and determine the application filed by the Respondent.

(a) If the Appellant (the British High Commission) is clothed with diplomatic immunity (sic), the institution and maintenance of an action against the Appellant and the consequent enforcement are questions that are of a mandatory nature to be borne in mind;

(b) The Diplomatic Privileges Act, No. 9 of 1996 (sic) accords immunity from suit to the British High Commission/or its consular personnel;

(c) Though the Respondent's contract of employment states that the conditions of service are subject to Sri Lankan Labour Law, what is in issue is whether legal proceedings could be instituted in the event of an alleged violation thereof;

(d) The Respondent has failed to show that the Appellant is not subject to diplomatic benefits and immunities;

(e) A legally binding order cannot be delivered against the Appellant and the Respondent cannot maintain an application against the Appellant;

Since the Respondent gave evidence before the Labour Tribunal in the ex parte proceedings, the President, Labour Tribunal made the following determinations on the merits.

(a) The Respondent has not established his case that he was ill and/or indisposed and that he had duly notified his superiors on the date in question which according to him prevented him from performing his duty;
(b) The Respondent has admitted in his evidence that he had slept whilst on duty;
(c) Neither in his application nor in the Replication does the Respondent state that he was suffering from a viral fever on the day in question; He had not even informed any officer that he was unwell and that he had failed to open the gate for the High Commissioner;

The Respondent workman preferred an appeal to the Provincial High Court in Colombo from the Order of the Labour Tribunal and the High Court had the benefit of written and oral submissions addressed to it on two pivotal questions albeit erroneously assumed. Can the Appellant British High Commission plead Diplomatic Immunity from suit in the Labour Tribunal when a Sri Lankan workman attached to the High Commission impleads it on an alleged infringement of his contract of employment? Does this plea avail it when the contract of employment contains a clause that the employee's conditions of service are subject to Sri Lankan Labour Law?

The Order of the Provincial High Court dated 27th March 2012

The Learned High Court Judge concluded in his order that the waiver of immunity must be express in relation to jurisdiction as well as enforcement and such waiver is apparent from the contractual provisions contained in the letters of appointment of the Respondent that the conditions of service of the Respondent are subject to Sri Lankan Labour Law.

According to the judgment of the Provincial High Court, such a declaration in the letters of appointment would amount to an express waiver of immunity. As regards the argument of the Appellant that the British High Commission is neither a natural nor a legal person and thus no institution of proceedings could be maintained against the British High Commission, the Provincial High Court takes the view that having filed an answer before the Labour Tribunal in opposition to the application, it does not lie in the mouth of the Appellant to contend that the application cannot be sustained and that the Labour Tribunal possesses the jurisdiction to hear and determine the application. In fact Diplomatic Immunity figured again in the Provincial High Court as they do in this Court but the distinction between State Immunity and Diplomatic Immunitydo not seem to have been appreciated by both Counselor the Learned High Court Judge. I will proceed to discuss this distinction in the course of this judgment.

The Appellant was granted leave on the following questions of law as itemized in the petition of appeal.

(a) Has the Learned High Court Judge erred in law in failing to construe and/or give effect **to the Diplomatic Privileges Act No. 9 of 1996 which incorporated into our domestic law the Vienna Convention on Diplomatic Relations 1961 to** which Sri Lanka was a signatory?

(b) Has the Learned High Court Judge misdirected himself in law by failing to construe and/or in not considering that under the principles of Public International Law and/or Diplomatic Privileges Act No. 9 of 1996, the British High Commission and inter-alia its members of the mission and/or members of the staff of the mission and/or diplomatic agents are entitled to sovereign immunity from inter-alia legal process and/or court proceedings in Sri Lanka?

(f) Has the Learned High Court Judge erred in law in construing the provision "Your conditions of service are subject to Sri Lankan Labour Law and in line with the Foreign and Commonwealth Office LE Staff Strategy and best practice" in the Letter of Appointment marked A6 and/or the payment of statutory benefits respectively to be tantamount to an express waiver of immunity?

(g) Has the Learned High Court Judge erred in law in holding that the said clause and/or payment of statutory benefits constitute the submission by the British High Commission to jurisdiction and/or that the statutory provisions and Labour Laws of Sri Lanka cannot be isolated for the Court machinery and enforcement machinery?

(h) Has the Learned High Court Judge erred in law in holding that the Labour Tribunal has the jurisdiction to hear and determine the application of the Respondent and/or enforce an award?

(l) Without prejudice to the aforesaid, has the Learned High Court Judge erred in law in allowing the appeal thereby granting the Respondent all the reliefs prayed for by the Respondent without

having considered the matter on the merits having particular regard tothe Respondent being a Security Guard at a foreign Diplomatic Mission?; and/ or

(m) Has the Learned High Court Judge erred in law in not stating what reliefs prayed for by the Respondent are allowed in appeal having regard to the Respondent having sought the reliefs of reinstatement with back wages and in the alternative a sum of Rupees Four Million (Rs 4,000,000/-) as compensation in lieu of reinstatement from the Labour Tribunal?

(n) Has the Learned High Court Judge erred in law in construing that the mere filing of an answer by the British High Commission constituted a waiver of objection to the defect in the Labour Tribunal application per se?

As I stated above, the case at bar hinges on sovereign immunity which does not engage the provisions of the Diplomatic Privileges ActNo. 9 of 1996. The Diplomatic Privileges ActNo. 9 of 1996 is Sri Lanka's response to its dualistpractice of enacting domestic legislation to give effect to its international obligations under the Vienna Convention on Diplomatic Relations of 1961 and I must observe that neither the Convention nor our domestic legislation is engaged in the case at bar. If one peruses the answer filed by the British High Commission-the Respondent before the Labour Tribunal the position taken by the High Commission becomes relevant. Paragraph 3 of that answer stated as follows :

"It is respectfully submitted that the Respondent British High Commission looks after the interests of the United Kingdom in Sri Lanka and the Sri Lankan lawsdo not apply to the Respondent."

By this averment no diplomatwas seeking any immunity from suit and the British High Commission was asserting nothing but the immunity of the United Kingdom from suit in the Sri Lankan Labour Tribunal on a contract of employment which had been entered into by an agent of the UK and the Respondent workman who functioned as a Security Officer. Interestingly enough the initial letter of appointment issued to the Respondent on 12 April 2001 states that his conditions of service are subject to Sri Lankan Labour Law and not British. This initial letter had been signed by one R.P.Morris, Management Officer of the British High Commission and the Respondent. Subsequent letters issued to the Respondent bearing several dates such as 5th October 2001 and 14th March 2003 incorporate the terms and conditions of the initial letter dated 12 April 2001 and the letter dated 22nd April 2009 which confirmed the Respondent in his position of "Security Assistant" at Grade V(b) also specifically refers to the fact that the Respondent's conditions of service are subject to Sri Lankan Labour Law and in line with the Foreign and Commonwealth Office's L.E Staff Strategy and best practice.

From the foregoing the following issues merit recapitulation. Whilst the letters of appointment of the Respondent subject the terms and conditions of employment to Sri Lankan Labour Law, the answer before the Labour Tribunal asserts state immunity. If one looks at the terms and conditions of employment, they traverse such areas as pay, bonus, EPF, ETF, gratuity, working hours etc. Under the rubric "Performance" -paragraph 13 of the terms and conditions is to this effect-"You may terminate your appointment at any time by giving one month's notice. We reserve the right to terminate your employment at any time without notice or payment in lieu ofnotice on grounds of willful misconduct and/or negligence and/or disobedience, neglect of duties or breach of any express or implied term of your employment".

The alleged termination took place through a letter dated 3rd February 2010 which was addressed to the Respondent by one Philip Nalden –Second Secretary of the Appellant. The letter alleged that on Saturday 23rd of January

2010 at about 14.50 hours it was reported by the British High Commissioner, Dr. Peter Hayes that the Respondent had been asleep whilst on an alert guard duty. The letter described the circumstances in which the Respondent was found to be asleep. The High Commissioner had driven up to the main gate of Westminster House to exit. As there was no response from the gatehouse, he stepped out of his vehicle and went to the gatehouse where he found the Respondent asleep. The letter further alleged that this conduct was in breach of his employment contract ((Neglect of Duty), and Post Security Regulations (Instructions for Security Assistants para 36 which states that sleeping on duty is strictly forbidden).

The letter further stated –"Based on the facts, and on your own admission that you had "dozed off", your employment with the British High Commission is hereby terminated with immediate effect."

It is consequent to this alleged letter of termination that the Respondent instituted Labour Tribunal proceedings by his application dated 25th March 2010. The Appellant's plea of immunity was denied by the Respondent in his replication but he admitted that his EPF and ETF contributions had been duly paid. As I alluded to before, the Appellant did not participate in the proceedings at which the Respondent testified on the merits denying the charges leveled by the High Commission and giving a different version of events. After having rejected this version presented by the Respondent in the witness box, the President of the Labour Tribunal has gone into the plea of immunity by undertaking an assay into the Diplomatic Privileges ActNo. 9 of 1996 on the mistaken assumption of its applicability to the issues before him-a course which was no doubt referable to the submissions of counsel before him.

The President of the Labour Tribunal also alludes to the paramount duty of delivering an order which is executable against a party and for that purpose it is a requirement of law that an application should be filed against a natural or legal person. On the facts the Labour Tribunal concludes that it cannot reach a

finding whether the British High Commission is a natural or legal person-(***The Superintendent, Deeside Estate Maskeliya v IllankaiTholarKazhakam* 70 NLR 279).**

In the end the President, Labour Tribunal concluded that the application cannot be instituted and maintained against the British High Commission.

The Learned High Court Judge fell into the same error of assuming that the provisions of the DiplomaticPrivileges ActNo. 9 of 1996 were engaged in the matter before him and he equated the express assertions in the letters of appointment that the terms and conditions of employment would be governed by Sri Lankan Labour law, to be express waivers of immunity and concluded that the President, Labour Tribunal had jurisdiction. In the end the appeal of the Respondent was allowed by the High Court Judge.

So much for the trajectory of the case. In the appeal before this Court only two issues loom large for resolution. Can the British High Commission assert state immunity on behalf of the United Kingdom having regard to the facts and circumstances of this case? Is there a waiver that defeats this plea of sovereign immunity?

It has to be borne in mind by all triers of fact that it is settled law that where a claim of immunity is raised by a state, that is to be treated as a preliminary issue, to be settled conclusively before the court addresses any aspects of the merits of the dispute (***Maclaine Watson v Department Trade*** (1988) 3 All ER 257 at 317, CA). I will proceed to answer the two issues now.

Pleaof Sovereign Immunity

Immunity by reason of the sovereign independent status of a state is only available when proceedings are initiated against a foreign state and is a preliminary plea taken at the commencement of the proceedings. It serves a very important purpose; It debars the court of the State where proceedings are brought (the forum Court or national Court) from exercising jurisdiction to

inquire further into the claim; so a plea of immunity is a technique of avoidance of jurisdiction of a Court of one State and such a denial of jurisdiction is said to arise out of international comity. The Latin maxim '*par in parem non habet imperium'* (one equal cannot exercise authority over another) neatly summarizes the justification for sovereign immunity. Specific legislation has been enacted by states to deal with the subject and its challenges and one needs only to advert to UK's State Immunity Act of 1978 and Australia's Foreign State Immunity Act of 1985. It has to be noted that there is no domestic legislation specifically dealing with the question of State or Sovereign Immunity in Sri Lanka and we have to look for guidance from customary international law or other jurisdictions whenever a plea of immunity is raised before us.

There is today a distinction between absolute immunity and restricted immunity. Whereas the immunity was once absolute, the pendulum has since swungtowards restrictive immunity. With the dramatic increase in state involvement in commercial contracts and trading activities, not many States are now willing to apply the doctrine of absolute immunity in granting exemptions from legal process to foreign sovereigns and States. Even those States which were applying the doctrine in its full vigour have attempted to create certain exemptions in the matters of private contracts undertaken by the foreign State. So States have moved towards a position of accepting only a restricted doctrine of immunity. States did this by providing that a state has immunity for only a limited class of acts. The distinction is between acts *jure imperii* (A State acting in a public or sovereign capacity) and acts *jure gestionis* (A State acting in a private capacity). The purpose of distinction is to ensure that the state is treated as a normal litigant when it behaves like one, and as a sovereign when it exercises sovereign power**.** In the United Kingdom itself, the doctrine of absolute immunity was clearly abandoned in commercial transactions in the **Philippine Admiral** case (1976) 1 All ER 71 (PC) (action *in rem*) and **Trendex Trading Corporation v Bank of Nigeria** (1977) QB

529(action *in personam*) also gave effect to the emerging doctrine of restrictive immunity. In **Trendex Trading Corporation,** Lord Denning M.R stated-

> "If a government department goes into the market places of the world and buys boots or cement, as a commercial transaction that government department should be subject to all the rules of the market place. The seller is not concerned with the purpose to which the purchaser intends to put the goods."

It has to be remembered that both the **Philippine Admiral** case and **Trendex Trading Corporation** were decided before the UK enacted State Immunity Act, 1978 and in fact **Trendex** did highlight the need for legislation. The conclusion that Lord Denning reached in Trendex was followed in the House of Lords in **I Congreso del Partido**(1983)AC 244 and the case becomes relevant to the issues before this Court having regard to the test propounded by Lord Wilberforce in the case to untangle the knotty issue of determining whether a particular act of a State is *jure imperii* or*jure gestionis*.

Lord Wilberforce's test becomes relevant because the distinction between public or sovereign acts (*juraimperii*) and private acts (*juragestionis)* is not easy to draw. This distinction is important because restrictive immunity restricts immunity to sovereign acts (*juraimperii*), whilst commercial and private acts (*juragestionis*) do not enjoy immunity at all. In **I Congreso del Partido,** the House of Lords developed a two-stage test in order to distinguish between acts *jure imperii* and acts *jure gestionis*for disputes arising under English common law. The case concerned two ships (*The Playa Larga*and *The Marble Islands*) carrying sugar to Chile, both of which were diverted elsewhere on the orders of the Cuban Government after a new Government came to power in Chile. An action *in rem* was brought by the Chilean owners of the cargo against ***I Congreso,*** another ship owned by Cuba. Cuba claimed state immunity.

In order to determine whether Cuba was entitled to state immunity, the House of Lords held that the distinction between acts *jure imperii* and acts *jure*

*gestionis*depended on whether the relevant acts of Cuba were acts of private law or acts done by virtue of governmental authority. In a much cited passage Lord Wilberforce formulated the test-

> "The court must consider the whole context in which the claim against the State is made, with a view to deciding whether the relevant acts on which the claim is based should, in that context, be considered as fairly within an area of activity, trading or commercial or otherwise of a private law character. Or whether the relevant activity should be considered as having been done outside the area within the sphere of governmental or sovereign activity."

Employment in foreign embassies has quite frequently engaged this distinction and there have been a slew of cases that have grappled with this distinction in order to arrive at a decision whether a particular activity attracts immunity or not. The test was relied upon in the UK in **Senguptav Republic of India** 65 ILR 325 (1983) ICR 221, **Littrell v United States of America (No 2)** (1994) 2 All ERand **Holland v Lampen Wolfe (2000) 1 WLR 1573.**

In**Sengupta v Republic of India** 65 ILR 325 a decision prior to the 1978 State Immunity Act, the Employment Appeal Tribunal held on the basis of customary law that immunity existed with regard to a contract of employment dispute since the working of the mission in question constituted a form of sovereign activity.The Supreme Court of Canada decided **United States of America v The Public Service Alliance of Canada and others**(***Re Canada Labour Code***)94 ILR 264 and held that the conduct of labour relations at a foreign military base was not a commercial activity so that the US was entitled to sovereign immunity in proceedings before a Labour Tribunal. One has to take cognizance of the underlying rationale. The closer the activity in question was to undisputed sovereign acts, such as managing and operating an offshore military base, the more likely it would be that immunity would be recognized. In **Kuwait Airways Corporation v Iraqi Airways Co** (1995) 1 WLR 1147, Lord

Goff, giving the leading judgment in the House of Lords, adopted Lord Wilberforce's statement of principle in **Congreso** and held that-

> "the ultimate test of what constitutes an act *jus imperii*is whether the act in question is of its own character a governmental act, as opposed to an act which any private citizen can perform".

Drawing in aid the rationale of these cases before me, I turn to the question, which side of the divide the contract of employment that the UK government entered into with theRespondent as a Security Assistant falls? Is it an act jure imperii or jure gestionis? In my view, the employee's duties in this case (the Respondent's duties as a Security Assistant to the premises of the UK High Commission) were not only to provide security butalso to maintain the inviolability of the Embassy premises. The maintenance of security in the mission could not be classified as merely auxiliary but in my view since the duties of the Respondent were integral to the core sphere of sovereign activity, the contract of employment was not effected in the capacity of a private citizen and the functions of the Respondent were enlisted in the interest of the public service of the UK Government and on these premises I am irresistibly drawn to the inescapable conclusion that immunity becomes applicable in the instant case.

In **Holland v Lampen Wolfe (supra)**the House of Lords considered the case of a US citizen who was a teacher on a US base in the United Kingdom. The plaintiff was arguing that a memorandum written by her superior was libel. The House of Lords granted immunity to the United States, contending that the act concerned took place in the context of the provision of education on a military base, which was an activity serving the needs of US military and therefore a sovereign act.This case also cited with approval the **Littrell v United States of America (No 2) –**a case which held that military treatment for US personnel on a US base in the United Kingdom was a sovereign activity.

Thus one could see that the whole tenor of these decisions was to look at the whole context of the activity carried on and if the sovereign performed an act in the exercise of sovereign authority for the purpose of maintaining an efficient fighting force, that activity attracted immunity in these cases. By the same token, the contextual approach of analyzing the Respondent's employment in terms of its purpose and nature-the twin facets of Lord Wilberforce's test fortify me with the conclusion that the contract of employment with the Respondent to provide and maintain security services could not be a private or commercial activity and it bespeaks nothing but a sovereign activity. So having regard to the facts and circumstances of this case, the Respondent would not be able to initiate legal proceedings against the UK in our courts based on the above principles which no doubt derive provenance from customary international law. I arrive at this conclusion having regard to the nature and purpose of the contract of employment which the Respondent had with the appellant. In the end applying the same principles I hold that immunity applies in this case to the act complained of as well but it remains to be seen whether this restrictive immunity has been waived. I hold that when the Respondent was appointed as Security Assistant and confirmed later in his position, it was an act *jure imperii*that attracts immunity. Diplomatic Privileges Act No. 9 of 1996 was not meant to give effect to restrictive State Immunity but as its preamble quite eloquently demonstrates it was -

> "An Act to give effect to the Vienna Convention on Diplomatic Relations; to provide for the grant of immunities and privileges to the officers, agents and property of certain international organizations; and to provide for matters connected therewith or incidental thereto."

Nowhere does any of its provisions give effect to the restrictive State Immunity I have discussed above and which British High Commission claims in this case. Having thus disposed of the first issue in the case –whether immunity exists

having regard to the facts and circumstances of this case, I now proceed to examine whether there has been a waiver of state immunity.

Waiver of Sovereign Immunity

It has to be borne in mind that the doctrine of restrictive immunity operates subject to waiver.It has been recognized for a State to waive its immunity from the jurisdiction of the Court. As I turn to guidance from customary international law or other jurisdictions, I observe that some principles of law have crystallized on waiver. Courts have oftentimes held that the entering into an arbitration agreement by a State amounts to a waiver of immunity-see **Libyan American Oil Company (Lamco) v Socialist Peoples Libyan Arab Jamahirya** (1981)Ybk Comm.Arb 89 and **International Tin Council v Amalgamated Inc**(1988) NYS 2d 1971. The authors of that seminal work on International Arbitration Redfern and Hunter) observe at page 667 of their 5th Edition (2009)-

> "During the course ofan arbitration proceeding to which a State is a party, the distinction between absolute and restrictive immunity should be of no relevance. The arbitration can only proceed validly on the basis that the State concerned has agreed to arbitrate; and such an agreement is generally held to be a waiver of immunity. This is also taken to extend to the jurisdiction of the relevant court at the seat of arbitration to supervise the arbitration taking place in its territory."

In the instant case we are not concerned with such a waiver in an arbitration agreement: One has to recall that the Learned High Court Judge treats the contractual provision of subjecting the terms and conditions to Sri Lankan Labour Law as a waiver. It has to be pointed out that there are dicta to the effect that express waiver of immunity from jurisdiction must be granted by an authorized representative of the State and I do not find such a waiver anywhere in the contract that the Respondent had with the appellant.

In **R v Madhan(1961) 2 QB 1,** the defendant was employed in the Passport Office of the Indian Mission in England and was entitled to diplomatic immunity. He was charged and convicted for obtaining a season ticket and attempting to obtain money by false pretenses. The Deputy High Commissioner wrote to the Commonwealth Relations Officer that in order not to impede the course of justice**, the High Commissioner** was prepared to waive the defendant's immunity. Thus one could see that it was the Head of the Mission that waived immunity. Although this was a case on diplomatic immunity which preceded the 1964 Diplomatic Privileges Act incorporating the Vienna Convention on Diplomatic Relations, 1961, the English Court of Appeal in **Aziz v Republic of Yemen (2005) EWCACiv 745, para 48,** held the statement to be of general application, including with regard to a consideration of the waiver of state immunity under the 1978 Act.

I find further case law fortifying the position that all waivers must be made by the head of the State's Diplomatic Mission-see **Malaysian Industrial Redevelopment Authority v Jeyasingham (**1998) ICR 307. In **Egypt v Gamal-Eldin**(1996) 2 All ER 237 a letter sent to an employment tribunal by the Medical Officer of the Egyptian Mission did not, as a matter of interpretation, constitute a waiver or submission to jurisdiction. Likewise in **Ahmed v Government of the Kingdom of Saudi Arabia** (1996) 2 All ER 248 a Solicitor's letter advising the Government that employees might have certain employment rights in UK Law could not be interpreted as a "written agreement to waive immunity under Section 2 of the UK's State Immunity Act 1978".

Even the Sri Lankan Diplomatic Privileges Act No. 9 of 1996 specifically refers to the mandatory requirement of **the High Commissioner** renouncing immunity on behalf of a state. Section 2 (3) of the Sri Lankan Act states-

> "For the purposes of Article 32 of the Vienna Convention, a waiver by the Head of Mission of any State or any person for the time being performing his functions, shall be deemed to a waiver by that State."

Though copious arguments revolved around the Sri Lankan Diplomatic Privileges Act albeit erroneously, the important provision of law namely Section 2(3) of that Act had gone a begging and as a result the Learned High Court Judge too fell into an error into assuming that a Junior Officer of the British High Commission who enters into a contract of employment with the Respondent could waive state immunity in the letter of appointment. I take this general proposition, namely that the Head of the Mission should waive state immunity on behalf of the State, to represent the correct statement of law and as such a waiver is wanting in the relationships between the parties or before the Tribunal, I hold that there is no waiver of restrictive immunity.

There is another principle of law that negatives the assumption of the High Court Judge that a reference to Sri Lankan Labour Law in the terms and conditions of the contract had the effect of waiver. Such a provision that the Sri Lankan Labour Law would apply to the terms and conditions was nothing more than an assertion that Sri Lankan Labour Law was the governing law of the terms and conditions. Such an assertion would not constitute an express waiver of state immunity. In fact the case of **Ahmed v Government of the Kingdom of Saudi Arabia** (supra) a Solicitor's letter advising the Government that employees might have certain employment rights in UK Law could not be interpreted as a "written agreement to waive immunity under Section 2 of the UK's State Immunity Act 1978".

In fact the mere recitation that Sri Lankan Labour Law will apply to the terms and conditions of the contract of employment is not be understood as a submission to jurisdiction as in an arbitration agreement -see **Mills v USA 120 ILR p.162.** In the circumstances I hold that the covenant in the letter of

appointment that Sri Lankan Labour Law will apply to the terms and conditions is not to be regarded as a submission to jurisdiction and there is thus no waiver of immunity on that score.

In the circumstances I dispose of the two important issues by holding that –

a) the nature and purpose of the contract in the case enables a plea of state immunity to be taken in the instant case; and

b) such immunity has not been lost by any waiver.

In view of the forgoing holding which is sufficiently dispositive of the issues in the case I do not deem it necessary to answer all questions of law some of which have been formulated*ex abuntanticautela,* albeit on the mistaken assumption of the applicability of the Diplomatic Privileges Act No. 9 of 1996. I would now proceed to amend the relevant questions of law in order to answer them on the propositions of law that have been adumbrated above.

(a) Has the Learned High Court Judge erred in law in failing to construe and/or give effect **to the Diplomatic Privileges Act No. 9 of 1996 which incorporated into our domestic law the Vienna Convention on Diplomatic Relations 1961 to** which Sri Lanka was a signatory?

This Court would not answer this question as it is premised on an erroneous basis as pointed out in the judgment.

(b) Has the Learned High Court Judge misdirected himself in law by failing to construe and/or in not considering that under the principles of Public International Law **and/or Diplomatic Privileges Act No. 9 of 1996,** the British High Commission **and inter alia its members of the mission and/or members of the staff of the mission and/or diplomatic agents** are entitled to

sovereign immunity from inter alia legal process and/or court proceedings in Sri Lanka?

This broad formulation does not take into account the fact that absolute immunity is a thing of the past and as such it is amended as follows and answered accordingly in consonance with the holding in the case.

Amended question

Has the Learned High Court Judge misdirected himself in law by failing to construe and/or in not considering that under the principles of Public International Law the UK Government is entitled **to sovereign immunity for acts juraimperii?**

Answer-yes

Question of Law (f) as amended

(f) Has the Learned High Court Judge erred in law in construing the provision "Your conditions of service are subject to Sri Lankan Labour Law and in line with the Foreign and Commonwealth Office LE Staff Strategy and best practice" in the Letter of Appointment marked A6 to be tantamount to an express waiver of immunity?

Answer-Yes

Question of Law (g) as amended

(g) Has the Learned High Court Judge erred in law in holding that the Labour Tribunal has the jurisdiction to hear and determine the application of the Respondent ?

Answer-Yes

Question of Law (h) as amended

(h) Has the Learned High Court Judge erred in Law in holding that the Labour Tribunal has jurisdiction to hear and determine the application of the Respondent?

Answer-Yes

Question of Law (l)

(l) Without prejudice to the aforesaid, has the Learned High Court Judge erred in law in allowing the appeal thereby granting the Respondent all the reliefs prayed for by the Respondent without having considered the matter on the merits having particular regard to the Respondent being a Security Guard at a foreign Diplomatic Mission?;

Answer-Yes

Question of Law (m)

(m) Has the Learned High Court Judge erred in law in not stating what reliefs prayed for by the Respondent are allowed in appeal having regard to the Respondent having sought the reliefs of reinstatement with back wages and in the alternative a sum of Rupees Four Million (Rs. 4,000,000/-) as compensation in lieu of reinstatement from the Labour Tribunal?

In view of the aforesaid finding the requirement to answer this question does not arise.

However the Court wishes to formulate another question of law in consonance with its holding in the case.

Has the High Court Judge erred in law by failing to appreciate the proposition that having regard to the facts and circumstances of this case, sovereign immunity applies to the UK?

Answer-Yes

Thus I proceed to affirm the order of the Labour Tribunal dated 29th October 2010 to the extent of its holding that the Tribunal had no jurisdiction to embark into an inquiry having regard to the facts and circumstances of the case and set aside the judgment of the Learned High Court Judge dated 27th March 2012for the reasons set out above in the judgment.

Accordingly I allow the appeal of the Appellant but with no costs.

MOHAN PIERIS, P.C., C.J.

CHIEF JUSTICE

PRIYASATH DEP P.C., J

I agree.

JUDGE OF THE SUPREME COURT

EVA 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 appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 104/2008

C.A. (Writ) Application No.414/2005

K.H.M.S. Bandara
No. 46, Circular Road,
Malkaduwawa,
Kurunegala.

Petitioner

Vs.

1. Air Marshal G.D. Perera,
   Commander of the Sri Lanka
   Air Force,
   Air Force Headquarters,
   Katunayake.

2. Group Captain K.A. Gunatilleke,
   Base Commander,
   Sri Lanka Air Force Base,
   Katunayake.

3. Wing Commander Prakash Gunasekera,
   Commanding Officer-
   14th Battalion,
   Sri Lanka Air Force Base,
   Katunayake.

4. Wing Commander P.R. Perera
   Sri Lanka Air Force Base,
   Katunayake.

5. Mr. Ashoka Jayawardane,
   Secretary,
   Ministry of Defence,
   Colombo.

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

Respondents.

And Now Between

1. Air Marshal G.D. Perera,
Commander of the Sri Lanka
Air Force,
Air Force Headquarters,
Katunayake.

2. Group Captain K.A. Gunatilleke,
Base Commander,
Sri Lanka Air Force Base,
Katunayake.

3. Wing Commander Prakash Gunasekera,
Commanding Officer-
14th Battalion,
Sri Lanka Air Force Base,
Katunayake.

4. Wing Commander P.R. Perera
Sri Lanka Air Force Base,
Katunayake.

5. Mr. Ashoka Jayawardane,
Secretary,
Ministry of Defence,
Colombo.

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

Respondents-Appellants

SC. Appeal 104/2008

Vs.

K.H.M.S. Bandara
No. 46, Circular Road,
Malkaduwawa,
Kurunegala.

Petitioner-Respondent

* * * * * *

BEFORE : **Chandra Ekanayake, J.**
Priyasath Dep, PC. J. &
Eva Wanasundera, PC.J.

COUNSEL : Rajitha Perera,SC. for the -Respondent-Appellants.

Rohan Sahabandu, PC for the Petitioner-Respondent.

ARGUED ON : **08.05.2014**

Written Submissions filed : By the Respondents-Appellants on 22-05-2014
By the Petitioner- Respondent on 30-05-2014

DECIDED ON : **29.09.2014**

*** * * * ***

Eva Wanasundera, PC.J.

Leave was granted in this matter on 23.07.2008 on the grounds pleaded in paragraph 6 of the petition dated 05.05.2008. At the commencement of the hearing on 08.05.2014 the questions of law was confined to only paragraph 6(c), (d), (e) and (f) of the Petition. They are as follows:-

6(c) Did the Court of Appeal err in not considering the violation of the base standing orders by the Respondent?

(d) Did the Court of Appeal misconstrue the facts in this case by holding that upto date no formal discharge of the Respondent from the Air Force has been made?

(e) Did the Court of Appeal err in holding that the inquiry and the discharge appear to be arbitrary and outside the provisions of the law when a disciplinary inquiry following principals of natural justice was held against the Respondent?

(d) Did the Court of Appeal err in applying the concept of proportionality to this case when the Respondent was not covered by any statutory provisions?

The Court of Appeal judgment from which the Respondent-Appellants (hereinafter referred to as the "Appellants") have appealed to this Court is marked X1 dated 26.03.2008. The said decision of the Court of Appeal granted a Writ of Certiorari quashing the decision of the 1st Respondent-Appellant contained in the document marked 1R7 in the pleadings of the Court of Appeal, in so far as it affects the Petitioner-Respondent in this case. The decision of the Court of Appeal awarded costs in a sum of Rs.25000/- payable by the 1st Respondent-Appellant to the Petitioner-Respondent (hereinafter referred to as the "Respondent").

I observe that 1R7 is an internal document of the Air Force issued by the Department of Administration of the Air Force Head Quarters, Colombo under Ref. SLAF/C. 11224/P2 under the heading Discharge Officer Cadets-Officer Cadet Bandara KHMS(11224)-GD/P, addressed to 'List A-Z' mentioning that the Commander, who is the 1st Respondent-Appellant in the present Supreme Court case, has approved the discharge 'on SNLR' (meaning services no longer required) of Officer Cadet Bandara KHMS (11224)-GD/P with effect from 22.12.2004. I find that this is the only document available in the brief amongst all

the documents pleaded and filed by both parties to indicate that the Respondent was discharged from the service of the Air Force. If any other document informing the same to the Respondent was available in the files of the Army, the Appellants would have brought the same before the Court of Appeal or this Court and they have not done so, I believe, because there is no such document.

The arguments of the Appellants were that (a) the Respondent is an Officer-Cadet (b) he is a probationer and holds a provisional enlistment. (c) Sri Lanka Air Force Act Sections 40.1, 40.3 , 42 and 43(a) have no application in this matter. (d) the Respondent was informed of the discharge on 21.12.2004 and to clear immediately (e) the Appellants had authority to hold an inquiry and discharge the Respondent and (f) the inquiry was according to the rules of natural justice.

The arguments of the Respondent were that (a) the Respondent even though an Officer-Cadet comes under the Provisions of the Air Force Act (b) Sections 42 and 43 lay down the punishments for Officers after a summary trial (c) in terms of Section 43 the 1st Appellant has no authority to discharge the Respondent from the Air Force and (d) the discharge is ultra vires.

It is clear to me, that the Cadet Officer, Respondent was tried summarily under Regulation 126 of the Air Force Regulations which are referred to normally as the base standing orders, and discharged. The discharge only was the subject matter in the Court of Appeal. The Court of Appeal quashed the decision of the 1st Appellant by a Writ of Certiorari and ordered costs of Rs.25000/- to be paid by the 1st Appellant to the Respondent. The Appellants have appealed to the Supreme Court against that order of the Court of Appeal dated 26.03.2008.

The facts of this case are as follows:- One Plt. Officer named Sanjeewa was looking for a serviceable fan as the fan fitted to his room was out of order and beyond repair. The Respondent helped Sanjeewa being a batch-mate, to find an electric fan in working order in a residential quarter appearing to be abandoned, which was one of the 'Officers married Quarters' and recognised as 'OMQ 28'. Flt. Lt. C.J.C. de Silva made a complaint that the Respondent and Sanjeewa

entered into his residential OMQ No. 28 on 11.10.2004. A Board consisting of Wing Commander Nissanka and Sgt. Lt. Hemasinghe held an investigation on 13.11.2004. It was revealed that the Respondent with Sanjeewa seemed to have violated base Standing Orders Chapter 2, namely entering premises of OMQ 28 without due authority and committing criminal trespass. An inquiry was held on 29.11.2004 and the Respondent was found guilty of both charges. He was imposed 30 days detention on charge 1 of criminal trespass and 14 days detention on entering premises OMQ 28 without authority. Later the Respondent was exonerated on the 1st charge and only the sentence of the second charge was carried out.

The Petitioner reported for work on 19.12.2004. On 21.12.2004 he was informed orally that he was discharged from Sri Lanka Air Force and to clear immediately. 1R7 filed in the Court of Appeal by the Appellants show that the Respondent was discharged from service with effect from 22.12.2004 as that fact was informed to other departments by 1R7. He had been listed as a Cadet Officer with effect from 09.01.2002 on the "Sri Lanka Air Force from 75c(A) under the heading 'Entry as an Aircraft Apprentice or Airman' with service No. 11224 and name Bandara K.H.M.S." These details are contained in the document of 8 sheets of paper marked B filed by the Appellants in the Court of Appeal by way of a motion dated 05.02.2007. The very 1st paragraph in Part 1 of the document B specifically states that "you are hereby warned, that if after enlistment,, it is found that you have willfully or knowingly made a false answer to any of the following questions, you will be liable under the Air Force Act to a maximum punishment of three months imprisonment with hard labour". So, it is amply evident that the Respondent was taken subject to the Air Force Act. It cannot be heard as correct when the State submits that the Respondent is not subject to the Provisions of the Air Force Act as he was only a trainee. He had worked in the said capacity for almost 3 years when he was subjected to the punishment of only 14 days detention. Thereafter he was discharged meaning that he was dismissed from service and he lost his occupation in which he had performed well as a clever officer as evident from the documents filed by him in the Court of Appeal.

It is blatantly clear that the discharge from service which means losing his occupation was totally disproportionate to the punishment of 14 days which he was subjected to, which is unreasonable and cannot be justified and as such arbitrary.

It is obvious that the Officer Cadet even though a trainee was recruited under the Air Force Act and the oath and attestation was done under the provisions of the Air Force Act. The Respondent was an Officer enlisted in the Regular Force of Sri Lanka Air Force. The documents on which the Respondent was enlisted bears ample evidence to show that the Respondent was subjected to the provisions of the Air Force Act. Regulation 126 of the base regulations have come into place according to the provisions of the Air Force Act. The 1st Respondent cannot be heard to say that the Respondent was tried summarily as provided by the Regulations and that the provisions of the Air Force Act do not apply. The Regulations are made under the Air Force Act and under no other Act of Parliament. Anyway Regulation 126 does not confer an unfettered discretion on the 1st Appellant to discharge the Respondent from service.

Having read Sections 40,42 and 43, I have observed that s "discharge from service" cannot be granted as a punishment for any person who has been tried under a summary trial.

The Respondent was charged under Section 102(1) and Section 129 of the Air Force Act. Under these two Sections, the person who is the suspect has to be tried by a Court Martial. The Respondent was not tried by a Court Martial. The Appellants have acted wrongfully and against the provisions of law in the Air Force Act.

It is apparent that no person could be "discharged from service" consequent to a summary trial in terms of Sections 42 and 43 of the Air Force Act. It has to be after a conviction by a Court Martial. Under the Air Force Act, criminal trespass is an offence punishable under section 129 of the Air Force Act read with Section 427 of the Penal Code. Entering any premises without due

authority is an offence punishable under Section 102(1) of the Air Force Act. Charges under Section 129 and 102(1) of the Air Force Act should be tried by a Court Martial. The Respondent, even though charged under the aforementioned sections at the inquiry against him was not tried by a Court Martial. Ordering a discharge from service is one of the punishments that could be imposed under Section133 of the Air Force Act, by a Court Martial.

I hold that the Respondent could not have been tried under summary trial and thereafter discharged. The discharge was bad in law. The 1st Appellant had acted contrary to the provisions of the Air Force Act in ordering the discharge after the summary trial.

Furthermore, the Appellants have not explained as to what caused the Respondent to be punished and discharged from service. He was punished at the end of the inquiry. After he completed the detention period, he was ordered to be discharged. This is equal to a second sentencing which is not allowed in law. No person can be punished twice over. I hold that the discharge of the 1st Respondent was ultra -vires.

I answer the questions of law in the negative and hold that the findings of the Court of Appeal should not be disturbed. The Court of Appeal has analysed the provisions of law quite well and quashed the decision of the 1st Appellant. However, I vary the judgment to the effect that no costs be granted to the Respondent payable by the 1st Appellant. The costs ordered in the Court of Appeal in a sum of Rs.25000/- payable by the 1st Appellant to the Respondent is set aside. The appeal is dismissed. I order no costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

Priyasath 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 appeal in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka and the Provisions of the Industrial Disputes (Amendments) Act No. 32 of 1990 as subsequently amended.

SC/Appeal/106/2009
SC/SPL/LA/35/2009
WP/HCCA/KAL No. 21/2006
HCA (LT) 05/2006
LT.25/PN/507/2002

M.D.Gunasena & Co. Ltd.,
217, Olcott Mawatha,
Colombo 11.

Employer-Appellant-Appellant

Vs.

Somaratne Gamage ,
4/101, Padukka Road,
Horana

Applicant-Respond-Respondent

Before	:	Tilakawardane, J Imam, J Dep, PC J
Counsel	:	Shirley M. Fernando PC with Ruwn D.V. Dias Instructed by Palitha Perera for the Employer-Appellant-Appellant. W. Premathilake with Padma S. Perere for the Applicant-Respondent-Respondent.
Argued on	:	19-10-2011
Decided on	:	07-09-2012

Priyasath Dep, P.C, J.

This is an Appeal preferred against the Judgment dated 22- 01-2009 of the Provincial High Court of Kalutara affirming the Judgment of the Labour Tribunal of Panadura in Case No LT/PN/25/507/2002 which reinstated the Applicant-Respondent-Respondent.

The Applicant –Respondent-Respondent (hereinafter referred to as "Applicant") filed an Application in the Labour Tribunal of Panadura under Section 31B of the Industrial Disputes Act challenging the termination of his services by the Respondent-Appellant-Appellant (hereinafter referred to as "Respondent –Appellant") The Applicant was employed by the Respondent-Appellant as its Manager of the Horana Branch. He was employed in that capacity from 27th December 1994 and his services were suspended on 18.09.2000. By the letter dated 24-11-2011 his services were terminated with effect from 18. 09.2000. The Applicant alleged that his services were terminated unlawfully and claimed reinstatement with back wages or in the alternative compensation considering his past employment and the period he could be employed in the establishment in the future.

The Respondent-Appellant in its answer admitted termination and alleged that the termination was justified and that the Applicant is not entitled to any relief. The Respondent –Appellant stated that before terminating the services of the applicant a domestic inquiry was held by a retired judicial officer who found the applicant guilty of following acts of misconduct:

1. Failure to pay exhibition sales commission money to places where exhibition sales were conducted and where the money was collected by the Applicant for such payment.

2. Failure to pay sales promotion officer, C. Rajapakse the full sum payable to him on account of exhibition commissions.

In the letter of termination dated 24th November 2001 it was stated that that the Applicant was guilty of charges of serious nature which amounts to misappropriation of company's money.

In the replication the Applicant refuted the allegations made against him. The Applicant alleged that the domestic inquiry was not properly conducted and he was not allowed to continue with his cross-examination of the principal witness and the inquiry was abruptly concluded.

In the inquiry held by the Labour Tribunal, in order to justify termination the Respondent called Chaminda Rajapakse, sales promotion officer to prove the charges to which the Applicant was found guilty at the domestic inquiry. The said Chaminda Rajapakse gave evidence on several days and he was cross examined by the Applicant. Before the conclusion of his cross-examination the said witness Chaminda Rajapakse passed away. At this stage an application was made on behalf of the Applicant to expunge the evidence of this witness from the proceedings as he did not conclude his evidence. It is the position of the Applicant that he was prevented from cross-examining this witness on important

matters due to his sudden death. The President of the Labour Tribunal overruled the objection and proceeded with the inquiry. The Labour Tribunal is not prevented from considering Rajapakse's evidence subject to the infirmity that the Applicant could not complete his cross-examination which will no doubt affect the probative value of his evidence. The Respondent did not call other witnesses to supplement or substitute the evidence of Rajapakse.

The Applicant gave evidence and produced documents marked A1 –A59 and concluded his evidence. He did not call witnesses to support or corroborate his evidence. After the conclusion of the inquiry the Labour Tribunal ordered the reinstatement of the Applicant without a break in service and ordered the appellant to pay one year's salary as compensation. The learned President held that there was no evidence to prove Charge (1) leveled against the Applicant at the domestic inquiry. In relation to charge (2) where the Applicant did not pay the full sum payable to Chaminda Rajapakse as his exhibition commission it was established that Chaminda Rajapakse had wrongfully failed to return books worth over Rs. 12,000/- given to him for exhibitions. It was revealed in evidence that the Applicant had sent several reminders to Rajapakse to return books. He made a complaint against Rajapakse to the police after obtaining instructions from his seniors. The Applicant had deposited the money in the company account and he did not misappropriate that sum. The Labour Tribunal held that the Applicant was not guilty of misconduct.

Being aggrieved by the Order of the Labour Tribunal the Respondent filed an appeal to the Provincial High Court of Panadura. The Provincial High Court of Panadura affirmed the Order of reinstatement made by the Labour Tribunal. At the time of the judgment, it was revealed that the applicant had only one year to serve in the establishment before reaching the retiring age of 55. In view of this fact the High Court ordered the Respondent to pay four years salary as compensation or else the applicant to be employed by the Respondent Appellant for a period of four years.

Being aggrieved by the Order of the Provincial High Court, the Respondent Appellant appealed against the order to the Supreme Court and obtained leave on following questions of law;

Questions of Law;

(a) Is the Judgment of the Provincial High Court and the Order of the President of the Labour Tribunal vitiated by the fact that it is contrary to the mandatory provisions of the Industrial Disputes Act, which requires that such order should be just and equitable, particularly as the said employee himself has not asked for enhancement of relief ?

(b) Is the Judgment of the said Provincial High Court and the Order of the President of the Labour Tribunal vitiated by the failure to judicially evaluate the evidence led at the inquiry before the Labour Tribunal ?

In considering the first question of law it is necessary to ascertain whether the orders of the Labour Tribunal and the High Court are just and equitable particularly for the

reason that the Employee (Applicant) did not ask for enhanced relief. The Applicant in his application to the Labour tribunal specifically prayed for reinstatement with back wages and in the alternative adequate compensation considering his period of service and also the prospect of future employment in the respondent company. The Labour Tribunal ordered reinstatement with effect from 15.06.2006 without a break in service and also compensation amounting to one year's salary. This order is well within the powers of the Labour Tribunal.

The Respondent-Appellant did not comply with the order of the Labour Tribunal and exercised its statutory right to appeal against the said order. The High Court upheld the findings of the Labour Tribunal. Considering the fact that the Applicant had only one year to serve in the respondent company before reaching the retirement age, ordered the respondent company to pay 4 years salary unless it allows the applicant to continue for four years in the company. It is to be observed that the applicant's services were terminated in September 2000. The said termination was held to be unjust. In such circumstances, the Labour Tribunal has the power to order reinstatement with back wages. However, Labour Tribunal did not order back wages. Therefore, Respondent- Appellant cannot complain that the order is not a just and equitable order. The applicant was out of employment from 2000 due to unlawful termination of his services. If he was reinstated in 2006 as ordered by the Labour Tribunal the applicant could have served more than four years in the company before reaching the retirement age. In such circumstances one cannot state that the order of the High Court to pay four years salary as compensation is not a just and equitable order. It is well within the powers given by the Industrial Disputed Act and falls within the reliefs prayed for by the applicant.

In the second question of law the Respondent- Appellant alleged that the President of the Labour Tribunal and the honorable judges of the High Court failed to judicially evaluate the evidence led at the inquiry before the Labour Tribunal.

The Labour Tribunal as well as the High Court after examining the evidence came to the conclusion that the Applicant was not guilty of misconduct. The question that arises is whether the evidence was properly evaluated and the finding could be supported by the evidence led at the inquiry.

It is necessary at this stage to briefly refer to the alleged misconduct and the evidence led to establish that fact. The main allegation against the Applicant is that he had failed to pay Sales Promotion officer, C. Rajapakse the full sum due to him as exhibition commission. The Applicant giving evidence admitted that he received Rs. 15216.91 as sales commission payable to C. Rajapakse, the sales promotion officer. The money was deposited in the bank account of the branch. Applicant was required to pay money out of daily proceeds of the branch. Accordingly on 9th April 1999 he paid Rs. 5216.90 and another sum of Rs. 5000/- was paid on 28th April 1999. He withheld Rs. 5000/- and retained that money in the bank account of the branch because the sales promotion officer C.Rajapakse failed to return books worth Rs. 12000/- given to him for exhibitions. It was revealed that in spite of several reminders, C. Rajapakse did not return the books and the applicant made a complaint to the police.

It is to be noted that the balance Rs. 5000/- due to C. Rajapakse was kept in the bank account of the branch. Therefore, one cannot state that the Applicant misappropriated that sum. He did not appropriate or convert that money for his use. He did not release the balance money to the sales promotion officer due to the reason that Rajapakse did not return the books belonging to the company in spite of several reminders sent to him. The Applicant's decision to retain that money in the Branch account is a sound and a prudent financial decision which is in the best interest of the Respondent-Appellant. On the other hand had the Applicant retained the money with him without paying Chaminda Rajapakse he is certainly guilty of misappropriation. In that background the Labour Tribunal as well as the High Court had to determine whether the conduct of the Applicant amounts to a misconduct or**.**

The Respondent-Appellant in order to justify the termination called the sales promotion officer C. Rajapakse to give evidence against the Applicant.-Respondent. He admitted that he retained the books with him and the applicant send reminders to him and also made a complaint against him.

The question that arises is whether the conduct of the applicant amounts to misconduct or not. If the applicant is found guilty of misconduct the next question that arises is whether it amounts to a grave or serious misconduct that warrants a dismissal.

Misconduct is not defined in the Industrial Dispute Act. In the absence of a definition it is necessary to refer to case laws in Sri Lanka and in other jurisdictions. Sri Lankan and Indian Courts have followed the English case law. As far back as 1886 Pearce v. Foster [(1886)17QBD 536, 5LJ QB306], laid down the law thus "The test is that the misconduct must be inconsistent with the fulfillment of the express or implied conditions of service in order to justify dismissal". This was followed in Shalimar Rope Works Mazdoor Union v. Shalimar Rope Works Ltd. 1953(2) LLJ 876, a case very often cited in our courts.

A slightly different test was laid down in Laws v. London Chronical Ltd. [1959-2 ALL ER 285, 1959-1WLR 698]. In that case it was held that "the misconduct must be inconsistent with the fulfillment of the express or implied conditions of service or such as to show that the servant had disregarded the essential conditions of the contract of service."

The implied conditions of service includes conduct such as obedience, honesty, diligence, good behavior, punctuality, due care. Therefore following acts such as disobedience, insubordination, dishonesty, negligence, absenteeism and late attendance, assault are treated as acts of misconduct which are inconsistent with the implied conditions of service.

The next question that arises is the degree of misconduct which will justify termination. In Clouston and Co. Ltd. V. Cory, 1906AC 122 the Privy Council stated "now the sufficiency of the justification depended upon the extend of misconduct. There is no fix rule of law defining the degree of misconduct which will justify dismissal. Of course, there may be misconduct in a servant which will not justify the

determination of the contract of service by one of the parties to it against the will of the other. On the other hand, misconduct inconsistent with the fulfillment of the express or implied conditions of service will justify dismissal"

The Indian case of Sharda Prasad Tiwari and others v. Divisional Superintendent, Central Railway, Nagpur Division (1961 AIR Bombay 150-154) followed the principles laid down in English cases cited above and proceeded to enumerate the acts or conduct of a servant which may amounts to misconduct . In the light of the above authorities this court has to ascertain whether the Applicant –Respondent is guilty of misconduct or not. I find that for the reasons stated above, Applicant Respondent's conduct is not inconsistent with the fulfillment of the express or implied conditions of service. The Appellant –Respondent failed to establish this fact. The Applicant did not commit any act of misconduct and therefore termination of his services is not justified.

I am of the view that the findings of both the Labour Tribunal and the High Court are correct and in accordance with the law.

The Provincial High Court of Panadura affirmed the order of reinstatement made by the Labour Tribunal. At the time of the judgment it was revealed that the applicant had only one year to serve in the establishment before reaching the retirement age of 55. In view of this fact the High Court ordered the Respondent to pay four years salary as compensation unless the applicant to be employed by the Respondent Appellant company for a period of four years. The applicant had now passed the retirement age and the relations between the applicant and the respondent had strained due to protracted litigation. Therefore the alternative relief of employing the applicant for a further period of four years is not desirable and for that reason that part of the judgment is set aside.

Subject to the above variation the judgment of the Provincial High Court of Panadura is affirmed. Respondent appellant is ordered to pay four years salary calculated on the basis of Rs 6800 per month as compensation in lieu of re instatement and a further sum of Rs 39,000/= as ordered by the High Court..

Appeal dismissed. I order Rs, 75,000/- costs to be paid by the Respondent Appellant - Appellant to the Applicant-Respondent - Respondent.

Judge of the Supreme Court

Shiranee Tilakawardana, J.
I agree

Judge of the Supreme Court

S.I. Imam, J.
I agree

Judge of the Supreme Court

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

SC. 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 application for Special Leave to Appeal to the Supreme Court in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka against the order of the Court of Appeal in CA (Writ) Application No. 411/2012 dated 03.01.2013.

Sumudu Kantha Hewage,
No. 38/7, Pokuna Road,
Oruthota,
Gampaha.

INTERVENIENT-PETITIONER-PETITIONER-APPELLANT

-Vs-

SC Appeal No. 114/2013
SC (SPL) LA Application No. 23/2013
CA (Writ) Application No. 411/2012

Dr. Upathissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake.

Residence of the Chief Justice of Sri Lanka
No. 129, Wijerema Mawatha,
Colombo 07.

Presently at: No. 170, Lake Drive, Colombo 08.

PETITIONER-RESPONDENT-RESPONDENT

-Vs-

1. Chamal Rajapakse,
   Speaker of Parliament,
   Parliament of Sri Lanka,
   Sri Jayawardenepura, Kotte.

2. Anura Priyadarshana Yapa,
   Eeriyagolla,
   Yakawita.

3. Nimal Siripala de Silva,
   No. 93/20, Elvitigala Mawatha,
   Colombo 08.

4. A. D. Susil Premajayantha,
   No. 123/1, Station Road,
   Gangodawila, Nugegoda.

5. Rajitha Senaratne,
   CD 85, Gregory's Road,
   Colombo 07.

6. Wimal Weerawansa,
   No. 18, Rodney Place,
   Cotta Road, Colombo 08.

7. Dilan Perera,
   No. 30, Bandaranayake Mawatha,
   Badulla.

8. Neomal Perera,
   No. 3/3, Rockwood Place,
   Colombo 07.

9. Lakshman Kiriella,
   No. 121/1, Pahalawela Road,
   Palawatta, Battaramulla.

10. John Amaratunga,
    No. 88, Negambo Road,
    Kandana.

11. Rajavarothiam Sampathan,
    No. 2D, Summit Flats,
    Keppitipola Road,
    Colombo 05.

12. Vijitha Herath,
    No. 44/3, Medawaththa Road,
    Mudungoda, Miriswaththa,
    Gampaha.

13. W.B.D. Dassanayake,
    Secretary General of Parliament,
    Parliament Secretariat,
    Parliament of Sri Lanka,
    Sri Jayawardenapura, Kotte.

14. The Attorney General,
    Attorney General Department,
    Colombo 12.

RESPONDENTS-RESPONDENTS-ESPONDENTS

Before **:** Hon. Saleem Marsoof, PC., J.
Hon. Chandra Ekanayake, J.
Hon. Sathyaa Hettige, PC., J
Hon. Eva Wanasundera, PC., J and
Hon. Rohini Marasinghe, J.

Counsel	**:**	Nigel Hatch, PC, with S. Galappathi and Ms. S. Illangage for the Intervenient-Petitioner-Petitioner-Appellant. M.A. Sumanthiran with Viran Corea and Niran Ankatell for the 11th Respondent-Respondent-Respondent. J.C. Welimuna with Viran Corea for the 12th Respondent-Respondent-Respondent. Shavindra Fernando, PC, Addl. SG, with Sanjay Rajaratnam, DSG, Nerin Pulle, SSC, and Manohara Jayasinghe, SC for the 14th Respondent-Respondent-Respondent.
Argued on	**:**	20.12.2013
Decided on	:	24.03.2014

SALEEM MARSOOF J.

This is an appeal against the order of the Court of Appeal dated on the 3rd January 2013 by which the said court refused an application made by the Intervenient-Petitioner-Petitioner-Appellant (hereinafter referred to as 'the Appellant') to intervene into CA (Writ) Application number 411/2012 which had been filed by the then incumbent Chief Justice Hon. (Dr). Upathissa Atapattu Bandarnayake Wasala Muduyanse Ralahamilage Shirani Anshumala Bandarnayake, (hereinafter referred to as 'Hon. (Dr.) Bandarnayake') against Hon. Chamal Rajapakse, Speaker of Parliament, and 12 others, seeking a writ of *certiorari* to quash the report and findings of the Parliamentary Select Committee (PSC) which had been appointed by the 1st Respondent-Respondent-Respondent to consider the allegations made against Hon. (Dr.) Bandarnayake, and an order in the nature of prohibition to restrain further steps being taken pursuant to the notice of resolution in terms of Article 107(2)and (3) of the Constitution. The said application was made by the Appellant on the basis that the Appellant is a concerned member of the public and represented the best interests of the public at large, and in particular asserted that the Court of Appeal was bereft of jurisdiction to entertain or to determine the writ application filed by Hon. (Dr.) Bandarnayake.

The only question on which this court granted special leave to appeal to the Appellant was set out in paragraph 19(c) of the petition dated 7th February 2013 filed by the Appellant, which was as follows:-

> Has the Court of Appeal erred in law in not allowing the Appellant to intervene in CA (writ application) no 411/2012 having regard to the Petitioner submitting to the Court of Appeal that it had no jurisdiction to entertain and/or hear and/or determine the said application?

Mr Nigel Hatch PC., has emphasised that the Appellant had an interest in the protection and the fostering of the independence and integrity of the judiciary, and that the refusal of the application of the Appellant to intervene in the proceedings that were then pending in the Court of Appeal amounted to a travesty of the law. He also submitted that had the Appellant been allowed to intervene, the Court of Appeal would not have exceeded its jurisdiction conferred by Article 140.

By the impugned order of the Court of Appeal dated 3rd January 2013, the applications of the Appellant and another person (who has not appealed against the order of the Court of Appeal) to intervene into the then pending proceedings in CA (Writ) Application No. 411/2012, were refused on certain grounds that would appear from the passage of the impugned order of the Court of Appeal quoted below:-

> This order is in relation to the intervention applications filed by Don Chandrasena and Sumudu Kantha Hewage [present Appellant]. These two intervenient applications were supported by the learned President's Counsel and they have sought to intervene in this writ application filed by the Petitioner [Hon. (Dr.) Bandaranayake] which sought to quash the decision of the Parliamentary Select Committee. The petitioners claimed that they are citizens of Sri Lanka and the proposed intervenient, Mr. Sumudu Kantha Hewage, in addition claimed that he is an Attorney-at-Law. Their position is that their intervention would assist this Court in arriving at a decision as the petitioner has not made the Attorney General as a party to these proceedings. This Court after careful consideration of the application of the two petitioners observes that a grant or refusal of the relief sought by the petitioner will not have any adverse impact directly or indirectly on the intervenient petitioners. Further, the Court has decided to notice the Attorney General to appear as *amicus curiae* in this application and therefore the intervention of the intervenient petitioners is not required to assist Court in these proceedings. Therefore this Court dismisses the application for intervention. Both applications for intervention are dismissed.

It is noteworthy that after the refusal of the application of the Appellant to intervene on 3rd January 2013, the Attorney General was in fact noticed to assist Court, and after hearing all Counsel including the learned Attorney General on 7th January 2013, proceeded to pronounce judgment on the same day, granting the Hon. (Dr.) Bandaranayake a mandate in the nature of writ of *certiorari* quashing the report and findings of the Parliamentary Select Committee, while refusing prohibition. The said judgment, which concluded all proceedings in the Court of Appeal, was set aside by this Court on appeal in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014) *inter-alia* on the basis that the Court of Appeal lacked jurisdiction to review a decision of a Select Committee of Parliament appointed under Article 107 read with Order 78A(2) of the Standing Orders of Parliament in writ proceedings.

Having heard all the learned Counsel, who made extensive submissions, I am of the opinion that in making the impugned order dated 3rd January 2013, the Court of Appeal had taken into consideration the law and practice applicable to applications for intervention in pending proceedings, and did exercise its jurisdiction correctly in refusing the Appellant's application to intervene. In particular, it is apparent from above quoted passage from the impugned order of the Court of Appeal, that court was satisfied that the participation of the Attorney General, who is the Chief Law Officer of the State, was sufficient to represent the interests of the parties as well as those of the public. In any event, since the proceedings in the Court of Appeal have come to an end, I cannot see any useful purpose in granting the Appellant any relief. For these reasons I make order dismissing the appeal, without costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J,

I agree.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasundera, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Rohini 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 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

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
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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

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

Balasinghe Pedige Wilson
7th Defendant-Respondent-Petitioner-Apellant.

SC Appeal 123/2010
SC(HCCA) CALA 223/10
WP/HCCA/GPH/No. 49/02(F)
DC Gampaha Case No.34135/P

Vs

Nilgal Pedige Kusumawathi
Plaintiff-Appellant-Respondent-Respondent

1. Balasinghe Pedige Babiya (Deceased)
1a. Balasinghe Pedige Wilbert
2. Balasinghe Pedige Edwin
3. Balasinghe Pedige Wilbert
4. Balasinghe Pedige Anulawathi
5. Balasinghe Pedige Jayamanna
6. Balasinghe Pedige Nalini Jayamanna
7. Balasinghe Pedige Wilson
8. Sinhala Pedige Pesona
9. Balasinghe Pedige Swarna
10. Chandrasiri Pathiranage Keerthiratne

Defendant-Respondent-Respondent-Respondents

Before : Saleem Marsoof PC, J
Sisira J De Abrew J
Sarath de Abrew J

Counsel : Sandamal Rajapakshe for the
7th Defendant-Respondent- Petitioner-Apellant.
Palitha Ranatunga for the
Plaintiff-Appellant-Respondent-Respondent
Sumudu Liyanaarchchi for the 1a and 3rd
Defendant-Respondent-Respondent-Respondents

Argued on : 7.7.2014
Decided on : 17.10.2014

Sisira J De Abrew J.

The Plaintiff-Appellant-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) filed action in the District Court of Gampaha (DC Gampaha 34135/P) to have the land called Othudena Atambagahakumbura which is morefully described in the schedule to the plaint partitioned. After trial the learned District Judge, by his judgment dated 1.7. 2002, dismissed the action. Being aggrieved by the said judgment, the said plaintiff-Respondent filed an appeal in the High Court (Civil Appellate) of Gampaha (hereinafter referred to as the High Court). The said Plaintiff-Respondent before filing the petition of appeal in the High Court, filed a notice of appeal naming all the parties in the District Court. She also sent notices of appeal to all the parties. At the hearing before the High Court, the7th Defendant-Respondent-Petitioner-Appellant (hereinafter referred to as the Appellant) raised a preliminary objection that the Plaintiff had not given names of all the respondents in the petition of appeal as required by Section 758 of the Civil Procedure Code. The High Court overruled the said preliminary objection and fixed the matter for argument. Being aggrieved by the said order of the High Court, the Appellant has appealed to this court.

This court, by its order dated 4.10.2010 granted leave to appeal on the question of law set out in paragraph 13(1) of the petition of appeal dated 16.7.2010 which is reproduced below:-

> "Did the learned judges of the Provincial High Court err in law in arriving at the erroneous conclusion that not naming all the affected parties to an action in the Petition of Appeal is a curable defect under the Provisions of section 759(2) of the Civil Procedure Code?"

Learned counsel for the Appellant stressed on the same preliminary objection raised in the High Court. He submitted that failure on the part of the Plaintiff-Respondent to name the nine respondents who were defendants in the District Court had caused severe prejudice to the said respondents. He further submitted that this was not a curable defect under Section 759 of the Civil Procedure Code. This was the only ground submitted by him. Learned counsel for the 1a and 3rd Defendant-Respondent-Respondent-Respondents too made the same submission. I now advert to the said contention.

It has to be noted here that when the Plaintiff-Respondent filed the notice of appeal she cited the names of all the parties in the said notice of appeal. Further she had sent notices to all the parties. When I consider the submission of learned counsel for the Appellant it is pertinent to consider Section 759 of the Civil Procedure Code which reads as follows.

> "(1) If the petition of appeal is not drawn up in the manner in the last preceding section prescribed, it may be rejected, or be returned to the appellant for the purpose of being amended, within a time to be fixed by the court; or be amended then and there. When the court rejects under this section any petition of appeal, it shall record the reasons of such rejection. And when

any petition of appeal is amended under this section, the Judge, or such officer as he shall appoint in that behalf, shall attest the amendment by his signature.

(2) In the case of any mistake, omission or defect on the part of any appellant in complying with the provisions of the foregoing sections, the Court of Appeal may, if it should be of opinion that the respondent has not been materially prejudiced, grant relief on such terms as it may deem just."

I would like to consider a certain judicial decision on this point. In *Nanayakkara V Warnakulasuriya* [1993] 2 SLR 289 Supreme Court held thus:

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

The decision of the Supreme Court in *Jayasekara V Lakmini* and others [2010] 1SLR41 would lend support to answer the contention raised by learned counsel for the Appellant. In the said case the following facts were observed.

"The 4th defendant-appellant failed to name the 1st and the 2nd defendants in the District Court in the partition action as the respondents in the appeal – only the plaintiff was made a party. On the objection raised by the plaintiff-appellant that the appeal is not properly constituted the High Court overruled the objection stating that all necessary parties had been noticed by the 4th defendant-appellant in compliance with Section 755 and fixed the case for the argument. The plaintiff-respondent sought leave to appeal from the said order and leave was granted." Justice Chandra Ekanayake (with JAN de Silva CJ and Marsoof PC,J agreeing) held (page 52) thus: "The issue at hand falls within the purview of a

mistake, omission or defect on the part of the appellant in complying with the provisions of Section 755. In such a situation if the Court of Appeal was of the opinion that the respondent has not been materially prejudiced, it was empowered to grant relief to the appellant on such terms as it deem just."

In the light of the aforesaid judicial decisions, I hold that when there is a failure on the part of an appellant to name all the respondents in the petition of appeal the test that should be applied is whether the respondents have been materially prejudiced by such failure. If the respondents have not been materially prejudiced, the Court can grant relief under Section 759 of the Civil Procedure Code.

Can it be said that the respondents in the present case have been materially prejudiced by the failure on the part of the Plaintiff-Respondent to state names of all the respondents? It is correct that the Plaintiff-Respondent has set out only the name of the 1st respondent in the petition of appeal filed in the High court. If the respondents were notified of the appeal which would be filed in Court, in my view, it cannot be said that the respondents were materially prejudiced because if the respondents were interested in opposing the appeal, they had the opportunity to do so. The Plaintiff-Respondent has cited the names of all the respondents in the notice of appeal and sent notices to all of them and to their registered Attorneys-at-law under registered post. Thus if they wanted to oppose the appeal they had ample opportunity to do so. For these reasons, I hold that the respondents have not been materially prejudiced by the failure on the part of the Plaintiff-Respondent to name all the respondents in the petition of appeal. In my view the said defect can be cured by amending the caption naming all the respondents and by sending notices to the respondents. For the above reasons, I hold that the above defect is a curable

defect under Section 759 of the Civil Procedure Code. I answer the above question of law raised by the Appellant in the negative.

The learned High Court Judges, in their judgment dated 10.6.2010, have already specified the names of all the respondents. The Plaintiff is directed to file an amended caption by naming all the respondents.

For the above reasons, I dismiss the appeal with costs and direct the High Court to send notices to all the respondents whose names appear on the notice of appeal and conclude the appeal without delay. In all the circumstances of the case, I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

Saleem Marsoof PC, J

I agree.

Judge of the Supreme Court.

Sarath de Abrew 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 Section 5C of the High Court of the Provinces (Special Provisions) At No. 54 of 2006.

Nandasena Wickramasekara Rajapaksha,
No. 51, New Town,
Kataragama.

SC APPEAL No. 125/2010
SC (HC) CALA No. 350/2009
SP/HCCA/MA/198/2003F
DC Tissamaharama Case No. L.26/1997

DEFENDANT - APPELLANT - APPELLANT

-Vs-

1. Wanniarachchi Kankanamalage Temawathie,

2. Wanniarachchi Kankanamalage Julie Nona,
Both of No. 104, Old Buttala Road,
Kataragama.

PLAINTIFFS – RESPONDENTS - RESPONDENTS

BEFORE	:	Hon. Saleem Marsoof, P.C., J, Hon. Sisira J. de Abrew, J, and Hon. Sarath de Abrew, J.
COUNSEL	:	W. Dayaratne, P.C. with R. Jayawardane and S.T. de Zoysa for the Appellant - Appellant - Appellant. Manohara de Silva, P.C. with Ms. Pubuduni Wickramarathne and H. Munasinghe for the Plaintiff - Respondent - Respondent.
ARGUED ON	:	07.07.2014 and 02.09.2014
Written Submissions	:	16.5.2012 (Appellant) 19.5.2012 (Respondents)
DECIDED ON	:	17.12.2014

SALEEM MARSOOF, P.C., J,

This is an appeal from the judgment of the High Court for the Southern Province holden in Matara exercising civil appellate jurisdiction (hereinafter referred to as "the Civil Appellate High Court") dated 12th November 2009 which affirmed the judgment of the District Court of Tissamaharama dated 17th July 2003 granting the Plaintiffs-Respondents-Respondents (hereinafter referred to as "the Respondents") certain relief against the Defendant-Appellant-Appellant (hereinafter referred to as "the Appellant").

This Court has granted leave to appeal against the said judgment of the Civil Appellate High Court on the following substantive questions of law set out in paragraphs 12(b), 12(c), 12(d) and 12(h) of the petition of appeal, which read as follows:-

(b) Did their Lordships of the Civil Appellate High Court as well as the learned trial judge err in law when they held that the Plaintiffs-Respondents-Respondents had inherited the title of Wanniarachchi Kankanamlage Babun Appuhamy, when he did not even have an annual permit to the *corpus*?

(c) Did their Lordships of the Civil Appellate High Court err in law when they seriously misdirected themselves by treating the action filed by the said Respondents as a *rei vindicatio* action and declared that the Respondents are the owners, when the learned trial judge had held that this is not a *rei vindicatio* or a declaratory action and therefore he cannot declare that Babun Appuhamy was the owner, and would consider this only as a possessory action?

(d) Did their Lordships of the Civil Appellate High Court as well as learned trial Judge err in law when they failed to consider that the Respondent's action is time barred in terms of Section 4 of the Prescription Ordinance?

(h) Did their Lordships of the Civil Appellate High Court as well as the learned trial Judge err in law when they totally disregarded the evidence of the witness who prepared ඕ1 and also signed as a witness, whose evidence was not contradicted and which would clearly disprove the Respondents' contention that they were in possession of the *corpus*?

Before considering the submissions of the learned President's Counsel for the Appellant and the Respondents, it might be useful to outline the material facts.

The Factual Matrix

Wanniarachchi Kankanamlage Babun Appuhamy, who was the father of the two Respondents, Temawathie and Julie Nona, had been the owner of lot 453 of the land described in Topographical Survey Plan No 25 pertaining to Kataragama, which was 33.2 perches in extent, which was acquired under the Land Acquisition Act No. 9 of 1950, as amended, for the Kataragama Sacred City Project. In lieu of the said land, the government allotted to Babun Appuhamy, lot 1295 of Detagamuwehena, in extent 40 perches, which is the land described in the schedule to the plaint filed by the Respondents in the District Court of Tissamaharama, until they were evicted on or about 27th November 1996 from the said *corpus* by the fiscal. The Respondents claim that they were deprived of their possession of the land by virtue of an order made in favour of the Appellant in terms of Section 68 of the Primary Courts' Procedure Act No. 44 of 1979, as amended, in Primary Court Tissamaharama case No. 36365, which the Respondents claim was obtained by misleading Court through a total abuse of the judicial process.

It is common ground that the said land is State Land, and it is also evident that no permit had been granted to Babun Appuhamy, and the Respondents claim that Babun Appuhamy was allotted and put into occupation of the land on the basis that he will be issued in due course with a permit in terms of the Land

Development Ordinance, No 19 of 1935, as amended. Babun Appuhamy died in 1977, and the Respondents claim that upon the death of their father, their mother possessed the land, but she died of a bomb explosion in 1989 as a result of which the 1st Respondent, Temawathie, also was seriously injured, but they continued to possess the land until they were evicted on or about 27th November 1996 by an order made by the Primary Court.

By their plaint dated 16th January 1997, the Respondents sought the following relief from the Appellant:-

(අ) මෙම ඉඩමේ මුල් මිහිකරු සහ භුක්තිකරු වූයේ වන්නිආරච්චි කංකානම්ලාගේ බබුන් අප්පුහාමි බවට ප්‍රකාශයක්ද,

(ආ) පැ1 දරණ ලේඛණය, වංචා වැලැක්වීමේ ආඥාපනතේ විධිවිධාන වලට පටහැනි ලේඛණයක් බවට තීන්දු, ප්‍රකාශයක්ද,

(ඇ) පැ1 දරණ ලේඛණය මත මෙම විත්තිකරුට මෙම ඉඩමට නීත්‍යානුකූල හිමිකමක් ලැබී නැති බවට ප්‍රකාශයක්ද,

(ඈ) විත්තිකරු සහ ඔහු යටතේ හිමිකම් කියන සියල්ලන්ම එකී ඉඩමෙන් ඉවත් කොට මෙම පැමිණිලිකරුවන් එකී ඉඩමේ භුක්තියේ පිහිටුවීමේ නියෝගයක්ද,

(ඉ) 1996.11.27 දින සිට සෑම මසකටම රු:1500/- බැගින්, භුක්තිය භාරදෙන දිනය දක්වා අලාභද, එකී අලාභමය වාණිජ පොලියද විත්තිකරුගෙන් අයකර ගැනීමේ නියෝගයක්ද,

(ඊ) ප්‍රාථමික අධිකරණයේ අංක 36365 දරණ නඩුවට ඉදිරිපත් කිරීම නිසා මෙම පැමිණිලිකරුවන්ට දැරීමට සිදුවූ නීති කටයුතු වියදම් වශයෙන් රුපියල් 25,000/- ක මුදලක් හා 1996.11.27 දින සිට එය ගෙවන දිනය දක්වා ඊට වාණිජ පොළියද ලබාගැනීම සඳහා නියෝගයක්ද,

(උ) මෙම නඩුවේ නඩු ගාස්තු සහ ගරු අධිකරණයට සුදුසු යයි හැගෙන වෙනත් සහ අනෙකුත් සහනයන්ද වේ.

When translated into English, the prayers for relief would read as follows:-

(a) a declaration that Wanniarachchi Kankanamlage Babun Appuhamy was the original owner and possessor of the subject matter;
(b) a declaration that the documents marked පැ1 is contrary to the provisions of the Prevention of Frauds Ordinance;
(c) a declaration that the document marked පැ1 does not give the Appellant any legal entitlement to the land in dispute;
(d) a decree for an ejectment of the Defendant-Appellant-Appellant and all those claiming title under him and to restore the Respondents back in possession;
(e) damages in a sum of Rs. 1500/- per month and interest thereon from the Appellant from 27.11.1996 until the possession is handed back to the Respondents; and
(f) a decree to recover, legal expenses in a sum of Rs.25,000/- incurred by the Respondents in case No. 36365 filed in the Primary Court from 27.11.1996 until the payment in full.

The Appellant filed his answer on or about 31st July 1997, denying the several averments contained in the plaint and praying for (a) an order that the plaint is not in conformity with Section 46 of the Civil

Procedure Code, (b) a judgment that that the Respondents are not entitled to maintain the action without making the State a party, (c) a judgment that the Respondents are not entitled to any reliefs prayed for in the plaint, (d) for judgment in the sum of Rs. 50,000/- as damages for the defamation and injury caused to the Appellant's social status and the mental pain suffered by the Appellant as a result of the institution of the instant action by the Respondent alleging fraud and dishonesty on the part of the Appellant, and (e) for costs.

At the commencement of the trial, the parties admitted the jurisdiction of court, and also further admitted that the said Babun Appuhamy possessed the corpus consisting of the 40 perch land described in the schedule to the plaint, that the said Babun Appuhamy is now dead, that the Appellant is a Post Master and a Member of the Katharagma Pradeshiya Sabha and that the document annexed to the plaint marked පැ1 was produced in Primary Court Tissamaharama case No. 36365. Thereafter, the Respondents raised issues 1 to 8, which are reproduced below:-

1. එකී බබුන් අප්පුහාමිගේ පිවිත කාලයේදී මෙම නඩුවට විෂය වන ඉඩම විත්තිකරු නමට අන්සතු නොකරන ලද්දේ ද?

2. එකී බබුන් අප්පුහාමි විසින් දරණ ලද බුක්තිය හේතුවෙන් නිතිය ඉදිරියේ ඔහු අයිතිකරු හා / හෝ හිමිකරු බවට නිතියෙන් පූර්ව නිගමනය කළ යුතුද?

3. 96.11.27 දින පටන් තිස්සමහාරාම ප්‍රාථමික අධිකරණයේ අංක 36365 දරණ නඩුවේ නියෝගය මගින් පැමිණිලිකරුවන්ගේ බුක්තිය අහිමි වී ඇද්ද?

4. එසේ පැමිණිලිකරුවන්ගේ බුක්තිය අහිමි වුයේ එම ප්‍රාථමික අධිකරණයේ නඩුවේ දී මෙම විත්තිකරු විසින් ඉදිරිපත් කරන ලද දිවුරුම් ප්‍රකාශ සහ ලේඛණ හේතුවෙන් ද?

5. පැමිණිල්ල සමග ගොනුකොට ඇති පැ.1 දරණ ලේඛණය මත විත්තිකරුට කිසිම නීත්‍යානුකූල හිමිකමක් මෙම වඩුවේ විෂය වස්තුව සම්බන්ධයෙන් නොලැබේද?

6. පැ.1 දරණ ලේඛණය වංචා වැළැක්වීමේ අඥා පනතේ විධිවිධාන වලට පටහැනි කූට සහ නීතිවිරෝධී ලේඛණයක් ද?

7. ප්‍රාථමික අධිකරණයේ අංක 36365 නඩුවේ ඉදිරිපත් කරන ලද විත්තිකරුගේ දිවුරුම් ප්‍රකාශ මගින් මෙම ඉඩම බබුන් අප්පුහාමිට අයත්ව බුක්ති විඳින බවට විත්තිකරු විසින් කරන ලද ප්‍රකාශයක් ප්‍රතික්ෂේප කිරීමෙන් විත්තිකරු ප්‍රතිබන්ධනය වී ඇද්ද?

8. ඉහත සඳහන් ප්‍රශ්න වලට ඔව් යනුවෙන් පිළිතුරු ලැබේ නම් පැමිණිලිකරුවන්ට පැමිණිල්ලේ ඉල්ලා ඇති සහන ලැබිය යුතු ද?

Of the issues 9 to 18 raised by the Appellant, the most material for this appeal were issues 9, 10, 13 and 18, which are reproduced below:-

9. මෙම විෂය වස්තුවේ බුක්තියේ සිට බබුන් අප්පුහාමි, පැමිණිල්ල ඉදිරිපත් කිරීමට වර්ෂ 20 කට පමණ පෙර විෂය වස්තුවේ සාමකාමී බුක්තිය විත්තිකරුට බාරදී ඉවත්ව ගියේ ද?

10. එදින සිට විත්තිකරු විෂය වස්තුව අඛණ්ඩව බුක්ති විඳගෙන එන්නේ ද?

13. විත්තිකරු විෂය වස්තුව දැනට අවුරුදු 20 කට පෙර සිට ඇද දක්වා සංවර්ධනය කර බුක්ති විඳින්නේ ද?

18. ඉහත සඳහන් පැනයන්ට විත්තිකරුගේ වාසියට උත්තර ලැබෙන්නේ නම් උත්තරයේ ඉල්ලා ඇති සහන විත්තිකරුට ලැබිය යුතුද?

I have not reproduced the other issues of the Appellant, which were entirely procedural in nature, such as whether the plaint discloses a cause of action against the Appellant, whether the action can be maintained without adding the State as a party, or whether the action was undervalued, which should have been taken up and dealt with by way of motion before the case was set for trial.

At the trial, the two Respondents testified, and also called witnesses Aluthgedara Henry Dias, who was a Colonization Officer of the Kataragama Divisional Secretariat Office, Herath Mudiyansalage Vini Lalith Abeywickrema, who was Deputy Director of the Town and Country Planning Department, Battaramulla, and Nawaratne Dheerasinghe Mudiyanselage Vijitha, who was a Planning Officer of the Surveyor General's Department. The Respondents concluded their case by marking in evidence documents පැ1 to පැ8.

Thereafter, the Appellant testified on his behalf, followed by the evidence of Kuda Antonige Manuel, Chandrasena Wickramarachchi, and Palitha Devanarayana, who was a subject Clerk of Pradeshiya Sabha, Kataragama. The Appellant concluded his case marking in evidence documents වි1 to වි5. After the conclusion of the trial, both parties were directed to file written submissions. After the filing of written submissions, the learned District Judge pronounced judgment on 17th July 2003 in favour of the Respondents. The reasoning of the learned District Court Judge is unclear as to whether the Court regarded the present case to be *rei vindicatio* action or a possessory action. At page 9 of his judgment, the learned District Court Judge stated:-

> "පැමිණිලිකරුවන් විසින් ඉඩමේ මුල් හිමිකරු වශයෙන් තම පියාට අයිති බවට ප්‍රකාශයක් කරන මෙන් ඉල්ලා ඇතත් පැමිණිල්ලේ සඳහන් කරුණු සහ නඩු විභාගයේ දී ඉහත ඉදිරිපත් කරන ලද කරුණු අනුව එසේ 'අයිතියක්' ප්‍රකාශකරවා ගැනීම පැමිණිලිකරුට නෛතික හැකියාවක් නොමැති බව පැහැදිලි වේ. නමුත් පැමිණිල්ලේ ආයාචනයේ ඉදිරිපත් කර ඇති පරිදි ඊට අඩු තත්වයක් වන බුක්ති විඳීමට ප්‍රකාශයක් ලබා ගැනීමට හැකියාවක් ඇති බව පෙනී යයි."

The District Court granted relief to the Respondent in the following terms:-

> "ඒ අනුව පැමිණිල්ලේ ආයාචනයේ (අ) මගින් ඉල්ලා ඇති පරිදි මෙම ඉඩම භුක්ති විඳීමට බඹුන් අප්පුහාමිට හිමිකමක් තිබූ බවට තීරණය කරමි. ආයාචනයේ (ඈ) පරිදි විත්තිකරුට එරෙහිව භුක්තියේ පිහිටීමට පැමිණිලිකරුවන්ට නියෝගයක් නිකුත් කරමි."

The Appellant preferred an appeal against the decision of the District Court to the Court of Appeal, but the case was subsequently transferred to the Civil Appellate High Court of the Southern Province holden in Matara, which enjoys concurrent jurisdiction with the Court of Appeal. The Civil Appellate High Court, after hearing both parties, pronounced its judgment on 12th November 2009, affirming the judgment of the learned District Judge and dismissing the appeal. It would appear from page 11 of the judgment of the Civil Appellate High Court which is reproduced below, that the Court considered the case to be one of *rei vindicatio*, albeit with defective pleading, which that Court was willing to overlook or rectify on the basis of equity:-

"මෙම ඉඩමේ මුල් හිමිකරු හා භුක්තිකරු වූයේ වන්නිආරච්චි කංකානම්ගේ බබුන් අප්පුහාමි ලෙසට ප්‍රකාශ කරන ලෙසට පැමැණිලිකාර වගඋත්තරකරුවන් සිය ආයාවනයේ අයැද නැත. එසේ වුවද නඩුව පවරා ඇත්තේ පැමිණිලිකාර වගඋත්තරකරුවන් බැවින් ඔවුන්ට මෙම දේපලේ අයිතියක් ඇති බවට තහවුරු කිරීමට ආයාවනයේ අයැද නැත. එය පැමිණිල්ලේ නිතිඥ මහතා නඩුව සම්බන්ධයෙන් නිසි අවබෝධයකින් තොරව කල ක්‍රියාවකින් පැමිණිලිකාර වගඋත්තරකරුවන්ට අගතියක් සිදුවන බවයි. පැමිණිලිකරුවන් මෙම දේපල අයිති බවට තින්දු ප්‍රකාශයක් අයැද නොතිබීම මත ඔවුන්ට සාධාරණත්ව නීතිය (law if equity) ලැබෙන සහනය නොදීමට අධිකරණය තීරණය කරයි නම් එය නිවැරදි නොවනු ඇත.

ඒ අනුව මෙම දේපල බබුන් හාමිට අයිතියව තිබුණු බවට තීරණය කිරීම එම අයිතිවාසිකම් ඔහුගේ දරුවන්ට මෙම දේපල හිමිවිය යුතු බවට තීරණය කරමි. කෙසේ වුවද මියගිය තැනැත්තෙකුට මෙම දේපල අයත් බවට තීරණය කිරීමට මෙම අධිකරණයට නොහැකි වන අතර, මියගිය තැනැත්තෙකුට අධිකරණයක් විසින් අයිතිව තහවුරු කිරීමට හැකියාවක් නැත. ඒ අනුව මියගිය බබුන් අප්පුහාමිට අයිතිය තිබූ බව පමණක් නිගමනය කලහැකිය. ඒ අනුව මෙම නඩුවේ පැමිණිල්ලේ ආයාවනයේ ඇතුලත් කලයුතු සහනයක් වන වගඋත්තරකරුවන්ට මෙම දේපලට සිය මියගිය පියාගේ අයිතිවාසිකම් මත මෙම දේපලට අයිතියක් ඇති බවට ප්‍රකාශයක් ඉල්ලා සිටීමට පැමිණිල්ල ගොනුකිරීමේ දී එම ආයාවනයේ සඳහන් කළ යුතු අතර එසේ නොවීම තුලින් වගඋත්තරකරුවන්ට එම සහනය ප්‍රදානය නොකිරීම ඉහත සඳහන් හේතු මත නුසුදුසු බැවින් ඔවුන්ට එම දෙපලට අයිතියක් ඇති බවට තීරණය කරමි."

Being aggrieved by the said judgment of the Civil Appellate High Court dated 12th November 2009, the Appellant filed an application seeking Leave to appeal to this Court, and as previously noted, this Court granted Leave to Appeal on the several substantive questions referred to at the commencement of this judgment.

Respondents' Right to Succession

The first matter for consideration by this Court as set out in question (b) on which leave to appeal has been granted is whether the Civil Appellate High Court as well as the learned trial judge erred in law when they held that the Respondents had inherited the title of Wanniarachchi Kankanamlage Babun Appuhamy when he did not even have an annual permit to the corpus.

It is common ground that the subject matter of the action was State Land, and it is also evident that Babun Appuhamy, the father of the Respondents had been put into occupation of the land described in the schedule to the plaint, by the State, but to date, neither Babun Appuhamy nor any of the children of Babun Appuhamy including the Respondents had been granted any permit for the land by the State.

When the land in dispute is State land that has been alienated or granted under the Land Development Ordinance, the issue of succession has to be determined exclusively with reference to the provisions of the Land Development Ordinance. Section 170(1) of the Land Development Ordinance No. 19 of 1935, as amended, provides that:-

> "No written law (other than this Ordinance) which provides for succession to land upon an intestacy and *no other law relating to succession to land upon an intestacy shall have any application* in respect of any land alienated under this Ordinance." (*emphasis added*)

Section 48 of the Land Development Ordinance defines “succession” as follows:-

> “In this Chapter "successor", when used with reference to any land alienated on a permit or a holding, means a person who is entitled under this Chapter to succeed to that land or holding upon the death of the permit-holder or owner thereof, if that permit-holder or owner died without leaving behind his or her spouse, or, if that permit-holder or owner died leaving behind his or her spouse, upon the failure of that spouse to succeed to that land or holding or upon the death of that spouse.”

The Appellant has argued that is only a nominated successor who can succeed to land granted under the Land Development Ordinance. However, this is an incorrect proposition in law. Section 72 of the Land Development Ordinance states that:-

> “If no successor has been nominated, or if the nominated successor fails to succeed, or if the nomination of a successor contravenes the provisions of this Ordinance, the title to the land alienated on a permit to a permit-holder who at the time of his or her death was paying an annual installment by virtue of the provisions of section 19 or to the holding of an owner shall, upon the death of such permit-holder or owner without leaving behind his or her spouse, or, where such permit-holder or owner died leaving behind his or her spouse, upon the failure of such spouse to succeed to that land or holding, or upon the death of such spouse, devolve as prescribed in rule 1 of the Third Schedule.”

The Third Schedule to the Land Development Ordinance is reproduced below:-

THIRD SCHEDULE

RULES

1. (a) The groups of relatives from which a successor may be nominated for the purposes of section 51 shall be as set out in the subjoined table.

(b) Title to a holding for the purposes of section 72 shall devolve on one only of the relatives of the permit-holder or owner *in the order of priority in which they are respectively mentioned in the subjoined table, the older being preferred to the younger* where there are more relatives than one in any group.

Table

(i) Sons.	(vii) Brothers.
(ii) Daughters.	(viii) Sisters.
(iii) Grandsons.	(ix) Uncles.
(iv) Granddaughters.	(x) Aunts.
(v) Father.	(xi) Nephews.
(vi) Mother.	(xii) Nieces.

In this rule, "relative" means a relative by blood and not by marriage

2. Where in any group of relatives mentioned in the table subjoined to rule 1, there are *two or more persons of the same age who are equally entitled and willing to succeed*, the Government Agent may nominate one of such persons to succeed to the holding. Such decision of the Government Agent shall be final.

4. If any relative on whom the title to a holding devolves under the provisions of these rules is *unwilling to succeed* to such holding, the title thereto shall devolve upon the relative who is next entitled to succeed under the provisions of rule 1.

[Rules 3 and 5 were repealed by Act No. 16 of 1969.]

In this context, it is relevant to take into consideration the evidence of the 1st Respondent, Temawathie, who states that after the death of her father Babun Appuhamy in 1977, her mother possessed the land, but she died in a bomb explosion in 1989 as a result of which the witness too was seriously injured, but the essence of her testimony was that after the death of her mother, the siblings of Babun Appuhamy jointly possessed the said land. The nature of the possession of this land, according to the Respondents, was by seasonal cultivation and not by continuous residence, as the land did not have continuous supply of water and was cultivated only in the rainy season (මාස් කන්නය). In the course of her testimony, she also stated that:-

"89 සිට සහෝදරයෝත් සමග ඒ ඉඩමේ දෙහි, දොඩම්, පොල්, ගොඩ බෝග මිරිස්, මුං, කව්පි වගා කරගෙන බුක්ති වින්දා. පියා ඉන්න කාලයෙත් ගොඩ බෝග වගා කරලා තිබුණා, ඉටිගු, කජු, මිරිස් වගේ බෝග වගා කළා. ඉටිගු තාවකාලික බෝගයක්. කජු ස්ථිර බෝගයක්. දෙහි, දොඩම්, පොල් තාත්තා දැම්මා ඒ ඉඩමේ. මම බුක්ති විඳින්නට පටන් ගත්තට පස්සේ මම ගොඩ බෝග වගා කළා. තාවකාලික බෝග වර්ග කජු, මිරිස්, ඉටිගු වගා කලේ මම. මාස 6 න් ඒ බෝග වගා කරනවා. ඒ මාස 6 වගා කරන කොට මම ඒකේ කටු මැට ගහල ගෙයක් හදාගෙන පදිංචි වී සිටියෙ. මගේ සහෝදරයො ඇවිත් අඹුපාඹු සොයා බලලා යනවා. කටු මැට ගහල ගේ හදාගෙන පදිංචි වුන කාලය මට මතක නැහැ. 89 දි බෝම්බ වැදිලා මගේ කකුල බිඳුනා. ඒකෙන් මගේ මව නැති වුනා. මට කල්පනාව නැහැ ගේ හදාගෙන පදිංචි වුනේ කොයි කාලයේද කියා. කටු මැට ගේ හදා තිබුණා මව සිටිද්දි. මව මිය ගියාට පස්සේ මම ඒකේ පදිංචි වෙලා වගා කළා. අනෙක් සහෝදරයන් මට උදව් කළා."

In terms of the rules set out in the Third Schedule to the Land Development Ordinance, title to a holding can devolve by operation of law in accordance with the rules of succession set out therein even if a successor is not nominated by a permit-holder. However, Rule 1 of the Third Schedule specifies that *title can devolve upon only one person*, *in the order of priority specified therein, the older being preferred to the younger where there is more than one relative in a given group.* According to the table in the Third Schedule, *sons are given preference in the devolution of title, and thereafter, daughters.*

On the face of it, the provisions of the Third Schedule appear to be discriminatory on the ground of sex, but was probably fashioned by the assumption that it is the men in the family who actively participate in cultivation, the validity of which assumption may be questioned in the context of this case, where it appears from the evidence that the Respondents, who were both females, had cultivated the land in dispute with the assistance of all family members including brothers. I am of the opinion that the provision

has to be reviewed by policy makers in the light of the realities of the day and in particular Article 12 of the Constitution. Further, it may be desirable to recognize a concept of "joint permit-holders", to apply in situations where the family of a permit-holder had collectively helped to develop the land even during the lifetime of the permit-holder, as the recognition of such a concept would help maintain the family cordiality after the death of the permit holder. But in this case, we are bound to give effect to the provisions of rule 1 of the Third Schedule, under which the Respondents cannot claim any right of succession to title, given that it is clear from the evidence that Babun Appuhamy had at least one son. The evidence of the 1st Plaintiff-Respondent-Respondent, Temawathie, at page 98 of the brief was as follows:-

> "චිත්තිකරු කැති පොලු ආයුධ අරගෙන කෝලහාල කරන්න ගියා. ඒ අවස්ථාවේ මගේ මල්ලි හිටියා. ඔවුන් සමග රණ්ඩුවක් වුනා. බහින්බස් වීමක් වුනා."

It is in these circumstances that the Appellant contends that if the present action was considered to be a *rei vindicatio* action, the Learned Judges of the Civil Appellate High Court erred in law by granting title to the Respondents, as by operation of law, the sons of Babun Appuhamy would be preferred in the order of devolution specified in the Third Schedule of the Land Development Ordinance.

On the broader definition of "permit-holder" in Section 2 of the Land Development Ordinance, Babun Appuhamy may no doubt be regarded as the permit-holder of the land in dispute, and it may also be presumed that upon his death, his widow, succeeded to the holding in terms of Section 48A(1) of the Ordinance. In my opinion, such succession would take place by operation of law even without a nomination made in terms of the Ordinance. It is also clear that, upon the death of Babun Appuhamy's spouse in 1989, as provided in Section 72 of the Ordinance, succession would be in accordance with rule 1 of the Third Schedule to the Ordinance, wherein male relatives are preferred over female relatives, and the older relation is preferred to the younger in the order of succession. It is in evidence that Babun Appuhamy had at least one son, and probably more. The evidence of the Respondents reveal, that the Respondent's brothers helped them in the cultivation and even rallied around when their possession was threatened by the Appellant. However, in the absence of any evidence to establish that the 1st or the 2nd Respondent is the eldest daughter of Babun Appuhamy, the mere fact that by the letter marked පැ4 the 1st Respondent took steps to regularise possession, is insufficient to show that they are entitled to the rights of Babun Appuhamy. Hence, I am of the opinions that the Learned Judges of the Civil Appellate High Court erred in law when they held that the Respondents have succeeded to the title of Babun Appuhamy, but the fact remains that they had in prayer (අ) of their plaint sought only a declaration with respect to the rights of Babun Appuhamy, which declaration, they are no doubt entitled to, along with the relief prayed for by them in prayers (ආ), (ඇ) and (ඈ) of the plaint.

The True Nature of the Respondents' Action - Rei vindicatio or Possessory Remedy?

The second issue for consideration as set out in question (c) on which leave to appeal was granted by this Court is whether the present action should be properly regarded as a *rei vindicatio* action or a possessory action.

In the plaint, the Respondents have prayed for *inter alia* a declaration that Wanniarachchi Kankanamlage Babun Appu was the original owner and possessor of the subject matter (prayer 'a') and a decree for an

ejectment of the Appellant-Appellant-Appellant and all those claiming title under him and to restore the Respondents back in possession (prayer 'd'). By the said prayers for relief, the Respondents sought a declaration of title in respect of Babun Appuhamy, their father, and a restoration of their possession.

Learned President's Counsel for the Appellant, relying on the judgment in *Palisena v Perera* 56 NLR 407, have argued that to maintain an action for *rei vindicatio* pertaining to State land, there should be a valid permit or deed of disposition, and that in the present case, the Plaintiff's father did not have a permit for the land in dispute. The said Appellant also relies on the fact that there is no prayer in the Plaint seeking for a declaration of title in the Respondents' favour. Instead, the Respondents have prayed for in prayer (අ) as follows:-

> "මෙම ඉඩමේ මුල් හිමිකරු භුක්තිකරු වූයේ වන්නිආරච්චි කංකානම්ලාගේ බබුන් අප්පුහාමි බවට ප්‍රකාශයක්ද..."

Learned President's Counsel has submitted that the said finding of the Civil Appellate High Court is *ex facie* bad in law as the Court cannot grant relief which had not been prayed for by a party in the prayers of the plaint or an answer, and has referred to the decisions in *Weragama v Bandara* 77 NLR 289, *Vangadasalem v Chettiyar* 29 NLR 446 and *Danapala v Babynona* 77 NLR 95.

I am not in a position to entirely agree with these submissions, as this Court has noted in *Latheef and Another v Mansoor and Another,* (2011) B.L.R. 189 at 196, that although the action for declaration of title is the modern manifestation of the ancient vindicatory action (*vindicatio rei*) having its origins in Roman Law and is essentially an action *in rem* for the recovery of property, as opposed to a mere action *in personam***,** Withers J in *Allis Appu v Edris Hamy* (1894) 3 SCR 87 at page 93, has recognized "actions of an analogous nature" to a *rei vindicatio* action for declaration of title combined with ejectment of some person from land or premises. In such cases, the defendant is related to the plaintiff by some legal obligation (*obligatio*) arising from contract or otherwise, such as an over-holding tenant (*Pathirana v Jayasundara* (1955) 58 NLR 169) or an individual who had ousted the plaintiff from possession (*Mudalihamy v Appuhamy* (1891) CLRep 67 and *Rawter v Ross* (1880) 3 SCC 145), proof of which circumstances would give rise to a presumption of title in favour of the plaintiff obviating the need for him to establish title against the whole world (*in rem)* in such special contexts. These are cases which give effect to special evidentiary principles, such as the rule that the tenant is precluded from contesting the title of his landlord or a person who is *unlawfully* ousted from possession is entitled to a rebuttable presumption of title in his favour.

Burnside CJ, has explained the latter principle in *Mudalihamy v Appuhamy* (1891) CL Rep 67 in the following manner:-

> "Now, *prima facie*, the plaintiff having been in possession, he was entitled to keep the property against the whole world but the rightful owner, and if the defendant claimed to be that owner, the burden of proving his title rested on him, and the plaintiff might have contented himself with proving his *de facto* possession at the time of the ouster."

It is evident that in certain defined circumstances, a presumption of title may arise in favour of persons who have been *unlawfully* dispossessed from the land which forms the subject matter of a case. Although

such a presumption would not arise in a *rei vindicatio* action *stricto sensu,* such a presumption may arise in actions of an analogous nature. Thus two questions warrant further analysis; firstly, if the circumstances of the present case warrants such a presumption of title; and secondly, if the Respondents have been *unlawfully* dispossessed.

In the present case, while the lower Courts have held that there was no contractual relationship between the Respondent's father Babun Appuhamy, or the Respondents and the Appellant, and did not regard අ1 and ඒ1 to transfer any rights in relation to the land in relation in view of section 2 of the Prevention of Frauds Ordinance No 7 of 1840, as amended, the land in dispute is State land, and accordingly, there exists a nexus between the State and the Respondents since their father was put into possession of the land by the State, on the basis that he would be issued with a permit, in terms of the Land Development Ordinance. Although eventually, Babun Appuhamy was not granted a permit, he may be considered to be a permit-holder, in terms of section 2 of the Land Development Ordinance which defines the term "permit-holder" as "any person to whom a permit has been issued and includes a person who is in occupation of any land alienated to him on a permit although no permit had actually been issued to him". Even though it cannot be conclusively said that the Respondents are entitled to succeed to the title of Babun Appuhamy, it is abundantly clear to this Court that title to the land in dispute has devolved on one of the children of Babun Appuhamy, on the basis of the Third Schedule to the Land Development Ordinance, and that the Respondents' possession of the land is founded upon this entitlement. There is no dispute between the children of Babun Appuhamy as to who the rightful heir of the land in dispute is; in fact, it is in evidence that the other children of Babun Appuhamy are in constant communication with the Respondents regarding the land and the harvesting thereon. Thus, it can be construed that the Respondents possession is with the leave and licence of the rightful successor to the holding in terms of the Land Development Ordinance. Within a factual matrix such as this, I am of the opinion that the circumstances of the case warrant a presumption of title in favour of the Respondents.

I now turn to the question of 'unlawful dispossession'. The Respondents state that they were dispossessed by order of the Tissamaharama Primary Court in case No. 36365 on the 27th of November 1997. Ordinarily, this would not amount to an 'unlawful dispossession'. However, the order of the Primary Court has been obtained by fraud, and in highly suspicious circumstances. The learned Magistrate exercising the powers of the Primary Court has been misled, and it is evident that the process of law has been abused. It is perplexing, indeed, it is revealing, that a document relied upon in the Primary Court proceeding by the Appellant, which was a Grama Niladhari report, has not been adduced as evidence in the District Court.

The Appellant has relied upon documents marked අ1 and ඓ1 to prove his contention that Babun Appuhamy transferred his legal entitlement to the land in dispute to the Appellant in 1974. The document marked as අ1 is dated 21st August 1974 which is purportedly signed by Babun Appuhamy, allegedly transferring his entitlement to the land in dispute to the Appellant, for the purpose of building a house on the said land. It is not signed by any witness. This document was produced by the Appellants in Tissamaharama Primary Court case No. 36365. A similar document marked ඓ1 is dated 8th April 1974, which is purportedly signed by Babun Appuhamy, also allegedly transferring his entitlement to the land in dispute to the Appellant. There is no reference to the purpose of building a house. It has been signed by a

witness, one Chandrasena Wickremaarachchi. This document, which is dated prior to ඇ1, was not produced in the Primary Court. Both documents pertain to the same land, and both documents purport to transfer Babun Appuhamy's legal entitlement to the land in dispute to the Appellant. Both documents refer to the Appellant as a relative of Babun Appuhamy, although it clearly transpires in evidence that this is not so. Thus it is clear that the circumstances surrounding these two documents are highly mysterious, and reeks of fraud. Furthermore, and most importantly, the documents marked ඇ1 and ඒ1 have absolutely no force or avail in law as they contravene section 2 of the Prevention of Frauds Ordinance which states as follows:-

> "No sale, purchase, transfer, assignment, or mortgage of land or other immovable property, and no promise, bargain, contract, or agreement for effecting any such object, or for establishing any security, interest, or incumbrance affecting land or other immovable property (other than a lease at will, or for any period not exceeding one month), nor any contract or agreement for the future sale or purchase of any land or other immovable property, and no notice, given under the provisions of the Thesawalamai Pre-emption Ordinance, of an intention or proposal to sell any undivided share or interest in land held in joint or common ownership, shall be of force or avail in law unless the same shall be in writing and signed by the party making the same, or by some person lawfully authorized by him or her in the presence of a licensed notary public and two or more witnesses present at the same time, and unless the execution of such writing, deed, or instrument be duly attested by such notary and witnesses."

None of the documents have been signed in the presence of a licensed notary public, nor in the presence of two or more witnesses, and has not been attested by such notary and attesting witnesses. Thus documents marked ඇ1 and ඒ1 contravene the Prevention of Frauds Ordinance. Thus, the Appellant cannot rely on the documents to establish his title to the land in dispute. Nor would section 17 of the Prevention of Frauds Ordinance apply in this situation where the Government is not a party to any transaction coming within section 2 of the said Ordinance. The Appellant cannot rely on any prescriptive rights as he has not adduced evidence of long possession that is necessary to prescribe against the State by *longisimi temporis praescriptio,* wherein the Appellant would have to prove that he was in adverse possession of the land in dispute for one third of a century. Thus, wisely, the Appellant has not relied on the ground of prescription.

In Roman-Dutch law, as in Roman Law, the remedy *restitutio in integrum* is a remedy which empowers a court to set aside a contract or an obligation (including a judgment in either a civil or criminal case) on grounds *inter alia* of force or duress, fraud, minority, inexcusable mistake or where some other judicially acceptable equitable cause existed, and to restore the *status quo ante.* The order of the Tissamaharama Primary Court in case No. 36365 has been obtained *inter alia* on the basis of fraudulent documents and amounts to an abuse of the process of law. This would be a fitting case to set aside the order of the Primary Court Judge and to restore the *status quo ante* in exercise of the powers of the Supreme Court, to grant in appropriate cases relief by way of *restitutio in integrum.*

In these circumstances, I hold that this is a case in which a presumption of title arises in favour of the Respondents, and the Appellant has not succeeded in rebutting the presumption of title in favour of the Respondents, wherein they possess the land in reliance of their rights of succession to the title of Babun

Appuhamy, which has devolved on his heirs in terms of the Third Schedule to the Land Development Ordinance.

The Question of Prescription of the Right of Action

The third issue for consideration as set out in question (d) on which leave to appeal was granted by this Court is whether the Respondents' action in the District Court was prescribed in terms of section 4 of the Prescription Ordinance No. 22 of 1871, as amended.

The Appellant has submitted that as the learned District Judge has considered this case to be a possessory action, section 4 of the Prescription Ordinance would apply and that in terms of section 4 of the Prescription Ordinance a possessory action has to be instituted within one year of dispossession. However, as stated previously in this judgment, the present action is not a possessory action, and thus section 4 of the Prescription Ordinance does not have any application.

The Evidence of the Witness who Prepared වි1

The fourth issue for consideration in terms of question (h) on which leave to appeal was granted by this Court, was whether the Civil Appellate High Court as well as the learned trial Judge err in law when they totally disregarded the evidence of the witness who prepared වි1 and also signed as a witness. The Appellant's position is that the learned District Court Judge and the learned Judges of the Civil Appellate High Court have not considered the evidence of Chandrasena Wickramaarachchi, who was the attesting witness to the document marked as වි1. The evidence of the said witness *inter alia* was as follows:-

> "වි1 දරණ ලියුම ලිව්වේ මම. එහි තිබෙන අත් අකරු මගේ. මේ ලිපිය මේ විදියට ලියන්න කියලා බබුන් අප්පුහාමි මට කිව්වා. එහි සඳහන් කරුණු කිව්වේ ඔහු. ඒ අනුව මම ලිව්වා මම ඉස්කෝලේ යන කාලේ, මේ නඩුවට අදාල ඉඩම බුක්ති විඳින්නේ චිත්තිකරු. මේ ලියුමට පස්සේ ඔහු බුක්ති විඳින්නේ. වි1 ලේඛණය ලිව්වට පසුව මේ ඉඩම බුක්ති විඳින්නේ චිත්තිකරු. අද වනතුරු ඔහු එය බුක්ති විඳිනවා." *(vide page 174 of the brief)*

I have perused the evidence of Chandrasena Wickramaarachchi, who was the attesting witness to the document marked වි1. The Appellant's contention is based on the erroneous premise that the *factum* of possession is material to the determination of the present case. The onus of proof was on the Appellant to sufficiently displace the presumption of title that has arisen in favour of the Respondents, and the evidence of Chandrasena Wickremaarachchi falls far short of what is required to rebut such a presumption. The document marked වි1 contravenes the provisions of the Prevention of Frauds Ordinance, and the evidence of this witness, who fared miserably under cross-examination by learned Counsel for the Respondents, and admitted that he did not know who possessed the disputed land since 1974, was considered most unreliable by the learned District Judge.

Accordingly, I hold that the learned District Court Judge and the learned Judges of the Civil Appellate High Court have not disregarded the evidence of Chandrasena Wickremaarachchi and in any event, his evidence was irrelevant to displace the presumption of title that had arisen in favour of the Respondents.

Conclusion

In these circumstances, I am of the opinion that the Respondents should be restored to possession on the basis that the action filed by them was an action for declaration of title analogous to a *rei vindicatio* action, wherein the burden on the Respondents was to show that they held the land in dispute as the heirs of Babun Appuhamy who was a permit-holder in terms of the Land Development Ordinance, and to which they hoped to succeed. I hold that the Appellant has failed to rebut this presumption of title that arises in these circumstances. I hold that judgment should be entered in favour of the Respondents as prayed for in prayers (අ), (ආ)), (ඇ) and (ඇඇ) of the plaint dated 16th January 1997. The impugned judgment of the Civil Appellate High Court dated 12th November 2009, which affirmed the judgment of the District Court dated 17th July 2003, by which the Respondents were granted relief in terms of prayer (අ) and (ඇඇ), is accordingly varied.

In all the circumstances of this case, the Respondents shall be entitled to costs in a sum of Rs. 50,000.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J,

I agree.

JUDGE OF THE SUPREME COURT

SARATH DE ABREW, J,

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. Appeal No. 126/2012
SC Spl LA 193/2011
WP/HCCA/COL/12/2009 [RA]
D.C. Colombo Case No. 7957 Spl

In the matter of an Application for Leave to Appeal and/or Special Leave to Appeal from the Judgment of the Provincial High Court of the Western Province [Civil Appellate] holden at Colombo, under and in terms of Section 5C of Act No. 54 of 2006.

Amaradasa Liyanage,
Kosmodara Ihalawatte, Kotapola,
Carrying on business as a sole proprietor under the name and style of "Kosmodara Tea Factory".
Respondent-Respondent-Petitioner

Vs.

Sampath Bank PLC,
No. 11, Sir James Pieris Mawatha,
Colombo 02.
Petitioner-Petitioner-Respondent

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

COUNSEL : Sanjeewa Jayawardane, P.C., with Ms. Sandamali Munasinghe for the Respondent-Respondent-Petitioner-Appellant.

Chandaka Jayasundara with Tharindu Rajakaruna for the Petitioner-Petitioner-Respondent-Respondent.

ARGUED ON : 25.11.2013.

DECIDED ON : 04.04.2014

TILAKAWARDANE.J

Special Leave to Appeal was sought by the Respondent-Respondent-Petitioner by the Petition dated 04.11.2011 in Application S.C. (Spl) LA No. 193/2011, in order to enable an Appeal against the judgment in case no. WP/HCCA/COL-12/2009[RA] by the High Court of Civil Appeals in Colombo. When the case was taken up for support before the Supreme Court on 10.07.2012, the Counsel for the Petitioner-Petitioner-Respondent raised the following preliminary objections:

I. The Respondent-Respondent-Petitioner has suppressed the fact that the Commercial High Court has refused to grant an interim injunction to prevent the sale which is the subject matter of the present Application;

II. The fact that an Appeal was made against the above order to the Supreme Court in S.C. H.C.L.A. 45/2006 and this Court has refused to grant relief was also suppressed;

The Counsel appearing for the Respondent-Respondent-Petitioner submitted that none of the material referred to above appear from the pleadings before the present case and, as all the documents, including the written submissions in the case, has been made available to this Court, there does not appear to be a suppression of material facts.

The Court accepted this submission and affirmed that there was no suppression of material facts as far as the present case was concerned and the preliminary objections were

overruled.

Subsequent to hearing the submissions of the Counsel, Leave to Appeal was granted by this Court on 10.07.2012 on the following questions of law:

1. Was there, in this case, a proper certificate signed by the Board of the Respondent Bank as contemplated by Section 15(2) of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 read with the definition of "Board" in Section 22 of that Act?

2. Did the High Court of Civil Appeals err in Law by failing to appreciate the significance and importance of the fundamental statutory pre-conditions imposed by Sections 8 and 9 of the Recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990 in holding that the certificate issued under Section 15(1) will have the conclusive effect stipulated in Section 15(2) of the Act, with respect to the impugned sale?

3. Did the High Court of Civil Appeals err in Law when failing to hold that in the special circumstances of this case, it was unwarranted to hold that the purported Certificate of Sale was valid and that it, in effect, cured the violation of the procedural requirements set out in the statute?

The facts relating to this Appeal are as follows. The Respondent-Respondent-Appellant having obtained credit facilities from the Petitioner-Petitioner-Respondent [hereinafter referred to as the Respondent] on 29.12.2000, hypothecated the property depicted as lot B, C and D in Plan No. 2427 prepared by S. Rasappa, Licensed Surveyor. However, subsequent to torrential rain and flooding in 2003, the abovementioned property was severely damaged and the Appellant defaulted on his payments. Subsequently, on 26.08.2004, a resolution to sell the property was passed by the Board of Directors, in accordance with the **Recovery of Loans by Banks [Special Provisions] Act No. 4 of 1990** [hereinafter referred to as the Recovery of Loans by Banks Act] and the Resolution was published in the Sinhala newspaper 'Dinamina'

on 11.10.2004 as well as in the Gazette on 11.02.2005.

Upon receiving knowledge of the resolution authorizing the sale of the property by public auction, the Appellant instituted action in the Commercial High Court in Colombo by the Plaint dated 24.02.2005 wherein he sought to obtain an order to stay the auction, which was unsuccessful. Aggrieved by this order, the Appellant further sought Special Leave to Appeal from the decision of the Commercial High Court on 28.02.2007 but the Application was dismissed on the basis that they did not appear before Court.

Subsequently, on 23.03.2007, a Notice of Auction was published in the Gazette while a letter informing the Appellant of the auction to be held on 10.04.2007 was dispatched by registered post on 04.04.2007. At the public auction, the Respondent, purchased the said property for a sum of Rs. 1000/-, and subsequently, requested the Appellant to vacate the premises by letter dated 25.06.2007. As this request was not complied with, the Respondent instituted action in the District Court in terms of ***Section 16*** of the **Recovery of Loans by Banks Act** by Petition dated 27.07.2007 in case No. 7957 SPL. ***Section 16*** states that where

> *"The purchaser of any immovable property sold in pursuance of the preceding provisions of this Act shall, upon application made to the District Court of Colombo or the District Court having jurisdiction over the place where that property is situated, and upon production of the certificate of sale issued in respect of that property under Section 15 be entitled to obtain an order for delivery of possession of that property".*

Thus, Section 16 clearly allows the purchaser of any such property sold in accordance with the Act to make an application to the District Court to obtain an order for delivery of possession. While, on 27.07.2007, the District Court judge issued an order nisi, having heard the submissions of the Counsels, refused to make the order absolute on 12.06.2009. An appeal from this decision was made to the High Court of Western Province on 07.07.2009 by the Respondent, upon which, on 23.09.2011, the order was made absolute.

Aggrieved by this decision, the Appellant filed an application in this Court seeking an Order to set aside the judgment of the High Court and affirm the Order of the District Court.

Having listed out this narrative, the most pertinent issues that merit consideration are primarily concerned with the Certificate of Sale issued in accordance with the **Recovery of Loans by Banks Act.** Therefore, at the heart of this case lies the fundamental issue regarding the validity of the Certificate of Sale. This Certificate, issued according to the **Recovery of Loans By Banks (Special Provisions) Act No. 4 of 1990** has been challenged on several grounds by the Petitioner, which will be dealt by this Court on two levels.

Firstly, the issue that is presented to this Court is whether the Certificate of Sale No. 2860, issued under ***Section 15(3)*** and certified by A. M. K. A. Goonetilleke on 24.05.2007, is valid. In determining the validity of the Certificate, **Section 15(2)** of the above Act has been cited:

> *"A certificate **signed by the Board** under subsection (1) shall be conclusive proof with respect to the sale of any property that all the provisions of this Act relating to the sale of that property have been complied with"*(Emphasis added).

The argument of the Counsel appearing on behalf of the Appellant can be summarized as follows: as the Recovery of Loans by Banks Act is concerned with the encroachment of property rights; it is a legislative enactment that must be subjected to strict interpretation, especially given that its provisions allow Banks to resort to parate execution as opposed to any other form of debt recovery action. Thus, such a strict interpretation would warrant the conclusion that the Certificate of Sale issued under **Section 15** be signed by *all* members of the Board of Directors.

The above mentioned Certificate was signed by Mr. Edgar Gunarathne and Mr. Anil Suneetha Amarasuriya, the Chairman and Managing Director respectively of Sampath Bank Limited and not the *entire* board. The Counsel supported this contention with reference to **The State Mortgage and Investment Bank Law No. 13 of 1975** and its consequent amending act

which amended the provision that '*the board shall sign a certificate of sale'* to *'any two members of the Board shall on behalf of the Board sign a certificate of sale',* as well as other legislative enactments including the **National Development Bank Act No. 02 of 1979, the Bank of Ceylon Ordinance** and the **People's Bank Act No. 43 of 1973**. In conclusion, the Counsel argued that if the intention of Parliament were to allow two members of the Board to sign the Certificate, it would have made its intention known in the words chosen.

In this regard, this Court feels it appropriate to make reference to the manner in which the Court may interpret legislative enactments. In **Bindra's Interpretation of Statutes** (*9th Edition*), it was stated that

> *"If the words of the statutes are explicit and unambiguous, there can be no resort to external aid for their construction. Language, which is plain and easily understood, should be looked at without extensive aid for the meaning intended"*

Thus, when interpreting ***Section 15(2)***, **Section 22** of the said Act defines 'Board' as follows:

> *"'Board' in relation to a Bank means the Board of Directors of the bank or any body of persons by whatever name or designation called for the time being charged with the management or administration of such bank".*

In the light of this provision, Court does not see cause to refer to any external aids in order to interpret ***Section 15(2)*** given that the provision is unambiguous and clear. Given this reality, stringent interpretation requires that the Board must sign the Certificate of Sale and that the signatures of two such members are insufficient.

However, the Court feels that this is an inadequate reason to invalidate the Certificate of Sale, especially given the fact that the Certificate itself has been signed by two members, and is not one that has not been signed at all. In fact, it appears to us that what presents itself as the Certificate is only subject to a **procedural irregularity** and it would be disproportionate to

allow such a minor shortfall to entirely invalidate the Certificate of Sale, thereby creating a chain reaction wherein the auction itself would be invalid.

It is the opinion of this Court that such minor procedural irregularities can be readily rectified and that, given the nature of the inadequacy, it does not merit a declaration that the validity of the Certificate of Sale is undermined.

Having resolved that the Certificate of Sale is indeed valid, and can be rectified effectively, the next issue that merits the discussion of this Court is whether the Certificate is *conclusive*. With regard to this matter, reference must be made to ***Section 15(2)*** again, which states that such a Certificate signed by the Board "*shall be **conclusive proof** with respect to the sale of any property that all the provisions of this Act relating to the sale of that property have been complied with".*

The Counsel for the Appellant has relied heavily on the decision of Amarasinghe J in **National Development Bank v Serendib Asia (Pvt) Ltd and Another (1999)** *(2 SLR 56)* wherein the following was elucidated:

> "*Admittedly, Section 50(2) states that the certificates signed by the General Manager under Section 50(1) shall be conclusive proof, with respect to its sale of property, that all the provisions of the National Development Bank Act relating to the sales of the mortgaged properties have been complied with.*
>
> *Yet, in my view, it does not preclude the Court from considering whether both in fixing the upset price under Section 46 and in purchasing the properties at Rs. 1, 000 under each of the three bonds, the Appellant had acted lawfully, in good faith, and in a commercially reasonable manner, although in terms of Section 46, the Appellant was not bound by the upset price".*

It appears to this Court that the principles set forth in the above dicta are acting lawfully, in

good faith and in a commercially reasonable manner. It does not speak of the Court being in a position to evaluate whether the provisions of a particular Act have been complied with prior to the issuance of the Certificate of Sale. This case particular dealt with the setting of the upset price and therefore, must be distinguished from the present case wherein the issue is whether the Certificate of Sale in itself is conclusive proof that the provisions of the Act has been complied with.

In terms of considering whether the Certificate of Sale is conclusive, the case of **Hatton National Bank v Marimuttu [2004]** reported in the *Bar Association Law Report* is relevant. In this case, similar to the present case, a property was sold at an auction upon a resolution passed by the Board of Directors of a Bank and a Certificate of Sale was issued. Thereafter, the Bank made an Application to the District Court for an order for delivery of possession. The issue relevant in the present consideration was whether the Certificate of Sale was conclusive. In this regard, Amaratunga J stated

> *"…the existence of a case where the legality of the sale and the Resolution are being challenged, in itself is not a ground to refuse the Application of the Bank. In terms of Section 15(2) of the Recovery of Loans by Banks Act,* ***a certificate of sale is conclusive proof with respect to the sale of any property*** *and that all the provisions of the Act relating to the sale of that property have been complied with. Thus, despite the existence of a case where the sale itself and the certificate of sale have been challenged is not a ground to disregard the conclusive effect"* [Emphasis added].

Similar sentiments were expressed in **Haji Omar v Wickramasinghe and Another (2002)** *(1 SLR 113)* where the Petitioner argued that the Certificate of Sale could not be issued as the notices were irregular and that the resolution passed by the Board was not in conformity with the Act. In this case, Fernando J elucidated that

> *"Section 15 (1) of the Act provides that upon the issue of the certificate the title of the borrower vests in the purchaser, and section 15 (2) makes the certificate "conclusive*

> *proof with respect to the sale . . . that all the provisions of [the] Act relating to the sale . . . have been complied with". **That includes the passing of the resolution, the notice of sale, the payment of the price, and the sale**"* [Emphasis added].

Therefore, this Court notes that the validity of the Certificate issued has been challenged on vexatious grounds i.e. upon the Certificate being signed by two members of the Board rather than all members of the board, an irregularity that is readily remediable without any adverse effects. Furthermore, given that the Certificate of Sale is, on all counts, valid, it appears to be conclusive proof that all provisions of the Act have been complied with. Thus, in accordance with ***Section 15*** of the Act:

> *"If the mortgaged property is sold, the Board shall issue a certificate of sale and thereupon all the right, title, and interest of the borrower to, and in, the property shall vest in the purchaser; and thereafter it shall not be competent for any person claiming through or under any disposition whatsoever of the right, title or interest of the borrower to, and in, the property made or registered subsequent to the date of the mortgage of the property to the bank, in any court to move or invalidate the sale for any cause whatsoever, or to maintain any right title or interest to, or in, the property as against the purchaser".*

This legislative provision is included in the Act with good reason: while ***Section 15*** dictates that the right, title and interest of the borrower will vest in the purchaser and that the issuance of a Certificate of Sale is conclusive proof that the provisions of the Act have been complied with, it states so in order to protect the rights of the purchaser, be it the Bank itself or a third party. Allowing the Certificate of Sale to not prove to be conclusive would be to open a Pandora's box of sorts wherein prospective buyers of property at a public auction would be greatly discouraged from doing so as, if the Court finds that the Certificate is not conclusive, it will open the option of reverting the rights vested in the purchaser back to the borrower.

Therefore, this Court finds that the Certificate of Sale is both valid and constitutes conclusive

proof that the provisions of the Act have been complied with. Hence, the Respondent is well within his rights to seek the delivery of possession of the property in terms of ***Section 16****.*

However, given the narrative of this case, Court feels it imperative to address the concerns of the Appellant with regard, especially, to the allegations made.

The charges made by the Appellant are numerous. It was contended that the resolution passed by the Board was published only in one Sinhala newspaper on 08.01.2005 and was not published in an English and Tamil newspaper or in the Gazette as required by the Act. It was further alleged that the Appellant was not given notice of the resolution by letter. Relevant here is paragraph 10 of the Petition dated 04.11.2011 the Appellant claims the following:

> *"Surprised and bewildered by this sudden turn of events [i.e. subsequent to receiving the letter from the Respondent to deliver vacant possession of the property], the Petitioner, upon further inquiry became aware that:*
>
> *a) The Respondent had only published the purported resolution passed by the Respondent bank in one Sinhala paper i.e. Dinamina newspaper on 08.01.2005.*
> *b) The Respondent had failed and neglected to publish the purported resolution in the gazette or newspapers of either English or Tamil. Furthermore…..the Petitioner had not been given any notice whatsoever of the said purported resolution.*
> *c) The Respondent had completely and utterly failed and neglected to publish the Notice of Sale in the Gazette".*

Several points merit the consideration of this Court. Firstly, the Appellant adamantly informed this Court that he had absolutely no notice of the publication of the resolution in the paper until after receiving the letter dated 25.06.2007.However, in case no. 40/2005 instituted before the High Court wherein an order to stay the auction was sought by the Appellant, he admits knowledge of the publishing of the resolution in the Sinhala newspaper in paragraph 19 of the

Plaint. Furthermore, though he alleges that the Respondent neglected to publish the resolution in the Gazette and did not give notice of said resolution, the same paragraph also carries an affirmation of knowledge of a Notice of Sale published in the Gazette on 11.02.2005.

In addition to the facts admitted by the Appellant, it is clear to the Court upon further inquiry that the Respondent published a Notice of Sale on 23.03.2007 and further, a letter dated 03.03.2007 informing the Appellant of the scheduling of the Auction for 10.04.2007, was sent by registered post.

Such inconsistencies in argument as well as blatant misrepresentations of fact by the Appellant make it extremely difficult for this Court to accept that the provisions of the Act had not been complied with, especially when evidence presented before Court suggest otherwise. Therefore, it must be affirmed that, in the eyes of this Court, ***Section 8*** which requires Notice of resolution to be published in the newspapers as well as the Gazette and ***Section 9*** which requires a Notice of Sale being dispatched to the borrower both have been complied with.

Another concern raised by the Appellant was the fact that an upset price was not fixed by the Respondent thereby resulting in the property being sold for Rs. 1000/-. It was fervently argued that the failure to do so was absurd and unreasonable as the property was valued at over Rs. 85 Million. However, ***Section 11*** clearly states that

> *"The Board may fix an upset price below which the property shall not be sold to any person other than the bank to which the property is mortgaged".*

Section 11 clearly indicates that the fixing an upset price is not mandatory and, given that the remainder of the provisions have been complied with, this Court does not see a formidable reason which effectively bars the Respondent from purchasing the property for Rs. 1000/-.

A final point of contention made by the Counsel appearing from the Appellant was that his

client was given insufficient time to make the payments as required. It was the view of the Counsel that the intention behind providing the debtor notice of the auction was to provide him with an opportunity to pay the sum of monies owed, even at that stage and that in the present case, the Appellant was denied this right as he was informed of the sale subsequent to the conclusion of the auction. While on one hand it has already been established that the Appellant was given notice of the auction, the Court must also consider the fact that the initial resolution to sell the property by auction, was passed on 26.08.2005 whereas the property was actually sold on 10.04.2007: nearly two years after the passage of the resolution. It is clear to this Court that the Appellant, therefore, enjoyed the option to make the necessary payments for a considerable period of time had he so wished and his failure to do so cannot be excused by an '*alleged'* lack of notice.

The ambit and purpose of the **Recovery of Loans by Banks Act** is, in essence, to recover monies due to the Bank while ensuring that the Bank does not enjoy an unjust enrichment. The provisions of the Act, by allowing parate execution, is to facilitate the process of collecting monies due, without lengthy court proceedings, and to do so in a fair and reasonable manner. This objective should therefore not be hindered by minor procedural irregularities such as the absence of the signatures of all Board members on the Certificate of Sale, for such minor irregularities cannot have much impact on the rights of the borrower.

Minor procedural irregularities cannot, further, be grounds upon which actions may be instituted for such actions would only amount to the abuse of the process of Court which must not be allowed. In the present case, monies due remained unpaid for a total of four years prior to the auction taking place and to challenge the sale of property on the basis of a minor irregularity in documentation will undoubtedly remain unsuccessful.

In these circumstances, the present Appeal is dismissed and the judgment of the High Court case No. HCCA/Rev/12/2009 is affirmed. We also award costs in a sum of Rs 75,000/- to the Bank.

Sgd.

JUDGE OF THE SUPREME COURT

EKANAYAKE. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

WANASUNDERA. P.C.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

MK

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

In the matter of an Application for Leave to Appeal against judgment dated 26.07.2011 delivered by the High Court of the Western Province exercising Civil Appellate jurisdiction at Gampaha in case No. WP/HCCA/GPH/02/2010 / Revision - D.C. Negombo Case No. 2425/P.

SC. Appeal 130/2012

SC.H.C.CA. LA. 344/2011
WP/HCCA/GPH/02/2010/Revision
D.C. Negombo No. 2425/P

1. Edirisinghe Pedige Jayasinge,
2. Edirisinghe Pedige Thilakarathne,

Both of Keraminiya, Horampella.

Plaintiffs

Vs.

1. Edirisinghe Pedige Mangalasena Edirisinghe,

1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella.

2. Edirisinghe Pedige Somasiri,
3. Noiyya, more correctly Malhinnage Premawathie,
4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella.
5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella.
6. Ramanayake Pedige Asilin, Keraminiya, Horampella.

Defendants

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1. Edirisinghe Pedige Jayasinge,
2. Edirisinghe Pedige Thilakarathne, (deceased), both of Keraminiya, Horampella.

2A. Edirisinghe Pathiranage Chamari Dushanthi Edirisinghe, all of Keraminiya, Horampella.

Plaintiff- Petitioners

Vs.

1. Edirisinghe Pedige Mangalasena Edirisinghe, (deceased)

1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella.

2. Edirisinghe Pedige Somasiri,

3. Noiyya, more correctly Malhinnage Premawathie,

4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella.

5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella.

6. Ramanayake Pedige Asilin, Keraminiya, Horampella.

Defendants-Respondents

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2. Edirisinghe Pedige Somasiri,

4. Edirisinghe Pedige Lal Premasiri, more correctly Lal Premasiri Edirisinghe, all of Keraminiya, Horampella

Defendants-Respondents-Appellants

Vs.

1. Edirisinghe Pedige Jayasinge,

2A. Edirisinghe Pathiranage Chamari Dushanthi Edirisinghe, all of Keraminiya, Horampella.

Plaintiff- Petitioner-Respondents

1. Edirisinghe Pedige Mangalasena Edirisinghe, (deceased)

1A. Heenmenike Jayasundara, No. 147/B, Keraminiya, Horampella.

3. Noiyya, more correctly Malhinnage Premawathie,

5. Edirisinghe Pedige Sunithra Kanthi, Keraminiya, Bodhipihitiwela, Horampella.

6. Ramanayake Pedige Asilin, Keraminiya, Horampella.

Defendants-Respondents-Respondents.

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* * * * *

BEFORE : **Eva Wanasundera, PC. J.**
Sisira J. de Abrew, J. &
Sarath de Abrew, J.

COUNSEL : Dr. Sunil Cooray with Ms. Sudarshani Cooray for the Defendant-Respondent-Appellants

Palitha Ranatunga instructed by Indika Kahatapitiya for the 1st and 2nd Plaintiff- Petitioner-Respondents.

ARGUED ON : **03.10.2014**

DECIDED ON : **29.10.2014**

* * * * * *

Eva Wanasundera, PC.J.

In this application on 25.07.2012 leave to appeal was granted against the judgment of the Civil Appellate High Court of Gampaha, on the questions of law contained in paragraphs 20 (a), (b), (c) and (d) of the petition dated 05.09.2011.

They are as follows:-

20(a) Did the High Court err by totally failing to consider whether the Plaintiff-Petitioners are guilty of misrepresenting material facts in paragraph 12 of their petition seeking 'Revision' regarding why no appeal was filed by them against the Judgment of the District Court?

(b) Did the High Court err by failing to consider or to make any reference to the documents marked 'Z' filed as an exhibit to the statement of objections of the 2nd and 4th Defendant-Respondents?

(c) Did the High Court err by holding that the Learned District Judge erred by failing to consider that the Defendant-Respondent-Petitioners had in their statement of claim prayed for the partition of Lots C and D in plan 'Y', when the uncontroverted evidence on the record is that Lots C and D had been alienated to outsiders and that position was never contested by the Plaintiff-Petitioners?

(d) Did the High Court err by failing to consider that the Plaintiff-Petitioners had not made out a case for trial de-novo in this partition action which had been instituted in 1990 when the Plaintiff-Petitioners, who did not themselves ask for partitioning of Lots C and D, could if they now so wish, get lots C and D partitioned by instituting a fresh partition action for that purpose?

In the District Court the Plaintiffs were 2 in number and the Defendants were 6 in number. The Plaintiffs wanted to get **one big land of 1A 1R 8.7P** partitioned, which was Lot A2 in Plan 137/5/P. The 1st to **4th Defendants** prayed that four more smaller blocks of land, in extent 34.6 Perches, 23.32 Perches, 7.5 Perches and 4.4 Perches be **added** to the corpus to be partitioned. Two Survey Commissions were issued by Court. Plan 903 and report were marked X and X1, Plan 2316 and report were marked Y and Y1. Plan 903, namely X, surveyed only the big land and marked it as 'A'. Plan 2316 namely Y, surveyed the other 4

lots as well and **marked the big land once again as Lot 'A',** the 34.6 Perche land as Lot E, 23.32 Perche land as Lot F, 4.4 Perche land as Lot B and divided the 7.5 Perch land into 2 blocks namely **Lot C and Lot D. Lot C was in extent 5.54 Perches and Lot D was in extent 2.17.**

The District Judge in his judgment has excluded Lots C and D from the corpus of partition on the evidence given by the 4th Defendant in open Court on 25.09.2008 at pg. 199 of the District Court brief, specifically stating thus: "I am not asking for Lots C and D in Plan No. 2316 marked Y to be partitioned. I am asking that only Lots A, B, E and F be partitioned. Lots C and D have got transferred to others by way of deeds. Therefore I am not claiming the said lots". Furthermore he says "I am not asking to partition the land in the 4th Schedule to my statement of claim". He concludes his evidence thus: "I am begging Court to grant 2/6th to the 1st Plaintiff, 1/6th to 2nd Plaintiff, 1/6th to the 1st Defendant, 1/6th to the 2nd Defendant, my uncle, 1/12th each to 4th and 5th Defendants who are my sisters, in a possible way that can be enjoyed according to the way we all are resident". This is exactly what is given by the District Judge in his judgment. It is the 4th Defendant who concluded his case in that manner. I observe that it is the 4th Defendant who wanted to get Lots C and D partitioned in his statement of claim and it is he himself who gave evidence before court and asked that the same lots be excluded from the corpus.

The only other person who gave evidence in this case was the 1st Plaintiff. The 1st Plaintiff's evidence is concluded with a suggestion from the Plaintiff's Lawyer, "Do you have any objections to the partition of other co-owned portions of land adjoining the land you have requested to be partitioned" to which he answers, "If my lawyer says, I consent to such partitioning." It is quite obvious that the Plaintiffs and the 4th Defendant giving evidence wanted the land which is co-owned, partitioned in a particular way with certainty in each one's shares and that is exactly what the judgment has granted.

In summary, the Plaintiff wanted Lot A partitioned. The 4th Defendant at first wanted Lots A, B, E, F, C and D partitioned. When giving evidence, he wanted Lots C and D, the total extent of which was only 7.71 Perches be excluded from the corpus. The Plaintiff did not object to this exclusion at that time. These parties were represented by lawyers at all times of the case. The Court Commissioner was directed by Court to partition the land in practically a possible manner, giving their shares around their residencies, leaving the roadway etc.

I further observe that the plaint in the partition action is dated 16.02.1990. The District Court Judgment is dated 10.07.2009. The Civil Appellate High Court has ordered **a trial de-novo** on 26.07.2011, i.e.21 years later that the inception of this partition action. The extent of land that the Plaintiff-Petitioners are trying to get included **in the corpus of an extent of approximately 1A 2R 31P** to be partitioned, **is only 7.71 perches** in the village of Horanpella, District of Gampaha. The facts are shocking and invites one to wonder whether the six parties to the case really want to partition this small extent of land. I wonder whether they would even know at what cost to each one of them, in money and in time, they would get a partition out of an additional 7.71 perches. At its best, each party would be getting one perch or so at the end of many more years. I cannot imagine of any party to a partition action wanting to get one perch per person stepping into a trial de- novo

The Plaintiffs did not appeal from the District Court judgment. After 7 months, on 23.02.2010, the Plaintiffs filed a Revision application in the Civil Appellate High Court praying to revise or set aside the District Court Judgment. The 4th Defendant objected to the Revision application on the grounds that the Revision application was based on a fabrication of so called facts which were utterly false and was on the breach of the duty of uberrima fides and prayed that the High Court should dismiss the Revision application. The 4th Defendant filed the document 'Z' with records of a court case to show the falsity of what was averred in the Revision application by way of exceptional grounds for such an application.

The High Court Judge allowed the Revision application, not taking into account the objections and not considering the contents of document 'Z' which contained facts proven by valid records. The High Court further ordered **a trial de novo**. The 2nd and 4th Defendant-Respondent-Appellants (hereinafter referred to as the 'Appellants') are now before this Court challenging the Judgment of the High Court.

I observe that the written submissions filed before the High Court by the 1st and 2(A) Plaintiff-Petitioners dated 22.7.2011 in paragraph 7 of the written submissions at pg. 265 of the District Court brief reads thus: **"Inordinate delay and failure to maintain uberimae fides are all accepted and admitted by the Petitioners** with greatest regret pleading for a judgment pronounced by Your Lordships Court that will rectify the error of excluding Lots C and D of Plan No. 2316 (Y) without any valid reason as above mentioned in the judgment of the Learned District Judge". The Petitioners in the High Court are the Plaintiff-Petitioner-Respondents in this appeal. In the teeth of this admission, no appeal Court Judge could allow a revision application. In this revision application itself no other exceptional grounds were averred except one of the Plaintiffs falling sick which is totally disproved by the document 'Z' , which the High Court had failed to consider at all.

Uncontestedly, Lots C and D were dropped out of the corpus by the 4th Defendant- Respondent who wanted those lots in, according to his statement of claim. The Plaintiffs' lawyer did not ask any questions in cross examination nor did their lawyer object to such dropping of the Lots C and D from the corpus. The Plaintiff got what he asked for in his prayer in the plaint. The Defendants joined a little more adjoining land and got the same shares which were due to them. The apportionment of the shares was the same. If the Plaintiffs still want Lots C and D partitioned they can still file another action and get their share. Lots C and D were not included in the corpus which the Plaintiffs sought to get partitioned by the partition action they filed before the District Court. Therefore

they cannot be heard to say that they now want Lots C and D included in the corpus to be partitioned.

The learned High Court Judge refers to submissions by the Plaintiffs to the effect that “no opportunity was given for cross examination” and “no opportunity was given for re examination” etc. There is no record of an application to cross examine or to re examine and the judge not having allowed the same. The lawyers were present in court and they did not cross examine and re-examine at different times. It is observed by me, that they did not do so due to reasons they would have thought were not beneficial to their clients. The learned High Court Judge has failed to see that, whatever each party alleges, has to be borne out by the court record and if it is not so recorded the appeal court judge cannot take connivance of just allegations in the air. The High Court has gone quite wrong in its decision to that effect.

For the reasons set out above, I answer the questions of law aforementioned in the affirmative in favour of the Appellants. I set aside the judgment of the Civil Appellate High Court of Gampaha dated 26.07.2011. I affirm the judgment of the Learned District Judge dated 10.07.2009. I allow the appeal. I order costs of rupees twenty five thousand (Rs. 25000/-) to be paid to the Appellants by the Respondents in this appeal.

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court

Sarath de Abrew, 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 from the judgment of the High Court of Civil Appeal, Kegalle dated 9.8.2012 in terms of Section 5C of the High Court of Provinces [Special Provisions] Act No. 54 of 2006 [as amended] read along with Articles 127 and 128 of the Constitution.

SC. Appeal 134/2013

SC.H.C.CA. LA. 389/2012
Civil Appellate High Court
No. SP/HCCA/Keg/795/10(F)
D.C. Kegalle No. 5935/L

Abusali Sithi Fareeda,
No. 74, Anguruwella Road,
Warakapola

Plaintiff

Vs.

1. Mohamed Noor,
2. Mohamed Farook,

Both of No. 76,
Anguruwella Road,
Warakapola.

Defendants

And Between

Abusali Sithi Fareeda,
No. 74, Anguruwella Road,
Warakapola

Plaintiff-Appellant

Vs.

1. Mohamed Noor,
2. Mohamed Farook,
Both of No. 76,
Anguruwella Road,
Warakapola.

Defendant-Respondents

And Now Between

Abusali Sithi Fareeda,
No. 74, Anguruwella Road,
Warakapola

Plaintiff-Appellant-Appellant

Vs.

1. Mohamed Noor,
2. Mohamed Farook,

Both of No. 76,
Anguruwella Road,
Warakapola.

Defendant-Respondent-Respondents

* * * * *

BEFORE : **Saleem Marsoof, PC. J.**
Eva Wanasundera, PC. J. &
Sarath de Abrew, J.

COUNSEL : S.N. Vijithsingh for Plaintiff-Appellant-Appellant.
A.H.G. Ameen with Ms. G.M.S.K. Waduge for Defendant-Respondent-Respondents.

ARGUED ON : **01.09.2014**

DECIDED ON : **28.10.2014**

* * * * * *

Eva Wanasundera, PC.J.

In this appeal leave was granted on 11.10.2013 on the question of law pleaded in paragraph 18(6) of the Petition dated 12.09.2012 which is as follows:-

> "Whether the High Court of Civil Appeal erred in law by holding that Deed bearing No. 19 dated 15.01.1966 is not obnoxious to Section 66 of the Partition Law."

Section 66 of the Partition Law reads as follows:-

66(1) After a partition action is duly registered as a *lis pendens* under the Registration of Documents Ordinance, no voluntary alienation, lease or hypothecation of any undivided share or interest of or in the land to which the action relates shall be made or effected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition, under section 36 or by the entry of a certificate of sale.

(2) Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of sub section (1) of this section shall be void

Provided that any such voluntary alienation, lease or hypothecation shall in the event of the partition action being dismissed, be deemed to be valid.

(3) Any assignment, after the institution of a partition action, of a lease or hypothecation effected prior to the registration of such partition action as a *lis pendens* shall not be affected by the provisions of sub sections (1) and (2) of this section.

Facts pertinent to the case can be summarised as follows:-

The Plaintiff-Appellant-Petitioner (hereinafter referred to as the 'Appellant') filed action in the District Court of Kegalle bearing No. 5935/L on 26.02.1997 praying for (a) a declaration that she is the owner of the land and property described in the schedule to the plaint i.e Lot 1C of Plan No. 2046/A dated 10.03.1965 surveyed by L.B. Beddewela Licensed Surveyor, of the land named 'Pinneowita Watta' of an extent of 21 ½ perches (A0 R0 P21 ½) as per the judgment and decree entered in Kegalle District Court case No. 17075/Partition and (b) for ejectment of 1st and 2nd Defendants and damages.

The Appellant pleaded her title claiming from Sunil Premasiri who bought $4/6^{th}$ portion of the property from the children of the deceased 7th Defendant in the District Court case No. 17025/P.

The 1st and 2nd Defendants claimed that the 7th Defendant in 17075/P, named Abdul Wadood Sithi Zubeitha Umma, while the partition case was proceeding, transferred her title by deed No. 19 dated 15.01.1966 to H.K. Piyasena and H.K. Warnelis. They in turn transferred their entitlement to Lot 1C by deed No. 136 dated

05.12.1967 to the 14th Defendant Brampisingho who later transferred the said property to the 1st and 2nd Defendants.

There had been a house bearing assessment No. 76 on the property. The 1st and 2nd Defendants had been living in that house and property, each one owning and using 1/2 of the house and property for a very long time. They had been tenants of Brumpisingho, before they bought the property from Brumpisingho, on 12.04.1978 by deed Nos. 34329 and 34330. Brumpisingho was the 14th Defendant in case No. 17075/P.

The question to be decided is whether Deed No. 19 dated 15.01.1966, by which the title was transferred by A.W. Sithi Zubeitha to H.K. Piyasena and H.K. Warnelis, while the partition case was proceeding and/or pending, is obnoxious to Section 66 of the Partition Law or not.

Examining the said Deed No. 19, I observe that it is specifically mentioned in the Schedule to the said deed, as the subject matter of the sale for good consideration , by the Vendor A.W. Siththy Zubeitha as follows: "all my right title interest property claim and demand or whatever share that would be allotted to me in partition case No. 17075/P of the District Court of Kegalle from and out of the land called Pinneowita Watta ....". She had intended to sell whatever portion which would be allotted to her at the end of the D.C. Case No. 17075/P, to the Vendees, Piyasena and Warnelis. It is specifically mentioned that A.W. Sithi Zubeitha, for all purposes intended to dispose of "her share that would be allotted at the conclusion of the partition case". It is cognizably a definite portion. It was not vague. If the partition case got dismissed, this deed would not have come into effect because then, there wouldn't have been any portion of land allotted to the Vendor at the conclusion of the case. So, nothing would have passed to the Vendees if the partition case got dismissed. The partition case No. 17075/P did not get dismissed but was concluded on 23.01.1970 allotting shares to the parties.

The counsel for the Appellant argued that due to the mere reason or the fact that Deed No. 19 did not have the words ‘ in the final decree’ added to the words “allotted to me”, when A.W.Sithi Zubeitha transferred her entitlement by the said Deed , that transfer was not valid and no rights flowed from that instrument. The counsel for the Respondents argued that, the case law from the time of the Partition Ordinance to date is in favour of the proposition that, if and when “ any portion which would be allotted to the vendor at the conclusion of the partition case ” is transferred while the case is pending, the vendee gets proper title automatically, to the portion of land which is allotted to him at the end of the case.

As Section 66 of the Partition Law provides that any alienation after the partition action is duly registered as a lispendens under the Registration of Documents Ordinance is void, I would like to analyse the authorities by way of decided case law regarding this point of law.

The Partition Ordinance No. 18 of 1863 preceded the Partition Law No. 21 of 1977. Section 66 of the Partition Law was in substance equal to Section 17 of the Partition Ordinance. Section 66 of the Partition Law prohibits only the alienation or hypothecation of *undivided interests presently vested in the owners of a land* which is the subject matter of pending partition proceedings.

In ***Babun Vs. Amarasekera*** **1 SCC 24** Phear CJ. Explained the object of the prohibition in Section 17 of the Partition Ordinance thus;

"The sole purpose of the clause seems plainly to be, to reserve full effect to the legal proceedings for partition, when once instituted, and to take care that it shall be in the power of any party concerned to defeat them or embarrass the course of them while transferring his share or interest in the property to a stranger".

Even at a very early stage as in the year 1904, Layard CJ. In ***Louis Appuhamy Vs. Punchi Baba*** **10 NLR 196,** held that "a sale or mortgage executed during the pendency of a partition action under the Partition Ordinance No. 10 of 1863, but before the certificate of sale is signed by the Judge, is valid. A sale or mortgage executed during the pendency of a partition suit in respect of a share or interest to which a person may become entitled after the termination of such suit is valid and is not affected by Section 17 of Ordinance No. 10 of 1863."

In ***Subasena Vs. Porolis*** **16 NLR 319** , Woodrenton ACJ. Stated that "the clear object of the enactment was to prevent the trial of partition actions from being delayed by the intervention of fresh parties whose interest had been created since the proceedings began".

In ***Khan Bhai Vs. Perera*** **26 NLR 204**, a Full Bench of the Supreme Court then, decided on this same point of law, unanimously ruling that persons desiring to charge or dispose of their interests in a property subject to a partition action could do so "by expressly charging or disposing of the interest to be ultimately allotted to them in the action."

In ***Sirisoma Vs. Saranelis Appuhamy*** **51 NLR 337** the effect of the sale of a contingent interest was considered. It was held that "If the instrument is in effect a present alienation or hypothecation of a contingent interest, the rights of ownership (or the hypothecary rights) vest in the grantee automatically upon the acquisition of that interest by the grantor."

In the same case, at page 341, the Judges stated after analyzing the effect of the judgment of a Full Bench in ***Khan Bhai Vs. Perera (Supra) thus;*** "The ruling has influenced the actions of countless vendors and purchasers for over a quarter of a century and it confirms the opinion previously pronounced by an exceptionally strong Bench of Judges of this Court. Besides it is unquestionably a correct statement of the law on the point. Section 17 of the Partition Ordinance prohibits the alienation or hypothecation of 'undivided interests presently vested' in the owners of a land which is the subject of pending partition proceedings. **There is no statutory prohibition against a person's common law right to alienate or hypothecate, by anticipation, interests which he can only acquire upon the conclusion of the proceedings**. That right is in no way affected by the pendency of an action for partition under the provisions of the Ordinance. Section 17 imposes a fetter on the free alienation of property and **Court ought to see that, that fetter is not made more comprehensive than the language and the intention of the section require."**

As such in the case of *Sirisoma Vs. Saranelis Appuhamy* 51 NLR 337, Gratian J. concluded that it is settled law that "Section 17 of the Partition Ordinance does not prohibit the alienation or hypothecation, pending partition proceedings of an interest to which a co-owner may ultimately became entitled by virtue of the decree in the pending case".

In ***B. Sillie Fernando Vs. W. Siliman Fernando and Others*** **64 NLR 404** also, it was held that "where, prior to the entering of the interlocutory decree in a partition action, a party transfers by sale or donation whatever will be allotted to him by the final decree, the lot in severalty finally allotted to the transferor or those representing him (if he has died before the entering of the final decree) will automatically pass and vest in the transferee, without any further conveyance by the transferor or his representatives."

In ***Sirinatha Vs. Sirisena and Others*** **(1998) 3 SLR 19,** Ismail, J. (P/CA) at that time, stated that "It is clear that the object of Section 66 of the Partition Law is to prevent the passage of a partition action being prolonged by permitting new parties to

be added on every occasion that the interests presently vested in the parties to the action are alienated or hypothecated."

Having looked at the authorities and analysing the cases, I feel that there is no bar preventing any person who is a party to a partition action, while the partition action is pending, from transferring the interests *which he 'would acquire' upon the conclusion of the partition action*.

I am of the view that it is settled law for many decades that in spite of the provisions included in the Partition Ordinance firstly by Section 17 and thereafter in the Partition Law by Section 66, any party to a law suit of partitioning a co-owned land is able to gift, sell, or hypothecate his entitlement to the share of the land which would be allocated to him at the end of the case.

In the instant case by Deed No. 19 dated 15.1.1966, A.W. Sithi Zubeitha transferred her title to H.K. Piyasena and H.K. Warnelis and I hold that it is a valid transfer. The land allotted to Sithi Zubeitha at the end of the case automatically got transferred to the Vendees. The 1st and 2nd Defendant – Respondent – Respondents are the lawful owners of the land and property which were granted to them by the deeds of transfer that were executed thereafter.

For the reasons set out above, I answer the question of law raised as aforementioned in the negative. I hold that Deed No. 19 dated 15.1.1966 is not obnoxious to Section 66 of the Partition Law No. 21 of 1977. I affirm the judgment of the Civil Appellate High Court dated 09. 08. 2012 and the judgment of the District Court dated 15.10.2010. I dismiss the appeal. I order no costs.

Judge of the Supreme Court

Saleem Marsoof, PC. J.

I agree.

Judge of the Supreme Court

Sarath de Abrew, 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 appeal against the judgment of the High Court

Fritzroy Clarance De Seram
Plaintiff.

SC Appeal No. 143/2013
SC HC (CA) LA 82/2013
Civil Appellate High Court
Mt Lavinia WP/HCCA/Mt 110/06(F)
DC Mt Lavinia 1587/02/L

Vs

Dehiwela Mount Lavinia Municipal Council

Defendant.

AND BETWEEN

Dehiwela Mount Lavinia Municipal Council

Defendant-Appellant

Vs

Fritzroy Clarance De Seram

Plaintiff-Respondent

AND BETWEEN

Dehiwela Mount Lavinia Municipal Council

Defendat-Appellant-Petitioner

Vs

Fritzroy Clarance De Seram

Plaintiff-Respondent-Respondent

AND NOW BETWEEN

Dehiwela Mount Lavinia Municipal Council

Defendant-Appellant-Petitioner-Appellant

Vs

Fritzroy Clarance De Seram

Plaintiff-Respondent-Respondent-Respondent

Before : Chandra Ekanayake J
Eva Wanasundera PC, J
Sisira J De Abrew J

Counsel : Vikum de Abrew DSG with Suranga Wimalasena SSC for the Defendant-Appellant-Petitioner-Appellant
Wimal Premathilake instructed by GD Gunaratne for the Plaintiff-Respondent-Respondent-Respondent.

Argued on : 5.6.2014 and 21.7.2014
Written submission filed on : 29.8.2014 by the Defendant-Appellant-Petitioner-Appellant
10.9.2014 by the Plaintiff-Respondent-Respondent
Decided on : 17.10.2014

Sisira J De Abrew J.

This is an appeal against the judgment of the learned High Court Judges of the Civil Appellate High Court of Mount Lavinia wherein they affirmed the judgment

of the learned District Judge of Mount Lavinia who decided the case in favour of the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent).

Plaintiff filed action against the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-Appellant) for declaration of title to the land described in the 1st schedule of the plaint [lot No 6B of plan No.1921 dated 1.3.2000 made by Licenced Surveyor BHA de Silva] and to eject the Defendant-Appellant from the said land. The learned District Judge held in favour of the Plaintiff-Respondent and on appeal Civil Appellate High Court affirmed the judgment of the learned District Judge. Being aggrieved by the said judgment of the Civil Appellate High Court, the Defendant-Appellant has appealed to this court. This court granted leave to appeal on the questions of law set out in paragraph 15 of the petition of appeal which are reproduced below.

1. Did both the District Court and the Civil Appellate High Court err in Law by failing to consider the failure of the Plaintiff-Respondent to prove his title which is indispensible requirement in a vindicatory action?
2. Did both the District Court and the Civil Appellate High Court err in Law by failing to consider the long and continued possession by the Defendant-Appellant of the subject matter adverse to the rights of the Plaintiff-Respondent?
3. Did both the District Court and the Civil Appellate High Court err in Law by not taking into account of the validity or invalidity of the Power of Attorney marked and produced as P1 in the trial?
4. Did both the District Court and the Civil Appellate High Court err in Law by not taking into account that the plaint had not disclosed a cause of action against the Defendant-Appellant?

5. Is the judgment of the Civil Appellate High Court wrong or contrary to Law?
6. Did both the District Court and the Civil Appellate High Court err in Law by not taking into account the provisions of the cemeteries and Burial Grounds Ordinance?

At the very inception I must state here that no evidence was led to challenge the validity of the power of attorney marked as P1 and that there was no specific issue on this matter. It is undisputed that the corpus in this case is Lot No.6B of plan No.1921 dated 1.3.2000 made by Licenced Surveyor BHA de Silva (hereinafter referred to as Plan No 1921). The extent of the said land is eight (8) perches. The Defendant-Appellant claimed prescriptive title to this land. The original owner of the land described in the 3rd schedule of the plaint the extent of which isA5,R2,P9.8 was Peter Thomas De Seram. This land was divided into 23 Lots. The Plaintiff-Respondent claims that Lot No.6 of plan No.233 dated 2.3.1957 made by W R de Silva Licensed Surveyor (hereinafter referred to as Plan No.233) is one of the said 23 Lots. An extract of Plan No. 233 has been produced as P3. Thus it is clear that the original owner of Lot No.6 (21.75 perches) was Peter Thomas De Seram. After his demise, his wife Agnes Maria De Seram and children Shirley Brian De Seram, Fritz Roy Clarenz De Seram and Rex Stanly De Seram became the owner of Lot No.6 of Plan No 233. This Lot No. 6 is shown as Lot No. 6A and 6B of Plan No 1921. According to this plan the extent of Lot 6A is 14 perches and extent of Lot No.6B is 8 perches. It appears that there is a difference of 0.25 perches between Plan No. 233 and Plan No.1921. This difference can be understood as plan No.1921 was drawn up after 43 years of the earlier plan. After Maria De Seram's demise three children Shirley Brian De Seram, Fritz Roy Clarenz De Seram and Rex Stanly De Seram became the owner of Lot No.6 of

Plan No 233. Shirley Brian De Seram, by deed No 912 of HA Kulatunga Notary Public dated 16.4.1998 gifted his share of Lot No. 6 to Fritz Roy Clarenz De Seram (the Plaintiff-Respondent). By this deed Shirley Brian De Seram even gifted his share of Lot No.7 of Plan No.233 to Fritz Roy Clarenz De Seram. Plaintiff-Respondent says that later he and Rex Stanly De Seram who were the owners of Lot No.6 of Plan No.233 sold 14 perches from Lot No.6 of plan No 233 by deed No. 934 of HA Kulatunga Notary Public to Samaraweera Silva. It appears that the said 14 perches were later demarcated as Lot No 6A of Plan No.1921.Thus it appears that Fritz Roy Clarenz De Seram and Rex Stanly De Seram are the owners of Lot no 6B of Plan No 1921 which is the balance portion of Lot No 6 of Plan No.233. The subject matter of the case is Lot No.6B of Plan No.1921.

Learned DSG appearing for the Defendant-Appellant contended that deed No 934 was a fraudulent deed. He contended that Lot No.7 of Plan No.233 had earlier been sold by Agnes Maria, Shirley Brian De Seram, Fritz Roy Clarenz De Seram and Rex Stanly De Seram to one Haniffa Munzir Marrikkar by deed No 981 dated 16.5.1964. The said Haniffa Munzir Marrikkar transferred the said lot No.7 to Peter Damian Fernando by deed No.4364 dated 4.10.1967. The said Peter Damian Fernando, by deed No 5796 dated 18.11.1976, transferred the said Lot No.7 to the Municipal Council (Defendant-Appellant). Learned DSG therefore contended that deed No.934 was a fraudulent deed. I would like to state here that the folio in which deed No.5796 was registered (if it was registered) had not been produced at the trial by the Defendant Appellant. It is interesting to find out the portion that had been sold by deed No.934 dated 24.7.1998. According to this deed a portion (22.25 perches) from amalgamated Lots No. 6 and 7 of Plan No.233 had been sold to Saundahannadige Samaraweera Silva. Learned DSG submitted that the Plaintiff-Respondent and his brothers could not have sold portion of Lot No.7

of Plan No.233 in 1998 since it had been sold in 1964. He therefore contended that deed No.934 dated 24.7.1998 was not a genuine one. But the Plaintiff-Respondent contended that by deed No.934 he and his brothers sold 14 perches from Lot No.6 of Plan No.233. It appears that the said 14 perches had later been demarcated as Lot No.6A of Plan No.1921 and that they remained to be owners of the remaining portion of Lot No.6B of Plan No.1921. Can this court declare that deed No.934 is a fraudulent deed in these proceedings? It is Samaraweera Silva who had purchased the property mentioned in deed No.934 by this deed. Court cannot make a pronouncement that deed No 934 is a fraudulent one without giving a hearing to Samaraweera Silva. Further I would like to state here that the deed No.981 has only dealt with lot No.7 of Plan No.233. It has not dealt with lot No.6 of Plan No. 233. Lot No.6 of Plan No.233 had not been sold by deed No.981. Therefore the ownership of Lot No.6 remains unaffected even after the execution deed No.981. Although the learned DSG contended that deed No.934 which was executed in favour of Samaraweera Silva was a fraudulent one, I would, for the following reasons, like to state here that the Defendant-Appellant had accepted the rights of Samaraweera Silva with regard to this property. The Defendant-Appellant, by P5 (a letter written by Municipal Council Dehiwala-Mount Lavinia), has stated that it would issue a development permit with regard to Lot No.6A of Plan No.1921. This letter with a copy to Samaraweera Silva was addressed to the Lawyer of the Plaintiff-Respondent. For the Defendant Respondent to have issued such a letter, it must have been satisfied with the title of the property of Samaraweera Silva. This shows that Defendant-Appellant had accepted the title of the property of Samaraweera Silva (Lot 6A of plan No.1921). How did Samaraweera Silva get title to his property? It is only through deed No.934.This shows that the Defendant-Appellant had accepted the title of Samaraweera Silva with regard to of Lot No.6A

of Plan No.1921. How can the learned DSG who appears for the Defendant-appellant now challenge the deed No.934? It is an accepted principle in law that one cannot approbate and reprobate.

As I pointed earlier deed No.981 had not touched Lot No.6 of Plan No.233. If one assumes without conceding that deed No.934 marked asV6 is a fraudulent deed, what would have been the position? Then the title of the property stated therein may not have passed to Samaraweera Silva. Then the ownership of Lot No.6 of Plan No.233 would continue to remain with the Plaintiff-Respondent and his brothers. Further it has to be noted here that the Defendant-Appellant does not claim title to Lot No.6B by deeds.

Learned DSG contended that since Lot No.7 had had been earlier sold by deed No.981 (P8), the Plaintiff-Respondent and his brothers could not have again sold Lot No.7 of Plan No.233. Therefore he contended that, by deed No.934, if the Plaintiff-Respondent and his brothers had transferred **22.25** perches to Samaraweera Silva, it could have been done only from Lot No.6 of Plan No.233. This contention, at the very inception, fails because the extent of Lot No.6 is only **21.75** perches.

Learned DSG, at the end of his submission, tried to contend that the Plaintiff-Respondent and his brothers did not have title Lot No 6 and Lot No7 of Plan No.233 as they had sold the same to Samaraweera Silva by deed No.934. But by deed No. 934, Lot No.6 and/or lot No.7 of Plan No.233 had not been sold. They had, by the said deed, only sold a portion (22.25 perches) of amalgamated Lots 6 and 7 of Plan No.233.

I would again like to consider the letter sent by the Defendant-Appellant marked P5. The Defendant-Appellant, in the said letter, had admitted that Lot No.6B of plan No.1921 belonged to the Plaintiff-Respondent.

When I consider all the above matters, I hold that the Learned District Judge was right when he held that the Plaintiff-Respondent had established title to Lot No.6B of Plan No.1921. The learned High Court Judges too, in my view, were right when they agreed with the learned District Judge on this point. For the above reasons I reject the contention of the learned DSG who appeared for the Defendant-Appellant that the Plaintiff-Respondent had not established title to Lot No.6B of Plan No.1921.

The next question that must be considered is whether the Defendant-Appellant had established prescriptive title to Lot No.6B of Plan No.1921 (the corpus of the case). Defendant-Appellant says that this Lot was used by it as a part of the cemetery of Mount Lavinia over a period of ten years. But the land Officer of The Defendant-Appellant Mallika Kankanmge Sunil, in his evidence, had stated that the Defendant-Appellant possessed the said Lot 6B with the permission of the Plaintiff-Respondent and his brothers. Then how can the Defendant-Appellant claim prescription? If a person possesses a land over a period of ten years with permission of owner of the land he cannot claim prescriptive title against the owner. Further the Defendant-Appellant, in P5, has stated that it had acquired Lot No.6B of Plan No.1921 which is the corpus in this case. The said letter further says that the Defendant-Appellant would pay compensation for the said land as it had been acquired for the cemetery. If the Defendant-Appellant had acquired prescriptive title to the land, why should it (the Defendant-Appellant) pay compensation to the Plaintiff-Respondent in respect of the land? Further isn't it an implied admission that the land belongs to the Plaintiff-Respondent? The Municipal Commissioner, in the said letter marked P5, has referred to two lots. They are Lot No.6A and Lot No.6B of Plan No.1921. He, in the second paragraph of the said letter, says that a development permit would be issued to lot No.6A and

in the 3rd paragraph he refers to the land acquired for the cemetery. Thus this land should be Lot No.6B of Plan No.1921. I would like to point out here that the Municipal Commissioner, in the said letter, has admitted this land (Lot No.6B of Plan No.1921) belongs to the Plaintiff-Respondent. As I pointed out earlier this letter has been addressed to the lawyer of the Plaintiff-Respondent. When I consider all the above matters, I hold that Defendant-Appellant had not established prescriptive title to the corpus of the case. I therefore hold the learned District Judge was correct when he rejected the plea of prescription. The learned High Court Judges, after considering the above matters, have affirmed the judgment of the learned District Judge. In my view there are no reasons to interfere with the judgments of both courts. I uphold both judgments of the District Court and the High Court. In view of the above conclusion reached by me the question of law raised by the Defendant-Appellant are answered in the negative.

For the above reasons I dismiss the appeal with costs.

Judge of the Supreme Court.

Chandra Ekanayake J

I agree

Judge of the Supreme Court.

Eva 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 for Special Leave to Appeal to Supreme Court under and in terms of Articles 128(2) of the Constitution of 1978 read with the Supreme Court Rules of 1990 against the Order of the Court of Appeal dated 17.09.2010 in C.A. (writ) No. 535/2010.

SC APPEAL No. 150/2010
SC (SPL) LA Appl. No. 188/10
CA (Writ) No. 535/10

DFCC Bank,
No. 73/5, Galle Road, Colombo 03.

1ST RESPONDENT-APPELLANT

-Vs-

Weliwita Don Kusumitha Mudith Perera,
No. 112, Sewagama, Polonnaruwa.

PETITIONER-RESPONDENT

1. Mrs. Induni Karunananda,
   Attorney-at-Law,
   Legal Officer-DFCC Bank,
   No. 73/5, Galle Road,
   Colombo 03.

2. A.N. Fonseka,
   General Manager-DFCC Bank,
   No. 73/5, Galle Road,
   Colombo 03.

3. Sewagama Rice Products (Pvt) Ltd,
   No. 112, Sewagama,
   Polonnaruwa.

RESPONDENT-RESPONDENTS

BEFORE : Hon. Saleem Marsoof, PC., J,
Hon. Sathyaa Hettige, PC., J, and
Hon. Priyasath Dep, PC., J.

COUNSEL : Nigel Hatch, P.C., with P. Abeywickrama and S. Illangage for the Appellant.

David Weeraratne with A.K.Chandrakantha for the Respondents.

ARGUED ON : 2. 2.2012

WRITTEN SUBMISSIONS ON : 25.4.2012 and 30.5.2012

DECIDED ON : 25.3.2014

SALEEM MARSOOF J:

This appeal arises from an order made by the Court of Appeal on 17th September 2010, in the course of a writ application filed in terms of Article 140 of the Constitution in the Court of Appeal by the Petitioner-Respondent, Weliwita Don Kusumitha Muditha Perera (hereinafter sometimes referred to as "Muditha Perera"). By the said order, the said Muditha Perera was granted interim relief as prayed for in prayer (c) to the amended petition filed by him against the 1st Respondent-Appellant, DFCC Bank (hereinafter sometimes referred to as "the DFCC Bank) restraining the DFCC Bank from selling by public auction the property mentioned in Mortgage Bond bearing No. 1811 dated 25th May 2009, attested by A.M.M.Rauf, Notary Public.

It may be mentioned that the said Muditha Perera had cited three more parties as respondents to his amended petition filed in the Court of Appeal, namely, the Legal Officer and Managing-Director of the DFCC Bank, who are the 1st and 2nd Respondent-Respondents to this appeal, and the Sewagama Rice Products (Pvt) Ltd., the present 3rd Respondent-Respondent. Sewagama Rice Products (Pvt) Ltd., of which, the said Muditha Perera and one Weliwita Don Neel Perera, are Directors, admittedly borrowed a sum of Rs. 25,000,000 from the said Bank on the security of the aforesaid mortgage executed by the said Muditha Perera and the said Weliwita Don Neel Perera, who are admittedly co-owners of the property which was so mortgaged.

Pursuant to an application for special leave to appeal being filed in this Court by DFCC Bank, this Court has granted special leave to appeal against the aforesaid order of the Court of Appeal on the following questions of law set out in paragraph 17 (a)-(f) of the amended petition filed by the said Bank:-

a) Did the Court of Appeal err in law by determining that the Appellant was not a "borrower" within the meaning of the Recovery of Loans by Bank (Special Provisions) No.4 of 1990 having regard to the decision of the Supreme Court in *HNB v Jayawardena* (2007) BALJR 50;

b) Is the *ratio* of the decision of the Supreme Court in *HNB v Jayawardena* (2007) BALJR 50 that a Director of a Corporate entity who mortgages his property as security for loans obtained by that corporate entity is a borrower within the meaning of the Recovery of Loans by banks (Special Provisions) No. 4 of 1990;

c) Was the decision of the Supreme Court in *HNB v Jayawardena* (2007) BALJR 50 binding in the Court of Appeal and / or not capable of any distinction in its application to the instant case;

d) Has the Court of Appeal failed to follow the principle of binding precedent and / or *stare decisis*;

e) Has the Court of Appeal misdirected itself in law by determining that the Appellant-Respondent has established a *prima facie* case and was entitled to the interim relief having regard to all the material before the Court of Appeal including the Appellant Bank's oral and written submissions;

f) Has the Court of Appeal erred in law by determining that cogent reasons had been furnished by the Appellant-Respondent for not complying with the principle in *Ukwatte v DFCC Bank* (2004) 1 Sri LR 164.

At the hearing, learned Counsel agreed to confine the argument to the two substantive questions set out above as (a) and (f).

Although I was one of the Judges of the Divisional Bench of this Court that heard and decided *HNB v Jayawardena* (2007) BALJR 50, which is expressly referred to in some of the questions on which special leave was granted, and most notably in question (a) above, learned Counsel also graciously stated at the commencement of the hearing that they had no objections whatsoever to my being a member of the Bench that heard this appeal.

The two main questions for consideration at the hearing were questions (a) and (f), which are both substantive questions of law. I shall now consider these questions in turn.

Is the Appellant a "borrower"?

The question is whether the Appellant Muditha Pererea is a "borrower" within the meaning of the Recovery of Loans by Bank (Special Provisions) Act No.4 of 1990, as subsequently amended, having regard to the decision of the Supreme Court in *Hatton National Bank v Jayawardena* (2007) BALR 50.

To answer this question, it would be necessary to look closely at the material facts of this case, but I consider it useful to first explain very briefly the importance of this question from the perspective of its legislative and legal antecedents.

Prior to the enactment of the Recovery of Loans by Bank (Special Provisions) Act of 1990, any Bank that lent money on the security of a mortgage had to rely on the provisions of the Mortgage Act No. 6 of 1949, as subsequently amended, to obtain a "hypothecary decree" from Court in terms of Section 48(1) of the Act to have the mortgage enforced. S.N.Silva CJ in his erudite majority judgment in *Ramachandran and Others v Hatton National Bank* (2006) 1 Sri L.R. 393 at page 399, described the Mortgage Act as a "piece of erudition", after explaining in his immaculate style how our own Common Law founded on Roman-Dutch law differed both from Roman Law and English law in regard to the ability to sell the secured property without recourse to court at pages 395 to 399 of his judgment, and went on to highlight the features of the Mortgage Act of 1949 and the concept of the "hypothecary action" it introduced. It is not necessary for the purposes of this decision, to repeat his very useful exposition of the law found in those pages.

What is material for this decision is to consider, as a Five Judge Bench of this Court (S.N. Silva CJ., Bandaranayake J., Jayasinghe J., Udalagama J., and Dissanayake J.), did in *Ramachandran's case,* the category of persons against whom the *parate* execution provisions of the Recovery of Loans by Bank (Special Provisions) Act of 1990, will operate. This is because it is only against a person belonging to such a class that the Board of Directors of a Bank may pass a resolution authorising sale by public auction any property mortgaged to the bank by him as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan, together with the money and costs recoverable under section 13 of the said Act. In *Ramachandran's case,* the majority of the judges favoured a strict interpretation of the provisions of the Act in keeping with the Rule of Law and the existing legal position, to restrict the said class to those who had borrowed money by mortgaging property owned by them to exclude from this category mere "guarantors" who were not party to the loan agreement with the Bank. However, Shirani

Bandaranayake J. (as she then was), in her dissent, favoured a broader interpretation to include "third party mortgagors" who were not party to the loan provided by the Bank.

It is also important to understand the legal reasoning on the basis on which this Court arrived at its majority decision, as that decision is binding on the Bench before which this appeal was argued. S.N. Silva CJ in *Ramachandran's case,* sought to identify the category of persons against whom *parate* execution was intended to be provided by the Act as follows at page 404 of his judgment :-

> "The submissions of Counsel for the Petitioner [in *Ramachandran's* case], is that the class of persons is clearly identified in the provisions of the Act commencing from Section 2 itself. Section 2(1)(a) requires 'every person to whom any loan is granted by a Bank on the mortgage of property' to register with the Bank the address to which a notice to him may be sent. I am inclined to agree with this submission since a Resolution of the Board to sell by Public Auction, as empowered by Section 4, has to be dispatched to this address in terms of Section 8. Similarly, the notice of sale in terms of Section 9 should be dispatched to that address.
>
> *There is a clear link in the provisions between the taking of a loan and the mortgage. The law will apply where a mortgage is given by the person to whom the loan is granted. In Sections 7, 14, 15, 16 and 17 this person is identified as the 'borrower'. The borrower is none other than the person to whom a loan is granted and who is required in terms of Section 2 to register his address with the Bank.* In terms of Section 14 where the mortgaged property is sold and an amount in excess of what is due to the Bank is recovered, such amount has to be paid by the Bank to the borrower. This clearly established that it is only the property mortgaged by a borrower that could be sold by a Bank to recover a loan granted to him. If the provisions are extended by a process of interpretation to cover a mortgage given by a guarantor, Section 14 will bring about a preposterous result in which the guarantor's property is sold and the excess recovered is paid by the Bank to the borrower. It is when confronted with their unanswerable contention, that the Counsel for the Banks submitted that the term borrower should be interpreted to include any debtor and that where a loan is in default the guarantor would be a debtor. *The words 'borrower', 'guarantor' and 'debtor' have specific significance attaching to them in legal proceedings. These distinctions cannot be removed and the application of the special provisions law extended to encompass guarantors in view of the serious implications of its provisions as revealed in the preceding analysis*." (*Emphasis added*)

It is the submission of the learned Counsel for Muditha Perera, who claims to be a "third party mortgagor" against whom the provisions of the Recovery of loans by Banks (Special Provisions) Act would not operate, that the majority decision in *Ramachandran's* case is applicable to the facts and circumstances of his case, while learned President's Counsel for the DFCC Bank submits that the decision of this Court in *Hatton National Bank v Jayawardena* (2007) BALJR 50 is applicable. In the latter case, this Court (Jayasinghe J., Thilakawardane and Marsoof J.), considered the special circumstances of that case appropriate to lift the veil of incorporation of Nalin Enterprises (Pvt) Ltd., which was the corporate body that had obtained the loan from the Bank in question, to ascertain whether the two guarantors who were Directors of the said company constituted the *alter ego* that would indirectly benefit from the non-payment of the loan.

In the impugned decision of the Court of Appeal, that court (Rohini Marasinghe J.) considered both decisions in the context of an application for interim relief to restrain the holding of an auction to sell by public auction, the immovable property of the Petitioners-Respondents. Having done so, her Ladyship went on to analyse the factual position in the light of the applicable law, and observed as follows:-

> "The 1st Respondent Bank had called upon the Company and the mortgagor to enter into the Mortgage Bond to grant security. Accordingly, the Petitioner [Muditha Perera] has mortgaged the immovable property mentioned in the relevant Bond as security for the repayment of the loan. *It is a clause in the Bond that the Company should not utilize any portion of its funds in the loan to the benefits of its shareholders. According to the attestation clause the Bank as the obiligee has agreed to pay the sum in the loan to the 4th Respondent Company [Sewagama Rice Products (Pvt) Ltd.] as the obligor. The Petitioner stated the legal person who borrowed the money is the 4th Respondent Company.* It was the Petitioners position that the Divisional Bench of the Supreme Court that interpreted the Act No. 4 of 1990 in *Ramachnadra and Ananda Siva v Hatton National Bank* 2006 1 SLR 393 had clearly ruled that the Bank can levy *parate* execution of immovable property in a mortgage Bond *only if the property belonged to the borrower and thus as the petitioner is not the borrower*, the resolution passed to sell the mortgage property in Bond No. 1811 is illegal and is of no force and avail in Law."

The Court of Appeal went on to make the following pertinent observation, in regard to the submissions made by learned Counsel:-

> The English Courts have upheld the principle in *Solomn v Solomn & Company* 1897 AC 22, to mean that the rights and liabilities of Directors are different to those of the shareholders. The position of the Petitioner was that the Bond No. 1811 clearly shows the borrower was the 4th Respondent Company, and the Petitioner was Guarantor. Nowhere does the English Law inclusive of Company Law deems a Managing Director of a Company as a borrower of a loan solicited and granted to the Company by a Bank or a person, although the Managing Director had given a security by way of mortgage binding himself jointly and severally with the Company. The Petitioner urged that in the subsequent case of *HNB v Jayawardene 2007 1 SLR 181* is either *obiter* or could be distinguished *and cannot be accepted as a general proposition of Law which makes a Managing Director who had given a mortgage of immovable property as a surety is considered a borrower of the Company*. He also relied on the English cases cited in the Judgment which he explained in his submissions. He also stated that in the Case of *HNB v Jayawardane*, Justice Jayasinghe had said that the Directors in that case had been borrowers in fact with Nalin Enterprises and had benefited with the Loan facility. Thus as the judgment does not reveal the relevant mortgage documents in the case, the decision could be correct if the loan mentioned in the Bond of the case had been solicited both by the Company and Directors and had been granted to both without any restriction on them to use the money in the loan.

It is in these circumstances, that the Court of Appeal concluded that Muditha Perera had established a *prima facie* case and that he is not the borrower within the principle of *Ramachandran's* case, and that *Jayawardane's* case can be distinguished. The Court of Appeal accordingly granted interim relief restraining the conduct of the auction of the mortgaged property, on the following basis:-

> If the Bank's Resolution to sell the property in bond No. 1811 is outside the jurisdiction granted to a Bank under Act No. 4 of 1990 all subsequent steps will be of no avail in law and therefore are null and void. I am satisfied that the Petitioner has established a *prima facie* case and I am of the opinion that irreparable loss and damage would be caused to the Petitioner if an interim order is not granted to stop the auction at least till the next date. This order is made inter partes with the Learned President's Counsel for 1, 2 and 3 Respondents making lengthy submissions on law and facts. I make this order especially because the points of Law raised by petitioner are of very substantial importance.

I am in agreement with the submission of the learned Counsel for Muditha Perera that in all the circumstances of this case, as would appear from the various passages of the order of the Court of Appeal I have chosen to quote in this judgment, there is no basis to apply the obviously narrow principle laid down in *Hatton National Bank v Jayawardane*. As has been observed by Gower and Davies, *Principles of Modern Company Law*, (Eighth Edition 2008), pages 208-209,

> The doctrine of lifting the veil plays a small role in British company law, once one moves outside the area of particular contracts or statutes. Even where the case for applying the doctrine may seem strong, as in the undercapitalised one-person company, which may or may not be part of a larger corporate group, the courts are unlikely to do so. As Staughton L.J. remarked in *Atlas Maritime Co SA v Avalon Maritime Ltd.* The Coral Rose [1991] 4 All ER 769 at 779, "The creation or purchase of a subsidiary company with minimal liability, which will operate with the parent's funds and on the parent's directions but not expose the parent to liability, may not seem to some the most honest way of trading. But it is extremely common in the international shipping industry and perhaps elsewhere. To hold that it creates an agency relationship between the subsidiary and the parent would be revolutionary doctrine."

I accordingly answer substantive question (a) above in the negative, and hold that**,** in all the circumstances of this case, the Court of Appeal did not err in law by determining on a *prima facie* basis, for the purposes of considering interim relief, that the Appellant was not a "borrower" within the meaning of the Recovery of Loans by Banks (Special Provisions) No.4 of 1990 having regard to the decision of the Supreme Court in both *Ramachandran and Others v Hatton National Bank* and *HNB v Jayawardena.*

Are the Members of the Board of Directors Essential Parties?

I now have to consider substantive question (f) on the basis of which leave to appeal was granted by this Court against the impugned order of the Court of Appeal, which is whether the said court erred in law by determining that cogent reasons had been furnished by Muditha Perera for not complying with the principle in *Ukwatte v DFCC Bank* (2004) 1 Sri LR 164.

It is convenient to first refer to the approach of the Court of Appeal to this question, which is revealed by the following passage in its order:-

> "Counsel for the Respondent raised a legal objection citing the case of *Ukwatte v DFCC Bank* 2004 (1) Sri LR 164, to the effect that the Petitioner [Muditha Perera] is not entitled to a writ of *certiorari* because the writ must be prayed against the Board of Directors. Although on the face of it, it is a valid legal objection, the Petitioner has given sufficient reasons in the petition as to why he did not make the members of the Board

Respondents to this application. In paragraph 31 supported by the affidavit he states that he had requested the Branch Manager of the 1st Respondent Bank at Polonnaruwa, for a true copy of the Resolution passed by the Bank and the Petitioner had been informed that no such Resolution had been passed prior to the date of P13. The Petitioner had then gone to the head office of the 01st Respondent to ask for the copy and thereafter he had sent the letter P15 through his Attorney-at-Law requesting the names of the Board stating that information is necessary for him to file legal action. The Petitioner stated the information was not given and the Counsel for the 1, 2, 3rd Respondents [DFCC Bank and its officers] stated that they are not bound to give the information requested. Thus when information is exclusively within the knowledge of 1st Respondent and it is not provided by the 1st Respondent Bank when requested, I am of the view that the Petitioner can file an application for writ of certiorari citing the 01st Respondent only and obtain the relief as the Board of Directors are only expressing the decision of the 1st Respondent."

I am of the view that the Court of Appeal need not have gone that far, since though the Board of Directors is the most important decision making body of the company, as Gower and Davies, *Principles of Modern Company Law*, (Eighth Edition 2008), page 366 notes, "it would be difficult to glean any similar understanding of the importance of the board from a reading of the Companies Act." This is because the determination of the role of the Board of Directors within the company to the company's constitution, which is, of course under the control of the shareholders. The fact still remains that by and large, the Board of Directors is the most dynamic organ of a modern company.

In any event, in the context of the Recovery of Loans by Banks (Special Provisions) No.4 of 1990, it is obvious that the loan that is sought to be recovered under its provisions should have been granted or advanced by the Bank, and not its Board of Directors, and section 22 of the Act defines a "Bank" primarily as a "licensed commercial bank within the meaning of the Banking Act, No. 30 of 1988" and further defines a "Board" in relation to a Bank as a "the Board of Directors of the bank or any body of persons by whatever name or designation called for the time being charged with the management or administration of such bank". Although it is envisaged by the Act that a decision to proceed by way of *parate* execution for the recovery of the loan has to be taken by the Board of Directors, it is clear that the proceeds of any auction sale pursuant to the *parate* execution would come into the coffers of the Bank, and that as provided in section 14 of the said Act, when the said proceeds exceed the value of the loan and other dues, it is the bank that is bound "after deducting from the proceeds of the sale the amount due on the mortgage and the moneys and costs recoverable under section 13, pay the balance remaining, if any either to the borrower or any person legally entitled to accept the payment due to the borrowers or where the Board is in doubt as to whom the money should be paid into the District Court of the district in which the mortgage property is situate."

In my opinion, it is the Bank that stands to gain when it exercises the right of *parate* execution, and the Board of Directors is simply its managing body that takes decisions primarily for the benefit of its shareholders. It is clear from the decision of the House of Lords in *Salomon v A. Salomon and Co. Ltd.* (1897) AC 22 that the company has a personality distinct from its shareholders and board of directors, and the same principle applies to Banking companies. I am therefore of the opinion that the decision of the Court of Appeal in *Ukwatte v DFCC Bank* 2004 (1) Sri LR 164, in which interim relief prayed for in that case was refused on the basis that the members of the Board of Directors of the Bank that passed the resolutions sought to be quashed by *certiorari,* were not cited as respondents to the writ application, is irreconcilable with the principle

enunciated by the House of Lords in *Salomon v A. Salomon and Co. Ltd*., which has been consistently and universally followed.

In any event, unlike in the *Ukwatte* decision, the relief prayed for from the Court of Appeal in prayers (b) and (c) were sought against the 1st Respondent-Appellant DFCC Bank, and not against its Board of Directors. By prayer (b) the relief sought was a mandate in the nature of writ of *certiorari* on DFCC Bank quashing the decision contained in the document P13, which is the impugned resolution of the Board of Directors of the said Bank, and the relief sought by prayer (c) was interim relief restraining the DFCC Bank from selling by public auction the property mentioned in the Mortgage Bond No. 1811 until the final determination of the application filed in the Court of Appeal.

I therefore have no hesitation in answering substantive question (f) also in the negative, and against the Appellant. I hold that the Court of Appeal did not err in law in determining that cogent reasons had been furnished by Muditha Perera for not complying with the principle in *Ukwatte Vs. DFCC Bank* (2004) 1 Sri LR 164.

Conclusions

For the foregoing reasons, I uphold order of the Court of Appeal dated 17th September 2010, and dismiss the appeal. I also remit the case to the Court of Appeal for it to expeditiously conclude this case, and direct that the order made by the Court of Appeal on 17th September 2010 restraining the DFCC Bank from selling by public auction the property mentioned in the Mortgage Bond No. 1811 shall continue until the final determination of the application filed in the Court of Appeal, unless the Court of Appeal for good reasons considers otherwise.

In all the circumstances of this case, I do not make any order as to costs.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Priyasath 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 appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal No. 150/2012

SC(HCCA) LA No. 278/2011
WP/HCCA/KAL/114/2009 (F)
D.C. Panadura No. 1964/MR

Wanakkuwatta Waduge Nirosh Priyasad Fernando.
"Swarna",
Swarnajothi Mawatha,
Thanthirimulla,
Panadura.

Plaintiff

Vs.

1. Subramaniam Indrajith,
   No. 26, Thissa Mawatha,
   Horethuduwa,
   Panadura.

2. Hettiyakandage Jagath Jayalal Fernando,
   37/30, Edward Benadict Mawatha,
   Horethuduwa,
   Panadura.

Defendants

Between

1. Subramaniam Indrajith,
   No. 26, Thissa Mawatha,
   Horethuduwa,
   Panadura.

2. Hettiyakandage Jagath Jayalal Fernando,
   37/30, Edward Benadict Mawatha,
   Horethuduwa,
   Panadura.

Defendant-Appellants

Vs.

Wanakkuwatta Waduge Nirosh Priyasad Fernando.
"Swarna",
Swarnajothi Mawatha,
Thanthirimulla,
Panadura.

Plaintiff-Respondent

And Now Between

Wanakkuwatta Waduge Nirosh Priyasad Fernando.
"Swarna",
Swarnajothi Mawatha,
Thanthirimulla,
Panadura.

Plaintiff-Respondent-Petitioner

Vs.

1. Subramaniam Indrajith,
   No. 26, Thissa Mawatha,
   Horethuduwa,
   Panadura.

2. H. Jagath Jayalal Fernando,
   37/30, Edward Benadict Mw,
   Horethuduwa,
   Panadura.

Defendant-Appellant-Respondents.

SC. Appeal No. 150/2012

BEFORE : **Saleem Marsoof,PC. J.**
Sripavan, J. &
Eva Wanasundera, PC.J.

COUNSEL : T.M.S. Nanayakkara for Plaintiff-Respondent-Appellant.
Rohan Gunapala for Defendant-Appellant-Respondents.

ARGUED ON : **03.02.2014**

DECIDED ON : **11.09.2014**

* * * * *

Eva Wanasundera, PC.J.

Leave was granted on 04-09-2012 on the question of law set out in para 18 of the Petition dated 20-07-2011; ie. "whether the Plaintiff-Respondent-Appellant's proceeding for higher studies could be reckoned to mitigate the effect of the injury".

The judgment of the Provincial High Court of Civil Appeal holden at Kalutara dated 09-06-2011 has affirmed the judgment of the District Court dated 14-09-2009 in favour of the Plaintiff – Respondent – Appellant (hereinafter referred to as the "Appellant") but reduced the quantum of damages by Rs.200,000/- . The contention of the Appellant is that the reasons given for such reduction of damages is baseless and as such the judgment of the High Court should be set aside.

The facts in this case are as follows:- A road accident occurred at 6.15 a.m. in Panadura. The Appellant was a child in Grade 10 of Ananda College, Colombo 10. He was seated inside a school van on a window seat of the van. A lorry

driven by the 1st Defendant-Appellant-Respondent (hereinafter referred to as the "1st Respondent") and owned by the 2nd Defendant-Appellant-Respondent (hereinafter referred to as the "2nd Respondent") coming from the opposite side collided with the school van and the Appellant's right arm and hand was injured. The hand was fractured in 4 places. He had to undergo 3 operations in 2 hospitals and get physiotherapy etc. to reach close to a normal working arm and hand. The driver, the 1st Respondent pleaded guilty for negligent driving in the Magistrate's Court and was punished. The Appellant filed action in the District Court. At the end of the trial the District Judge granted damages of Rs.800,000/- to the Appellant child. The 1st and 2nd Respondents appealed to the Civil Appellate High Court and the High Court reduced the quantum of damages to Rs.600,000/-.

The 1st and 2nd Respondents who were the Defendants in the District Court appealed to the Civil Appellate High Court on two grounds i.e. that there was contributory negligence on the part of the driver of the vehicle in which the Plaintiff travelled and that the quantum of damages was excessive. The High Court has clearly and specifically held that there was no contributory negligence on the part of the Plaintiff. Yet, the High Court has reduced the quantum of damages from Rs.800,000/- to Rs. 600,000/-taking into account the fact that the Appellant child had, later on, gone abroad for higher studies, reckoning that as a factor to mitigate the damages for the inquiry suffered by him.

I would like to analyse the situation at this juncture. The Appellant child suffered injuries as a result of the accident which occurred due to the negligence of the lorry driver. The same child, if the accident never occurred could have proceeded abroad for higher studies having done the normal course of studies like any other child. He would have done it with ease, or he would have done it even better if he did not have to suffer so much due to the accident. It could even be otherwise. It could be that he was so determined to do his studies well because he was less capacitated than others of that age due to the fact that he suffered so much which gave him the determination to study well. If that argument is upheld, is the Judge entitled to give credit for that, to the driver who

acted negligently and caused damages to the child for giving him the determination to do well. Definitely not. In the same way, the intelligence of a child, the aptitude of the child and the mentality of the child who has done well after the accident could not be taken into account in calculating the damages for the injury. If the arm or the hand was totally cut off and yet the child performed well in studies, could any person take that into account when calculating damages for the injuries.

There are things that one can do with a well performing arm and hand. There are things that one cannot do with a half performing arm and hand. It is the usability of the hand and the suffering he underwent to get to the point of the arm to be usable that has to be taken into account when calculating the damages. The arm is a limb which a person has got from birth. It is his birth right to be able to use it till nature gets it less usable or unusable. It is his birth right to try and keep it well used and usable. It is the victim who suffers in mind, fears in the mind and with effort gets the limb to work to the extent possible to be used during his life time. The person who caused damage to the limb should be directed to pay damages taking into account the actual cost of medical treatment and compensation for both the resulting patrimonial loss and for the suffering of bodily pain and pain of mind. The victim's birth right to keep the arm and hand intact has been disturbed and that is what should be addressed in calculating damages. What should be considered is not what he has achieved after the incident but what he was subjected to due to the negligence which caused the incident. The aftermath of the vehicle accident should be looked at with a flash light on the substance to the detriment of the victim and not on the substance to the betterment of the victim.

In the case of ***Gafoor vs Wilson and Others 1990 1 SLR 142 at pg. 145***, Amarasinghe,J stated that, under the Aquilian action, compensation is awardable where "there is loss in respect of property, business or prospective gains capable of pecuniary assessment". Hence, even the loss of capability to a smoothly functionable arm can be compensated on the basis of prospective pecuniary

loss, caused by such damage due to a road accident or any other accident, if it could be assessed.

To throw more light on this, I would like to take a beggar man on the road with limbs broken due to a motor car accident. The driver who was negligent cannot ever be heard to say that the victim was not a wage-earner at the time he was run over by the car but he is earning a lot by begging on the road and therefore the damages for the injury should be lessened due to that fact. The better things which happened to the victim as a result of the incident which caused the injury is not a relevant factor to decide on the quantum of damages. Only the worse things after the incident are relevant factors to decide on the quantum of damages.

As such I rule out the reasoning which the High Court Judges have taken into account when reducing the quantum of damages as 'not relevant'. After all it is the birth right of the Appellant which has been interfered with by the negligent driver. I hold that the High Court has held wrongly when it decided to bring down the quantum of damages from Rs.800000/- to Rs. 600000/-. The question of law raised is answered as follows:- "The Plaintiff-Respondent-Appellant's proceeding abroad for higher studies should not have been reckoned to mitigate the effect of the injury".

I set aside the judgment of the Provincial High Court of Civil Appeal holden at Kalutara dated 09-06-2011. I allow the appeal by the Appellant and affirm the judgment of the District Court dated 14-09-2009. The Appellant is entitled to legal interest on the sum awarded by the District Judge from the date of the District Court Judgment and costs of suit in all the lower Courts upto and including the Supreme Court.

Judge of the Supreme Court

Saleem 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 Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal No. 153/2010

SC(Spl) LA. No. 64A/10
CA. No. 932/95(F)
DC. Kegalle No. 19859/P

Paradeniyalage Andirisa,
Kudapallegama,
Mahapallegama.

Plaintiff (Deceased)

Paradeniyalage Gunapala,
Kudapallegama,
Mahapallegama.

Substituted Plaintiff

Vs.

1A. Paradeniyalage Jayaneris,
2A. Paradeniyalage Somapala,
3A. Paradeniyalage Sumanawathie
4A Paradeniyalage Anulawathie
5A. Hewayalage Jayantha Wimalasiri,

All of
Kudapallegama,
Mahapallegama

Substituted-Defendants

And Between

Paradeniyalage Gunapala,
Kudapallegama,
Mahapallegama.

Substituted Plaintiff-Appellant

Vs.

1A. Paradeniyalage Jayaneris,
2A. Paradeniyalage Somapala,
3A. Paradeniyalage Sumanawathie
4A Paradeniyalage Anulawathie
5A. Hewayalage Jayantha Wimalasiri,

All of
Kudapallegama,
Mahapallegama

Substituted-Defendant-Respondents

And Now Between

Paradeniyalage Gunapala,
Kudapallegama,
Mahapallegama.

Substituted Plaintiff-Appellant-Appellant

Vs.

1A. Paradeniyalage Jayaneris,
2A. Paradeniyalage Somapala,
3A. Paradeniyalage Sumanawathie
4A Paradeniyalage Anulawathie
5A. Hewayalage Jayantha Wimalasiri,

All of Kudapallegama, Mahapallegama

Substituted Defendant Respondent-Respondents

* * *

SC. Appeal No. 153/2010

BEFORE : **Eva Wanasundera, PC.J.**
Buwaneka Aluwihare, PC. J. &
Priyantha Jayawardane, PC.J.

COUNSEL : W. Dayaratne, PC. with Ms. R. Jayawardane and Ms. D.W. Dayaratne for Substituted Plaintiff-Appellant-Appellant.

Erusha Kalidasa with Ms. Narmada Samarasinghe for 5A Substituted Defendant-Respondent-Respondent.

ARGUED ON : **23.07.2014**

DECIDED ON : **18.11.2014**

* * * * *

Eva Wanasundera, PC.J.

On 28.10.2010 this Court granted Special Leave to Appeal against the judgment of the Court of Appeal dated 26.02.2010 on the following two questions of law set out in paragraph 15 of the Amended Petition of the Substituted – Plaintiff – Appellant -Petitioner dated 19.10. 2010. .

(1) Did their Lordships of the Court of Appeal err in law when they failed to consider that there were no reasons given by the Learned District Court Judge in his judgment dated 23.11.1995 in case No. 19859/P in rejecting the deeds which represented the pedigree of the Plaintiff?

(2) Did he err in law in his consideration of prescriptive rights that had devolved?

The Court of Appeal affirmed the judgment of the District Court holding that there was no reason to interfere with the findings of the learned District Judge and dismissed the appeal.

Facts in this case in summary are as follows:

Paradeniyalage Gunapala is the Substituted Plaintiff-Appellant-Appellant (hereinafter referred to as the 'Plaintiff-Appellant') in this case. Hewayalage Jayantha Wimalasri is the 5A Substituted Defendant-Respondent-Respondent (hereinafter referred to as the '5A Defendant-Respondent'). The contesting parties have been the Appellant and the 5A Defendant - Respondent, right along. The Plaintiff in the District Court case was Paradeniyalage Andirisa and the 5th Defendant was Hewayalage Adonisa.

The Plaintiff - Appellant filed action on 23.1.1973 praying that the land mentioned in the Schedule to the plaint, of an extent of " twelve lahas of paddy' be partitioned according to the pedigree given in the plaint since co-ownership with the other parties was difficult and partition was a necessity for the settlement of soil rights. He claimed inter alia that he be given 41/120th share and the 5th Defendant – Respondent be given 60/120th share from and out of the land called " Weliyaddehena now Watta" which is of an extent of 1A 0R 9P according to the Survey Plan done on 07.08.1973 by an order of Court marked 'X'. The Surveyor's report is marked 'X1'.

In the pleadings of the District Court, all other Defendant – Respondents except the 5th Defendant - Respondent sailed with the Plaintiff - Appellant. There was no dispute about the identity of the corpus. The dispute was only on the pedigree. The Plaintiff - Appellant claimed that the initial owners were four in number, namely Kirihonda, Davitha, Allisa and Jayathuwa. The 5th Defendant - Respondent claimed that the initial owners were two in number, namely Jayathuwa and Pinsethuwa.

The land surveyed by order of Court is depicted as Lot 1 of Plan 261 marked as 'X' and was accepted by all parties. Dwellings therein were marked as A and B and lavatory as C, one well as E and the other well as D. All the parties accepted that A, B, C and E were built by the 5th Defendant – Respondent. According to the Surveyor's report X1, the Plaintiff – Appellant contended that

the well marked as D was co-owned. The 5th Defendant - Respondent claimed the whole plantation on the entire land. The Plaintiff – Appellant claimed that only the plantation done in one half of the land belonging to the 5th Defendant – Respondent should be granted to the 5th Defendant – Respondent.
It was agreed by all parties on 13.09.1976 in Court , according to the journal entry of that date, that all the listed documents would be admitted without calling any witnesses. Therefore it was a matter of analysing the documents along with the evidence given by both contesting parties, meaning the Plaintiff – Appellant and the 5th Defendant – Respondent, that the District Judge was burdened with.

The Plaintiff-Appellant produced documents P1 to P4 all of which were deeds and document P5, which was a judgment in case No. 11012/ P. The 5A Defendant-Respondent produced documents 5D1 to 5D12, all of which were deeds.

In the deeds P1 and P2 marked in evidence in this case, the transferors state that **"the share that belongs to us/ me is hereby transferred"** . The deeds do not mention the exact share and that is acquired by the Plaintiff' – Appellant. P1 and P2 are transfers in favour of the Plaintiff, Andirisa in 1958 and in 1969. The 5th Defendant-Respondent has bought **specific shares** and become the owner of the said undivided portions of the said land.

The documents P1 and P2 have been mentioned by the District Judge at the beginning of the judgment. The said deed Nos. 2397 and 1133 dated 06.05.1969 and 17.12.1958 have been mentioned. So, the pedigree commences in 1958 and 1969. The District Judge in the 2nd paragraph of the judgment analyses P1 and P2. She further states that P3 = 5D2, P4 = 5D3, P5 = 5D4 and P6 = 5D5. The Plaintiff admitted 5D2, 5D3, 5D4 and 5D5 as these deeds were the same as P3, P4, P5 and P6. All the deeds **5D2, 5D3, 5D4 and 5D5 are dated before the year 1956**. **P1 and P2 deeds are dated 1969 and 1958.** If as agreed in the proceedings, 5D2 to 5D5 are admitted as correct by the Plaintiff - Appellant, there is no way that the Plaintiff can commence a new pedigree in the year 1958, which year is later than 1956 with the base as 4 persons owning the

same land as co-owners namely Kirihonda, Davitha, Allisa and Jayatuwa. 5D1, the 1st deed on behalf of the 5th Defendant – Respondent in the year 1891 specifically says **"undivided ½ share of Weliyaddehena of 12 lahas"** with the boundaries uncontested, is transferred by Pinsetuwa to Allisa. By 5D2 in 1929, Allisa's children **transfers 3/4th of the same land** to W.A. Appuhamy and K.P. Appuhamy. It goes down properly according to the 5th Defendant's pedigree down the line upto the 5th Defendant, each deed giving **a specific portion from and out of** the land named Weliyaddehena, all adding up to a one full land at the end, belonging to the 5th Defendant- Respondent.

If I may compare and contrast the pedigree of the Plaintiff - Appellant, with that of the 5th Defendant - Respondent, I observe that, the pedigree of the Plaintiff Appellant starting with a basis of Jayatuwa, Allisa, Kirihonda and Davitha , each owning 1/4th share of Weliyaddehena in the year 1958 or before that, has not been proven at all. In contrast, I observe that the 5th Defendant- Respondent has the commencement of his pedigree in 1891 and proven how he has got full and complete title to the whole land named Weliyaddehena at the end.

Within the judgment, in pg. 166 of the original Court record, the learned District Judge refers to the Plaintiff's stance taken up in the proceedings as well as the documents marked in the case and compares and contrasts the contents of the deeds and comments that "it is not possible", " it cannot be" etc. Just the mere fact that, on the face of the record, that P1 and P2 have not been rejected per se or have not been accepted per se, **does not mean that the Judge has not considered the same.** Having gone through the deeds myself and having gone through the judgment, I am of the view that the learned District Judge has gone through the deeds and the contents very carefully before arriving at the decision. Finally, the learned District Judge says that she is not satisfied with the pedigree of the Plaintiff and rejects the apportionment suggested and pleaded in the plaint by the Plaintiff. Therefore, I hold that the judge has mentioned the deeds P1 and P2, considered the said deeds and then come to the conclusion that the Plaintiff had not proven his entitlement to the share that he had claimed in his Plaint. It is **only in addition to that**, that she says that the 5th Defendant had possessed it right along and had created a **prescriptive right as well**.

It is trite law that a co-owner in a partition case cannot claim prescriptive rights against another co-owner. The situation in this case is otherwise. The Plaintiff has failed to prove his entitlement to any part of the corpus with all his documents placed before Court and hence he cannot in anyway be considered a co-owner.

The Surveyor's report says that the 5th Defendant claims all the buildings and plantations. The Plaintiff admits that all the buildings and one out of two wells belongs to the 5th Defendant **because it is the 5th Defendant who built them all.** The Plaintiff's position was that the 5th Defendant owned only ½ of the full land of Weliyaddehena and that the Plaintiff owned 41/120th share of the said land but he has not been able to prove the same. The Plaintiff has failed to prove his case either through his evidence or through his documents. After all the Plaintiff has claimed a little bit more than 1/3rd of the land, i.e. 41/120th share as his share. Yet he has failed even to prove his entitlement through title deeds or evidence.

The Court of Appeal has also considered the District Court judgment and quite correctly found that there was no merit in the Appeal of the Plaintiff Appellant.

For the reasons set out above I answer the questions of law aforementioned in the negative, and hold in favour of the 5th Defendant - Respondent. I affirm the Judgment of the Court of Appeal dated 26.02.2010 and the judgment of the District Court dated 23.11.1995. I dismiss the appeal. I order no costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC. J

I agree.

Judge of the Supreme Court

Priyantha Jayawardane, 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 judgement of the Court of Appeal of the Democratic Socialist Republic of Sri Lanka under and in terms of Article 128(2) of the Constitution.

The People's Bank,
No. 75, Sir Chittampalam A. Gardiner
Mawatha, Colombo 02

SC Appeal 156/2010
S.C. (Spl) LA
Application No: 83/10

Petitioner-Respondent-Petitioner-Appellant

Vs.

C.A.Rev App 204/2006
D.C. Matara No. 382/SPL

Rosy Jayasuriya
No. 39B, Delkada Road
Matara

Respondent-Petitioner-Respondent

1. Ajith Ranasinghe Kodituwakku
Layland Florists
Station Road
Matara

2. Ekman Dalugoda
No. 39B, Delkada Road
Matara

Respondents-Respondents-Respondents

4. H.M. Ariyapala
No. 76, Rahula Road
Matara

4A. H.H. Shiromani Mala
No. 76, Rahula Road
Matara

Substituted –Respondent-Respondent

Before	:	Marsoof, PC. J. Hettige, PC. J. Dep, PC. J.
Counsel	:	Manohara de Silva, PC for Petitioner-Respondent-Appellant. Somapala Gunadheera for Respondent-Petitioner – Respondent
Argued on	:	18.06.2012
Decided on	:	20.03.2014

Priyasath Dep, P.C., J.

The Peoples Bank which is the Petitioner- Respondent- Petitioner- Appellant (herein after referred to as the Appellant) filed a summary action under section 72 of the Finance Act No 11 of 1963 against the 2nd Respondent -Respondent- Respondent (herein after referred to as 2nd Respondent) and the 3rd Respondent-Petitioner-Respondent (herein after referred to as the 3rd Respondent) in the District Court of Matara in DC Case No.382/Spl to evict the said 2nd and 3rd Respondents from the premises more fully described in the schedule to the Petition.

The learned District Judge by its order dated 6-9-2001 ordered the eviction of the 2nd and 3rd Respondents from the premises. The 3rd Respondent filed a Revision Application against the order of the District Judge in the Court of Appeal bearing Case No CA Revision Application No. 204/2006 . The Court of Appeal by its judgment dated 31-3-2010 set aside the judgment of the District Court of Matara in DC Case No.382/Spl. The Appellant- Bank filed a Special Leave to Appeal Application against the Judgment of the Court of Appeal and obtained leave

It will be necessary to examine the background to this case. H.M. Ariyapala who was the original owner of these premises, by Deed No. 669 dated 26.03.1968 attested by D. Weerathunga, Notary Public, mortgaged the property in suit to one Sarath Ranasinghe Kodithuwakku for a sum of Rs. 4500/= with 12% interest per annum. On the same day by deed No. 6694 attested by the same Notary Public, a secondary mortgage was effected for a sum of Rs. 4500/= with 12% interest per annum to one Chathura Kamalawathi Liyanage.

The said H.M. Ariyapala defaulted in paying the amount due under the mortgage and the mortgagee Chathura Kamalawathi Liyanage instituted action in the District Court of Matara bearing Case No. 2201/MB and obtained a decree. The said property was auctioned on 11.02.1980 and one H.M. Sumanasiri purchased the property. The Court Commissioner, by deed No. 1518 dated 09.06.1980 attested by A.Sapukotana, conveyed

the property to the said H.M. Sumanasiri. The said H.M. Sumanasiri by Deed No. 1814 attested by D.C.Dahanayake, Notary Public, transferred the property to Ajith Ranasinghe Kodithuwakku, who is the 1st Respondent –Respondent-Respondent.(hereinafter referred to as 1st Respondent) It is to be noted that H.M. Ariyapala who was the original owner was not in possession of the property and H.M. Sumanasiri who purchased the property at the public auction was not placed in possession. The 2nd Respondent and the 3rd Respondent-Petitioner were in occupation of the premises as tenants.

The original owner H.M.Ariyapala (Debtor) made an application on 4th April 1984 under section 71 of the Finance act No. 11 of 1963 to redeem his property. The Bank had conducted an inquiry and after noticing H.M. Ariyapala, the Applicant and H.M. Sumanasiri who is the present owner of the property . The 2nd Respondent and the 3rd Respondent were not given any notice of the inquiry. The People's Bank made a determination under section 72 (1) of the Finance Act No.11 of 1963.The Hon. Minister of Finance, by his order dated 30th June 1993, vested the premises with the People's Bank with effect from the said date. The said order was published in the Gazette (Extra Ordinary) No.774/11 dated July, 7th 1993. By its letter dated 9th June 1994 sent by registered post, the Bank informed the Respondent that it will take over the possession of the premises. On 09.06.1994 authorized officer of the Bank visited the premises to take over the possession. The 2nd Respondent and the 3rd Respondent who were present objected and refused to hand over the premises. The authorized officer made a complaint to the police .
The Peoples Bank, the Appellant filed a Petition in the District Court of Matara 382/Spl under section 72(7) and (8) of the Finance Act No 29 of 1961 as amended by Law No. 16 of 1973 and Act No 19 of 1984 under summary procedure to obtain delivery of the property. The bank sought and obtained an order nisi under section 387(a) of the Civil Procedure Code.

The 3rd Respondent filed objections stating that she is a lawful tenant of the original owner and she could not be evicted from the premises other than under the provisions of the Rent Act. The learned District Judge referring to the section 72 (3) as amended by Finance (Amendment) Act No. 19 of 1984 rejected the objections of the Respondents and made order nisi absolute and thereby ordered the eviction of 2nd and 3rd Respondents. The section 72(3) states thus:

' Where a vesting order under subsection (2) in regard to any premises is published in the Gazette, such premises shall, with effect from the date specified in the Order under that subsection, vest absolutely with the Bank free from all encumbrances'

The Finance (Amendment) Act No. 19 of 1984 added a paragraph to this subsection which reads thus :

' for the removal of doubts it is hereby declared that any right conferred on the tenant of any premises by the Rent Act No. 7 of 1982 and Protection of Tenants (Special Provisions) Act No. 28 of 1970 is an encumbrance within the meaning of this sub section'.

Aggrieved by the judgment of learned District Judge the 3rd Respondent filed a Revision Application in the Court of Appeal in CA(Revision) 204/2006.It transpired that H.M. Ariyapala , the original owner on whose behalf the property was acquired by the People's Bank did not disclose the fact that 2nd and 3rd Respondents were occupying the premises as tenants under him before the property was sold in the execution of the decree under the mortgage bond. The Hon. judges of the Court of Appeal drew a distinction between the tenants of the original owner and the tenants of the new owner who purchased the property sold in execution of the decree or in whose favour the property was transferred by the original owner in settlement of a debt secured by a mortgage. According to the judgment of the Court of Appeal, Section 72(3) applies only to persons who have acquired rights after the execution of the decree or after the transfer of the property in settlement of a decree secured by a mortgage. Otherwise in justice will be caused to the long standing tenants of the original owner.

The purpose of these proceedings is for the Bank to assist persons who were forced to part with their immovable property due to indebtedness or financial difficulty. It is to redeem the property which the debtor had and he will be restored to the original position. It is the submission of the learned Counsel for the 3rd Respondent that if the property was subject to a lease or tenancy those rights should not be wiped out. The Counsel for the 3rd Respondent further submits that if section 72 (3) applies to the original owner's tenants he could get more rights than he had and could use or abuse this procedure to get rid of the tenants.

The Court of Appeal held that if a literal interpretation is given to section 72(3) grave injustice will be caused to the innocent parties and it will lead to absurdity. The Court of Appeal quoted the following rule of interpretation referred to in Maxwell on Interpretation of Statues 11th Edition at page 221

> "Where the language of a statute, in its ordinary meaning and grammatical construction, leads to a manifest contradiction of the enactment, or to some inconvenience or absurdity, hardship or injustice, presumably not intended, a construction may be put upon it which modifies the meaning of the words, and even the structure of the sentence' .

The Court of Appeal held that literal interpretation given to section 72(3) by the trial judge will enable the original owner to get rid of tenants who are in lawful occupation and grave injustice will be caused to the tenants. The Court of Appeal set aside the order of the District Judge who made the order nisi absolute in the summary procedure adopted by the Bank to evict the 3rd Respondent-Petitioner.

Being aggrieved by the Judgment of the Court of Appeal dated 31.03.2010, the Petitioner -Bank filed a Special leave to Appeal Application and obtained leave. Among the substantial questions of law raised by the bank , following substantial questions of law are relevant for the determination of this case:

1. The Court of Appeal erred by not correctly applying provisions of 72(3) of Finance Act.
2. The Court of Appeal misdirected itself in wrongly applying the principles of interpretation in construing aforementioned provisions of the Finance Act.

3. The Court of Appeal failed to consider the settlement entered into in the District Court Case No. L 6953 between the parties, (which is also confirmed by the Court of Appeal in CA 757/94) by which the 3rd Responded agreed to vacate the premises within a period of one year. Therefore, even if any tenancy rights remain with the 3rd Respondent, the same ceased to exist after the lapse of one year from the date of decree entered in L 6953 based on the aforementioned settlement.

4. The Court of Appeal erred in failing to take into consideration and/or correctly interpret section 72(7) and (8) of the Finance Act which does not give any discretion to the District Court to refuse an Application made under section 72 (7) and (8) seeking possession on the ground of tenancy.

5. The Court of Appeal erred in holding that there were exceptional circumstances to invoke the revisionary jurisdiction of the Court of Appeal.

6. The Court of Appeal erred by not dismissing the application of the 3rd Respondent in limine on the grounds of laches as the present Revision Application was filed seeking a revision of the judgment delivered on 06.09.2001 after a delay of almost 5 years and want of exceptional circumstances.

The learned Counsel for Appellant submits that the Court of Appeal should have dismissed the Revision Application due to the delay and lack of exceptional circumstances. The judgment in District Court of Matara in Case No 382/Spl was delivered on 06.09.2001. The present Revision Application to the Court of Appeal was filed in 2006 and there was a delay of almost 5 years. The learned Counsel for the 3rd Respondent submits that the 3rd Respondent appealed against the Judgment and it was dismissed by the Court of Appeal in 2005 as the appeal was filed out of time. After the dismissal of the action within 6 months, as submitted by the counsel within a reasonable time filed the Revision Application. He submits that the appeal was held up for five years and till it is disposed of, the 3rd Respondent could not have filed the Revision Application. He submits that " If any one had to be faulted for delay , it would be the legal system in which the appeal had been held up for five years". Therefore 3rd Respondent should not be penalized for the delay. When considering the circumstances in this case and the fact that there is a substantial question of law involved in the application ,the Court of Appeal was correct in not dismissing the application in limine due to the delay. The Court of Appeal has a wide discretion in revision applications and it could also act ex mero motu to correct the errors committed by inferior courts.

The learned President's Counsel for the Appellant Bank submits that the Court of Appeal did not consider the fact that 2nd and 3rd Respondents surrendered their tenancy rights in the District Court of Matara Case No 6953/L.

In the District Court of Matara, A.R. Kodituwakku the 1st Respondent – Respondent(present owner) filed a rei vindicatio action on 4-8-1984 against the 2nd and the 3rd Respondent to declare him as the owner of the premises and to evict the 2nd and 3rd Respondents on the basis that they are in unlawful occupation. The 2nd and 3rd Respondents who are the defendants in the action defaulted in filing the answer and an ex-parte judgment was entered. Their application to set aside the ex-parte judgment was unsuccessful. However, parties entered into an agreement and a consent judgment was entered into on 25-2-1992 and the 2nd and 3rd Respondents agreed to vacate the premises and hand over the premises to the Plaintiffs (1st Respondent) within one year. As the 2nd and 3rd Respondents did not vacate the premises the 1st Respondent who is the Plaintiff in that case obtained a writ of execution on 14-10-94. A Revision Application was filed against the consent judgment in CA(Revision) 757/94 and the said application was dismissed .While dismissing the Application Justice Sarath Silva (as he then was) stated that: "the documents appear to state that the premises in suit is vested in the People's Bank in terms of the order dated 07.07.93 in which event the Plaintiff no longer has title to the premises in suit and would not be entitled to proceed to execute the decree. The defendant Petitioner may urge this matter before the District Court' The Plaintiff A.R. Kodithuwakku who is the first Respondent-Respondent to this Application did not proceed with the District Court case. As the 2nd and 3rd Respondents challenged the consent judgment it cannot be said unequivocally that the 2nd and 3rd Respondents surrendered their tenancy rights.

In one of the a substantial questions of Law raised by the Bank it has taken up the position that the Court of Appeal erred in law by not correctly applying provisions of 72(3) of the Finance Act No 11 of 1963.The learned President's Counsel submits that the learned District Judge correctly allowed the application for a writ of possession filed under section 72(7) and (8) of the Finance Act No. 11 of 1963. The learned President's Counsel submits that with the publication of the vesting order in the gazette the property absolutely vested with the Bank and the Bank is entitled to take possession of the premises. He relies on section 72(3) which states:

> "where a vesting order under sub section 2 in regard to any premises is published in the gazette, such premises shall, with effect from the date specified in the order under that sub section vest absolutely in the bank free from all encumbrances.

It is the submission of the counsel that the property vested with the bank free from all encumbrances and the bank has a right to take possession under section 72(7) and(8) of the Finance Act No. 11 of 1963. He further states that the vesting order was never challenged in any court of law and continue to be valid and in force.

In the most important substantial questions of Law raised by the Bank is that the Court of Appeal misdirected itself in wrongly applying the principles of interpretation in construing 72(3) of the Finance Act.

The Hon judges of the Court of Appeal did not apply the literal rule and applied the beneficial rule of interpretation to avoid injustice been caused to a particular category of persons. It drew a distinction between the rights of tenants of the original owner and the rights of the new owner, who purchased the property sold in execution of the decree or in whose favour the property was transferred or their his tenants, lessee and others who acquired rights or interest in the property. According to the judgment of the Court of Appeal section 73(3) applies only to persons who have acquired rights after the execution of the decree in an action based on a mortgage bond or after the transfer of the property in settlement of a debt secured by a mortgage. Otherwise there will be injustice caused to the long standing tenants of the original owner. However it should be observed that persons who purchase property in the execution of a decree are bona fide purchases for consideration and they acquire title and could enter into transactions affecting the property with third parties who could legally acquire rights and interest in the property. When a vesting order is made the property vests with the Bank free from all encumbrances. The vesting order would affect their rights too. Therefore there is no rational basis to draw a distinction between the tenants of the original owner and others who acquire rights subsequent to the sale or transfer of the mortgaged property. The remedy available to the parties affected by the vesting order is compensation under section 76 of the Finance Act. In an appropriate case the Bank could recommend to the Minister in charge of the subject of Finance to revoke the vesting order . This could be done under section 72 A of the Finance Act. The Respondent did not challenge the vesting order in the appropriate Court and therefore it is valid in law.

I am of the view that the Court of Appeal erred in Law when it excluded the tenants of the original owner when there is no rational basis to exclude them from effects of the vesting order. The words used in section 72 (2) and (3) are clear and unambiguous, there fore the Court is required to give effect to intention of the legislature as expressed in unequivocal language.

The Court of Appeal had referred to certain legislation which excluded certain category of persons including tenants being evicted under writs of execution. The Court referred to the Debt Recovery (Special Provisions) Act No. 2 of 1990[Section 13 (1)], the Mortgage (Amendment) Act No 3 of 1990 [Section 62G (B) (1)] and The Recovery of Loans by Banks (Special Provisions) Act No.4 of 1990[Section 16 (4)]

These Acts expressly exclude certain categories of persons including tenants from being evicted. There are no vesting orders under those Acts unlike in the Finance Act No 11 of 1963 as amended by Act No 19 of 1984 which has the effect of wiping out all encumbrances including tenancy rights.

I am therefore of the view that the Court of Appeal erred when it excluded the tenants of the original owner from the effect of the vesting order issued under section 72 (2) of the Finance Act.

For the reasons stated above, I set aside the Judgment of the Court of Appeal dated 31-03 2010 and affirmed the judgment of the District Court dated 6-9-2001.

Appeal allowed. No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C. J.
I agree.

Judge of the Supreme Court

Satyaa Hettige, 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 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 application for leave to appeal in terms of Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996.

People's Bank,
No. 75, Sir Chittampalam A. Gardiner Mawatha,
Colombo 02.

SC APPEAL 163/2011
SC HC LA No. 75/2011
HC (CHC) Case No. 227/2002 (1)

PLAINTIFF-APPELLANT

-Vs-

01. Minal Chandra Jayasinghe,
No. 49/15, Fife Road,
Colombo 05.

02. Suresh Harkishim Mirchandani,
No. 7, Sulaiman Terrace,
Colombo 05.

03. Amith Mahinder Mirchandani,
No. 7, Sulaiman Terrace,
Colombo 05.

DEFENDANT-RESPONDENTS

BEFORE	:	Hon. S. Marsoof, P.C., J, Hon. K. Sripavan, J, and Hon. P. Dep, P.C., J.
COUNSEL	:	Kushan de Alwis P.C with C. Wickramanayake and Ms. Ruwanthi Amarasinghe for the Plaintiff-Appellant. M.U.M. Ali Sabry P.C with Shamith Fernando for the 2nd Defendant-Respondent. 1st and 3rd Defendant-Respondents absent and unrepresented.
ARGUED ON	:	08.08.2012
WRITTEN SUBMISSIONS ON	:	28.11.2012 (Plaintiff-Appellant) 13.02.2013 (Defendant-Respondent)
DECIDED ON	:	15.12.2014

SALEEM MARSOOF, P.C., J,

The main issue in this appeal is whether the Plaintiff-Appellant Bank (hereinafter referred to as "the Appellant ") should have been allowed to call an unlisted witness to prove the service to the 2nd Defendant-Respondent (hereinafter referred to as "the Respondent") of a letter demand for the purpose of establishing the liability of the said Respondent under a Guarantee Bond put in suit. This Court has granted leave to appeal in this case against the order of the learned Judge of the Commercial High Court dated 8th July 2011, on the questions set out in paragraph 20 of the petition of appeal dated 26th July 2011 which sets out the following substantial questions of law for determination by this Court :-

(a) Did the learned Judge of the Commercial High Court err in interpreting the provisions of Section 175 (1) of the Civil Procedure Code, in disallowing the Appellant's application to call the witness from the Central Mail Exchange?

(b) In any event, did the learned Judge of the Commercial High Court misdirected himself in law in failing to appreciate that the said officer from the Central Mail Exchange has been listed as a witness in the Additional List of Witnesses and Documents dated 30.06.2009 to :- "චිත්තිකරුවන් වෙත යවන ලද එන්තරවාසි ලිපි වලට අදාළ ලියාපදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය හා අදාළ පොත්පත් ඉදිරිපත් කිරීමට සහ හෝ ඉදිරිපත් කර සාක්ෂි දීමට?"

(c) Do the matters set out in paragraphs 18 to 23 of the Written Submissions of the Appellant marked X9 above constitute special circumstances in terms of the first proviso to Section 175(1) of the Civil Procedure Code?

Before considering the above questions, it will be useful to outline the facts material to the determination of this appeal.

The Material Facts

On or about 27th September 2002, the Appellant Bank instituted action in the Commercial High Court, seeking *inter alia*, judgement and decree against the 1st, 2nd and 3rd Defendant-Respondents in a sum of US $ 440,350 together with interest allegedly due in terms of a Guarantee Bond executed by the said Defendant-Respondents in their capacity as Directors of the Rican Lanka (Pvt) Limited as security for the three loan facilities granted by the Appellant Bank to the said company.

By clause 2 of the said Guarantee Bond, the Respondents had agreed as follows:-

> "IN CONSIDERATION of the Bank at my / our request agreeing not to require immediate payment of such of the moneys herein mentioned as may be now due and / or in consideration of any moneys herein mentioned which the Bank may hereafter advance or pay or which may hereafter become due, I / we the undersigned.
>
> (a) Minal Chandra Jayasinghe
> of 49/15, Fife Road, Colombo 5.
>
> (b) Suresh Harkishim Mirachandani
> of 7, Sulaiman Terrace, Colombo 5.

(c) Amith Mahinder Mirchandani
of 7, Sulaiman Terrace, Colombo 5.

hereby agree to pay to the Bank, the moneys herein mentioned *ten days after demand* (PROVIDED ALWAYS that the total liability including all interest from the date of demand, and such further sums by way of Banker's charges, Legal costs and expenses in accordance with Bank's usual course of business shall not exceed the sum of US dollars Seven Hundred and Fifty Thousand (USD 750,000) only.)"

Party (b) to the aforesaid Guarantee Bond was Suresh Harkishim Mirachandani, who was the 2nd Defendant-Respondent to this appeal. It is obvious that in order to succeed in the action against the said Respondent, the Appellant had to establish that *the amount claimed by the Appellant was demanded* from the said Respondent, since in terms of the Guarantee Bond the cause of action would arise only "*ten days after demand*".

It is relevant to note that the since the 1st and 3rd Defendant-Respondents had failed to file answer on the due date, the action was fixed for *ex-parte* trial against these Respondents, and the only contesting party at the trial *inter-partes* was the 2nd Defendant-Respondent, who filed his answer on 28th May 2003. It is significant to note that in paragraph 9 of the plaint filed by the Appellant dated 27th September 2002, it was specifically averred that the sum of US $ 440,350 together with interest allegedly due in terms of a Guarantee Bond *was demanded* from the 1st , 2nd and 3rd Defendants by letters demand dated 15th July 2002, which averment was denied in paragraph 4 of the Answer of the Respondent dated 28th May 2003 by a general denial of paragraphs 4, 5, 7, 8, 9, 10, 11 and 12 of the plaint. However, in paragraphs 3 and 12(ii) of the said answer the Respondent has specifically averred that no cause of action has arisen or disclosed in the plaint for the Appellant to sue the Respondent.

The Trial before the Commercial High Court

It appears from the journal entries of the Commercial High Court marked X12 that the case was initially fixed for trial *inter-partes* against the Respondent on 29th May 2003, on which day two dates were fixed, viz 6th August 2003 for tendering of issues and 26th August 2003 for trial. Due to various reasons that are not very material to this appeal, the trial from which this appeal arises commenced only on 20th February 2009. Prior to this date the Appellant had filed two lists of witnesses and documents, and the first of these was filed on 3rd July 2003 prior to the original trial date of 26th August 2003. In the said list of witnesses and documents, the letter demand dated 15th July 2002 alleged to have been sent by the Appellant to the Respondent was listed as document No. 4, and the postal article receipt relating to the alleged posting of the said letter demand to the Respondent was listed as document No. 5. The said list of witnesses and documents also contained a notice in terms of Section 66 of the Evidence Ordinance addressed to the Respondent requiring him to produce the original of the said letter demand at the trial failing which, it was also intimated that secondary evidence would be led to prove the same. After the said first trial date of 26th August 2003, an additional list of documents dated 28th July 2004 and an additional list of witnesses and documents dated 30th June 2009 were filed by the Appellant, and the latter list of witnesses and documents included as witness No. 3, the Officer in charge of the Central Mail Exchange or his representative, to produce the postal article receipt relating to the letters demand allegedly sent to the Defendants-Respondents in the case including the Respondent. When the trial commenced on 20th February 2009, the learned Judge of the

Commercial High Court noting that while the case was for trial *inter-partes* against the Respondent, it was also fixed for trial *ex-parte* against the 1st and 3rd Defendant-Respondents, who had defaulted in appearance, indicated that *ex-parte* judgment against the said Respondents will be pronounced simultaneously with judgment in the *inter-partes* trial.

The Appellant's main witness, Mohamed Thambi Fazal Mohamed, who had affirmed to the affidavit dated 12th February 2009, was called to give evidence on 20th February 2009, and the Court allowed the adoption of the contents of the said affidavit as the examination-in-chief of the said witness, subject to him being subjected to cross-examination by the learned Counsel for the Respondent. It is noteworthy that the learned Judge specifically recorded the fact that learned Counsel for the Respondent had objected to the reception in evidence of the documents the said witness had tendered with the his aforesaid affidavit marked පැ.5-අ to පැ.5-ඈ, being respectively the postal article receipts bearing Nos. 1290, 1291 and 1292 relating to the letter-demand dated 15th July 2002 marked පැ6 allegedly despatched to the 1st Defendant-Respondent Minal Chandra Jayasinghe, the Respondent Suresh Harkishim Mirachandani and the 3rd Defendant-Respondent Amith Mahinder Mirchandani, and the learned Judge of the Commercial High Court ordered that they be accepted subject to proof. It is significant that witness Fazal Mohomed clarified in the course of his testimony that the original of the postal article receipt bearing No. 1291, relating to the letter-demand dated 15th July 2002 marked පැ6 alleged to have been despatched to the Respondent by registered post, had got misplaced and could not be traced in the relevant file. During the cross-examination and re-examination of the witness Mohamed Thambi Fazal Mohamed, he was questioned at length about the despatch of the letters-demand, and he clarified that letters-demand in question had been despatched by an officer by the name of Visaka Kumari Gunapala, who is still in service in the Appellant Bank.

After the conclusion of the testimony of the said witness on 23rd February 2010, the next witness to be called to the witness box was E.M. Gamini Karunaratne, who was at the relevant time a Senior Manager in the International Division of the Appellant Bank, and was listed by name and designation as witness No. 2 in the additional list of witnesses and documents dated 30th June 2009. He testified mainly in regard to the liability of the principal debtor, Rican Lanka (Pvt) Limited. Thereafter, witness Visaka Kumari Gunapala, Attorney at law and the Legal Officer for the Western Zone 11 of the Peoples Bank, who was listed as witness No. 1 in the additional list dated 30th June 2009 was called to give evidence, and she testified that she prepared and despatched the letter demand dated 15th July 2002 marked as පැ6, under her hand to the Respondent under registered cover, and stated as follows in her examination in chief:

"ප්‍ර. මේ අනුව 02 වෙනි විත්තිකරුට පැ.6 දරණ එන්තරවාසියේ මුල් පිටපත යැව්වා කියා ගරු අධිකරණයට සහතික කර කියන්න පුලුවන්ද?

උ. ඔව්. යැව්වා. නැවත ආපසු මා වෙත ලැබුණේ නැහැ.

ප්‍ර. ඒ යැව්වේ පැ.6-අ ලෙස ලකුණු කර තිබෙන ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය අනුව ලියා පදිංචි කරලාද?

උ. ඔව්.

ප්‍ර. මහත්මය කලින් ගරු අධිකරණයට කිව්ව ආකාරයට පැ.6-අ කියන අංක 1291 ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සියේ මුල් පිටපත අස්ථාන ගතවී තිබෙන්නේ?

ළ. ඔව්.

ප්‍ර. මහත්මයගේ මතකයේ හැටියට 02 වෙනි විත්තිකරු විසින් පැ.6 දරණ එන්තරවාසියේ කරුණු ප්‍රතික්ෂේප කර ලිපියක් මහත්මය වෙත යොමු කළාද?

ළ. නැහැ.

අධිකරණයෙන් :-

ප්‍ර. පැ.6-අ කුවිතාන්සියේ තිබෙන ලිපිනය තමන්ලාට දුන්න ලිපිනයද?

ළ. එහෙමයි. එම ඇප බැඳුම්කරයේ සඳහන් වෙන ලිපිනය."

The witness was cross-examined at length in regard to the despatch of the aforesaid letter-demand, and she was firm in her testimony that she was quite certain that the said letter-demand was in fact posted under registered cover to the Respondent and it did not get returned in post. She also stated that the original of the postal article receipt had got misplaced from the relevant file, after the affidavit necessary for the *ex-parte* inquiry against the 1st and 3rd Defendants had been prepared. She answered questions in cross-examination as follows:-

"ප්‍ර. 02 වන විත්තිකරු වෙනුවෙන් යෝජනා කර සිටිනවා තමන්ට, මෙම පැ.6-අ දරණ තැපැල් භාණ්ඩ කුවිතාන්සිය මගින් තමා විත්තිකරු වෙත මේ ලිපිය යැව්වා කියා ප්‍රකාශ කළත් සත්‍ය වශයෙන්ම ඒ විදිහේ ලියා පදිංචි තැපැල් මගින් යැවීමක් සිදුකර නැහැ කියලා?

ළ. මම ඒක ප්‍රතික්ෂේප කර සිටිනවා.

ප්‍ර. ඒ වගේම යෝජනා කරනවා, ඒ ආකාරයට යැව්වා නම් සහ විශේෂයෙන්ම අනෙකුත් ලේඛණ පවා, මහත්මයගේ සන්තකයේ තිබියදි මෙම ලේඛණ විතරක් නොමැති වන්න කිසිදු සාධාරණ හේතුවක් නැහැ, මේ ලේඛණයක් පමණක් නැති වුනා කියන්නේ මේ නඩුවේ විත්තිකරුට යවා නොමැති ලේඛණයක් යැව්වා කියන පදනම සනාථ කරන්න කියන අසත්‍ය සාක්ෂියක් කියා මම යෝජනා කරනවා?

ළ. මම ඒක ප්‍රතික්ෂේප කරනවා. තව දුරටත් කියා සිටින්නේ, මෙම සියලු ලේඛණ එකට අප ලග තිබුණා ලිපි ගොණුවක. මේ 02 වෙනි විත්තිකරුට එරෙහිව පමණයි විභාගයට නියම වුනේ. එවිට ඒක පාක්ෂික විභාගයට ඉතිරි ලේඛණ ගොනු කිරීමෙන් අනතුරුව තමයි ඉතිරි වුනේ. 02 වෙනි විත්තිකරුගේ එන්තරවාසි ලිපිය හා අදාළ තැපැල් භාණ්ඩ කුවිතාන්සියේ මුල් පිටපත. එම ලේඛණ දෙක පමණක් වීම සහ කුඩා ලිපි ගොනුවක් බවට පරිවර්තනය වුනා. ඉන් අනතුරුව තමයි මෙහෙම අස්ථාන ගත වෙලා තිබෙන්නේ. සියලු ලේඛණ ඒක පාක්ෂික විභාගයේ දිවුරුම් ප්‍රකාශය සමග ගොනු කිරීමෙන් අනතුරුව.

At the conclusion of the evidence of this witness, the case was adjourned for further trial on 13th December 2010. On that date, witness No. 3 in the Additional list of witnesses and documents dated 30th June 2009, namely the Officer in Charge of the Central Mail Exchange or his representative was called to give evidence by the Appellant with the view of producing the postal article receipts and other relevant books relating to the issue of letters-demand on the three Defendants Respondents. Upon objection being taken by learned Counsel for the Respondent, learned Counsel were granted time to file written submissions on the question whether the Court should exercise its discretion in favour of the Appellant and allow the witness to be called or should uphold the objection taken up by learned Counsel for the Respondent. After the learned Counsel

for the Appellant and the Respondent filed their written submissions, the learned Judge of the Commercial High Court made his impugned order dated 8th July 2011.

The Order of the Commercial High Court

By the impugned order of the learned Judge of the Commercial High Court dated 8th July 2011, the application of the Appellant Bank to call the Officer in Charge of the Central Mail Exchange or his representative to give evidence in the case and produce the relevant documents relating to the dispatch issue of the letters-demand in question was disallowed. In the course of his order, the learned Judge considered Sections 121(2) and 175 of the Civil Procedure Code No. 2 of 1889, as subsequently amended, and stated that he cannot agree with the submission of the learned Counsel for the Appellant that the words "fifteen days before the date fixed for the trial of an action" as used in Section 121(2) should be interpreted to mean fifteen days before any date to which the trial has been adjourned. The learned Judge of the Commercial High Court observed at pages 4 to 5 of his impugned order that:-

> "මේ අනුව 121(2) වගන්තියේ විභාගයට දින 15 කට පෙරාතුව සාක්ෂි ලැයිස්තුව ගොනු කළ යුතුය යන්න නඩු විභාගය කල් තබන ඕනෑම දිනයකට දින 15 ට පෙරාතුව ලෙස අර්ථ නිරූපනය කළහොත් එය ප්‍රායෝගික අන්තරකාරී ප්‍රතිඵල ගෙන දිය හැකිය.

At pages 6 to 7 of the impugned order, the learned Judge expressed the view that it was the duty of the Plaintiff and his lawyers in any case to ensure that all witnesses and documents are properly listed as contemplated by Section 121(2) of the Civil Procedure Code. He further observed that in the circumstances of the case it is necessary to consider whether the Court can exercise the discretion vested in it by the first proviso to Section 175 of the Civil Procedure Code to permit the testimony of the witness from the Central Mail Exchange, and correctly observed that for this purpose the Appellant has to satisfy Court that there were exceptional circumstances to permit such a course of action. The learned Judge reasoned as follows at pages 6 and 7 of the impugned order:-

> "ඒ අනුව මෙම සාක්ෂිකරුට ඉඩ දිය හැක්කේ සිවිල් නඩු විධාන සංග්‍රහයේ 175(1) අතුරු විධි විධාන අනුව විශේෂ අවස්ථානුගත කරුණු පෙනී යෑම මත යුක්තිය ඉටු කිරීම සඳහා අවශ්‍ය වීටෙය. 1997(1) SLR 176 හි සඳහන් ඇසිලින් නෝනා එදිරිව විල්බට් සිල්වා නඩු තීරණය අනුව මෙම විශේෂ අවස්ථානුගත කරුණු පෙන්වා සිටීම එසේ මෙම සාක්ෂිකරු මෙහෙයවීමට ඉල්ලා සිටින පාර්ශවයන්ගේ වගකීම වේ. මේ බව ආබෑ එදිරිව සේකරම් 2003(1) SLR 373, 1999(1) SLR 76 නඩු තීන්දු අනුව පෙනී යයි. ඒ අනුව මෙම සාක්ෂියට ඉඩ දීමට නම් මෙම සාක්ෂිකරු කැඳවීම සඳහා විශේෂ අවස්ථානුගත හේතු ඇති බව මෙම සාක්ෂි මෙහෙයවීමට ඉල්ලා සිටින පාර්ශවය පෙන්වා සිටිය යුතුය. එමෙන්ම පාර්ශවයන්ගේ නොසැළකිල්ල නිදාගිලි බව පියවීමට සිවිල් නඩු විධාන සංග්‍රහයේ 175(1) වගන්තිය යටතේ ඇති අභිමතය භාවිතා කිරීම සුදුසු නැත. මෙම නඩුවේ පැමිණිල්ල අනුව 2 විත්තියට එන්තරවාසි යවන ලද බවට එහි 9 වන ඡේදයේදී කියා ඇතත්, විත්තියේ උත්තරයේ 4 වන ඡේදයේදී පැමිණිල්ලේ 9 වන ඡේදය ප්‍රතික්ෂේප කර ඇත. ඇපකරයක් මත බැඳීම් ඉටු කිරීමට ඉල්ලා සිටින බැවින් දැනට ලකුණු කර ඇති ඇපකරය අනුව නඩු නිමිත්ත පැන නැගීමට විධාන කොට ඉල්ලීමක් ඔප්පු කිරීමක් අවශ්‍ය විය හැක."

The learned Judge concluded that in all the circumstances of the case, the Appellant has failed to satisfy Court that there were exceptional circumstances to justify the exercise of the discretion of the Court in favour of the Appellant. In particular, the learned Judge observed as follows at pages 11 and 12 of his order:-

"ඊළඟට සැළකිය යුතු වන්නේ, පැමිණිල්ලේ ලිඛිත දේශන වල 22, 23 ඡේදවල දක්වන කාරණය විශේෂ හේතුවක් ලෙස සැළකිය යුතුද යන්නයි. එහි දක්වන්නේ අදාළ ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය නිකුත් කළ S.S. Corner Sub – Post Office යන තැපැල් කාර්යාලය වසා දැමීම නිසා මධ්‍යම තැපැල් හුවමාරු තැපැල් කාර්යාලයෙන් සාක්ෂි කැඳවීම හැර වෙනත් අවස්ථාවක් හිමි නොවුනු බවයි. මෙම හේතුව විශේෂ හේතුවක් ලෙස සළකා මධ්‍යම හුවමාරු තැපැල් කාර්යාලයේ සාක්ෂිකරු කැඳවීමට ඉඩ දීමට S.S. Corner Sub – Post Office මුල් සාක්ෂි ලැයිස්තුවෙහි ලැයිස්තු ගත කර තිබිය යුතුය. එසේ වී නම් එය වසා දැමීම නිසා අලුත් තත්ත්වයක් උදා වීමෙන් විශේෂ අවස්ථානුගත කරුණක් පැන නැගීමට තිබුණි. නමුත් S.S. Corner Sub – Post Office පවා නිසි කලට නිවැරදි සාක්ෂි ලැයිස්තුවේ ලැයිස්තු ගත කර නැත. එය පවා ලැයිස්තු ගත කර ඇත්තේ විවාදිත සාක්ෂිකරු ලැයිස්තු ගත කරන ලැයිස්තුවෙන්මය. ඒ අනුව එම කරුණ විශේෂ අවස්ථානුගත කරුණක් හැටියට මා හට සැළකීමට නොහැක. අනික් අතට එකී ලිඛිත දේශනයේ 23 වන ඡේදයෙන් දක්වන්නේ S.S. Corner Sub – Post Office දැන් පැවැත්මක් නැති බව සනාථ කිරීමට මෙම සාක්ෂිකරු කැඳවීම අවශ්‍ය බව වුවත්, අතිරේක සාක්ෂි ලැයිස්තුවෙන් දක්වා ඇත්තේ තැපැල් භාණ්ඩ කුවිතාන්සිය හා අදාළ පොත් පත් ඉදිරිපත් කිරීමට කැඳවන බවද නිරීක්ෂණය කරමි.

මේ අනුව ඉහත දැක්වූ පැමිණිල්ලේ ඉදිරිපත් කරන විශේෂ අවස්ථානුගත කරුණු අනුව මා හට සැහිමකට පත් විය නොහැක. ඒ අනුව සාක්ෂිකරු කැඳවීමට ඉඩ දීම ප්‍රතික්ෂේප කරමි."

Submissions of Counsel on appeal

At the hearing of this appeal, the submissions of learned Counsel were confined to the question whether the Commercial High Court had erred in exercising the discretion vested in it under Section 175 of the Civil Procedure Code against the Appellant, but in this context they also adverted to Section 121(2) of the Code which is expressly referred to in Section 175.

Learned President's Counsel for the Appellant has contended that the learned Judge of the Commercial High Court had erred in rejecting his submission that in terms of Section 121(2) of the Civil Procedure Code, additional lists of witnesses or documents may be filed fifteen days before any subsequent date of trial, and that any witness listed in such a list may be called to give evidence. He further submitted that the learned Judge of the Commercial High Court had misdirected himself in the interpretation of Section 175 of the Code, and had also failed to appreciate the fact that the Appellant had been compelled to call the Officer in Charge of the Central Mail Exchange, who had been listed as a witness in the Additional List of Witnesses and Documents filed by the Appellant dated 30th June 2009, only when the Appellant had come to know that the ''SS Corner Sub-Post Office" from which the letter-demand dated 15th July 2002 marked පැ6 was allegedly sent to the Respondent by registered post, had been closed down. He emphasised that the said witness was called to testify only on 13th December 2010, more than a year and six months after the listing of the witness. He further submitted that in those circumstances, it cannot be contended that the Respondent was taken by surprise. In support of his submission that the learned Judge of the Commercial High Court had misdirected himself in the interpretation of the first proviso to Section 175 of the Civil Procedure Code, leaned President's Counsel for the Appellant invited attention of the Court to the decision of this Court in *Girantha v Maria* 50 NLR 5199 (SC). He also submitted that the learned Judge of the High Court erred applying the *ratio decidendi* of the decision in *Silva v Silva* (2006) 2 SLR 80 (CA) to the circumstances of this case. He argued that the objection of the Respondent was purely technical, and submitted relying on the decisions in *Casie Chetty v Senanayake* (1999) 3 SLR 11 (CA) and *Colgan and Others*

v Udeshi and Other (1996) 2 SLR 220 (SC) that upholding the said objection will not further the interests of justice.

It was the contention of the learned President's Counsel for the Appellant that the matters set out in paragraphs 18 to 23 of the Written Submissions of the Appellant filed in the Commercial High Court dated 13th January 2011 and marked as "X9", constitute special circumstances in terms of the first proviso to Section 175(1) of the Civil Procedure Code. In the aforesaid paragraphs It was submitted on behalf of the Appellant that at the time of posting the Letters-demand to the 1st, 2nd and 3rd Defendant-Respondents, the registered postal article receipt Nos. 1290, 1291 and 1292 were issued by the S.S Corner Sub-Post Office; that the registered postal article receipt Nos. 1290 and 1292 had been tendered to court with the affidavit filed by the Appellant at the *ex-parte* trial against the 1st and 3rd Defendant-Respondents; that the relevant postal article receipt bearing No. 1291 marked එ6-(අ) and received in evidence subject to proof related to the issue of the letter-demand to the Respondent; that witness Visaka Kumari Gunapala has in her evidence testified that the letters-demand were sent to the 1st, 2nd and 3rd Defendant-Respondents at the same time and the said registered postal article receipts were issued at the same time by S.S. Corner Sub-Post Office, which upon inquiry the Appellant has become aware, has been since closed down and it is not possible to call a witness from the said sub-Post Office in order to produce the second copy (pink copy) of the said registered postal article receipt; and in those circumstances, the Appellant had no option but to call the said witness from the Central Mail Exchange in order to prove the non-existence of the said sub Post Office, and to produce any records, books and counterfoils that may exist in regard to the said registered postal article receipt bearing No. 1291. The learned President's Counsel for the Appellant has stressed that the learned Judge of the Commercial High Court had erred in concluding that the special circumstances set out in paragraphs 18 to 23 of the Written Submissions of the Appellant did not constitute exceptional circumstances to justify the exercise in favour of the Appellant the discretion alleged to be vested in Court by the first proviso to Section 175 of the Civil Procedure Code. He submitted that the calling of the witness from the Central Mail Exchange was necessary to ascertain the truth in regard to the despatch of the letter-demand which was vital to prove that a cause of action has arisen to sue the Respondent on the Guarnatee Bond. He submitted that the appeal should be allowed in the interests of justice to enable the trial to go on for the truth to be ascertained.

Learned President's Counsel for the Respondent submitted that the lists referred to in Section 121(2) should have been filed before fifteen days before the first date of trial, and that any witness listed in any additional list filed thereafter may be called to give evidence only with the leave upon being satisfied that special circumstances exist which render such a course advisable in the interests of justice. He invited the attention of Court to the language of Section 121(2) and the first proviso to Section 175 of the Civil Procedure Code and referred to the decision in *Asilin Nona and Another v Wilbert Silva* 1997(1) SLR 176 (SC) in which this Court had observed that Section 175(1) of the Code imposes a bar against calling of witnesses who are not listed in terms of section 121. He submitted that the granting of permission for calling unlisted witnesses is a matter eminently within the discretion of the trial judge, and cited the decisions of the Court of Appeal in *J.A. Chandramali v M.M. Rivaldeen and Another* reported in [2010] BLR 205 (CA) and *Kandiah v Wiswanathan and Another,* 1991(1) Sri L.R.269 (CA) for the proposition that an exception can be made only if "special circumstances appear to it to render such a cause advisable in the interest of justice", the burden of satisfying Court as to the existence of special circumstances is on the party seeking to call such witness.

It was the contention of the learned President's Counsel for the Respondent that in the circumstances of this case, the Appellant had failed to discharge the burden placed on it by law to establish that exceptional circumstances exist to justify the granting of leave to call a witness from the Central Mail Exchange. He emphasised that the averment in the plaint that the sum of US $ 440,350 together with interest allegedly due in terms of a Guarantee Bond *was demanded* from the from the Respondent by the letter demand dated 15th July 2002 was denied in the paragraph 4 of the Answer of the Respondent, who had specifically taken up the position in the answer that no cause of action has arisen or disclosed in the plaint for the Appellant to sue the Respondent. He pointed out that the Respondent had not objected to witnesses Gamini Karunaratne and V.K. Gunapala testifying in the case in view of the fact that even though these names were included for the first time in the Additional List of Witnesses and Documents field on 30th June 2009, they could have been called in terms of the original List of Witnesses and Documents filed by the Appellant as they had been listed by their designations, and stressed that none of the two lists of witnesses filed prior to 30th June 2009 included any officer from the ''SS Corner Sub-Post Office", and therefore there was no justification for calling a witness from the Central Mail Exchange on the basis that the sub-post office in question had been closed down. Referring to the decision of the Court of Appeal in *Wijesekara v Wijesekara* 2005(1) SLR 58 (CA), he submitted that it is to the best interest of the administration of justice that a Judge should not ignore or deviate from the procedural law and decide matters on equity and justice, and in all the circumstances of this case, the appeal should be dismissed with costs.

The Relevant Statutory Provisions and their interpretation

As already noted, the three substantive questions on which this Court has granted leave to appeal in this case, focus on Section 175 of the Civil Procedure Code No. 2 of 1889, as amended by Section 29 of the Civil Procedure Code (Amendment) Law No. 20 of 1977, appearing on Chapter XIX of the Code headed "Of the Trial", which provides as follows:-

> "(1) No *witness* shall be called on behalf of any party unless such witness shall have been included in the list of witnesses previously filed in court by such party *as provided by section 121*:
>
> Provided, however, that the court may *in its discretion*, *if special circumstances appear to it to render such a course advisable in the interests of justice*, permit a witness to be examined, although such witness may not have been included in such list aforesaid
>
> Provided also that any party to an action may be called as a witness without his name having been included in any such list.
>
> (2) A *document* which is required to be included in the list of documents filed in court by a party *as provided by section 121* and which is not so included shall not, *without the leave of the court*, be received in evidence at the trial of the action:

Provided that nothing in this section shall apply to documents produced for cross-examination of the witnesses of the opposite party or handed over to a witness merely to refresh his memory." (*Emphasis added*)

The gist of the matter in issue is whether the learned Judge of the Commercial High Court properly exercised the discretion vested in him by the first proviso to Section 175 of the Civil Procedure Code in refusing to allow the witness from the Central Mail Exchange to testify at the trial.

Learned President's Counsel for the Appellant and the Respondent have, at the hearing of this appeal, invited our attention to Section 121 of the Civil Procedure Code, particularly since that section is expressly mentioned in Section 175 of the Code in its reference to "the list of witnesses previously filed in court by such party *as provided by section 121*". Section 121 appears in Chapter XVII of the Civil Procedure Code entitled "Witnesses and Documents", and Section 121(1) of the Code, enacts that the parties may, after the summons has been delivered for service on the defendant, obtain from Court "before *the day fixed for the hearing*" summonses to persons whose attendance is required either to give evidence or to produce documents. Section 121(2) of the Code as amended by Section 29 of the Civil Procedure Code (Amendment) Law No. 20 of 1977, goes on to provide that-

"(2) Every party to an action shall, not less than fifteen days before *the date fixed for the trial* of an action, tile or cause to be filed in court after notice to the opposite party-

(a) a list of witnesses to be called by such party at the trial, and

(b) a list of the documents relied upon by such party and to be produced at the trial."

It was contended by the learned Counsel for the Respondent that that the lists referred to in Section 121(2) should have been filed before fifteen days before the first date of trial, and that any witness listed in any additional list filed thereafter may be called to give evidence or any document listed in any additional list can be produced in evidence only with the leave of court upon being satisfied that *special circumstances* exist which *render such a course advisable in the interests of justice.* Learned Counsel for the Appellant argued the contrary and submitted that additional lists of witnesses or documents may be filed fifteen days before any *subsequent date of trial*.

It is noteworthy that both Section 121 and Section 175 of the Civil Procedure Code underwent substantive amendment in 1977, and while Section 121(2) which was quoted above is what now stands as the current law, prior to the Civil Procedure Code (Amendment) Law No. 20 of 1977 this provision was differently worded, and provided that "a list of witnesses shall be filed in court by the party applying for such summonses, after notice to the other side, and *within such time before the trial as the Judge shall consider reasonable*, *or at any time before the trial with the consent of the other side appearing on the face of such list*." Similarly, when the Civil Procedure Code was enacted, Section 175 was not divided into two sub-sections, and Section 175(2) was also introduced into the Code by Section 31 of the Civil Procedure Code (Amendment) Law of 1977.

The changes brought about into the Code in 1977 obviously reflect a change of policy of speeding up the disposal of cases through clearer procedural rules with time limits while further reducing the surprise element in litigation. It is interesting to note that this policy was carried further when Section 93 of the Code dealing with amendment of pleadings was amended twice, first by Section 9 of the Civil Procedure Code (Amendment) Act No. 79 of 1988, which provision was then repealed and replaced by Section 3 of the Amending Act No. 9 of 1991. The law in this regard as it now stands is found in Section 93 of the Code as amended by Act 9 of 1991, which for the first time draws a distinction between situations when an amendment in the pleadings is sought by application made "before *the day first fixed for trial* of the action" which is now regulated by Section 93(1) which confers on the court "full power of amending in its discretion, all pleadings in the action", and Section 93(2) which confers power on the Court to permit an amendment of pleadings where the application for the same is made after the "*day first fixed for trial*" only where the court is satisfied, for reasons to be recorded, "that grave and irremediable injustice will be caused if such amendment is not allowed".

In my view, while it is likely that the words "*the day fixed for the hearing*" used in the first sub-section of Section 121 of the Civil Procedure Code was intended to mean the same day as "*the date fixed for the hearing*" as used in the second sub-section of that Section, there being no material difference between "day" and "date" and "hearing" and "trial" in the context of an action, the use in Section 93 of the Civil Procedure Code of the words "*the day first fixed for trial"* may be contrasted with the words "*the date fixed for the trial"* as used in Section 121(2) of the Code. In my opinion, the difference in language between Section 93 and 121(2) may be significant in deciding whether the fifteen day limit fixed in Section 121(2) was intended by the legislature to be confined in its application to the day first fixed for trial of any action or whether it was intended to be applied also to a further date to which the trial may have been postponed.

However, since the three questions on which leave to appeal has been granted in this case are based on the first proviso to Section 175 of the Civil Procedure Code, it is not necessary for me to go deep into the question whether the additional list of documents dated 28th July 2004 and additional list of witnesses and documents dated 30th June 2009 have been field fifteen days before "the date fixed for trial" within the meaning of Section 121(2) of the Civil Procedure Code. In my view, in determining whether the discretion vested in the Commercial High Court by the first proviso to Section 175 of the Civil Procedure Code has been properly exercised, it would be material for this Court to take into consideration the fact that the Appellant moved to call witness No. 3 the Officer in Charge of the Central Mail Exchange or his representative, listed in the additional list of witnesses and documents dated 30th June 2009, only on the adjourned trial date of 13th December 2010 more than 17 months after the said listing, which I wish to stress at the outset, altogether takes away the element of surprise, which in my view, is all what Section 175 is about.

Learned President's Counsel for both parties have invited the attention of this Court to several decisions of this Court and the Court of Appeal that have sought to interpret Section 175 of the Civil Procedure Code. Of particular importance are the decisions of this Court in *Girantha v Maria* 50 NLR 519 (SC) and *Asilin Nona and Another v Wilbert Silva* 1997 (1) SLR 176 (SC). If I may refer first to the second of these cases, *Asilin Nona and Another v Wilbert Silva, supra*, which was a case involving conflicting claims of prescriptive title to land, in which the parties had agreed that either party would file a list of witnesses one week before the date of trial. The learned District Judge had upheld an objection taken on behalf of the plaintiff when the

defendants sought to call a witness listed in an additional list of witnesses filed by them after the plaintiff had closed his case. The defendants made an application for leave to appeal against the decision of the Court of Appeal, which was refused by the Court of Appeal, and the defendants preferred an appeal to this Court. This Court affirmed the decision of the Court of Appeal and dismissed the appeal. In the course of his judgement, His Lordship G.P.S de Silva CJ observed at page 178 that:-

> "Section 175(1) of the Civil Procedure Code in its enacting part imposes a bar on a party calling witnesses unless such witnesses were included in the list previously filed as provided by section 121. The first proviso to section 175(1) confers on the court the discretion to permit a witness not so listed to be called **"**if *special circumstance**s*** appear to it to render such a course advisable *in the interests of justice***".** The burden was on the defendants to satisfy the court in regard to the existence of such special circumstances. The finding of the District Judge, however, was that *no explanation was given for the default of the defendants.* This finding was not challenged before us. In my opinion, this clearly is an important circumstance which tells heavily against the defendants....."(*Emphasis added*)

In the course of his judgment, His Lordship G.P.S de Silva CJ distinguished the earlier decision of this Court in *Girantha v Maria, supra,* cited by learned Counsel for the defendants on the basis that that was a case in which there were special circumstances which required the court to permit the defendants to call a police inspector who was listed only after the plaintiffs' case was closed. That too was a case that involved prescriptive claims of the parties, and the defendants' proctor moved to call Police Inspector Sivasambo, whose evidence was vital to clinch the issue of prescriptive possession. The plaintiffs' proctor objected on the ground that the Inspector's name was not in the Defendants' list of witnesses filed before the original trial date and had been included in an additional list of witnesses filed by the defendant after the plaintiffs had closed their case. The District Judge upheld the objection, but on appeal, the Supreme Court reversed the decision. In the course of his judgment, His Lordship Gratiaen J. observed at page 522 that:-

> "The proviso to Section 175 of the Civil Procedure Code authorises the Court to permit a witness to be called although his name does not appear on the list of witnesses filed before the commencement of the *trial if such a course is "advisable in the interest of justice"*. The purpose of the requirement of Section 175 that each party should know before the trial the names of witnesses whom the other side intends to call is to prevent surprise. Subject *to the element of surprise being avoided it is clearly in the interest of justice that the Court, in adjudicating on the rights of the parties, should hear the testimony of every witness who can give material evidence on the matters in dispute*. In this case Inspector Sivasambo is admittedly a person whose evidence, if accepted by the trial Judge, would be of the greatest importance in deciding the issue of prescription.....The element of surprise does not arise because the plaintiffs had several months' notice of the defendant's decision to call him on the adjourned date of trial. In these circumstances, it seems to me that the objection raised by the plaintiffs to Inspector Sivasambo being called as a witness was highly technical and without merit. It was "in the interests of justice" that this material witness should be examined. The learned District Judge refused the application because the plaintiffs would be "placed at a disadvantage" if Inspector Sivasambo's evidence was allowed to be called. This is no doubt correct in a sense, but *the paramount consideration is the ascertainment of the truth and not the readily understandable desire of a litigant to be placed at a tactical advantage by reason of some technicality*".(*Emphasis added*)

In my view, the decision in *Girantha v Maria, supra,* is on all fours with the circumstances of the instant case, where too the proof of dispatch of the letter-demand alleged to have be sent to the Respondent is of vital importance to the parties, particularly in the context that the Appellant has not specifically denied in his answer the receipt of the said letter demand, and had also admitted at the trial the contents thereof. It is noteworthy that the learned Judge of the Commercial High Court has arrived at the conclusion that the Appellant has failed to discharge the burden placed on it by the first proviso to Section 175 of the Civil Procedure Code of satisfying court as to the existence of special circumstances to justify the calling of the Officer in Charge of the Central Mail Exchange mainly on the basis that since the Respondent has denied in his answer the averment in the plaint that the letter-demand in question was despatched to the Respondent, a witness from the S.S Corner Sub-Post Office should have been duly listed by the Appellant in its list of witnesses and documents dated 3rd July 2003, which the Appellant has failed to do. In this context, the question arises as to whether the Appellant could be blamed for this omission in the state of the pleadings in the case.

It is significant to note that paragraph 4 of the Answer of the Respondent dated 28th May 2003 by which the averment in paragraph 9 of the plaint to the effect that by letter-demand dated 15th July 2002, the principal sum sued for in this action was demanded from the Respondent, was in fact a general denial of paragraphs 4, 5, 7, 8, 9, 10, 11 and 12 of the plaint, and there was no specific denial in the answer of the receipt of the said letter-demand. It is expressly provided in Section 75(d) of the Civil Procedure Code that every answer should contain a statement admitting or denying the several averments of the plaint, and setting out in detail plainly and concisely the matters of fact and law, and the circumstances of the case upon which the defendant means to rely for his defence. Even the averments in paragraphs 3 and 12(ii) of the said answer by which the Respondent has specifically averred that no cause of action has arisen or was disclosed in the plaint for the Appellant to sue the Respondent, did not disclose the position later taken up by the Respondent at the trial that he did not receive the letter-demand in question. In fact, as already noted, notice had been given by the Appellant to the Respondent through its list of witnesses and documents dated 3rd July 2003 requiring him to produce the original of the said letter demand at the trial, failing which, it was also intimated that secondary evidence would be led to prove the same in terms of Section 66 of the Evidence Ordinance. In those circumstances, I am of the opinion that *while the Respondent cannot claim to have been taken by surprise by the application of the Appellant to call a witness from the Central Mail Exchange* to prove the despatch of the letter-demand, *the Appellant had most likely been taken by surprise* by the Respondent due to the vague nature of his denials in the answer and his failure to expressly disclose his defence that no cause of action has arisen or is disclosed in the plaint due to the Respondent not receiving the letter-demand alleged to have been sent to him in paragraph 9 of the plaint.

In my opinion, the Respondent knew very well that the Appellant had to prove the despatch of the letter-demand and showed his intent to lead secondary evidence through his Section 66 notice referred to above. A true copy of the letter-demand dated 15th July 2002 marked අ6, had been attached to the plaint and the affidavit of Mohamed Thambi Fazal Mohamed, along with a true copy of the relevant postal article receipt bearing No. 1291 allegedly issued by the S.S. Corner Sub-Post Office marked අ6-අ, and the Legal Officer of the relevant Branch of the Appellant Bank, Visaka Kumari Gunapala has testified at the trial that she despatched the three letters-demand addressed to the 1st, 2nd and 3rd Defendant-Respondents by Registered

Post from the S.S. Corner Sub-Post Office, which issued postal article receipts bearing Nos. 1290, 1291 and 1292 respectively, of which the postal article receipt bearing No. 1291 marked පැ6-අ related to the letter-demand sent to the Respondent. She has also testified that postal article receipts bearing Nos. 1290 and 1292 true copies of which were attached to the affidavit filed on behalf of the Bank with respect to the *ex-parte* trial against the 1st and 3rd Defendant-Respondents were photocopied along with postal article receipt bearing No. 1291 which had to be attached to the affidavit of Mohamed Thambi Fazal Mohamed filed in these proceedings, but thereafter the original postal article receipt bearing No. 1291 had got misplaced. Learned President's Counsel for the Appellant has explained that it was in these circumstances that it became necessary to call the witness from the Central Mail Exchange.

It is also relevant to note that the said documents marked පැ6 and පැ6-අ have been received in evidence subject to proof, and that prior to witness Visaka Kumari Gunapala commencing her testimony on 31st August 2010, Court had the following submissions of Counsel recorded:-

> "මෙම නඩුවේ අද දින පැමිණිල්ලේ ඉතිරි සාක්ෂි කැඳවීමට නියමිතය. මෙම නඩුවේ එන්තරවාසිය සහ එන්තරවාසිය යවන ලද රිසිට් පත වන පැ.6 සහ පැ.6-අ ඉදිරිපත් කර ඇත්තේ ඔප්පු කිරීමට යටත්ව බවද දන්වා සිටියි. ඒ අනුව අද දින සාක්ෂි කැඳවීමට ඇති බව දන්වා සිටියි.
>
> කෙසේ වෙතත් විත්තිය වෙනුවෙන් දන්වා සිටින්නේ එන්තරවාසිය සහ එහි අන්තර්ගතය ඔප්පු කිරීමේ අවශ්‍යතාවය ඉවත් කර ගන්නා බවයි. ඒ අනුව ලියා පදිංචි තැපැල් භාණ්ඩ කුවිතාන්සිය සම්බන්ධයෙන් පමණක් එකී ඔප්පු කිරීමට යටත් විරෝධය පවත්වාගෙන යන බව දන්වා සිටියි.
>
> එය සනාථ කිරීමට සාක්ෂි කැඳවේ."

The concession made by learned Counsel for the Respondent in the Commercial High Court on 31st August 2010 is indeed significant in that the letter-demand and its contents have been admitted by the Respondent subject to the proof of only the relevant postal article receipt. This makes it necessary in the interests of justice to call the witness from the Central Mail Exchange in regard to the alleged despatch of the relevant letter-demand and to prove all relevant records, books and copies of the postal article receipt bearing Nos. 1290, 1291 and 1292.

I am firmly of the opinion that-

(a) the learned Judge of the Commercial High Court erred in interpreting the provisions of Section 175 (1) of the Civil Procedure Code, and disallowing the Appellant's application to call the witness from the Central Mail Exchange;

(b) the learned Judge of the Commercial High Court misdirected himself in law in failing to appreciate that the said officer from the Central Mail Exchange has been listed as a witness in the Additional List of Witnesses and Documents dated 30.06.2009, and no prejudice would be caused to the Respondent since the Appellant sought to call him to give evidence more than seventeen months after the filing of the said list of Witnesses and Documents; and

(c) the matters set out in paragraphs 18 to 23 of the Written Submissions of the Appellant marked X9 constitute special circumstances sufficient to persuade a court to allow the calling of a witness from the Central Mail Exchange in all the circumstances of this case in terms of the first proviso to Section 175(1) of the Civil Procedure Code.

Conclusions

For these reasons, I answer all the substantive questions on which leave to appeal was granted in this case in the affirmative and in favour of the Appellant.

Accordingly, I allow the appeal and set aside the impugned order of the Commercial High Court dated 8th July 2011. I also make order directing the Commercial High Court to forthwith fix the case for further hearing and allow witness No. 3 of the Additional List of Witnesses dated 30th June 2009 to give evidence.

I award the Appellant costs of this Appeal in a sum of Rs. 75,000.00 payable by the 2nd Defendant-Respondent.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, 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 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 Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 172/2011

SC/HCCA/LA 109/2010
SP/HCCA/Rat/07/2007 (F)
D.C. Ratnapura No. 9844/L

1. Herath Mudiyanselage Leelawathie Menike

2. Kotahawadige Don Wimalasena

   Both of Mahajana Dispensary, Buttala.

Plaintiffs

Vs.

1. Ananda Dharmasinghe Bandara,
   Kalyani Pedesa,
   Kelaniya.

2. Herath Mudiyanselage Heen Bandara
   Jambu Sameeraya,
   Kiridigala.

Defendants

And Between

1. Ananda Dharmasinghe Bandara,
   Kalyani Pedesa,
   Kelaniya.

2. Herath Mudiyanselage Heen Bandara
   Jambu Sameeraya,
   Kiridigala.

Defendant-Appellants

SC. Appeal 172/2011

Vs.

1. Herath Mudiyanselage Leelawathie Menike

2. Kotahawadige Don Wimalasena

   Both of Mahajana Dispensary, Buttala.

Plaintiff-Respondents

And Now Between

1. Ananda Dharmasinghe Bandara,
   Kalyani Pedesa,
   Kelaniya.

   Presently At
   No. 565/2C, 15th Lane,
   Mahindu Mawatha,
   Athurugiriya Road,
   Malambe.

2. Herath Mudiyanselage Heen Bandara
   Jambu Sameeraya,
   Kiridigala.

Defendant-Appellant-Appellants

Vs.

1. Herath Mudiyanselage Leelawathie Menike

2. Kotahawadige Don Wimalasena

   Both of Mahajana Dispensary, Buttala.

Plaintiff-Respondent-Respondents

SC. Appeal 172/2011

BEFORE : **Marsoof, PC. J.**
Hettige, PC.J. &
Wanasundera, PC.J.

COUNSEL : W. Dayaratne, PC. with Ms. R. Jayawardane for Defendant-Appellant-Appellants.

Navin Marapana with Uchitha Wickramasinghe for Plaintiff-Respondent-Respondents.

ARGUED ON THE PRELIMINARY OBJECTION : **10-07-2013**

WRITTEN SUBMISSIONS FILED : By the Appellants on **04-05-2012**
By the Respondents on **04-05-2012**

DECIDED ON : **22 -01-2014**

* * * * *

Wanasundera, PC.J.

In this case, a preliminary objection was taken up by the Plaintiff-Respondent-Respondents with regard to non compliance of Rule 30(1) of the Supreme Court Rules by the Defendant-Appellant-Appellants.

Rule 30(1) reads:-

> "No party to an appeal shall be entitled to be heard, unless he has previously lodged five copies of his written submissions [hereinafter referred to as 'submissions') complying with the provisions of this rule".

This Court granted Leave to Appeal to the Appellants, from the judgment of the Civil Appellate High Court of Ratnapura on 28.10.2011. According to Rule 30(6),

the Appellant should lodge his written submissions within 6 weeks of the grant of leave to appeal.

Rule 30(6) reads:-

> "The appellant shall within six weeks of the grant of special leave to appeal, or leave to appeal, as the case may be, lodge his submissions at the Registry and shall forthwith give notice thereof to each respondent by serving on him a copy of such submissions".

According to Rule 30(7), if the Appellant fails to lodge his submissions as required by Rule 30(6), then the Respondent should lodge his submissions within 12 weeks of the grant of leave to appeal.

Rule 30(7) reads:

> "The respondent shall within six weeks of the receipt of notice of the lodging of the appellant's submissions, lodge his submissions at the Registry, and shall forthwith give notice thereof to the appellant and to every other respondent, by serving on each of them a copy of such submissions. 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 this case 6 weeks from 28.10.2011 falls on 09.12.2011 and 12 weeks from 28.10.2011 falls on 13.01.2012. The Respondents have in fact filed their written submissions on 16.01.2012, i.e three days after 13.01.2012. The Appellant has filed his written submissions on 17.01.2012. At the time of granting leave, this Court had fixed the date of hearing of this matter as 26.03.2012. Therefore, written submissions of both parties in fact were filed in Court before the date of hearing. The Respondents by way of a motion dated 14.12.2011 brought to the notice of Court that written submissions of the Appellant had not been filed in Court according to the Supreme Court Rules and pleaded that in terms of the decision of the Supreme Court in *Annamalai Chettiar Muthappan Chettiar vs.*

Mangala Karunanayake (SC. Minutes dated 06.06.2005) this application be dismissed. When this matter was supported in open Court, this Court granted time for both parties to file written submissions on this preliminary objection and thereafter heard oral submissions on the same and decided to make an order.

The Respondents' Counsel has based his argument on the unreported judgment in SC. Appeal 69/2003 written by Justice Shirani Bandaranayake (as she then was), namely the case of *Annamalai Chettiar Muthappan Chettiar Vs. Mangala Karunanayake and another* (SC. Minutes of 06.06.2005).

The fact that in the aforementioned case, the Supreme Court dismissed the appeal for non compliance of Rules 30(1) and 30(6), The Respondent does not urge any other reasons to seek the dismissal of the application. Yet I find that within the said judgment, Justice Bandaranayake states thus "…….. The contention of the Learned President's Counsel for the Appellant is that non-compliance with such Rule will not disentitle the Appellant being given a hearing. I am in agreement with the Learned President's Counsel that Rule 30(1) does not refer to an appeal being dismissed for non-compliance with that Rule. ……..".

In fact I observe that the said appeal was dismissed not due to non-compliance of Rules 30(1) and 30(6) but for not having diligently prosecuted the appeal under Rule 34 which reads:-

> "Where an appellant, or a petitioner who has obtained leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application, the Court may, on an application in that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non-prosecution, and the costs of the appeal or application and any security entered into by the appellant shall be dealt with in such manner as the Court may think fit."

In *Annamalai Chettiar Muthappan Chettiar Vs. Mangala Karunanayake and another* (SC. Minutes of 06.06.2005), SC. Appeal 69/2003, the Appellant had not filed written submissions for 1 year and 4 months after Court granted Special Leave to Appeal on 24.09.2003. Even when the appeal was taken up for hearing on 17.02.2005, there was no written submissions of the Appellant on record. It was an obvious case on "not prosecuting diligently". I disagree with the Counsel for the Respondents when he stated that this case has settled the law with regard to SC. Rule 30.

In *Priyani Soyza vs. Rienzie Arsecularatne 1999- 2 SLR 179* it was held that 'non compliance with the Rules, in particular, with regard to non-filing of written submissions will not disentitle the Appellant to be heard'. In *Union Apparels (Pvt) Ltd. Vs. Director General of Customs* 2000- 1 SLR 27 also, it was held that non compliance of the rules should be considered along with the circumstances of the case and then only could it be decided whether due diligence was not shown in prosecuting the application. The preliminary objection of non-compliance of the Rules was thus overruled.

In the present case, the Appellants did not file the written submissions within 6 weeks according to SC. Rules but filed at the end of 12 weeks begging Court to accept the written submissions mentioning that the delay was due to inadvertence on the part of the Lawyers appearing for the Appellants. The explanation given for the delay is 'inadvertence' of the Lawyer. The meaning of 'inadvertence' according to the Blacks Law Dictionary is, "an accidental oversight" which could be construed as 'an oversight not having occurred as a result of anyone's purposeful act'. The Lawyers have apologetically accepted inadvertence on their part on behalf of the Appellants, in the motion with which the written submissions were submitted. The first date of hearing of the appeal fell on 26.03.2012 and the Appellants filed their written submissions on 17.01.2012 which was more than 2 months prior to the date of hearing.

Recent cases related to this issue of whether Rule 30 not being complied with could disentitle a party to be heard by the Supreme Court is discussed in, *Fernando Vs. Fernando*, S.C. Appeal No. 81/09. (SC. Minutes of 30.04.2010), *Chandrani Vs. Lakmini & others*, S.C. Appeal No. 15/09 (SC. Minutes of 07.10.2010 and *Elias Vs. Gajasinghe & another*, S.C. Appeal No. 50/2008 (S.C. Minutes of 28.06.2011).

In all these cases where the preliminary objection of 'Rules not having been complied with' was taken up, the opposing party submitted to Court that the case of the other party be dismissed in limine. I see this as a plea to cut short the proper matter in issue before Court and an attempt to end a case without going into the merits of the case. Rules of procedure are fine and should be in place to regulate the procedure which smoothens out the path to justice. Yet, I believe Rules should not obstruct the path of justice. Rules are made to facilitate those who hear the case to get ready to do their part, to reach the end, which is nothing but justice. The litigants come to Court to get justice. They know nothing about the Rules. They do not expect their lawyers to win the case for them on technical objections. They expect their lawyers to place their side of the story to Court to reach justice. I quote Justice Suresh Chandra in *Elias Vs. Gajasinghe & another* (S.C. Minutes of 28.6.2011) SC. Appeal 50/2008, with which Justice Tilakawardane & Justice Amaratunga agreed, as follows:-

> "For the proper dispensation of justice, raising of technical objections should be discouraged and parties should be encouraged to seek justice by dealing with the merits of cases. Raising of such technical objections and dealing with them and the subsequent challenges on them to the superior courts takes up so much time and adds up to the delay and the backlog of cases pending in Courts. Very often the dealing of such technicalities become only an academic exercise with which the litigants would not be interested. The delay in dispensation of justice can be minimized if parties are discouraged from taking up technical objections which takes up valuable judicial time. What is important for litigants would

be their aspiration to get justice from courts on merits rather than on technicalities. As has often been quoted it must be remembered that Courts of law are Courts of justice and not academies of law."

In the case of *W.M. Mendis & Company Vs. Excise Commissioner 1999 (1) SLR 351,* it was held that "The object of rules of procedure is to decide the rights of the parties and not to punish them for their mistakes or shortcomings. A party cannot be refused just relief merely because of some mistake, negligence or inadvertence". In the case of *Nanayakkara Vs. Warnakulasooriya 1993 (2) SLR 289*, it was held that "if the opposing party is not prejudiced by an omission made by the Appellant, the Court shall not dismiss the appeal."

In the case of *Fernando Vs. Fernando*, SC. Appeal No. 81/09 a preliminary objection was taken up by the Substituted Plaintiff/ Appellant/ Appellant/Respondents that the Appellants had failed to serve a copy of their written submissions on the Respondents as required by Rule No. 30 (6) of the Supreme Court rules of 1990 and the Appellants' appeal should be dismissed *in limine*. Justice Sripavan, having considered the facts of that case found that the Appellants have filed their written submissions at the registry and the only matter to be considered is whether the Appellants' failure to serve the said written submissions on the Respondents would amount to a failure to exercise due diligence as provided in Rule 34.

Justice Sripavan with the Chief Justice J.A,N. de Silva and Justice Imam agreeing with him, in his judgment has stated as follows:

"One of the tests of determining the nature of the rule is to see whether it entails any penal consequences where disobedience of a rule carries a sanction. It could safely be said that said rule is mandatory. In the case of rules framed by Court for regulating its own procedure I am of the view that one should look for a greater degree of reasonableness and fairness."

In the said case the Supreme Court overruled the said preliminary objection and heard the case on its merits.

In the case of *Chandrani Vs. Lakmini & others*, SC. Appeal No. 15/2009 (S.C. Minutes of 07.10.2010), Justice Chandra Ekanayake with Chief Justice J.A.N. De Silva and Justice Saleem Marsoof agreeing with him, allowed the appeal of the Appellant who has not been able to make several Defendants as parties to the appeal and failing to serve notice of appeal to them, according to the Rules.

In the said judgment of Chandrani Vs. Lakmini & others, SC. Appeal No. 15/2009 (S.C. Minutes of 07.10.2010) the Supreme Court has taken into consideration several judgments and particularly *Nanayakkara Vs. Warnakulasooriya 1993 2 SLR 289,* where it was held that if the opposing party is not prejudiced by an omission made by the Appellant the court shall not dismiss the appeal. In the said case Justice Kulatunga held that **"**in an application for relief under Section 759(2), the rule 'that the negligence of the Attorney-at-Law is the negligence of the client' does not apply as in the case of Defendants, it is curable under Section 86(2), 87(3) and 77 of the Civil Procedure Code. Such negligence may be relevant, but it does not fetter the discretion of the court to grant relief where it is just and fair to do so".

In the instant case, the Respondents are not prejudiced by the Appellants' non-compliance with Rule 30(6) of the SC. Rules, because the written submissions of the Appellant was filed before Court two months prior to the date of hearing. In fact, written submissions of the Appellants and Respondents were filed at around the same time. If at all, if the Respondents claim that notice of the Appellants' written submission could have given the Respondents a chance to reply the submissions made by the Appellants, on application to Court, the Respondents could get more time to file some more written submissions on whatever point they missed giving their mind to. Any case should be heard on merits and not stifled by technicalities to reach justice which is very much needed by the parties.

For the reasons enumerated above, I overrule the preliminary objection taken up by the Plaintiff-Respondent-Respondent and fix this matter for argument of the main appeal, on the questions of law on which leave to appeal was granted by this Court on the 28th October 2011.

This matter **will be mentioned on 03.02.2014** for the purpose of granting a date for argument of the main appeal.

Judge of the Supreme Court

Marsoof, PC. 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 for Special Leave to Appeal against an Order of Learned Judge of High Court of Civil Appeal of Western Province Holden in Mount Lavinia dated 31/01/2011, under and in terms of Section 5C of the High Court of the Provinces (Special Provisions)Amendment Act No. 54 of 2006 read with Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC Appeal 178/2011
SC(HCCA) LA No. 79/11
WP/HC CA/MTL/106/06(F)
D.C. Mount Lavinia
Case No. 1113/98/L

1. Kodithuwakku Arachchige Dayawathie

2. Kodithuwakku Arachchige Dayarathne

Both of No. 119/1 Saranankara Road
Kalubowila
Dehiwala

The Defendants-Appellants-Appellants

Vs

Pattiayage Iranganie Sirisena of
No. 15/4, Sudharshana Road
Dehiwala

The Plaintiff-Respondent-Respondent

Before	:	Tilakawardane, J Dep, PC J Wanasundera, PC J
Counsel	:	J.M. Wijebandara for the Defendants-Appellants-Appellants. Ranjan Suwadaratne for the Plaintiff –Respondent-Respondent.
Argued on	:	18.10.2012
Decided on	:	04.04.2014

Priyasath Dep, PC, J

This is an appeal against the judgment of the High Court of Civil Appeal of Western Province holden in Mt. Lavinia which affirmed the judgment of the District Court of Mt. Lavinia in case No 1113/98/L.

The Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Mt. Lavinia against the Defendants-Appellants-Appellants (hereinafter referred to as Defendants) praying for the following reliefs:

a) Declaration to the effect that she is the lawful owner of the premises described in the scheduled to the Plaint.

b) Order to eject the Defendants and others claiming under the Defendants who are in occupation of the said premises.

c) Monthly damages in a sum of Rs. 7500/- with legal interests from the date of filing of this action.

Plaintiff stated that by deed of transfer No 1255 dated 24th June 1997 attested by H.W. Jayatissa, Notary Public she purchased the property described in the schedule to the plaint from the Defendants. The Defendants after the transfer of the said premises failed and neglected to hand over vacant and peaceful possession to the Plaintiff. The Defendant by their conduct caused damages in a sum of Rs. 7500/- per month.

The Defendants in their answer dated 13th August 1999 denied that a cause of action accrued to the Plaintiff to sue them and evict them from the premises. The Defendant admitted that they signed the deed mentioned in the Plaint but they did so under duress . Three days after the signing of the deed the 1st Defendant made a complaint to the Police and to the Notary Public who attested the deed. Defendants stated that prior to the signing of the deed the Plaintiff came to their residence with some thugs and threatened them with death and threatened to destroy their home. On the day the deed was signed , Plaintiff with some others came to their residence and threatened them and took them to the Notary Public and got the deed signed by them.

The Defendants in their answer set out a cross claim to set aside the deed of transfer as it was executed under duress. Plaintiff in her replication denied the cross claim filed by the Defendant.

At the trial both parties raised issues based on their pleadings. The Plaintiff commenced his case by calling Mr. H.W. Jayatissa, Notary Public who attested the deed. He testified that the deed was attested by him and the plaintiff, Defendants and witnesses were present and placed their signatures before him.The deed was duly executed. At the time of the execution he did not observe any reluctance on the part of the defendants to sign the deed. Three days after the execution of the deed, the defendants came to him and said that the plaintiff threatened and intimidated them and forced them to sign the deed and requested him not to register the deed. He made a note in the attestation clause that the defendants had informed him that they did not voluntarily sign the deed.

There after the Plaintiff gave evidence and stated that at the request of the 1st Defendant from time to time she advanced Rs. 700,000/- to the 1st Defendant. The 1st Defendant requested for this money to send her sister abroad. The Plaintiff stated that her husband was working abroad and sent money to his account regularly and she withdrew money from this account and gave it to the 1st Defendant as she was a close friend of hers expecting that she will return the money in due course. Her husband after returning to the country found that she had withdrawn money from the account and this led to a dispute with the husband. The 1st Defendant agreed to transfer the property in settlement of Rs. 700,000/- borrowed by her. The Plaintiff thereafter went to the Notary's office with the defendants and signed the deed. Her father-in-Law Jothipala Sirisena and her husband signed the deed as witnesses.

The 1st Defendant gave evidence and stated that it was her sister who is friendly with the Plaintiff borrowed Rs 175,000/= from the Plaintiff and her sister had settled the money with interest. She stated that Plaintiff came along with her husband and some unknown persons and forcibly took her and her brother before a Notary and got the deed executed . Three days after the signing of the deed she made a complaint to the Police and also informed the Notary Public of the threat made by the Plaintiff and requested him not to register the deed.

The learned District Judge disbelieved the evidence given by the Defendants and gave judgment in favour of the Plaintiff.

It was admitted that the deed was executed by the parties. In such a situation the burden of proof shifts to the defendants to establish duress if they intend to invalidate the deed. The Defendants failed to discharge the burden. The following facts are unfavourable to the defendants.

(a) The Notary who attested the deed testified that the parties signed the deed voluntarily.

(b) The complaint made to the police is a belated complaint.

(c) The Defendants did not take any steps to get the deed set aside. Only after the filing of this action in their answer made a cross claim to set aside the deed.

(d) It was revealed at the trial that the 2nd Defendant is a man prone to violence and facing a charge of murder. The learned District Judge had observed that it was improbable that the Plaintiff threatened the defendants and forcibly took the defendants before a Notary and got the deed signed.

The Defendants appealed against the Judgment of the learned District Judge to the High Court of Civil Appeal of the Western Province holden in Mt Lavinia and the Appeal was dismissed. The Defendants filed a Leave to Appeal application in the Supreme Court and this court granted Leave to Appeal on following Questions of Law:

1. Is a party permitted to adduce evidence against the contents of notarially executed deed to prove fraud and/or duress/intimidation?

2. If the answer is in the affirmative to the aforesaid question, has the Learned Trial Judge failed to evaluate the evidence of the defence in terms of law ?

3. If both the aforesaid questions are answered in the affirmative, are the defendants entitled to a judgment as prayed for in their answer?

The learned District Judge in his judgment stated that under section 92 of the Evidence Ordinance oral evidence could not be led which is inconsistent with the contents of the deed. Under proviso (1) to section 92 of the Evidence Ordinance any fact may be proved which will invalidate any document on the basis of fraud, intimidation, illegality, want of consideration etc. However, the learned trial judge had permitted the Defendants to lead evidence to invalidate the deed . The defendant had failed to establish duress or want of consideration. Therefore there is no prejudice caused to the defendants.

We find that the learned District Judge had properly evaluated the evidence led by both parties and having considered the inherent weaknesses of the defendants' case gave judgment in favor of the Plaintiff which was affirmed by the Civil Appellate High Court. The learned trial judge is the best person to observe the demeanor and deportment of witnesses. We see no basis to interfere with the findings of the learned District Judge.

For the reasons set out above in the judgment we dismiss the appeal and affirm the judgment of the District Court of Mt. Lavinia in Case No. 1113/98/L dated 14th December 2006 which was affirmed by the High Court of Civil Appeals.

Appeal dismissed. No costs.

Judge of the Supreme Court

Shiranee Tilakawardena ,J.

I agree.

Judge of the Supreme Court

Eva Wanasudera , 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 against Judgment dated 27/04/2010 delivered by the High Court of the North Central Province (exercising Civil Appellate Jurisdiction at Anuradhapura) in NCP/HCCA/ARP/274/ 2007 D. C. Anuradhapura Case No. 10594/RE.

K. Mary Margret Fernando
of Thopputhota, Waikkal.

SC Appeal No. 193/2011
SC/HC(CA)LA No. 151/2010
NCP/HCCA/ARP/274/2007(F)
DC Anuradhapura Case No. 10594/RE

Substituted-Plaintiff-Respondent-Petitioner-Appellant

-Vs-

1. Beeta de Silva
   of Guest House and Hotel,
   Anuradhapura.

2. L. Sarathchandra de Silva,
   Assistant Manager,
   Guest House and Hotel,
   Anuradhapura

Defendants-Appellants-Respondents-Respondents

BEFORE	**:**	Hon. Saleem Marsoof, P.C., J, Hon. Chandra Ekanayake, J, and Hon. Priysath Dep, P.C., J
COUNSEL	**:**	Gamini Marapana, P.C. with Naveen Marapana for Substituted-Plaintiff-Respondent-Petitioner-Appellant. C.E. de Silva with Sarath Walgamage for the Defendants-Appellants-Respondents-Respondents.
Argued On	**:**	3.12.2014
Written Submissions On	**:**	12.1.2012 (Appellant) 27.2.2012 (Respondents)
Decided On	**:**	17.12.2014

SALEEM MARSOOF, P.C., J:

The only question that was argued in this appeal was whether the subject matter of this action described in the schedule to the plaint was "excepted premises" within the meaning of the Rent Act No. 7 of 1972 as subsequently amended. The learned District Judge had held that it is, and the High Court of the Provinces exercising civil jurisdiction (hereinafter referred to as "the Civil Appellate High Court") has held that it is

not. This court has granted leave to appeal against the judgement of the Civil Appellate High Court dated 27th April, 2010 on the following substantial questions of law:-

(a) Did the High Court err in holding that the Substituted Plaintiff-Respondent-Petitioner-Appellant had failed to discharge the burden of proving that the premises is suit is not governed by the Rent Act as it is an "excepted premises".

(b) Did the Substituted Plaintiff-Respondent-Petitioner-Appellant by document P2 and P2a and by the oral evidence of herself and of Weerakone Mudiyanselage Weerakone Mudiyanse, a Revenue Inspector of the relevant local authority, discharge the burden of proving that the first assessment of annual value of the premises in suit was in 1987 and that it's amount was Rs. 12,350/= and that therefore the premises in suit is "excepted premises" to which the Rent Act does not apply.

(c) Has the High Court erred by failing to appreciate that the learned trial judge has come to a clear finding that the assessment number 42, which, according to P2 and P2a is "excepted premises" under the Rent Act.

It is relevant to note at the outset that Section 2(4) (a) of the Rent Act provides that, so long as the Rent Act is in operation in any area, "the provisions of this Act shall apply to all premises in that area, other than "excepted premises'' and some other categories of residential premises referred to in sub-paragraphs (c), (cc), (d) and (e) of Section 2(4) of the Act, which are not relevant to this appeal as the property that constitutes the subject matter of this action has been described in the schedule to the plaint as a "guest house and hotel". Section 2(5) of the Act provides that:-

> "The regulations in the Schedule to this Act shall have effect for the purpose of determining the premises which shall be excepted premises for the purposes of this Act, and may be amended from time to time, by regulation made under Section 43."

It is common ground that Regulations 3 made under Section 43 of the Rent Act defines except business premises by reference to the type of local authority within which it is situated in the following manner:-

> "Regulation 3:
>
> Any business premises (other than premises referred to in regulation 1 or regulation 2) situated in any area specified in Column I hereunder shall be exempted premises for the purposes of this Act if the *annual value thereof as specified in the assessment made as business premises* for the purposes of any rates levied by any local authority under any written law and in *force on the first day of January, 1968, or, where the assessment of the annual value thereof as business premises is made for the first time after the first day of January 1968,* the annual value of such first assessment, exceeds the amount specified in the corresponding entry in Column II :-

Area	Annual Value
Municipality of Colombo	Rs. 6,000
Municipality of Kandy, Galle or Any other Municipality	Rs. 4,000
Urban Council within the meaning of the Urban Councils Ordinance	*Rs. 2,000*

Town Council within the meaning of the Town Council Ordinance	.....	.....	.....	Rs. 1,000”

(Emphasis added)

It is common ground that at the time of institution of action, the property in suit was situated within the local authority area of the Anuradhapura Urban Council, and the relevant annual value for the property to be regarded in law as excepted premises, would be *Rs. 2,000 per annum as on 1st January 1968*, or *if the first assessment* of the annual value thereof *as business premises* was made *after* the first day of January 1968, *the annual value of such first assessment.*

Relevant facts

The Plaintiff-Respondent-Petitioner-Appellant (hereinafter referred to as “the Appellant”) instituted action in the District Court of Anuradhapura in 1982, against the 1st and 2nd Defendants-Appellants-Respondents-Respondents (hereinafter referred to as “the Respondents”) for *inter-alia* the ejectment of the Respondents from the premises in suit more fully described in the schedule to the plaint dated 9th November 1982 filed in this case. The Appellant also sought relief by way of damages for the alleged loss caused by the Respondents to the premises in suit, and for continuing damages at Rs. 10,000.00 *per mensem* from 01st June 1982 until the Appellant is restored to vacant possession of the premises in suit.

It is noteworthy that in the plaint of the Appellant it had been averred that the premises in suit was let to the Respondents on a monthly tenancy at a rent of Rs. 800.00 *per mensem* and that the Respondents have paid all rents up to date due, including the rent for the month of May 1982. It was also pleaded that the premises in suit is a “business premises” and is excepted premises in terms of the provisions of the Rent Act No. 7 of 1972 as amended by the Rent (Amendment) Act No. 10 of 1977 and the Rent (Amendment) Act No. 55 of 1980. It is specifically averred in the plaint that the Appellant through his Attorney-at-Law gave the Respondents notice to quit dated 11th January 1982, requiring the Respondents to quit and handover peaceful possession of the premises in suit to the Plaintiff on or before 30th April 1982, and that despite such notice, the Respondents continue in wrongful and unlawful occupation of the premises in suit causing damage to the Plaintiff at Rs. 1,000.00 *per mensem.*

The Appellant had also stated in the said plaint that the Respondents have converted the premises in suit to an unhygienic condition and have intentionally caused loss and damage to the walls of the building and the toilet pit of the premises in suit, and the Appellant claimed damages for the said loss which was estimated to be Rs. 10,000.00. It is noteworthy that after the death of the original Plaintiff-Respondent-Petitioner-Appellant during the pendency of the trial in the District Court, his widow, Kaduge Mary Margaret Fernando was substituted in his place as the Substituted-Plaintiff-Respondent-Petitioner-Appellant. The trial of this case commenced on 19.2.1999 and the parties recorded their admissions in the following manner:-

In the answer of the Respondents, the jurisdiction of court was admitted along with the *corpus* as described in the schedule to the plaint. However the Respondents have asserted in their answer that the monthly rent was approximately Rs. 850.00, and that they occupied the property since 1965 as a hotel and rest house and that all rent had been duly paid without default. The Respondents have also stated in the answer that although the Appellant was obliged to maintain and colour wash the premises, he omitted to do so and the Respondents had to attended to repairs and colour washing at their own expense. The Respondents also stated that they always maintained the premises in a hygienic condition, and hence deny

paragraph 5 of the plaint. In the said answer the Respondents also took up the position that the notice to quit referred to in paragraph 6 of the plaint was not lawful, and further averred that no cause of action was disclosed in the plaint and that the plaint was not prepared in accordance with law and did not comply with Section 46 of the Civil Procedure Code.

Admissions, Issues and Testimony of Witnesses

At the commencement of the trial, admissions were recorded as follows:-

පිළිගැනීම්

1. අධිකරණ බලය පිළිගනී.
2. පැමිණිල්ලේ දෙවන ඡේදය පිළිගනී.
3. පැමිණිල්ලේ 6 වන ඡේදයේ සඳහන් දැන්වීම විත්තිකරුට ලැබුණ බව පමණක් පිළිගනී.

In paragraph 2 of the plaint, which has been admitted by the parties, it was averred that the premises in suit which is the subject matter of the action has been fully described in the schedule to the plaint. In the schedule to the plaint, which is reproduced below, the property in suit was described as follows:-

"ඉහත කී උපලේඛණය

අනුරාධපුර නවනගරයේ කෙලින් වීදියේ පිහිටා ඇති ලොට් අංක 282, දරණ ඉඩම් කැබැල්ලට මායිම් :- උතුරට රක්ෂිත බිමද, නැගෙණහිරට පාරද, දකුණට පැරමවුන්ට් හෝටලයද, බස්නාහිරට ජාතික ඉතිරි කිරීමේ බැංකු ගොඩනැගිල්ලද යන මේ තුල ප්‍රමාණයෙන් පර්චස් 30 ක් පමණ විශාලවූ බිම සහ එහි තුල ඇති "ගෙස්ට් හවුස් හෝටලය" ගොඩනැගිල්ල ද වේ."

Paragraph 6 of the plaint, which is reproduced below, was also admitted by the parties:-

6. 1982 අප්‍රියෙල් මස 30 වන දින සිට ඊට පෙර එම ගොඩනැගිල්ලෙන් සහ ස්ථානයෙන් ඉවත් වී එහි නිරවුල් බුක්තිය ආපසු දෙන මෙන් පැමිනිලිකරු විසින් ඔහුලේ නීතිඥවරයා මගින් 1982 ජනවාරි මස 11 වන දින දරණ නීත්‍යානුකූල නිවේදනය එකී විත්තිකරුවන් වෙත භාර කරන ලදි.

In view of the fact that the pleadings in a case are relegated to the background once the issues are raised, as this Court observed in *Gunapala v Babynona* 1986 (2) Sri LR 374 (SC) at 376 the "case must be decided on the issues raised in the action". Hence, it is necessary to reproduce the issues raised by the parties and accepted by court at the trial:-

විවාද මූල පැමිණිල්ලෙන් ඉදිරිපත් කරයි

1. නඩුවට අදාළ පැමිණිල්ලේ උපලේඛණයේ විස්තර වන ස්ථානය විත්තිකරුගේ කුලි නිවසේ කුලිනිමයා පැමිණිලිකරුද?

2. විත්තිකරු විසින් එකී ස්ථානය මසකට රු 800/- බැගින් මාසික කුළියට පැමිණිලිකරුගෙන් බදු ගන්නා ලද්දේද?

3. එකී ස්ථානය සඳහා පැමිණිල්ලේ 4 වන ඡේදය විස්තර කර ඇති පරිදි ගෙවල් කුලි පනත බලපාන්නේ නැද්ද?

4. පැමිණිලිකරු විසින් පැමිණිල්ලේ 6 වන ඡේදයේ සඳහන් දැන්වීම යවා පැමිණිලිකරු සහ විත්තිකරු අතර ඇති මාසික කුලි ගිවිසුම අවලංගු කර තිබේද?

5. එසේ නම් 1982 මැයි මස සිට විත්තිකරුවන් නීති විරෝධී ලෙස නඩුවට අදාළ ප්‍රදේශයේ පදිංචි වී සිටිද?

6. ඉහත විසඳිය යුතු ප්‍රශ්න පැමිණිලිකරුගේ වාසියට තීන්දු කරන්නේ නම් පැමිණිලිකාරියට කොපමණ අලාභ මුදලක් ලබා ගත හැකිද?

7. ඉහත විසඳිය යුතු ප්‍රශ්ණ පැමිණිල්ලේ වාසියට තීන්දු කරන්නේ නම් පැමිණිලිකාරියට ඉල්ලා ඇති සහන ලබාගත හැකිද?

විත්තියෙන් විසඳිය යුතු ප්‍රශ්න

8. පැමිණිල්ලේ 3 වන ඡේදයේ සඳහන් බදු ගිවිසුම් ලේඛණය ලිඛිත ලේඛණයක්ද ?

9. එසේනම් එවැනි ගිවිසුමක් නීත්‍යානුකූල වශයෙන් සැළකිය හැකිද?

10. පැමිණිල්ලේ 6 වන ඡේදයේ සඳහන් 1982-01-11 වන දින දරණ නිවේදනයේ නීත්‍යානුකූල නිවේදනයක්ද?

11. එකී ස්ථානය 1972 අංක 2 දරණ පනත යටතේ (සංශෝධිත) පනතට යටත් වේද?

12. ඉහත සඳහන් 8, 9, 10, 11 හඹ ප්‍රශ්න විත්තිකරුගේ වාසියට පිළිතුරු ලැබෙන්නේ නම් නඩුව නිෂ්ප්‍රභා කළ යුතුද?

After the issues were agreed upon by learned Counsel and accepted by court, the Substituted-Plaintiff-Respondent-Petitioner-Appellant Kaduge Marry Margaret Fernando testified as follows:-

> "මගේ ස්වාමිපුරුෂයා මේ නඩුවේ මුල් පැමිණිලිකරු. ඔහු මියයාමෙන් පසුව මා ආදේශ කලා. නඩු දමන ලද ස්ථානය දන්නවා. ඒක ගෙස්ට් හවුස් එකක්. බලහත්කාරයෙන් අල්ලාගෙන, කඩාබිඳ දමා කුලියක් ගෙවන්නේ නැහැ. යම්කිසි කාලයක් රු:800/- ක් බැගින් කුලියක දුන්නා. බීටා ද සිල්වා කියන්නේ මේ නඩුවේ 1 වන විත්තිකරු. සරත් චන්ද්‍ර ද සිල්වා 2 වන විත්තිකරු. අද දින ඔහු ඉන්නවා. බීටාද සිල්වාගේ පුතා. රු:800/- ක් බැගින් කුලියක් ලැබුනා කියා මා කියා සිටියා. 82 ට කලින් වගේ ලැබුනේ කීවා. ගොඩනැගිල්ල කුලියට දුන් දිනය මට මතක නැහැ. මම මේ ස්ථානයට ඇවිත් ගියා. කුලිය ගෙවීවේ ස්වාමිපුරුෂයාට හා මට. අපි පදිංචි වයික්කාල. අඹුපාඹුකම් අපි ඇවිත් ගියා. ගෙස්ට් හවුස් එකේ අඹුපාඹු. 82 අයින් වෙන්න කියා ඉල්ලා සිටියා. මහින්ද දිවුල්වැව මහතා මගින් ලිපියක් ඉදිරිපත් කලා. (ලේඛණයක් ඉදිරිපත් කර සිටි) මේ අවස්ථාවේ නීතිඥ මහදිවුල්වැව මහතා විසින් විත්තිකරුවන්ට 82.01.11 දින දරණ ඉල්ලා අස්වීම් ලිපියේ පිටපත පැ1 වශයෙන් ලකුණු කර ඉදිරිපත් කර සිටි. පැ1 ලිපිය අනුව ඔවුන් එම ස්ථානයෙන් අයින් වුයේ නැහැ. එම ස්ථානය කඩා බිඳ දමා තිබුනා. බිත්ති සේරම වෙනස් කරගෙන තිබුනා. ගේ ඇතුලෙන් කඩා ඔවුන්ට අවශ්‍ය ආකාරයට වෙනස් කරගෙන තිබුනා. මෙය ව්‍යාපාරික ස්ථානයක්. ගේ ඇතුලේ කඩා කියා අදහස් කලේ නඩුවට අදාල ස්ථානයේ ඔවුන්ට අවශ්‍ය ආකාරයට වෙනස්කරගෙන තිබුනා කියන එක. පැ1 ලිපිය යැවීමෙන් පසුව අස්නොවීම නිසා මේ නඩුව පැවරුවේ. වරිපනම් බදු, ගෙවිවා. මෙහි වරිපනම් අංකය 42. (ලේඛණයක් පෙනවා සිටි)"

After the testimony of the Substituted Appellant, the witness Karunadhipathi Weerakoon Mudiyanselage Weerakoon, who is a Revenue Inspector of the Urban Council of Anuradhapura, was called to give evidence on behalf of the Appellant, and stated as follows in his examination in chief:-

> "අද මා පැමිණියේ අනුරාධපුර නගර සභාව වෙනුවෙනුයි. අද දින මෙම අධිකරණයට පැමිණෙන ලෙස සිතාසි ලැබුණා. (පැ.2 ලේඛණ පෙන්වයි) මෙම ලේඛණය නගර සභාවෙන් නිකුත් කරන ලද ලේඛණයක්. මෙම ලේඛණයේ තක්සේරු අංකය තමයි 48/2, 42, 48 කියලා ස්ථානයක් සඳහන් වෙනවා. එම ස්ථානය දන්නවා. 1987 තක්සේරු අංකයක් තිබෙනවා. අංක 42 පාර පළවන මාවත සහ මෛත්‍රීපාල සේනානායක මාවත දකුණු පැත්ත අයිතිකරුගේ නම ජස්ටින් ප්‍රනාන්දු, මෙම අංක 42 කියන ස්ථානය *කලින් තක්සේරු කර තිබෙන්නේ*, ලේඛණ අනුව, 87 වර්ෂයේ. මෙම අංක 42 කියන ස්ථානය මම දැකලා තිබෙනවා. එතැන අද තිබෙන්නේ හෝටලයක්. මෛත්‍රීපාල සේනානායක මාවතේ හැරිලා පළවැනියට තිබෙන්නේ පේ.

ප්‍රනාන්දු, කියන වරිපනම් අංක 48 ඉඩමයි. එය පසුකලාට පසු අල්ලපු ඉඩම අංක 41 කියන ඉඩම. අදාළ ස්ථානය අංක 42 කියලා. 1987 වර්ෂයේ අංක 42 දරණ ස්ථානය පැ.2 ලේඛණයේ පැ.2 (අ) ලෙස ලකුණු කිරීමට අධිකරණයෙන් අවසර ඉල්ලා සිටිනවා." (*emphasis added*)

The latter witness was later recalled to give further testimony in order to clarify whether any business been conducted at the premises in question at the time of the witness testifying in Court. He testified that though earlier business activities were carried out on the premises, at the time of his giving evidence, no business was carried out at that place. Thereafter the case for the Appellant was closed reading in evidence documents marked පැ1, පැ2 and පැ2අ.

When the case was taken up for further trial on the next date, the 2nd Defendant-Appellant-Respondent-Respondent, Liyanage Sarath Chandra de Silva, was called to give evidence on behalf of the Respondents. He stated in his evidence that:-

"මම මේ නඩුවේ 2 වන විත්තිකරු. මේ නඩුවට අදාලව ඇති ගෙස්ට් හවුස් හෝටලය පිහිටා ඇත්තේ අංක: 282/සී, ඒ 1 පාර, අනුරාධපුරය. 1965 සිට මා මෙම වෙළඳ ව්‍යාපාරය කරගෙන යනවා. මේකේ මත්පැන් සහ නවාතැන් පහසුකම් තිබෙනවා. මම ඒ කාලයේ යනවා එනවා. මගේ වයස දැන් අවුරුදු 45 යි. මෙම ව්‍යාපාරය තවමත් ඒ ආකාරයෙන්ම කරගෙන යනවා.

මම මේ නඩුවේ පැමිණිලිකරුව දන්නවා. එයා මේ ව්‍යාපාරය බලන්න යනවා එනවා. මේ නඩුවේ ජස්ටින් ප්‍රනාන්දු, කියන්නේ මේ නඩුවේ පැමිණිලිකාරියගේ ස්වාමි පුරුෂයා. මේ නඩුවේ දැනට ඉන්න පැමිණිලිකාරිය ආදේශිත පැමිණිලිකාරියයි. මේ නඩුවේ 1 වෙනි විත්තිකාරිය මගේ මව. තාත්තා නැති වුනා. මගේ පියාගේ නම ලියනගේ ධර්මසිරි ද සිල්වා. 1971.05.10 වැනිදා මගේ පියා නැති වුනා. මගේ පියා නැති වුනාට පස්සේ මම සහ කළමණාකරු මෙම ව්‍යාපාරය කරගෙන ගියා. මම මේ ව්‍යාපාර ගොඩනැගිල්ලට කිසිම අලාභහානියක් සිද කලේ නැහැ. මේ ගොඩනැගිල්ල වෙනස් කලේවත් නැහැ. කිසියම් ආකාරයකින් කඩා බිඳ දැම්මක් කලේත් නැහැ."

Adverting to the relevant premises number of the property in suit, his testimony was as follows:-

"මේ ලගට අනුරාධපුර නගර සභාවෙන් අපට 1988.10.20 වැනි දින එවන ලද ලිපියක් ගරු අධිකරණයට ඉදිරිපත් කරනවා. 1965 සිට මේ දක්වා වරිපනම් විස්තර සඳහන් ලිපියක් වී:10 ලෙස ලකුණු කොට ඉදිරිපත් කරනවා. මෙම වී:10 ලේඛණය අනුව වරිපනම් අංක 2 ක් තිබෙනවා. ඉස්සෙල්ලා වරිපනම් අංකය: 48/2, දැන් වරිපනම් අංකය: 48 කියලා තිබෙනවා. 1968 වර්ෂයට අදාලව වාර්ෂික වටිනාකම රු: 3130/- ක් වෙනවා. (මේ අවස්ථාවේදි වී:2 ලේඛණය පෙනවා සිටී.) 1968 ට අදාල වාර්ෂික වටිනාකම වෙනුවෙන් සටහනක් නැහැ."

The 2nd Defendant-Appellant-Respondent-Respondent was the only witness to testify on behalf of the Respondents, and at the conclusion of his testimony, the case of the Respondents was closed reading in evidence documents marked as වී1අ to වී15.

The Decisions of the District Court and the Civil Appellate High Court

The learned District Judge in his Judgment dated 17th February 2005, has analysed the testimony of the Substituted Appellant as follows:-

"පැමිණිලිකාරියගේ සාක්ෂියේ හරය වන්නේ මාසික කුලියට විත්තිකරුට දුන් අදාළ ස්ථානයෙන් ඉවත්වන ලෙස පැ1 ලේඛණය මත විත්තිකරුට දැනුම් දී ඇති අතර, ඔහු එසේ ඉවත් නොවීම මත මෙම නඩුව පැවරූ බවය. එමෙන්ම හරස් ප්‍රශ්ණ වලට පිළිතුරු දී මෙම ගොඩනැගිල්ල බදු දී නොමැති අතර, මාසික කුලියට දුන් බව සහතික කර ඇත. වැඩිදුරටත් හරස් ප්‍රශ්ණ අසා විත්තිය යෝජනා කර ඇත්තේ මෙම ස්ථානය කුලියට දී ඇත්තේ දිසාපතිවරයාගේ හෝ අනුරාධපුර සංරක්ෂණ මණ්ඩලයේ සභාපතිගේ

කැමැත්ත නොමැතිව බවය. එමෙන්ම අදාළ ව්‍යාපාරික ස්ථානය අංක 42 බවද ඔහුගේ සාක්ෂිය වේ. එය පැ2 වශයෙන් ලකුණු කර ඉදිරිපත් කර ඇත.

විත්තිකරු සාක්ෂි දී තමා අදාල ගොඩනැගිල්ල කිසිඳු හානියක් නොකර ව්‍යාපාරය පවත්වාගෙන යන බව සඳහන් කර ඇති අතර, ඒ සම්බන්ධයෙන් ගෙවන ලද මුදල් වලට අදාල කුවිතාන්සි රාශියක් ලකුණු කර ඉදිරිපත් කර ඇත. ආදේශිත පැමිණිලිකාරියගේ සැමියා මිය ගිය පසුව තමා ගෙවල් කුලි නොගෙවූ බවද ඔහු පිළිගෙන ඇත."

Thereafter the learned District Judge has considered the evidence of the 2nd Defendant-Appellant-Respondent-Respondent in regard to the assessment number of the premises in question, and has observed as follows:-

"වටිනාකම තක්සේරුව සම්බන්ධයෙන් අංක:42 ට අදාල ස්ථානය සම්බන්ධයෙන් ඔහු කරුණු පැහැදිලි කර ඇත. විත්තිය එකි වරිපනම් අංකය තහවුරු කිරීමට වෙනත් සාක්ෂිකරුවකු කැඳවීමට අවසර පතා ඇති අතර, පැමිණිල්ල ඊට විරුද්ධ වී ඇත. කෙසේ වුවද අධිකරණයේ අභිමතය පරිදි වරිපනම් අංකය තහවුරු කිරීමට කුරුණෑගල තක්සේරු දෙපාර්තමේන්තුවේ සාක්ෂිකරුවකු කැඳවීමට විත්තිය අවසර දුන්නද එම සාක්ෂිකරු විත්තය කාඳවා නැත.

ඒ අනුව මෙහි නෛතික තත්ත්වය සලකා බැලීමේ දී මෙම නඩුව ආරම්භයේ දී පිලිගැනීමක් ලෙස පැමිණිල්ලේ 02 වන පේදය පිලිගෙන ඇති අතර, පැමිණිල්ලේ 02 වන පේදය වුයේ විෂය වස්තුවයි. ඒ අනුව මෙම විෂය වස්තුව පිලිගෙන ඇත්නම් විත්තිකරුට වරිපනම් අංකය වෙනස් බව කියා විෂය වස්තුව හඹ කිරීමට හැකියාවක් ඇති බව නොපෙනේ. එම කරුණු කුමක් වුවද පැමිණිල්ලේ වරිපනම් අංකය අංක:42 යනුවෙන් සඳහන් කරන්නේ නම් එය අංක:42 නොව අංක:48 බව විත්තිය කියා සිටින අවස්ථාවකදී එකි ස්ථානයේ අංකය අංක:48 බව ඔප්පු කිරීමේ භාරය විත්තියට ඇත. අදාල ස්ථානයේ අංකය අංක:42 බව පැමිණිල්ල විසින් මනාව තහවුරු කර ඇත."

On this basis the learned District Judge has come to the conclusion that the assessment number of the relevant property is 42 and that since its annual value exceeded Rs. 2000.00 per annum, it was "excepted premises" within the meaning of the Rent Act. Accordingly, he has answered the Appellant's issues 1 to 5 in the affirmative, and issue 6 pertaining to the alleged loss and damage caused to the premises, in the negative. He has held that the alleged loss has not been proved, and in answering issue 7 has stated that the Appellant will be entitled to all relief prayed for in the plaint other than the claim for damages.

Being aggrieved by the decision of the District Court, the Respondent appeal to the Civil Appellate High Court, which overturned the decision of the District Court and allowing the appeal dismissed the action filed by the Appellant. In arriving at this conclusion, the Court took the view that the tenancy was illegal insofar as the subject matter of the action had been rented out to the Respondents contrary to condition 6(a) of a of a notification made in terms of the Anuradhapura Preservation Board Act No 32 of 1961, and that hence the tenancy was illegal and the Appellant cannot therefore recover possession thereof by action. In this connection the Court observed as follows:-

"වංචා වැලැක්වීමේ ආඥා පනතේ 02 වන වගන්තියේ දක්වා තිබෙන ප්‍රතිපාදන අනුව වලංගු ලියවිල්ලක් දෙපාර්ශවය අතර හුවමාරු වී නැති බවට අභියාවක වෙනුවෙන් තර්ක කොට ඇත. වලංගු බදු ගිවිසුමක් පැවතුන බව තහවුරු කිරීමට පැමිණිල්ල විසින් එවැනි පිළිගත හැකි ලියවිල්ලක් මෙම නඩුවට ඉදිරිපත් කොට නැත. දෙපාර්ශවය අතර වාචික ගිවිසුමක් මත මෙම ආරවුල් දේපල කුලියට දී තිබුණේ නම්, ඒ බව තහවුරු කිරීමට සාක්ෂි කැඳවිය යුතුව තිබුණි. එසේ වුව ද, පැමිණිල්ලෙන් එවැනි සාක්ෂියක් කැඳවා නැත. දේපල කුලියට දී තිබූ බව හෝ දේපල බද්දට දී තිබූ බව තහවුරු කිරීම සඳහා පැමිණිලිකාර පාර්ශවය ප්‍රමාණවත් සාක්ෂි කැඳවා නැති බව උගත් දිසා විනිසුරුවරයාගේ අවධානයට යොමු වී නැත.

මෙම නඩුවට ඉදිරිපත් කොට ඇති වී-11 දරණ ලේඛනය අනුව 1961 අගෝසතු 18 වන දින ප්‍රකාශයට පත් කරන ලද ගැසට් පත්‍රයේ සඳහන් ප්‍රතිපාදන මත ආරවුලට විෂය වස්තුව වන දේපල 99 අවුරුදු

බද්දට යටත්ව රජය මගින් ලබා දී ඇති ඉඩමක් බව පෙනී යයි. එම ගැසට් පත්‍රයේ 06(ඉ) ඡේදයේ දක්වා ඇති කොන්දේසිය අනුව අනුරාධපුර දිසාපතිවරයා සහ අනුරාධපුර සංරක්ෂණ මණ්ඩලයේ සභාපතිවරයාගේ කැමැත්ත ලිපියකින් ලබා ගැනීමක් තොරව මෙම ඉඩම වෙනත් අයෙකුට කුලියට දීමට, පවරා දීමට, උගස් කිරීමට හෝ අන් අයුරක් කිරීමට බදුකරුට බලයක් නොමැති බව සඳහන් වේ."

The Civil Appellate High Court also considered the question whether the premises in suit under the Rent Act, and observed as follows:-

"වර්තමාන නඩුවේ දී අදාල ආරවුල් ගොඩනැගිල්ල තුල එවැනි සැලකිය යුතු ප්‍රමාණයකින් භෞතික වෙනස්කම් සිදුකර තිබීම පිළිබඳව පැමිණිලිකාර පාර්ශවය මගින් තහවුරු කොට නැත. එසේ නම්, බැහර කල ස්ථානයක් ලෙස සැලකීමට අදාල වන්නා වූ තක්සේරු වටිනාකම් පැහැදිලිව නිගමනය කිරීමට උගත් දිසා විනිසුරුවරයාට අවස්ථාවක් හිමි වී නොමැති බව පෙනේ.

එසේ වුව ද, 1966 වර්ෂයට අනුරූපව වාර්ෂික වටිනාකම පැ-02 ලේඛනයේ සඳහන් කොට නොමැත. මිලග තක්සේරු වර්ෂය වශයෙන් සලකා බැලීමට අවස්ථාවක් සැලසේ යැයි අදහස් වන්නේ 1966 වසර සඳහා වූ තක්සේරු වටිනාකම බව සාක්ෂි අනුව පිළිඹිබු වේ. කුමන හේතුවක් මත හෝ 1966 වර්ෂයට අදාල තක්සේරු වටිනාකම කුමක්ද යන්න සඳහන්ව නැත."

Alleged Illegality of the Tenancy

I wish to consider at the outset the question of the possible illegality of the tenancy adverted to by the Civil Appellate High Court in its impugned judgement. The competence of a person to seek relief from a court of law may be affected by the twin principles of our common law contained in the maxims *ex turpi causa non oritur actio,* which means that no action can be founded on a bad cause, and *in pari delicto potior est conditio defendentis,* which means that where the parties are equally at fault, the Court will take the side of the defendant, both of which were examined by me in the judgment of this Court in *Silva v Ranaweera* [2006] BLR 95, in which the earlier decision of this Court in *Malwattage v Dharmawardena* (1991) 2 SLR 141 was distinguished.

Neither principle may be invoked without proper pleadings and issues, and in the instant case although the answer of the Respondents did not advert to any question of illegality, it is noteworthy that issue 8 was raised on behalf of the Respondents seeking a decision from court as to whether පැමිණිල්ලේ 3 වන ඡේදයේ සඳහන් බදු ගිවිසුම් ලේඛණය ලිඛිත ලේඛණයක්ද? The use of the words "ලිඛිත ලේඛණයක්ද"will more likely be understood as a reference to the requirement in Section 2 of the Prevention of Frauds Ordinance, that any contact relating to immovable property should be notarially attested, rather than to a failure to comply with any direction issued by the Anuradhapura Preservation Board under its governing Act. In fact, it is evident from the judgment of the Civil Appellate High Court that the matter of notarial attestation had also engaged the attention of the learned Judges of the Civil Appellate High Court, and in fact, and the Court had faulted the District Court for not considering the matter. It is trite law that the type of monthly tenancy that admittedly existed in this case does not require notarial attestation.

In any event, if it was the case of the Respondents that there had been some non-compliance amounting to illegality with respect to the provisions of the the Anuradhapura Preservation Board Act of 1961, the matter should have been clearly pleaded in the answer and specifically taken up as an issue, particularly since this Court has stressed in its decision in *Amarasekara v Abeygunawardena* 56 NLR 361, that the maxim *in pari delicto potior est conditio defendentis* is not an absolute or inflexible rule and may only to be applied in appropriate circumstances. As Gratiaen J noted at page 365 of his judgment in this case:-

> "I can well conceive of cases where, in the context of rent restriction legislation, public policy would require a landlord to refund the illegal premium. Similarly, I can conceive of cases where the tenant ought not to be allowed to claim the money back".

Such circumstances must clearly be pleaded and issues raised to enable, for instance, in the context of the instant case, the Appellant to produce any documents in his possession to show that the consent of the Chairman of the Anuradhapura Preservation Board had been obtained prior to entering into the tenancy. In any event, the Learned District Judge had taken the view that the alleged failure to comply with the directions issued by the said Board would not give rise to any illegality, but would be a mere non-compliance which can be dealt with by the Board, if so advised, but is not a matter to be considered by court in an ejectment case, and I am inclined to agree with that view. The requirements of proper pleading and clear issues are conducive to a fair trial, where no one is taken by surprise and all material evidence can be placed before court. In this case, the failure of the Respondents to properly plead and raise clear issues might have contributed towards the faiure of the Appellant to produce relevant evidence, in the event such evidence existed, which possibility I can by no means rule out.

This Court has probably taken these matters into consideration when it refrained from granting leave in regard to the question of illegality, and it is not necessary for me to deal with the question at greater depth, for the purposes of this appeal.

Is the Premises in Suit Excepted Premises?

This brings me to the main question on which leave was granted in this case, namely whether the property in suit is "excepted premises" within the meaning of the Rent Act on the date this action was filed, namely 9th November 1982. It is common ground that at the time of institution of the action, the property in suit was situated within the local authority area of the Anuradhapura Urban Council, and accordingly, for the Appellant to succeed in this appeal, he has to establish that the annual value thereof as specified in the assessment made *as business premises* for the purposes of any rates levied by the relevant local authority, namely the Anuradhapura Urban Council *on the first day of January, 1968, or, where the assessment of the annual value thereof as business premises is made for the first time after the first day of January 1968,* the annual value of such first assessment, exceeded Rs. 2,000.00.

Before going into the question of the assessment of annual value, it is necessary to consider the identity of the property, in particular because there was conflicting evidence in regard to the applicable assessment number of the premises. It is relevant to note that the schedule to the plaint describes the property in suit as අනුරාධපුර නවනගරයේ කෙලින් වීදියේ පිහිටා ඇති ලොට් අංක 282, දරණ ඉඩම් කැබැල්ලට මායිම් :- උතුරට රක්ෂිත බිමද, නැගෙණහිරට පාරද, දකුණට පැරමවුන්ට් හෝටලයද, බස්නාහිරට ජාතික ඉතිරි කිරීමේ බැංකු ගොඩනැගිල්ලද යන මේ තුල ප්‍රමාණයෙන් පර්චස් 30 ක් පමණ විශාලවූ බිම සහ එහි තුල ඇති "ගෙස්ට් හවුස් හෝටලය" ගොඩනැගිල්ල. It is significant that the parties had admitted specifically the identity of the property in suit, but apart from the reference to lot number 282, there is no reference to any assessment numbers in the schedule to the plaint.

The Substituted-Plaintiff-Respondent-Petitioner-Appellant has testified that the premises number allotted by the local authority for the property in suit was No. 42, and has produced marked පැ.2 a certified copy of extracts from the assessment register then maintained by the Urban Council, which after the institution of the action was converted into a Municipal Council. Witness Karunadhipathi Weerakoon Mudiyanselage Weerakoon, a Revenue Inspector of the Urban Council of Anuradhapura, who testified on behalf of the Appellant also testified regarding පැ.2 and testified that according to this document, the property bore assessment number 42 in 1987. Submissions were made as to the meaning of the words කලින් තක්සේරු

කර තිබෙන්නෙ used by this witness in his evidence, and while it was submitted on behalf of the Appellant that those words mean "first assessed" as used in Regulation 3 that has been quoted at the commencement of this judgment, this interpretation was hotly contested by learned Counsel for the Respondent.

I do not have any difficulty with this since පැ.2 can speak for itself. It is manifest from පැ.2 that lot 282 referred to in the schedule to the plaint appears to have several lots, and the premises numbers included in පැ.2 fall within lots 282 B and 282 C. Premises bearing assessment number 42 was first assessed under that number in 1987, but it is clear from පැ.2 that it was not its first assessment as business premises, since it had been assessed since 1963 under number 48/2 උළු සෙවිලි කරන ලද වෙළඳ ගොඩනැගිල්ල සහ ඉඩම, but as bare land and not as business premises. It is also significant to note that in පැ.2 no assessment information is given for the period 1967 to 1969, and according to පැ.2 the premises appears to have been first assessed as business premises in 1970 with an annual value of Rs. 3,130.00, which is above the threshold for excepted premises placed at Rs. 2,000.00 per annum. I consider it useful to reproduce the document and produced by the Appellant marked පැ.2 below:-

වර්ෂය	තක්සේරු අංකය	වාර	අයිතිකරුගේ නම	දේපල විස්තරය	වාර්ෂික වටිනාකම
1963 සහ 1966	48/2 (282 සී) -එම-	කෙලින් පාර -එම-	ජස්ටින් ප්‍රනාන්දු, ජස්ටින් ප්‍රනාන්දු,	ඉඩම උළු සෙවිලි කරන ලද වෙළඳ ගොඩනැගිල්ල සහ ඉඩම	10
1970 1971	48/2 -එම-	තානායම පාර කෙලින් පාර	ජස්ටින් ප්‍රනාන්දු, ජස්ටින් ප්‍රනාන්දු,	උළු සෙවිලි වෙළඳ ගොඩනැගිල්ල සහ ඉඩම -එම-	3,130/= 3,130/=
1987 පැ2අ	42	පළවෙනි මාවත දකුණු පැත්ත (මෛත්‍රිපාල සේනානායක මාවත)	ජස්ටින් ප්‍රනාන්දු,	උළු සෙවිලි උඩුමහල් හෝටලය සහ ඉඩම	12,350/=
	46	-එම-	අයිතිකරු - හිමිකම ජස්ටින් ප්‍රනාන්දු,	ඇස්බැස්ටස් සෙවිලි මෝටර් සයිකල් අලුත් වැඩියා කිරීමේ ගරාජය සහ ඉඩම	1,487/=
	48	-එම-	ජේ.ජස්ටින් ප්‍රනාන්දු,	උළු සෙවිලි උඩුමහල් සංචාරක හෝටලය සහ ඉඩම	22,840/=

වර්ෂය	අභාවිත අංක	ණව අංක	වාර	අයිතිකරුගේ නම	දේපල විස්තරය	වාර්ෂික වටිනාකම
1989 වර්ෂය සිට 1995 වර්ෂය දක්වා	42 46	42	පළමු මාවත-දකුණු පැත්ත	ජස්ටින් ප්‍රනාන්දු,	රට උළු සෙවිලි උඩුමහල් හෝටලය සහ ඉඩම	39,669/=
	48	48	පළමු මාවත-දකුණු පැත්ත	ජේ. ප්‍රනාන්දු,	රට උළු සෙවිලි උඩුමහල් සංචාරක හෝටලය සහ ඉඩම	34,710/=
1996	42	42	මෛත්‍රිපාල සේනානායක මාවත- දකුණු 1 පටුමග	ජස්ටින් ප්‍රනාන්දු,	උළු සෙවිලි තානායම සහ ඉඩම කැබලි අංක 282 බී	124,138/=
1996	48	48	මෛත්‍රිපාල සේනානායක මාවත- දකුණු 1 පටුමග	ජේ. ප්‍රනාන්දු,	උළු සෙවිලි නිවී පැරමවුන්ට හෝටලය සහ ඉඩම	වාර්ෂික තක්සේරුව ලැබී නැත

The obvious gap in referred to earlier in the Appellant's document පැ.2 has been however partially filled by the Respondents themselves, who have provided the assessment particulars for the period 1968 to 1969, through their document marked වී:10, which is reproduced bellow:-

වි:10

"අනස මු/2 1998.10.20

එම්. බ්ටා ද සිල්වා මහතා,
ගෙස්ට් හවුස් හා හෝටලය,
282/සී, ඒ 01/පාර,
නව නගරය, අනුරාධපුරය.

මහත්මයාණෙනි,

1965 වර්ෂයේ සිට මේ දක්වා වරිපනම් විස්තර ලබාගැනීම
වරිපනම් අංක 48 - පැරණි වරිපනම් අංකය 48/2.

ඉහත කරුණ සම්බන්ධයෙන් එවන ලද ඔබේ 1998.10.14 දිනැති ලිපිය හා බැඳේ.
එමගින් විමසා ඇති දැනට ලේඛණාගාරයෙන් සොයා ගත හැකි විස්තර මේ සමග ඉදිරිපත් කරම්.

වර්ෂය	වාර	වරිපනම් අංකය	අයිතකරුගේ නම	දේපල විස්තර	වාර්ෂික වටිනාකම
1968 සහ 1969	කෙලින් පාර	48/2	ජස්ටින් ප්‍රනාන්දු	උළු සෙවිලි වෙළඳ ගොඩනැගිල්ල හා ඉඩම	3,130/=
1996	මෛත්‍රිපාල සේනානායක දකුණු පටුමග	42	ජස්ටින් ප්‍රනාන්දු	උළු සෙවිලි තානායම සහ ඉඩම කැබලි අංක 282 බී	124,138/=
	එම-	48	ජේ. ප්‍රනාන්දු	උළු සෙවිලි නිවි පැරමවුන්ට් හෝටලය සහ ඉඩම	වාර්ෂික තක්සේරුව ලැබී නැත

ගණකාධිකාරී
අනුරාධපුර නගර සභාව"

This document establishes that the annual value for premises number 48/2 for the years 1968 and 1969 is also Rs. 3,130.00, which easily crosses the threshold for excepted premises. When one reads the documents පැ.2 and වි:10 together, it is also possible to gather that assessment number 48/2 was first allotted assessment number 42 in 1987 and valued at Rs. 12,350.00 per annum, and that in fact the property bearing assessment number 48 was first assessed as business premises in 1987 and described as "උළු සෙවිලි උඩුමහල් සංචාරක හෝටලය සහ ඉඩම" and valued at an annual value of Rs.22,840.00. Hence, even according to the position taken by the Respondents, if the premises in question bore assessment number 48 as testified by the 2nd Defendant-Appellant-Respondent-Respondent, it is obviously excepted premises within the meaning of the Rent Act. Furthermore, in 1996 the two assessment numbers 42 and 48 were amalgamated, and allotted assessment number 42 valued at Rs. 124,138, and assessment number 48 was not assessed, and that too is a first assessment as business premises that is clearly above the Rs. 2000.00 minimum for excepted premises stipulated in Regulation 3. Indeed in both පැ.2 and වි:10 there is no premises assessed at an annual value of less than Rs. 2000.00 other than assessment number 46 which is a garage valued at Rs. 1,487.00 in 1987.

In this context it is relevant to note that the 2nd Defendant-Appellant-Respondent-Respondent, Liyanage Sarath Chandra de Silva, has produced in evidence a few receipts issued by the original Plaintiff-Respondent-Appellant, W. Justin Fernando, marked වි1(a), වි1(b), වි1(c) and වි1(e) which clearly show that the rent per month for the property in suit, from November 1977 to June 1979 was Rs. 600.00, but from the year 1980, as is evidenced by වි2 and වි3, the rent was Rs. 750.00 per month. Again, it appears from වි5(a) and වි6(a), that from January 1983 onwards rent had been paid to the Appellant at the rate of Rs. 850.00 per month, but none of these receipts refer to any assessment number. The Receipts marked වි9(d) to වි9(j) show that from around May 1985 to July 1999, monthly payments have been directly deposited at

the Anuradapuraya Urban Council under assessment number 48 at the rate of Rs. 1000 per month. The Respondents have not taken up the position that these were illegal payments in excess of the receivable rent, which also suggests that even to the knowledge of the Respondents, the property in question was excepted premises within the meaning of the Rent Act. This also makes it possible for me to determine that the monthly payment of Rs. 1,000.00 per month claimed by the Appellant as continuing damages for the illegal occupation of the property after the termination of the monthly tenancy, is not excessive.

I am of the opinion that for all these reasons, the substantive questions of law on which leave to appeal was granted by this Court should be answered in the affirmative, and I specifically hold that the Appellant has, on a preponderance of probability, established that the property in suit is excepted premises within the meaning of the Rent Act.

Conclusions

For the foregoing reasons, I hold that the appeal should be allowed and the impugned judgment of the Civil Appellate High Court dated 27th April 2010 ought to be set aside. I make order affirming the judgment of the District Court dated 17th February 2005, and enter judgment as prayed for in the prayers to the plaint, except for the damages claimed on the basis of loss alleged to have been caused to the property in a sum of Rs. 10,000.00 which has been rightly disallowed by the learned District Judge.

I specifically hold that the Substituted Plaintiff-Respondent-Petitioner-Appellant shall be entitled to recover from the Defendants-Appellants-Respondents-Respondents jointly and severally damages in a sum of Rs. 1000.00 per month from 1st June 1982 to such date as the property described in the schedule to the plaint is handed over to the said Substituted Plaintiff-Respondent-Petitioner-Appellant with legal interest thereon.

The 1st and 2nd Defendants-Appellants-Respondents-Respondents shall each be liable to pay the Substituted Plaintiff-Respondent-Petitioner-Appellant costs of this appeal in a sum of Rs. 50,000.00.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

Priyasath 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 pursuant to an application for Special Leave to Appeal to the Supreme Court against the order of the Court of Appeal dated 23rd February, 2011.

SC. Appeal 199/2011

SC. (Spl) LA. No. 60/11
CA. No. 1099/98(F)
D.C.Kalmunai No.1590/L

1. Meerasaibo Mahamed Haniffa
   of Division No. 15, Ninthavur.

2. Meerasaibo Ummul Hair
   of Division No. 16, Ninthavur.

3. Meerasaibo Ummu Sellam
   of Division No. 16, Ninthavur.

4. Meerasaibo Jamal Mohamed
   of Division No. 14, Ninthavur.

5. Meerasaibo Atham
   of Division 2, Ninthavur.

6. Meerasaibo Sithy Faiza
   of Division No. 3, Ninthavur.

7. Meerasaibo Sara
   of Division No. 3, Ninthavur.

2nd to 8th Substituted-Defendants-Appellants-Petitioners-Petitioners

Vs.

Athambawa Mohamed Idroos
of Division No. 3, Ninthavur.

Substituted-Plaintiff-Respondent-Respondent-Respondent

SC. Appeal 199/2011

Previously

In the matter of an application in terms of Section 769(2) of the Civil Procedure Code and also in terms of Rules of the Supreme Court to reinstate the appeal.

1. Mohamed Ibrahim Kathisaumma
   Division No. 5, Ninthavur (presently dead)

2. Meerasaibo Mahamed Haniffa
   of Division No. 15, Ninthavur.

3. Meerasaibo Ummul Hair
   of Division No. 16, Ninthavur.

4. Meerasaibo Ummu Sellam
   of Division No. 16, Ninthavur.

5. Meerasaibo Jamal Mohamed
   of Division No. 14, Ninthavur.

6. Meerasaibo Atham
   of Division 2, Ninthavur.

7. Meerasaibo Sithy Faiza
   of Division No. 3, Ninthavur.

8. Meerasaibo Sara
   of Division No. 3, Ninthavur.

2nd to 8th Substituted-Defendants-Appellants-Petitioners

Vs.

Athambawa Mohamed Idroos
of Division No. 3, Ninthavur.

Substituted-Plaintiff-Respondent-Respondent-Respondent

SC. Appeal 199/2011

Before : **Mohan Pieris, PC.CJ.**
Sathyaa Hettige PC. J. &
Eva Wanasundera, PC,J.

Counsel : M. Nizam Kariapper with M.I.M. Iynullah for 2nd to 8th Substituted Defendants-Appellants-Petitioners, instructed by M.C.M. Navas.

Faiz Musthapa, PC. with U.L.A. Majeed for Substituted Plaintiff-Respondent-Respondent instructed by K.R.M. Abdul Raheem.

Argued On : **07-02-2014**

Decided On : **31- 03-2014**

*** * * ***

Eva Wanasundera, PC.J.

This Court granted Special Leave to Appeal to the Substituted Defendants-Appellants-Petitioners-Appellants (hereinafter referred to as the "Appellant") on the following question of law:-

> "Did the Court of Appeal err in law when it decided that a re-listing application of a final appeal could only be made by the Registered Attorney in the District Court"?

Written submissions were filed by both parties according to the Supreme Court Rules and it was argued and concluded on the 7th of February 2014.

The subject matter of this case in the District Court was "land". When judgment was pronounced in the District Court on 18.11.1998 in favour of the Plaintiff, the Defendant appealed to the Court of Appeal. The Court of Appeal, on 15.10.2009, affirmed the

judgment of the District Court. The Fiscal of the District Court of Akkaraipattu executed writ on 29.04.2010 and the Plaintiff took possession of the land after 28 years of litigation which commenced in the District Court on 29.09.1982. The Court of Appeal heard the case on 15.10.2009 on the merits even though the Defendant-Appellant was absent and unrepresented on the date of hearing and made order dismissing the appeal. Thereafter, judgment of the Court of Appeal had been read over to both parties in open Court in the District of Kalmunai on 26.02.2010. Then, about six months after the date of the judgment of the Court of Appeal the Defendant-Appellant filed a re-listing application in the Court of Appeal to have the appeal re heard by the Court of Appeal. That re-listing application was dismissed by the Court of Appeal on 23.02.2011 on the ground that "an application to Court has to be made by the registered Attorney on record and such application cannot be made by a different Attorney-at-Law." This appeal in the Supreme Court is against the said order of the Court of Appeal dated 23.02.2011 dismissing the re-listing application. Special Leave to Appeal has been granted on the question of law as aforementioned.

The argument of the 2nd-8th Substituted Defendants-Appellants- Petitioners-Petitioners (hereinafter referred to as "Petitioners") was based on the Supreme Court judgment in the case of ***Jeevani Investments(Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 207***. The Substituted Plaintiff-Respondent-Respondent-Respondent (hereinafter referred to as the "Respondent") argued that the Petitioners cannot maintain this appeal on the basis that the proxy of the original registered Attorney was still in force and not revoked and as such the new Attorney-at-Law who was different from the original registered Attorney cannot represent the Appellant in the application for re-listing. The Respondent's argument is based on the case of ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268*** and ***Jeevani Investments (Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 207***.

In ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268,*** Seneviratne, J. being a member of a Bench of three Judges who were specially appointed to hear this case in the Court of Appeal drew a distinction between the proceedings originating in the

original Court and those originating in the Court of Appeal. He held that an application for Leave to Appeal originates in the Court of Appeal and not in the original Court and as such an application for Leave to Appeal can be lodged by a new Attorney other than the registered Attorney in the original Court on record. As against a Leave to Appeal application, an Appeal originates in the District Court and not in the Court of Appeal. Therefore, an Appeal has to be signed and tendered by the registered Attorney of the original case record. A Leave to Appeal application can be filed by either the registered Attorney of the original case record or by a different Attorney-at-Law, who is new to the case, because a Leave to Appeal application originates in the Court of Appeal.

In the present case, it is to be noted that the application concerned is not a Leave to Appeal application. It is a re-listing application after the conclusion of the Final Appeal. It is directly related to the Appeal originating from the District Court judgment, because the District Court judgment was affirmed by the Court of Appeal in the first instance. When the Appellant moved the Court of Appeal to hear it once again, giving reasons for seeking a re-listing, it is a relisting or a continuation of the same case. It originates from the main Appeal. An application for re-listing cannot be recognized as a separate mechanism from the main Appeal. In fact, re-listing is connected with and ancillary to the main Appeal.

In ***Jeevani Investments (Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 207,*** Justice Jayasinghe has commended Justice Seneviratne in ***Saravanapavan Vs. Kandasamydurai 1984, 1 SLR 268*** in drawing a distinction between proceedings originated in the District Court and those originated in the Court of Appeal but, respectfully failed to appreciate that a re-listing application is different from a Leave to Appeal application. I observe that Justice Jayasinghe has placed an Application for Leave to Appeal and an Application for Re-listing on par with each other contrary to the rationale expounded by Justice Seneviratne. Seneviratne,J. in the case of **Saravanapavan *Vs. Kandasamydurai 1984, 1 SLR 268,*** held that,

> "A Leave to Appeal application is a step in the proceedings of the original Court but according to Section 756(4) of the Civil Procedure code, it originates in the Court of Appeal. Hence, the proxy in an application for Leave to Appeal can be filed either by the Registered Attorney who filed proxy in the lower Court or by any other Attorney. Further there is a long standing practice for an Attorney not necessarily the registered Attorney in the lower Court, to file proxy in the Court of Appeal."

He further added:

> "This is a long standing and reasonable practice which has grown up since 1974 when the Administration of Just Law No. 44 of 1973, came into force, in the interests of the diligent and expeditious conduct of proceedings. The practice causes no prejudice and involves no breach of the provisions of the Civil Procedure Code and it has now become *cursus curiae*."

I am of the opinion that in the instant case the original registered Attorney M.N. Kariapper remains as the Attorney-at-Law on record up to date because his proxy has not been revoked by the Appellant until up to the final disposal of the appeal on 15.10.2009. M N. Kariapper was the Attorney-at-Law in the proceedings of the District Court. He filed the notice of appeal under his signature. Then he continued to be the registered Attorney in the proceedings of the Court of Appeal until the date it was heard and disposed of on 15.10.2009. It was only thereafter that an application for re-listing was filed by a new Attorney M.C.M. Nawaz after 6 months from the delivery of the final appeal judgment. There is no provision in the Civil Procedure Code for re-listing. It's only a procedure that finds accommodation in Judge made Law. The re-listing application is an application which is directly related to the final appeal which originated in the District Court of Kalmunai. It cannot be treated as a distinctly separate set of proceedings. In the instant case the re-listing application was filed by a different Attorney M.C.M. Nawaz whose proxy cannot be accepted while the proxy of the original registered Attorney M.N. Kariapper was still in record.

It is settled law that the registered Attorney in the original Court should be the Attorney at all times to act such as signing settlements and signing the Petitions of Appeal etc., and that a party cannot change his Instructing Attorney without leave of Court, Vide ***Wace vs. Angage Helena Hami & others, 1881 4 SCC 48*** and ***Romanis Baas Vs. Revenna Kader Mohideen & another, 1881 4 SCC 61***.

In the case of ***Gunasekera Vs. De Zoysa 52 NLR 357***, an exception to this rule was laid down. The rule was that the Proctor on record in the original Court should sign all the papers at all times. As an exception, it was held by Gratiaen,J. that "an application made to the Supreme Court to exercise its revisionary powers in a civil case can be initiated by a Proctor other than the Proctor whose proxy was filed in the lower Court". In the same case Dias SPJ. Agreeing with Gratiaen J. further said, "I wish to state that when I suggested that this case should be dealt with by a fuller Bench, it was not fully appreciated that an application in revision to the Supreme Court in a civil case is not a continuation of the proceedings in the lower Court and which needed the filing of a fresh proxy. This fact distinguishes this case from all the cases where it has been held that there cannot be two proxies on the record of a civil case at the same time".

I would like to place a Revision Application as one which commences in the Appellate Court and that is why it can be initiated by a new Attorney other than the Attorney in the lower Court.

I would return to Justice Jayasinghe's rationale in ***Jeevani Investments (Pvt) Ltd. Vs. Wijesena Perera 2008 1 SLR 20*** His Lordship analyses a relisting application and an application for Leave to Appeal notwithstanding lapse of time, to have a bearing on the proceedings in the original Court. It is my considered view that if applications of this nature have a bearing on the original Court, it should be signed by the registered Attorney of record in the original Court. In a reasoning unsupported by authority Justice Jayasinghe says that "a party is entitled to appoint a new Attorney other than the registered Attorney in the original Court." I am most respectfully unable to agree with this rationale. This line of reasoning does not find accommodation with the line of

analysis. If an application for relisting originates from a matter in the original Court then it should be signed by the registered Attorney in the original Court.

Having regard to the case law and reasoning I have set out above, I hold that applications such as Revision in civil cases and Leave to Appeal application could be initiated by any other new Attorney other than the registered Attorney of record in the original Court, on the basis that the said applications originate in the Appellate Courts and they do not have a bearing on the lower Court. I am also of the view that an application for "relisting" has a definite bearing on the original Court as it distinctly relates to the appeal originating from the lower Court unlike a Leave to Appeal application or a Revision application which do not form a step in the proceedings of the original Court. 'Re listing', is an application that a distinct bearing on the case in the original Court unlike a Leave to Appeal Application or a Revision Application.

Therefore I proceed to answer the question of law in the negative and affirm the order of the Court of Appeal that a Re-listing Application of a Final Appeal could only be made by the registered Attorney on record in the District Court who has been on record up to the time of disposal of the final appeal.

I dismiss this appeal with costs fixed at Rs.10,000/- to be paid by the Petitioners to the Respondent.

Judge of the Supreme Court

Mohan Pieris, PC.CJ.

I agree.

Chief Justice

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 matter of an appeal in terms of Section 5 of the Industrial Disputes (amendment) Act No.32 of 1990

Dissanayake Gamini Ratnasiri
Applicant

SC Appeal No.212/12
SC/SPL/LA No.161/2012
HC Colombo No.HCRA28/2011
LT ColomboNo.8/452/2010

Vs

Sri Lanka Ports Authority
Respondent

AND

Sri Lanka Ports Authority
Respondent-Petitioner

Vs

Dissanayake Gamini Ratnasiri
Applicant-Respondent

AND NOW BETWEEN

Dissanayake Gamini Ratnasiri
Applicant-Respondent-Petitioner-Appellant

Vs

Sri Lanka Ports Authority
Respondent-Petitioner-Respondent-Respondent

Before : Saleem Marsoof PC, J
Rohini Marasinghe J
Sisira J de Abrew J

Counsel : JC Boange with Shirley Gurugagodafor the Applicant-Respondent-Petitioner-Appellant
R Razik SSCfor the Respondent-Petitioner-Respondent-Respondent

Argued on : 16.7.2014
Written Submission
tendered on : By the Applicant-Appellant on 19.8.2014
By the Respondent-Respondent on 2.9.2014
Decided on : 9.12.2014

Sisira J de Abrew J.

The Applicant-Respondent-Petitioner-Appellant (hereinafter referred to as the Applicant-Appellant) who was an employee of the Sri Lanka Ports Authority, the Respondent-Petitioner- Respondent-Respondent (hereinafter referred to as the Respondent), made an application to the labour Tribunal Colombo in terms of Section 31B of the Industrial Disputes Act moving for an order on the Respondent to reinstate him with back wages. He claimed that his services were unreasonably terminated by the Respondent. The Respondent raised a preliminary objection to the effect that the Applicant-Appellant could not maintain his application in the Labour Tribunal as he had failed to give one month notice under Section 54 of the Ports Authority Act No.51 of 1979 as subsequently amended by Acts No.35 of 1984, 36 of 1990 and 2 of 1992 (the Act). The learned labour Tribunal President, by his order dated 14.12.2010, overruled the said preliminary objection.

Being aggrieved by the said order, the Respondent filed a revision application in the High Court. The learned High Court Judge, by his judgment dated 5.7.2012, set aside the order of the learned President of the Labour Tribunal, upheld the preliminary objection taken up in the Labour Tribunal and dismissed the application filed by the Applicant-Appellant filed in the Labour Tribunal.

Being aggrieved by the said order of the learned High Court Judge, the Applicant-Appellant has appealed to this court. This Court on 4.12.2012 granted leave to appeal on the question set out in paragraph 10 of the petition of appeal of the Applicant-Appellant which is reproduced below.

"Is a Labour Tribunal precluded from entertaining an application under Section 31B of the Industrial disputes Act for failure to act under Section 54 of the Sri Lanka Ports Authority Act?"

It is common ground that the Applicant-Appellant did not give notice as contemplated by Section 54(a) of the Sri Lanka Ports Authority Act. When the Respondent, in its statement of objection took up objection to the maintainability of the application on the basis of the failure to give notice in terms Section 54 of the Act, the Applicant Appellant, in his replication, stated that it was not necessary to issue such notice. Section 54 of the Sri Lanka Ports Authority Act reads as follows.

> "No action shall be instituted against the Ports Authority for anything done or purported to have been done in pursuance of this Act-
>
> (a) without giving the Authority at least one month's previous notice in writing of such intended action; or

(b) after twelve months have elapsed from the date of accrual of the cause of action."

Learned counsel appearing for the Applicant-Appellant contended that since the Applicant-Appellant filed an application in the Labour Tribunal for reinstatement and back wages it was not necessary for him to give one month notice to the Respondent. He further contended that an application filed in the Labour Tribunal did not fall within the ambit of action mention in Section 54 of the Sri Lanka Ports Authority Act. I now advert to this contention. In order to find an answer to this question it is necessary to consider the meaning of 'action'.

Black's law Dictionary 9th edition page 32, in relation to the word action, states as follows.

> "A civil or criminal judicial proceeding- Also termed action at law- An action has been defined to be an ordinary proceeding in a court of justice, by which one party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong, or punishment of a public offence."

In the present case, the Applicant-Appellant prosecutes the Respondent for the enforcement or protection of his right to be in his employment. Thus, in my view, the application filed in the Labour Tribunal falls within the ambit of action.

Section 6 of the Civil Procedure Code reads as follows:

> "Every application to a court for relief or remedy obtainable through the exercise of the court's power or authority, or otherwise to invite its interference, constitutes an action."

In the present case the Applicant-Appellant whose services were terminated by the Respondent has made an application to the Labour Tribunal for relief which can be obtained through the exercise of the power of Labour Tribunal. After considering the above legal literature, I hold that the present application filed in the Labour Tribunal falls within the ambit of the term action in section 54 of the Sri Lanka Ports Authority Act. For the above reasons I reject the contention of learned counsel for the Applicant-Appellant.

The next question that must be considered is whether the Applicant-Appellant who filed the action in the labour Tribunal should give one month notice to Sri Lanka Ports Authority as the Labour Tribunal is empowered to make just and equitable orders. When I consider this question I would like to state here that there is no provision in the Industrial Disputes Act which grants Labour Tribunals immunity from acting under the Acts enacted by the Parliament. The Labour Tribunals must follow the prevailing law of the country. In this connection it is interesting to refer to a passage from the judgment of Justice Thambiah in the case of *Arnolda Vs Gopalan* 64 NLR 153 at pages 156 and 157. His Lordship referring to the powers of Labour Tribunal under the Industrial Disputes Act observed thus:

> "Its powers, as well as its jurisdiction, has to be looked for within the four corners of this statute and liability under this statute, … "

When I consider the above legal literature, it is clear that the Labour Tribunal has to comply with prevailing laws of the country although it makes just and equitable orders.

The main question that must be decided in this case is when an employee of the Sri Lanka Ports Authority files a case in the Labour Tribunal in terms of Section 31 B of the Industrial Disputes Act whether he should give one month notice to the Sri Lanka Ports Authority in terms of Section 54 of the Sri Lanka Ports Authority Act. This question arose in P Welis Vs Sri Lanka Ports Authority- case No. SC/SPL/LA 230/2009. His Lordship Marsoof PC,J (with whom Justice Sripavan and Justice Imam agreed), by judgment dated 10.3.2010, did not grant leave against judgment of the High Court Judge wherein he held that one month notice should be given to Sri Lanka Ports Authority when filing an application in the Labour Tribunal.

The same question arose in case of RP Nandasiri Vs Sri Lanka Ports Authority- No. SC/SPL/LA 92/2012. Her Ladyship Dr.Shirani Banaranayake J (with whom Ratnayake PC,J and Wanasundera PC,J agreed), by judgment dated 8.8.2012, did not grant leave.

When I consider all the above matters, I hold that when an employee of Sri Lanka Ports Authority files a case in the Labour Tribunal in terms of Section 31B of the Industrial Disputes Act, he must give one month notice to Sri Lanka Ports Authority in terms of Section 54 of the Sri Lanka Ports Authority Act and if he has failed to comply with the said requirement his application in the Labour Tribunal is bound to be dismissed. The learned High Court Judge in this case

has made an order dismissing the revision application of the Applicant-Appellant.

For the above reasons, I refuse to interfere with the judgment of the learned High Court Judge and dismiss the appeal of the Applicant-Appellant. In all the circumstances of this case I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

Saleem Marsoof PC,J

I agree.

Judge of the Supreme Court.

Rohini 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 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.

.

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

S.C. APPLICATION No: 665/2012(FR)

S.C. APPLICATION No: 666/2012(FR)

S.C. APPLICATION No: 667/2012(FR)

S.C. APPLICATION No: 672/2012(FR)

1. Athula Chandraguptha Thenuwara,
   60/3A, 9th Lane,
   EthulKotte.
   (Petitioner in SC Application 665/12 [FR])

2. Janaka Adikari
   Palugaswewa, Perimiyankulama,
   Anuradhapaura.
   (Petitioner in SC Application 666/12 [FR])

3. Mahinda Jayasinghe,
   12/2, Weera Mawatha,
   Subhuthipura, Battaramulla.
   (Petitioner in SC Application 667/12 [FR])

4. Wijedasa Rajapakshe,
   Presidents' Counsel,
   The President of the Bar Association
   of Sri Lanka.
   (1st Petitioner in SC Application 672/12 [FR])

5. Sanjaya Gamage,
   Attorney-at-Law
   The Secretary of the Bar Association
   of Sri Lanka.
   (2nd Petitioner in SC Application 672/12 [FR])

6. Rasika Dissanayake,
   Attorney-at-Law
   The Treasurer of the Bar Association
   of Sri Lanka.
   (3rd Petitioner in SC Application 672/12 [FR])

7. Charith Galhena,
   Attorney-at-Law
   Assistant-Secretary of the Bar Association
   of Sri Lanka.
   (4th Petitioner in SC Application 672/12 [FR])

Petitioners

Vs.

1. Chamal Rajapakse,
   Speaker of Parliament,
   Parliament of Sri Lanka,
   Sri Jayawardenepura Kotte.

2. Anura Priyadarshana Yapa,
   Eeriyagolla,
   Yakawita.

3. Nimal Siripala de Silva,
   No. 93/20, Elvitigala Mawatha,
   Colombo 08.

4. A. D. Susil Premajayantha,
   No. 123/1, Station Road,
   Gangodawila, Nugegoda.

5. Rajitha Senaratne,
   CD 85, Gregory's Road,
   Colombo 07.

6. Wimal Weerawansa,
   No. 18, Rodney Place,
   Cotta Road, Colombo 08.

7. Dilan Perera,
   No. 30, Bandaranayake Mawatha,
   Badulla.

8. Neomal Perera,
   No. 3/3, Rockwood Place,
   Colombo 07.

9. Lakshman Kiriella,
   No. 121/1, Pahalawela Road,
   Palawatta, Battaramulla.

10. John Amaratunga,
    No. 88, Negambo Road,
    Kandana.

11. Rajavarothiam Sampathan,
    No. 2D, Summit Flats,
    Keppitipola Road,
    Colombo 05.

12. Vijitha Herath,
    No. 44/3, Medawaththa Road, Mudungoda,
    Miriswaththa,
    Gampaha.

2nd – 12th Respondents Hon. Members of Parliament;
Members of the Select Committee of Parliament appointed with regard to the Charges against the Chief Justice.

13. The Attorney General,
Attorney General's Department,
Hulftsdorp, Colombo 12.

Respondents

1. Koggala Wellala Bandula,
No. 67A, Kandy Road,
Dalugala, Kelaniya.
(Intervenient-Petitioner-Respondent in SC Application 665/12 [FR],666/12 [FR], 667/12[FR] and 672/12 [FR])

2. Jayasooriya Alankarage Peter Nelson Perera,
No. 22/51, Chamikara Cannel Road, Chilaw.
(Intervenient-Petitioner-Respondent in SC Application 666/12 (FR) and 667/12 [FR])

3. Arumapperuma Arachchige Sudima Chandani,
No. 300/3, Kandy Road, Kirillawala, Webada.
(Intervenient-Petitioner-Respondent in SC Application 672/12 [FR])

Intervenient – Petitioners – Respondents

Before : Hon. Saleem Marsoof, PC, J,
Hon. Chandra Ekanayake, J,
Hon. Sathyaa Hettige, PC, J,
Hon. Eva Wanasundera, PC, J, and
Hon. Rohini Marasinghe, J.

Counsel : Suren Fernando for the Petitioner in SC Application 665/12 (FR).

Viran Corea and Ms. Sarita de Fonseka for the Petitioner in SC Application 666/12 (FR).

M.A. Sumanthiran for the Petitioner in SC Application 667/12 (FR).

Dr. Sunil Cooray for the Petitioners in SC Application 672/12 (FR).

Nigel Hatch, PC. with S. Galappatti and Ms. S. Illangage for the Intervenient-Petitioner-Respondent in SC Application 665/12 (FR), 666/12 (FR), 667/12 (FR) and 672/12 (FR), Koggala Wellala Bandula.

Prof. H.M. Zafrullah with B. Manawadu for the Intervenient – Petitioner-Respondent in SC Application 666/12 (FR) and 667/12 (FR), Jayasooriya Alankarage Peter Nelson Perera.

Razik Zarook, PC. with B. Manawadu for the Intervenient – Petitioner-Respondent in SC Application 672/12 (FR), Arumapperuma Arachchige Sudima Chandani.

Palitha Fernando, PC. Attorney-General, with Shavindra Fernando, DSG., Sanjay Rajaratnam, DSG., Ms. Indika Demuni de Silva, DSG., Nerin Pulle, SSC. and Manohara Jayasinghe, SC. for the 13th Respondent.

Argued On	**:**	23.10.2013
Written Submissions On	**:**	11.11.2013 and 13.11.2013
Decided On	**:**	24.3.2014

SALEEM MARSOOF, PC., J.

These fundamental rights applications were filed in terms of Article 17 read with Article 126 of the Constitution in the wake of the presentation to the 1st Respondent, who is the Hon. Speaker of the House of Parliament, of a notice of resolution for the removal of the 43rd Chief Justice of Sri Lanka, Hon. (Dr.) Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, in terms of Article 107(2) and (3) of the Constitution of Sri Lanka read with Order 78A of the Standing Orders of Parliament.

The Petitioner in SC Application 665/12 (FR), who is an artist by profession, sought redress for the alleged violation of his fundamental rights enshrined in Articles 12(1), 12(2), 14(1)(a) and (b) of the Constitution. Similar applications were also filed by the Petitioner in SC Application 666/12 (FR), who is an Attorney-at-Law and holds the post of General Secretary of the Inter Company Employee's Union, the Petitioner in SC Application 667/12 (FR), who is the General Secretary of the Ceylon Teacher's Service Union, and the Petitioners in SC Application 672/12 (FR), who are respectively the President, the Secretary, the Treasurer, and the Assistant Secretary of the Bar Association of Sri Lanka, which is, a representative body consisting of approximately eleven thousand Attorneys-at-Law of the Supreme Court of Sri Lanka.

When the aforesaid applications, filed by the respective Petitioners allegedly in their own right and in the public interest, were supported before this Court, leave to proceed was granted for the alleged violation of their fundamental right to equality enshrined in Article 12(1) of the Constitution. In so granting leave to proceed, by its order dated 23rd November 2012 made in the first three of these cases, this Court restricted the scope of the hearing to prayer (i) of the petitions filed by the Petitioners in those cases, by which they sought a declaration to the effect that Standing Order 78A is *ultra vires* the Constitution of Sri Lanka and is null and void and of no force or avail in Law. Similarly, when on 3rd December 2012, this Court granted leave to proceed to the Petitioners in SC Application 672/12 (FR), who were at the relevant time the key office bearers of the Bar Association of Sri Lanka, this Court similarly restricted the scope of the hearing to the corresponding prayer (f) of the petition in that case.

Several persons also applied to this Court to intervene into these cases in the public interest. This Court, by its orders dated 16th July 2013 and 25th July 2013, permitted Koggala Wellala Bandula, who is also known as Bandula Wellalage, a lawyer by profession who had also held office in the past as the Chairman of the Sri Lanka Foundation Institute, to intervene into all the applications. Similarly, Jayasooriya Alankarage Peter Nelson Perera, who is the Chairman of the Sri Lanka Pragathasili Peramuna, a registered political party, was permitted to intervene into SC Application Nos. 666/12 (FR) and 667/12 (FR), and Arumapperuma Arachchige Sudeema Chandani, a member of the Mahara Pradeshiya Sabha, who was permitted to intervene into SC Application No. 672/12 (FR).

When granting leave to proceed in these cases, Court also fixed dates for the filing of objections and counter-affidavits. However, the learned Attorney-General, who was the only Respondent to make an appearance in Court, informed Court that he has not filed any objections in view of the fact that the question is purely one of law. This obviated any need for the Petitioners in these cases to file any counter-affidavits. Similarly, learned Counsel for the Intervenient-Petitioners-Respondents, who were allowed by this Court to intervene into some or all of these cases, also indicated that they would not file any objections, and moved Court to treat the averments of their applications for intervention as their objections. The Petitioners have not filed any counter-affidavits in response to the averments in the applications for intervention.

Preliminary Objections

At the hearing into these applications on 23rd October 2013, Mr. Nigel Hatch P.C, who appeared for Koggala Wellala Bandula, moved to raise certain preliminary objections to the maintainability of the said applications, with which the learned President's Counsel for the other Intervenient-Petitioner-Respondents, associated themselves. The said preliminary objections were as follows:-

a) Proceedings under Article 126(1) of the Constitution are confined to any infringement or imminent infringement by "executive or administrative action" of any fundamental right or language right declared and recognised by Chapters III and IV of the Constitution, and do not extend to the present proceedings;

b) The Petitioners have no *locus standi*;

c) The Petition does not disclose on the face of it any violation of the fundamental rights of the Petitioners;

d) The matters sough to be determined are not justiciable having regard to the provisions of the Constitution.

This Court has heard oral submissions and also perused all the written submissions filed by learned Counsel who appeared in the case. I shall deal with the said preliminary objections in turn, to the extent necessary in the context of the circumstances of these cases.

(a) Executive or administrative action

The phraseology of "executive or administrative action", based on which the preliminary objection (a) appears to have been formulated, occurs in Article 17 and Article 126 of the Constitution. While Article 17 of the Constitution empowers every person "to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, *by executive or administrative action,* of a fundamental right to which such person is entitled under the provisions of this Chapter (Chapter III)", Article 126 of the Constitution confers on this Court, the exclusive jurisdiction to entertain and dispose of all fundamental rights applications. The said Article consists of several sub-articles, but for the purpose of considering this preliminary objection, it would suffice to reproduce the first sub-articles of that article:-

> "(1) The Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to *the infringement or imminent infringement by executive or administrative action* of any fundamental right or language right declared and recognized by Chapter III or Chapter IV." (*Emphasis added*)

Mr. Nigel Hatch P.C, addressed Court in support of preliminary objection (a), and submitted that this Court has jurisdiction to hear and determine any application filed in terms of Articles 17 and 126 of the Constitution, only if the alleged infringement or imminent infringement resulted from *executive or administrative action.* He argued that what is done by the Speaker of the House of Parliament or a Parliamentary Select Committee in the process of impeachment of a Judge of the Superior Courts does not fall within the purview of "executive or administrative action" within the meaning of the said articles. He submitted that Article 107, which is the first article under the sub-heading "Independence of the Judiciary", which occurs in Chapter XV under the heading "Judiciary", provides for *inter alia* the appointment of Judges of the Supreme Court and Court of Appeal by the President, and the removal by the President of any such Judge after an address of Parliament is presented to him as provided in Article 107(2) of the Constitution. He further submitted that this procedure was *sui generis*, and was intended to satisfy two fundamental objectives, namely the independence of the apex Judiciary and Judicial accountability, both equally important in the constitutional scheme.

Prof. H.M. Zafrullah, who appeared for Jayasooriya Alankarage Peter Nelson Perera, the Intervenient-Petitioner-Respondent in SC Application 666/12 and 667/12(FR), submitted that Standing Orders of Parliament are *sui generis* in nature since they were made by Parliament for the purposes of Article 107(3) of the Constitution. He additionally invited the attention of Court to

Order 78B of the Standing Orders of Parliament, which dealt with the procedure for the impeachment of certain key public officials including the Secretary-General of Parliament. All the other learned Counsel for the Intervenient-Petitioners-Respondents associated themselves with the submissions of Mr. Nigel Hatch PC.

The learned Attorney General, in the course of his submissions before Court, pointed out that Parliament possesses powers other than legislative, and submitted that this becomes apparent from the reference in Article 4(a) of the Constitution to "legislative power", which may be contrasted with the words "privileges, immunities and powers of Parliament" as used in Article 4(c) of the Constitution. He further submitted that these "powers" of Parliament are also distinct from judicial power dealt with under Article 4(c) of the Constitution. He submitted that the powers conferred by Articles 38, 104H(8)(a) and 107 of the Constitution, which dealt with respectively the impeachment of the President, the Commissioner General of Elections and Judges of the Supreme Court and Court of Appeal including the Chief Justice, are not judicial, executive or judicial in character, and stand on their own. He submitted that while in the process of impeachment of the President, the Supreme Court had an important role to play, the Constitution did not provide for the Supreme Court or any other court to be involved in the process of impeachment of the Commissioner General of Elections or Superior Court Judges. He referred to *dicta* of Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri L.R. 309 at 331 and 332 in support of these propositions.

Responding to these submissions, Mr. Suren Fernando, who appeared for the Petitioner in SC Application 665/2012 (FR), submitted that the Parliamentary Select Committee was appointed by the Speaker of Parliament purportedly in terms of Order 78A(2) of the Standing Orders of Parliament, which he submitted was not a legislative act, as it did not purport to legislate, nor was it a judicial act, and was thus clearly an administrative act, akin to that of appointing a public officer to a public office. He relied on the decisions of this Court in *Faiz v The Attorney General and Others* (1995) 1 SLR 372 and *Weerawansa v The Attorney General and Others* (2000) 1 Sri LR 387 to argue that the question whether or not a particular act or omission constitutes executive or administrative action must be determined on the basis of the nature of the power that is exercised or sought to be exercised, rather than on the basis of the office or position of the person who is alleged to have exercised the said power or performed the said function.

While the other learned Counsel who appeared for the Petitioners in these cases associated themselves with these submissions of Mr. Fernando, Mr. M.A. Sumanthiran, who appeared for the Petitioner in SC Application 667/2012 (FR), additionally invited the attention of Court to the distinction between judicial or legislative acts on the one hand and ministerial or administrative acts on the other. He submitted that the appointment of the Parliamentary Select Committee was a ministerial act, which attracts the fundamental rights remedy under Article 126 of the Constitution. He contended that the distinction between legislation and Standing Orders of Parliament has been recognised by the Constitution, which deals with legislation in Article 75 and deals with the power of Parliament to make Standing Orders in Article 74.

It is manifest that the legislative powers of Parliament are dealt with in Article 75 of the Constitution, which along with certain other procedural and ancillary provisions are contained in Chapter XI of the

Constitution which is headed "The Legislature". I find no reference in that entire Chapter to any "Select Committee", nor is there any reference in Article 107(2) and (3) to any Parliamentary Select Committee. It is Order 78A of the Standing Orders of Parliament that were purportedly made under powers conferred on Parliament by Article 74(1)(ii) for giving effect to the provisions of Article 107(2) and (3) of the Constitution dealing with the removal of Superior Court Judges, that mentions a Select Committee of Parliament which has to be constituted for the purpose. In any event, Article 107 occurs outside Chapter XI, in Chapter XV of the Constitution, which deals with "The Judiciary".

In considering the question that arises in this case, namely whether Parliament is amenable to Article 126 of the Constitution, when it, or its officials, perform an act which is "executive or administrative" in nature essential to carry out the powers and functions of Parliament, I take note of the fact that this question has not directly arisen before in any Sri Lankan case. In *Dayananda v. Weeratunga, S.I. Police, et al.* Fundamental Rights Decisions, Vol. 2 page 291*, Kumarasinghe v. A. G. et al.* SC Application No. 54/82 – SC Minutes of 6.9. 1982 and *Leo Fernando v. Attorney-General* (1985) 2 Sri LR 341, when the related question as to whether a judge would be amenable to the fundamental rights remedy enshrined in Article 126 of the Constitution arose, this Court answered the question in the negative. In *Leo Fernando's* case, where the matter was examined by a Bench consisting of 5 Judges of this Court, Colin Thome J, stated at page 357 that –

> "A judicial order does not become converted into an administrative or executive act merely because it is unlawful."

In *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309, the Petitioners sought to challenge an appointment made by the President to the office of Chief Justice by invoking the jurisdiction of this Court in terms of Articles 17 and 126(1) of the Constitution. This Court upheld a preliminary objection taken by the Attorney General that by holding office and functioning as the Chief Justice, the person so appointed had not violated any fundamental right of the Petitioners by what may be termed as "executive or administrative action". The Court took the view that the holding of judicial office, cannot be construed as "executive or administrative action" but the act of the President of appointing the Chief Justice or a Judge of the Supreme Court or Court of Appeal would attract the immunity conferred by Article 35(1) of the Constitution. This Court went on to hold that the Chief Justice cannot be made indirectly liable for the act of the President in appointing him into office, as he cannot be expected to be in a position to justify his suitability for the post.

That decision is obviously distinguishable from the decision of this Court in *Faiz v Attorney General,* (1995) 1 Sri LR 372, where it was alleged that two Members of Parliament and one Member of a Provincial Council had, acting purely in their personal capacities, instigated certain public officers to infringe the fundamental rights of the petitioners in that case, who were also public officers. This Court had no hesitation in holding that the responders, including the Members of Parliament and the Member of the Provincial Council, liable for the violation of the fundamental rights of the petitioners. In arriving at this conclusion, M.D.H Fernando J, at pages 381 to 382 of his judgment, adverting to the phrase "executive or administrative" as used in Article 126, observed that-

"That phrase does not seek to draw a distinction between the acts of "high" officials (as being "executive"), and other officials (as being "administrative")."Executive" is appropriate in a Constitution, and sufficient, to include the (official) acts of all public officers, high and low, *and to exclude acts which are plainly legislative or judicial (and of course purely private acts not done under colour of office)*. The need for including "administrative" is because there are residual acts which do not fit neatly into this three-fold classification. Thus it may be uncertain whether delegated legislation is "legislative" and therefore outside the scope of Article 126. However, *delegated legislation is appropriately termed administrative, although it has both legislative and executive features* (*Cf. Ramupillai v. Perera* (1991) 1 Sri LR 11 at pages 74 – 75 and *Jayathevan v. AG*· S.C. Application No. 192/91- SCM of 17.09.92). Thus "administrative" is intended to enlarge the category of acts within the scope of Article 126; *it serves to emphasise that what is excluded from Article 126 are only acts which are legislative or judicial, either intrinsically or upon the application of a historical test* (as in *R v. Liyanage* 64 NLR 313); *it may well be that the act of a court or a legislative body in denying a language right guaranteed by Article 20 or 24 is "administrative" for the purpose of Article 126 even though it is done in the course of a judicial or legislative proceeding*." (*Emphasis added*)

Though much relied upon by learned Counsel for the Petitioners, *Faiz v Attorney General, supra,* was not a case where the Members of Parliament concerned had been involved with the legitimate functions of Parliament. On the other hand, in the instant cases, the 1st Respondent Speaker of the House of Parliament, performed a function that was essential to proceed with an impeachment resolution placed on the Order Paper of Parliament, and in doing so, he was bound to act in accordance with Order 78A of the Standing Orders of Parliament, which had been adopted by Parliament with effect from 4th April 1984, except for Order 78A(4) which came into effect on 8th January 1985, in terms of Article 74(1)(ii) read with Article 107(3) of the Constitution. In so appointing the Parliamentary Select Committee, the 1st Respondent performed an important power of Parliament, which was required by Order 78A(2) of the Standing Orders of Parliament for the purpose of the investigation and proof of the allegations made against the Chief Justice by 117 Members of Parliament who had moved the impeachment resolution.

This was an integral part of a *sui generis* function of Parliament which did not fit easily into the legislative, executive or judicial spheres of government and bore a unique complexion in that, while being more disciplinary in nature, it could not be exercised by Parliament alone and had to be performed in concurrence with the President of Sri Lanka, as contemplated by Article 107(2) and (3) of the Constitution. It is for this reason that the power of impeachment does not find express reference in Article 4(a) of the Constitution that deals with the legislative power of the People vested *exclusively* in Parliament and the People at a Referendum, or in either Article 4(b) that vests the executive power of the People *exclusively* on the President or Article 4(c) that vests the judicial power of the People in Parliament to be carried out by the courts and other tribunals or institutions administering justice, "except in regard to matters relating to the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised directly by Parliament according to law."

In this context, all organs of government including the courts and other tribunals or institutions administering justice must always bear in mind Article 4(d) of the Constitution, which expressly provides that "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided." It is the solemn duty of this Court to honour the trust placed on it to respect, secure and advance the fundamental rights enshrined in the Constitution, and in doing so, I have examined very carefully all the provisions of the Constitution and principles of law referred to by learned Counsel in the course of submissions. Having done so, I am inclined to the view that the impugned act of the Speaker of the House of Parliament to appoint a Parliamentary Select Committee was indeed "executive or administrative action" within the meaning of Article 126 of the Constitution.

For these reasons, preliminary objection (a) is overruled.

(b) The locus standi of the Petitioners

The next preliminary objection raised by Mr. Nigel Hatch PC., is whether the Petitioners have the *locus standi* or standing to invoke the jurisdiction of this Court in terms of Articles 17 and 126 of the Constitution. Mr. Hatch PC., contends that none of the Petitioners are possessed of *locus standi* to invoke the fundamental rights jurisdiction of this Court. He relies on the language of Article Section 17, which provides that every person shall be entitled to apply to the Supreme Court, as provided by Article 126, in respect of the infringement or imminent infringement, "of a fundamental right to which *such person* is entitled", and submitted that in terms of this provision, as well as Article 126(2) of the Constitution, the applications of the Petitioners cannot be maintained by reason of the lack of *locus standi,* as they are seeking to indirectly challenge the impeachment of the Hon. (Dr.) Shirani Bandaranayake, and not any violation or imminent violation of their own fundamental rights. Learned Counsel for the Petitioners have submitted that the Petitioners do have *locus standi* in their own right and on behalf of the members of the public, to agitate a fundamental question relating to the removal of Superior Court Judges for any misbehaviour or incapacity, when the integrity of the judiciary is of great importance to the maintenance of the Rule of Law and the wellbeing of society.

For effectively dealing with the objection taken up by Mr. Nigel Hatch P.C, it is necessary to examine the averments of the petitions filed by the Petitioners in these cases to ascertain their alleged grievances for the redress of which they seek to invoke the jurisdiction of this Court in terms of Articles 17 and 126 of the Constitution. The Petitioners have stated in their petitions that they seek relief from this Court in their own right and in the public interest with the objective of safeguarding the rights and interests of the general public and securing due respect, regard for and adherence to the Rule of Law and the Constitution, which is the supreme law of the land. In their petitions, they have refereed to Article 3 and Article 4(c) of the Constitution, and assert that to the extent that "Standing Order 78A seeks to permit judicial or quasi judicial powers to be exercised by Parliament, in contravention of Article 4(c) of the Constitution, the said Standing Order is null and void, and of no effect or force in law."

The whole thrust of the case of the Petitioners is that the Parliamentary Select Committee appointed by the Speaker to consider the allegations contained in the impeachment resolution was not properly constituted insofar as the appointment of the Committee was made purportedly in terms of Order 78A(2) of the Standing Orders of Parliament, which the Petitioners allege was *ultra vires* the Constitution, particularly, Article 4(c) and Article 107(3) thereof. They state that the impeachment process in place in Sri Lanka is not conducive to the protection and fostering of the independence of the judiciary, which is so essential for the wellbeing of the People of Sri Lanka.

It is universally recognised that it is only through fair and transparent procedures for the recruitment of competent, independent and impartial judges and equally fair and transparent procedures for the removal of judges that the independence of the judiciary could be protected and fostered and the Rule of Law established or maintained. No such procedures existed in Sri Lanka even after the enactment of the Constitution of 1978 in regard to the appointment of the Chief Justice and Judges of the Supreme Court and the Court of Appeal, and in *Edward F William Silva and Others v Shirani Bandaranayake and Others* (1997) 1 Sri LR 92, M.D.H Fernando J noted at page 94 that-

> "Article 107 confers on the President the power of making appointments to the Supreme Court, and does not expressly specify any qualifications or restrictions. However, considerations of comity require that, in the exercise of that power, there should be cooperation between the Executive and the Judiciary, in order to fulfil the object of Article 107."

The position was remedied by the Seventeenth Amendment to the Constitution, which introduced a Constitutional Council, that was replaced by a Parliamentary Council under the Eighteenth Amendment to the Constitution, to perform the function of screening the suitability of persons to be appointed to the office of Chief Justice and as Judges of the Supreme Court and the Court of Appeal. However, Article 107 (3) of the present Constitution sought to introduce a fairer and more transparent procedure for the removal of such Judges than what existed in the past, and by the said provision the Parliament was empowered to provide for all matters relating to the presentation of an address for the removal of the Chief Justice or a Judge of the Supreme Court or Court of Appeal including the investigation and proof of the alleged misbehaviour or incapacity "by law or by Standing Orders". The Petitioners contend that Order 78A of the Standing Orders that purports to deal with the aforesaid matters is *ultra vires* the Constitution and null and void.

The question is whether the Petitioners have *locus standi* to invoke the jurisdiction of this Court in all the circumstances of this case. In this connection, it is relevant to note that this Court has granted leave to proceed only with respect to the alleged violation of Article 12(1) of the Constitution, and when a similar question arose in the context of the appointment of a Chief Justice in *Edward F William Silva and Others v Shirani Bandaranayake and Others, supra,* P.R.P Perera J. expressed the following view at pages 99 to 100 of his judgment:-

> "The violation of Article 12(1) involves two or more persons who are similarly placed or circumstanced. The grievance of the petitioner in relation to the respondent must be directly related to the impugned act. A petitioner will not have *locus standi* if he is not one who could have claimed a right in relation to this particular respondent. In this case, the petitioners do not

allege discrimination in relation to the 1st respondent and therefore he is not entitled to any relief under Article 12(1)."

The first respondent in that case happened to be, by an irony of fate, the 43rd Chief Justice of Sri Lanka, whose impending impeachment occasioned the institution of these proceedings by the respective Petitioners, but the reasoning of P.R.P Perera J quoted above cannot have application in respect to the 1st Respondent to these proceedings, who is the Speaker of the House of Parliament, who entertained the notice of resolution to remove the Chief Justice and appointed the Parliamentary Select Committee to investigate into the allegations made against her.

True, as pointed out by Mr. Hatch PC., Article 126(2) is of significance, and would have a limiting effect on *locus sandi* since it restricts the category of persons eligible to invoke the jurisdiction of this Court under that article to any person whose fundamental rights are alleged to be infringed or about to be infringed, who may "himself or by an attorney-at-law on his behalf" invoke the jurisdiction of this Court. Though our courts have applied this provision strictly, as in decisions such as *Somawathie v Weerasinghe* **(**1990) 2 Sri LR 121, where Amerasinghe J. (with Bandaranayake J. concurring, and Kulatunga J dissenting), observed at page 124 that "Article 126 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" and added that "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."

However, with the turn of the millennium, our courts have become more liberal with the rules of *locus standi*, and have sought to expand the horizons of standing, and this Court has permitted not only persons directly aggrieved but also others to challenge violations of fundamental rights. Cases such as *Mediwake and Others v Dayananda Dissanayake, Commissioner of Elections and Others* [2000] 1 Sri LR 177, *Sunila Abeysekera v. Ariya Rubasinghe* [2001] Sri LR 315, *Leader Publications v Ariya Rubasinghe* [2001] Sri LR and *Lilanthi De Silva v. Attorney General* [2003] Sri LR 155 are landmark decisions of this Court which reflect this liberal approach. As Amerasinghe J observed in *Bulankulama and others v. Secretary, Ministry of Industrial Development and others* [2000] 3 Sri LR 243 (better known as the *Eppawala* case) –

> "On the question of standing, in my view, the petitioners, as individual citizens, have a Constitutional right given by Article 17 read with Articles 12 and 14 and Article 126 to be before this Court. They are not disqualified because it so happens that their rights are linked to the collective rights of the citizenry of Sri Lanka - rights they share with the people of Sri Lanka. Moreover, in the circumstances of the instant case, such collective rights provide the context in which the alleged infringement or imminent infringement of the petitioners' fundamental rights ought to be considered. It is in that connection that the confident expectation (trust) that the Executive will act in accordance with the law and accountably, in the best interests of the people of Sri Lanka, including the petitioners, and future generations of Sri Lankans, becomes relevant."

The Petitioners have succeeded in obtaining leave to proceed with respect to the alleged violation of their fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution, and although they had sought from this Court various declarations and orders, this Court has declined any interim orders and restricted the purview of the hearing to one of the relief sought by the Petitioners, namely, "a declaration that Standing Order 78A is *ultra vires* the Constitution and null and void and of no force or effect in law".

Learned Counsel for the Petitioners have submitted that such a declaration from this Court was necessary to protect and foster the independence of the judiciary and safeguarding the rights and interests of the general public and securing due respect, regard for and adherence to, the Rule of Law and the Constitution. There can be no doubt that all responsible citizen of this country, will have a collective interest in protecting and fostering the independence of the judiciary and safeguarding the rights and interests of the general public and securing due respect, regard for and adherence to, the Rule of Law and the Constitution, as much as the Petitioners.

However, I fail to see how the invocation of the fundamental rights jurisdiction of this Court *at the time the Petitioners sought to do so,* could have furthered those very interests. As already noted, the Petitioners invoked the fundamental rights jurisdiction of this Court in the wake of a notice of a resolution to remove the incumbent Chief Justice of Sri Lanka from office. SC Applications 665 to 667/12 (FR) were filed on 21st November 2012, just seven days after the Speaker of the House of Parliament appointed a Parliamentary Select Committee to consider the allegations made in the notice of resolution against the Chief Justice by 117 Members of Parliament, and two days before the said committee commenced its sittings. SC Application 672/12(FR) was filed when the Committee was in session, and before it arrived at any findings or made its report.

It is common ground that the incumbent Chief Justice herself did not challenge the constitutionality of the appointment of the Select Committee or its constitution in any court till 19th December 2012, on which date, she filed CA (Writ) Application No. 411/2012 in the Court of Appeal seeking mandates in the nature of *certiorari* to quash the report of the Parliamentary Select Committee finding her guilty of certain charges which were considered to be "of such a degree of sufficiency and seriousness as to remove" her from the office of Chief Justice, and for prohibition on the Parliament and its Select Committee. In this factual backdrop, I am of the view that the Petitioners possessed no *locus standi* to challenge the constitutionality of the appointment of the Parliamentary Select Committee *at the time they filed their respective applications, particularly in the context that the incumbent Chief Justice herself was in the process of defending herself before the Committee*.

I am of the opinion that in all these circumstances and for all these reasons, preliminary objection (b) would succeed.

(c) *Failure of the petitions to disclose on the face of it any violation of the fundamental rights of the Petitioners*

Since preliminary objection (b) has been upheld by this Court, there is technically no necessity to deal with the question as to whether the petitions filed in these cases by the Petitioners disclose any

violation of their fundamental rights. However, I propose to do so in view of the fact that elaborate submissions have been made by learned Counsel on this question as well.

Mr. Nigel Hatch P.C, has submitted that the Petitioners have failed to disclose on the face of their petitions any violation or imminent violation of their fundamental rights. In particular, he has submitted that though the essence of the Petitioners' case is that their fundamental right to equality enshrined in Article 12(1) of the Constitution has been violated or was about to be violated by the 1st Respondent's act of appointing the Parliamentary Select Committee contrary to Article 107(3) and Article 4(c) of the Constitution, and was thus invalid, the said appointment was in fact made by the Speaker in terms of Order 78A(2) of the Standing Orders of Parliament, which was made by Parliament in terms of powers conferred on it by Articles 74(1)(ii) and 107(3) of the Constitution, and not being subordinate in nature, is immune from judicial review. Prof. H.M. Zafrullah, stressed that Standing Orders of Parliament are not subsidiary legislation, and associated himself with the other submissions made by Mr. Hatch, P.C. The learned Attorney General also associated himself with the submissions of Mr. Hatch P.C and Prof Zaffrullah, and emphasized that being *sui generis* in nature, all steps taken in pursuance of Article 107(2) and (3) of the Constitution fell within the exclusive domain of Parliament and could neither be challenged in terms of Articles 17 and 126 of the Constitution, nor are they justiciable.

Responding to these submissions, Mr. Suren Fernando, who appeared for the Petitioner in SC Application 665/2012 (FR), submitted that the Parliamentary Select Committee was appointed by the Speaker of Parliament purportedly in terms of Order 78A(2) of the Standing Orders of Parliament, which he submitted was is in essence subordinate legislation, and that such appointment was neither a legislative act nor a judicial act, and was thus clearly an administrative act, similar to that of appointing a public officer to a public office. He submitted that any appointment made purportedly under any Standing Orders of Parliament which are *ultra vires* the Constitution, are unconstitutional and therefore invalid. He further submitted that Article 107 read with Article 4(c) of the Constitution necessarily requires that the judicial aspect of impeachment can only be carried out by courts, tribunals and institutions created and established, or recognized, by the Constitution, or created and established by law. He contended that the distinction between legislation and Standing Orders of Parliament has been recognised by the Constitution, which deals with legislation in Article 75 and deals with the power of Parliament to make Standing Orders in Article 74. While the other learned Counsel who appeared for the Petitioners in these cases associated themselves with these submissions of Mr. Fernando, Mr. M.A. Sumanthiran, who appeared for the Petitioner in SC Application 667/2012 (FR), submitted that the appointment of the Parliamentary Select Committee was a ministerial act, and since the Standing Orders of Parliament in terms of which the purported appointment was made were subordinate in nature, such appointment may be quashed by Court if they are found to be *ultra vires.*

A summary of the averments contained in the petitions filed by the respective Petitioners were set out in the previous section in relation to objection (b), and I do not see in these any basis on which this Court could have come to a *prima facie* finding that any fundamental rights of the Petitioners had been violated or is about to be violated. In granting leave to proceed for the alleged violation of Article 12(1) of the Constitution, this Court had assumed that laying down the procedure necessary

for the investigation and proof of any allegation against any Chief Justice, Judge of the Supreme Court, President of the Court of Appeal or Judge of the Court of Appeal by Standing Orders of Parliament without enacting an Act of Parliament for this purpose, was inconsistent with the provisions of Articles 107(3) and 4(c) of this Constitution. However, this is an erroneous interpretation of the said provisions of the Constitution, as explained by this Court in its decision in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014). This being so, it is manifest that the petitions filed by the Petitioners do not *ex facie* disclose any violation of the fundamental rights of the Petitioners.

In this context it might be useful to recount that after the Petitioners in this case filed their respective petitions in this Court on various dates in November 2012, the Parliamentary Select Committee which had been appointed to consider the resolution to remove the then incumbent Chief Justice concluded its investigation, and on 8th December 2012 reported to Parliament that it had, by majority decision, found her guilty of charges 1, 4, and 5, which were "of such a degree of sufficiency and seriousness as to remove" her from the office of Chief Justice of Sri Lanka. CA (Writ) Application No. 411/2012 was filed by the incumbent Chief Justice in the Court of Appeal challenging the findings of the Parliamentary Select Committee on 19th December 2012, *inter alia* on the basis that the said Select Committee was not properly constituted for the same reasons that were advanced by the Petitioners of the present fundamental rights applications in their respective petitions. The Court of Appeal referred the question of constitutionality to this Court in terms of Article 125(1), and in SC Determination No. 3/2012, a Divisional Bench of this Court consisting of 3 Judges ruled that "it is *mandatory under Article 107(3) of the Constitution for the Parliament to provide by law* the matters relating to the forum before which the allegations are to be proved, mode of proof, burden of proof and the standard of proof of any alleged misbehaviour or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehaviour or incapacity". The Court of Appeal purported to follow the said determination, and by its Judgment dated 7th January 2013 granted relief to the incumbent Chief Justice by way of a mandate in the nature of *certiorari* quashing the report and findings of the Parliamentary Select Committee.

However, the Court of Appeal declined to grant the prohibition sought by the incumbent Chief Justice on the Speaker of the House of Parliament and the Members of the Parliamentary Select Committee to restrain them from proceeding with the impeachment resolution. The Court of Appeal accordingly concluded that the power "to make a valid finding, after the investigation contemplated in Article 107(3), can be conferred on a court, tribunal or body, *only by law and by law alone*", and went on to hold that the finding and / or the decision or the report of the Parliamentary Select Committee "has no legal validity" and proceeded to issue a writ of *certiorari* to quash the said report, purportedly for the purpose of giving effect to the determination of the Supreme Court referred to above.

It is significant that the decision of the Court of Appeal dated 7th January 2013 was set aside by a 5 Judge Bench of this Court in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014), which also carefully examined the determination of this Court in SC Determination No. 3/2012, which was purportedly followed by the Court of

Appeal, and overruled the same. In so overruling the determination of this Court in SC Determination No. 3/2012, this Court observed as follows:-

> "The determination of this Court in SC Reference No. 3/2012 does not offer any acceptable reasons for ignoring basic provisions of the Constitution, except for the observation that "no court, tribunal or other body (by whatever name it is called) has authority to make a finding or a decision *affecting the rights of a* person unless such court, tribunal or body has the power conferred on it *by law* to make such finding or decision". The "person" envisaged by the Court of Appeal in the above quoted observation in its factual setting was the Petitioner-Respondent, who had to face impeachment proceedings contemplated by Article 107(2) and (3) of the Constitution read with Standing Order 78A, for which the makers of the Constitution had expressly provided in Article 107(3) that the necessary procedures may be formulated by Parliament "*by law or by Standing Orders*".
>
> It is significant that Article 107(3) of the Constitution does not contain any words indicating that *only certain matters* contemplated by that provision may be provided for by Standing Orders *and certain other matters* must be provided for by law. If that was the intention of the makers of the Constitution, they would probably have adopted language sufficient to convey such a meaning, and used, for instance, the formula "by law *and* Standing Orders". They would also have indicated clearly *what matters should necessarily be provided for by law.* Thus, in my view, the determination of this Court in SC Reference No. 3/2012 is not only erroneous but also goes beyond the mandate of this Court to interpret the Constitution, and intrudes into the legislative power of the People. Hence, to conclude, as this Court did, in SC Reference No. 3/2012, that it is mandatory for Parliament to provide for the matters in question by law, and law only, not only does violence to the clear language of Article 107(3), but also takes away from Parliament, a discretion expressly conferred on it by the Constitution itself."

For these reasons, I hold that the petitions did not *ex facie* disclose any violation or even imminent violations of the fundamental rights of the Petitioners. Preliminary objection (c) is accordingly upheld.

(d) Justiciability of the matters sought to be determined

In view of the decision of this Court to uphold preliminary objections (b) and (c), it is strictly unnecessary to consider preliminary objection (c). However, since Mr. Nigel Hatch P.C who took up this objection, and Prof H.M. Zaffrullah, Mr. Razik Zarook P.C and the learned Attorney General, who have all associated themselves with Mr. Hatch PC, as much as Mr. Suren Fernando, Mr. Viran Corea, and Mr. M.A. Sumanthiran, who have chosen to differ from Mr. Hatch, have all made extensive submissions on this preliminary objection, I would like to express my opinion on this aspect of the case as well.

The question of justiciability was considered in great depth in the judgment of this Court in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014), which of course, was in the context of the writ jurisdiction of the Court of Appeal under Article 140 of the Constitution. The question now arises in the context of the fundamental

rights jurisdiction of the Supreme Court under Article 126 of the Constitution, and the focus has necessarily to be on whether that makes any material difference in the legal position.

Section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953, which proclaims that there "shall be freedom of speech, debate and proceedings in Parliament and such freedom of speech, debate or proceedings shall not be liable to be impeached or questioned in any court or place out of Parliament" echoes section 1 art. 9 of the English Bill of Rights, 1689, which provided that –

> "……the freedom of speech, and debates or proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament."

It is necessary to stress that while the above quoted provision from the English Bill of Rights is not part of our law, Section 3 of the Parliament (Powers and Privileges) Act of 1953 is an integral part of Sri Lankan law, more so because it has expressly been referred to and read into Article 67 of the Constitution, which provides as follows:-

> "The privileges, immunities and powers of Parliament and of its Members may be determined and regulated by Parliament by law and until so determined and regulated, the provisions of the Parliament (Powers and Privileges) Act, shall, *mutatis mutandis,* apply."

The legal effect of the incorporation by reference of the provisions of the Parliament (Powers and Privileges) Act into the Constitution was considered by this Court in great detail in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others, supra,* and as this Court observed in its unanimous judgment in that case,

> "……Article 67 does not stand alone and must be read with Article 4(c) of the Constitution which makes express reference to "the privileges, immunities and powers of Parliament and of its Members, wherein the judicial power of the People may be exercised by Parliament according to law". The direct vesting of the judicial power of the People with respect to the privileges, immunities, and powers of Parliament and its Members in Parliament, by Article 4(c) of the Constitution means .....that *no Court can exercise any supervision of that power*. I therefore hold that section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953 read with Articles 4(c) and 67 of the Constitution would have the effect of ousting the writ jurisdiction of the Court of Appeal in all the circumstances of this case." (*Emphasis added*)

In arriving at this conclusion, this Court examined a large number of decisions of the English courts that traversed a few centuries which interpreted the ambit and legal effect of section 1 art. 9 of the English Bill of Rights, 1689, which no doubt inspired section 3 of the Parliament (Powers and Privileges) Act No. 21 of 1953. It is therefore unnecessary for this Court to repeat the analysis of the English authorities on this question, except to refer to the decision of this Court in *The Attorney General v. Samarakkody and Dahanayake* 57 NLR 412 in which two members of the House of Representatives were noticed by this Court, on an application by the Attorney General, to show cause as to why they should not be punished for offences of breach of privilege of Parliament. On a question of conflict of jurisdiction between this Court and the House of Representatives having been raised by learned Counsel for the respondents, this Court had no hesitation in holding that, even if

the conduct complained of was disrespectful, *it was not justiciable by the Supreme Court*, as the conduct in question fell within the scope of sections 3 and 4 of the Parliament (Powers and Privileges) Act and could not therefore be questioned or impeached in proceedings taken in the Supreme Court under section 23 of the Act.

The question that arises in this case is whether this Court would exercise its jurisdiction and powers conferred by Article 126 of this Constitution so as to invade the exclusive domain of Parliament, the limits of which have been carefully delineated by Articles 4(c) and 67 of the Constitution. They seem to put to rest the centuries old conflict between the jurisdiction of courts and the legislature that added some colour and drama to the constitutional history of the United Kingdom, and lay down in very clear terms where the jurisdiction of the Courts begin and where the jurisdiction of Parliament would come to an end. The question under our Constitution would be, on which side of the two exclusive zones of jurisdiction would the particular question for determination fall, and the answer would depend on the nature and complexion of the particular question.

The question in this case is whether this Court would review the validity of Order 78A of the Standing Orders of Parliament on the basis that it was unconstitutional or went beyond the power of Parliament to make subordinate legislation. That was the only question raised by the Petitioners in their petition, there being no occasion to complain of what may have transpired after the date of the petitions in these cases, which were respectively 21st November 2012 (in SC Applications 665 to 667/12 (FR), that is 2 days prior to the commencement of the sittings of the Parliamentary Select Committee) and 26th November 2012 (in SC Application 672/12(FR) which was 3 days after the said Committee commenced sittings).

In all the circumstances of this case, particularly in the light of the fact that the Petitioners sought to invoke the jurisdiction of this Court in terms of Article 17 and 126 of the Constitution solely on the basis that Order 78A of the Standing Orders of Parliament is *ultra vires* the Constitution, which they contended made the appointment of the Parliamentary Select Committee for the purposes of Article 107(2) and (3) invalid, and therefore the said Committee could not lawfully consider the allegations contained in the impeachment resolution against the then incumbent Chief Justice, the correctness of all of which have been examined earlier in this judgment and held to be unfounded, preliminary objection (d) has necessarily to be upheld.

Conclusions

For the reason that preliminary objections (b),(c) and (d) raised by learned President's Counsel for Intervenient-Petitioner-Respondent Koggala Wellala Bandula, with which learned Counsel for the other Intervenient-Petitioners-Respondents associated themselves with, have been upheld, the petitions filed by the Petitioners in all these cases are hereby dismissed.

I do not make any order for costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J,

I agree.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasundera, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Rohini Marasinghe, 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

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Counsel	:	K.M. Basheer Ahamed with U.M. Mawjooth for the Defendant-Appellant. S.A. Parathalingam, PC with J. Bodhinagoda for the Plaintiff-Respondent.
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Decided on	:	05. 04.2013

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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 an application for appeal from a judgment of the High Court of the Western Province Holden at Colombo under Section 755(3) of the Civil Procedure Code read with Section 5(1) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996

Lanka Kect (Pvt) Limited
Plaintiff

SC CHC 19/2008
HC Civil 222/2001 (1)

Vs

1. DA Wickramasinghe,
   Director Buildings,
   Buildings Department, Battaramulla.
2. Secretary.
   Ministry of Public Administration and Reforms
3. The Attorney General

Defendants

And now Between

1. DA Wickramasinghe,
   Director Buildings,
   Buildings Department, Battaramulla.

2. The Attorney General

Defendant-Appellants

Vs

Lanka Kect (Pvt) Limited

Plaintiff-Respondent

Before : Eva Wanasundera PC, J
Buwaneka Aluwihare PC,J
Sisira J de Abrew J

Counsel : Viraj Dyaratne DSG for the Defendant-Appellants
GJT Alagaratnam PC with Lasantha Gurusinghe for the Plaintiff-Respondent

Argued on : 27.6.2014
Decided on : 5.9.2014

Sisira J de Abrew J.

This is an appeal by the defendant-appellants against the judgment of Commercial High Court dated 11.1.2008 wherein the leaned High Court Judge by her judgment dated 11.1.2008 decided the case in favour of the Plaintiff-Respondent (hereinafter referred to as the Plaintiff) who claimed that the 1st Defendant-Appellant (hereinafter referred to as 1st Defendant) was guilty of breach of contract entered into between them (the Plaintiff and the 1st Defendant).

The 1st Defendant, by document marked P11, called for tenders for the design, supply, installation and operation of a prop up assembly for reconstruction of Jaffna library. The plaintiff, by its letter dated 27.8.99 marked P12, placed a bid and offered to supply equipment on rental basis. Plaintiff, in the said letter, inter alia stated the following matters.

1. One month rental should be paid in advance.
2. Daily rental should be paid as soon as the goods are delivered whether the material is used or not.

3. The charges should be levied as soon as the goods are delivered to the port of Colombo and would continue to be levied till the goods are returned to the port of Colombo.

The 1st defendant, by his letter dated 6.9.99 marked P13, accepted the tender (P12) submitted by the Plaintiff. The heading of letter marked P13 is 'letter of acceptance.' Thereafter both parties entered into the contract marked P14. It has to be noted here that initially when the contract was signed, the office of the 1st Defendant was held by TMW Gunasekara. Later he was replaced by DA Wickramasinghe. It has to be noted here that according to the terms and conditions of the contract, the Plaintiff would supply equipments on hire to the 1st Defendant and he (the 1st defendant) would pay rentals until the goods are returned to the Plaintiff. According to the terms and conditions of the contract, there was no responsibility on the part of the plaintiff to deliver goods to the work place of the 1st defendant in Jaffna. He had to only supply goods to the port of Colombo. Once he delivers the goods to the port of Colombo his responsibility of delivering goods ceases. Thereafter it was the responsibility of the 1st Defendant to bring the goods to the work place in Jaffna. In returning the goods the 1st Defendant must deliver goods to the port of Colombo.

The 1st Defendant, Complying with terms of the contract, made a deposit with the plaintiff against the capital cost of equipments. However since the 1st Defendant defaulted the rentals, this deposit was set off against the rentals up to 31.3.2000. The 1st Defendant defaulted payment of rentals under the contract. The Plaintiff made several requests to the 1st Defendant for the return of the equipment but these requests were refused by the 1st Defendant. The Plaintiff filed this case for breach of contract. He claimed overdue rentals and return of the equipments or

in the alternative value of the equipments. The learned High Court Judge decided the case in favour of the Plaintiff.

The position of the 1st Defendant was that the contract of hire could be converted into a contract of supply and as such it was not necessary for him to pay rentals. He further tried to contend that this was a contract of hire with an option to purchase the equipments.

Can the 1st defendant convert the contract of hire to a contract of supply or purchase? The 1st defendant, by letter marked P30, stated that he unilaterally converted this contract to a contract of supply. The question that must be considered in this case is whether the 1st Defendant could convert the contract of hire to a contract of supply. I now advert to this question. Is there any specific clause in the contract marked P14 which empowers the Director Building to purchase the equipments? His own witness Thiruchelvam admitted in cross-examination that there was no such clause in the contract marked P14. It is interesting to state Thiruchelvam's own words in cross-examination on this point. He stated thus: "these props would not be of much use to the department and that is why we went for the hire option (page 341 of the brief). Thus it is clear that the intention of the 1st Defendant was to hire equipments. On this point it is interesting to consider the paragraph 7 of P12 by which the plaintiff submitted its offer. It states thus: "Payment terms - one million rental to be paid in advance, daily rentals to be paid as soon as goods are delivered whether material is used or not. The charges would be levied as soon as the goods are delivered to the port of Colombo and would continue to be levied till the time the goods are returned to the port of Colombo." The 1st Defendant agreed to these conditions. If the Plaintiff was going to levy rentals for the equipments from the time that the goods were delivered to the port of Colombo, how can it be a contract of sale? Further the letter of

acceptance (P13) signed by the 1st Defendant speaks about hire charges on daily basis. Further the 1st Defendant, by letter dated 29.10.2001, has sought permission of the Plaintiff to convert the contract into a supply of contract. The question that has to be asked is if the purported 'option to purchase' was already available for the 1st Defendant why did he seek permission of the plaintiff to convert the contract into a supply contract.

The above material and the observation made by me go on to show that the contract entered into by both parties was not a contract of supply or purchase and that there was no option available in the contract for the 1st Defendant to purchase the equipments. When I consider all the above matters, the above contention of the learned DSG fails. I reject the said contention of the learned DSG.

The learned DSG next tried to contend that there was a delay on the part of the Plaintiff in delivering the equipments. I now advert to this contention. Thiruchelvam who was a witness of the 1st Defendant when asked whether the plaintiff delayed the performance of the contract answered in the negative (vide page 341 of the brief). Under the contract, the duty of the plaintiff was to deliver the goods only to the port of Colombo. Under the contract there was no obligation on his part to deliver the goods to the port of Jaffna. Shipping of goods to the port of Jaffna was the responsibility of the 1st Defendant. According to the evidence led at the trial there was no delay in delivering the goods to the port of Colombo. When I consider all the above matters, I am unable to agree with the above contention of the learned DSG.

There is another matter that needs consideration. When the amended plaint was filed in the trial court on 20.5.2002, the original caption was also amended placing the present caption in the case record. But when the learned trial Judge prepared the judgment she continued to type the old caption. This appears to be a

mistake by the trial Judge. This mistake is not a ground to set aside the judgment of the learned trial Judge.

When I consider all the above matters, I hold the view that there are no grounds to interfere with the judgment of the learned trial Judge. I therefore upholding the judgment of the learned trial Judge dismiss the appeal with costs.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Buwaneka Aluwihare PC, J

I agree.

Judge of the Supreme Court.

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

Distilleries Company of Sri Lanka
No. 110, Norris Canal Road
Colombo 10

Plaintiff

SC (CHC) Appeal No. 38/2010

Vs.

Randenigala Distilleries Lanka
(Private) Limited
No. 162, Rajagiriya Road,
Rajagiriya

Defendant

HC (Civil) Case No. 34/2002(03)

AND NOW

In the matter of an appeal in terms of section 5 and 6 of the High Court of Provinces (Special Provisions) Act No.10 of 1996 read with Chapter LVIII of the Civil Procedure Code

Randenigala Distilleries Lanka
(Private) Limited
No. 162, Rajagiriya Road,
Rajagiriya

Defendant-Appellant

Vs

Distilleries Company of Sri Lanka
No. 110, Norris Canal Road
Colombo 10

Plaintiff-Respondent

BEFORE: Mohan Pieris, PC, CJ
Chandra Ekanayake, J
Rohini Marasinghe, J

COUNSEL: D.P. Kumarasinghe PC with Mahendra Kumarasinghe and Jayerani Kumarasinghe for the Defendant-Appellant
S.A Parthalingam PC with V.K Choksy for the Plaintiff-Respondent.

Written Submissions tendered by the Defendant-Appellant on 04.11.2014
Written Submissions tendered by the Plaintiff-Respondent on 29.10.2014

ARGUED ON : 22.09.2014

DECIDED ON: 19.12.2014

MOHAN PIERIS, PC, CJ

This is an appeal from the judgment of the High Court of the Western Province (exercising civil jurisdiction) holden in Colombo (Commercial High Court) dated 31 August 2010. It raises the central question of whether the labels and/or bottles used by the Defendant-Appellant (hereinafter referred to as the "Appellant") are visually and/or phonetically of sufficient similarity to mislead the consuming public and thereby establish a case of passing off in favour of the Plaintiff-Respondent (hereinafter referred to as the "Respondent"), and/or whether the Appellant is using the labels and/or bottles in a manner that violates Section 142 of the Code of Intellectual Property Act No. 52 of 1979, insofar as it constitutes an act or acts of unfair competition. I do not intend to narrate the facts of this case, as these have been set out clearly in the judgment of the Commercial High Court. Instead, I will shortly turn to the relevant issues that need to be addressed by this court, which has been adverted to above.

At the very outset, this Court feels it pertinent to make two preliminary observations. First, on the question of whether the current action is indirectly a second attempt by the Respondent to obtain exclusivity to the term 'extra special arrack'. The concept of *res judicata* is a well-established principle of law designed to protect a party from having to entertain repetitive legal attacks on the grounds of an issue that has already been

decided in full and final settlement by a court of law. Attempts of this kind under the smokescreen of being a fresh issue are frowned upon and cannot be entertained by courts, for such actions seek to discredit and abuse the finality of the legal process. Bearing this in mind, it is the view of this court, that the Respondent was entitled to pursue a separate action as they did, because the subject matter (the bottle shape and label), albeit on the same basis for the earlier action (SC (CHC) Appeal 38/1999), changed in substance, *viz.* the bottle and label shape of both parties is different to those in the earlier case. In light of this, this court feels that the foundation on which the Respondent instituted this claim is fundamentally different to the earlier case, since the subject matter in respect of which relief was being sought has since changed. Further, while the Respondent attempted to focus on establishing exclusivity in the term 'extra special arrack' during examination in chief, it was clearly not the focus of this action, and this court observes that the Respondent is free to proceed down any tangent he so wishes in the course of leading evidence since it will only be in vain, as it is clear to this court that the issue to be determined by this court does not relate to the term 'extra special arrack'. It is therefore the view of this court that even if the Respondent was successful in its action, this would relate only to the bottle and/or labels used and not to the use of term 'extra special arrack', as this court is possessed of the fact that this is a pre-determined issue, in respect of which the Respondent is not entitled to gain any circumvented relief.

The second observation is in relation to the trademark infringement alleged by the Respondent. This Court wishes to state with utmost clarity that this matter is *res judicata,* and therefore will not be reopened by this Court.

Let me move now to the substantive questions of law. Turning first to the question of passing off, this Court is well possessed of the general principle applicable to cases of passing off, which was captured by the observations of Lord Kingsdown in *The Leather Cloth Co v The American Cloth Co (1865)* 11 H.L Cas. 538, which are as follows:

> *"The fundamental rule is that one man has no right to put off his goods for sale as the goods of a rival trader, and he cannot therefore (in the language of Lord Lansdale in the case of Perry v Truefit (1843) 6 Beav. 66) be allowed to use names, marks, letters, or other indicia, by which he may induce purchasers to believe that the goods which he is selling are the manufacture of another person."*

Accordingly, the important question in this instance is whether the Respondent, has on the evidence produced before court established to the required standard of proof that the labels/bottles and/or get up of the coconut blended arrack sold by the Appellant has resulted in a misappropriation of the goodwill held by the Respondent in the sale of this class of goods with respect to the general consuming public. The pre-requisites for an action of passing off, as alluded to by the Appellant in his written submissions, were laid down by Lord Oliver in the House of Lords Case of *Rekitt & Colman v Borden (1990)* 1 WLR 491 (*Jif Lemon case*) as consisting of the following: (1) The Respondent's mark has goodwill; (2) The Appellant has made a misrepresentation that is likely to deceive the public; and (3) The said misrepresentation has caused damage.

In light of this, this Court is of the view that it is for the Respondent, being the party prosecuting the claim, to show that they have developed a reputation and understanding with the public sufficient to establish goodwill in the distinguishing mark in respect of which the protection of the law is sought. The importance in proving this goes to the root of passing off, *viz.* that the action is predicated on the misappropriation of goodwill developed amongst the public as a result of a signature mark, and not the misappropriation of the mark itself. This notion was captured by Lewison J in the case of *L'Oreal v Bellure* [2006] EWHC 2355 Ch., where he stated that:

> "*The law of passing off is not designed to protect a trader against others selling the same goods or copied goods."*

A consequence of this is that it is only possible to protect features that are distinctive of goods originating from one trader, and accordingly, features that are not directly suggestive of origin cannot be protected by an action in passing off. Mention must be made of the words of Jacob J in *Hodgkinson Corby Limited and Another v Wards Mobility Services Limited* [1995] F.S. 169 at paragraphs 174-175, who expands on this very same point:

> *"I turn to consider the law and begin by identifying what is not the law. There is no tort of copying. There is no tort of taking a man's market or customers. Neither the market nor the customers are the Respondent's to own. There is no tort of making use of another's goodwill as such. There is no tort of competition. I say this because at times the Respondent-Respondents seemed close to relying on such torts… At the heart of passing off lies deception or its likelihood, deception of the ultimate consumer in particular…Never has the tort shown even a slight tendency to stray beyond cases of deception. Were it to do so it would enter the field of honest competition, declared unlawful for some reason other than deceptiveness. Why there should be any such reason I cannot imagine. It would serve only to stifle competition."*

It is the view of this Court, therefore, in echoing the words of Jacob J, that it must be proven by the Respondent, that by deceiving the public as to the source of the goods they are purchasing, it is the goodwill generated by the labels and/or bottles and/or other distinguishing features of the Respondent's get-up that is being misappropriated by the Appellant. In order to do so, it is fundamental for the Respondent to provide in evidence proof of the goodwill they are seeking to protect, through the calling of witness or any other legal means in order to adduce evidence to this effect.

It is therefore the view of this court, that on the application of the law, it is insufficient to show that the Appellant has copied the goods and/or get up of the Respondent, for that is clearly not what constitutes an action of passing off. With reference to the evidence, the Respondent's witness, when

being cross-examined by Counsel for the Appellant stated, "a*fter they copied our label and our name they have got very big profits".* This appears to be the leak in the Respondent's sinking attempt to allege passing off, since the law is clear; it is the goodwill of Respondent's mark that may be protected under the law, and not acts of copying.

Notwithstanding the above, the remaining constituents of an action of passing off will also be examined. The second pre-requisite enunciated by Lord Oliver in the *Rekitt* case is that there must have been a misrepresentation by the Appellant as to the source of the goods. In this regard, Walker J identified three points for consideration in the case of *Limited biscuit (UK) Ltd v Asda Stores* (1997). They are as follows: (1) the subjective intentions of the Appellant; (2) the quality of the suggestion (conveyed by the get-up of the Appellants goods) of association or connection with the claimant's goods; and (3) the degree to which it is necessary for the claimant's name to be known to the general public as the owner of the business whose goodwill and reputation are threatened by any misrepresentation.

The subjective intentions of the Appellant in this case appear to be innocent. That being said, whether or not it was is purely a peripheral matter, since ultimately the intentions behind the act are irrelevant, although they may still be taken into consideration. Turning to the likelihood of confusion, or deception, as both words can seemingly be used interchangeably in this context; since the Appellant's mark is not identical to that of the Respondent, what must be put into focus is whether it is *too* similar; in other words, whether the similarities between the get-up of the Appellant's goods and that of the Respondent are close enough to confuse or deceive a customer as to the source of the goods they are about to purchase. When deciding whether there is such a likelihood of confusion, Aldous L.J at paragraph 31 of *Thomson Holidays v Norwegian Cruise Line* [2002] IP&T 299 rightly suggests that the court is to adopt the attitude of the average reasonably well informed consumer of the products, who I also add, is

reasonably observant and circumspect. Therefore the question posed before me is the extent of an impact the Appellant's mark is likely to have on objective consumers of the aforementioned characteristics, given the expectations they already have and the amount of attention they will most likely pay. If the impact is that the customer will be deceived as to the source of the goods, then this would amount to a misrepresentation. In this respect, it is fundamental in a claim for passing off, for a simple comparison to be made by placing side by side the mark of the Respondent and that of the Appellant, in order to establish whether there is a likelihood of confusion. The Learned High Court Judge having recited the law failed to give her conscious mind to the physical features in ascertaining whether the get-up of the two products were similar or dissimilar so as to be satisfied that a case of passing off can be made out, other than a cursory reference to what a witness narrated. It is clear to me, that there is no such likelihood of confusion, and further, in applying the objective test adhered to above, the impact on a reasonably well informed consumer of coconut blended arrack will be both low, and unlikely. Looking at the physical characteristics of the labels and bottles of the two parties through a lens of objectivity, and placing ourselves in the shoes of reasonably well informed consumer, it is clear to this Court that looking at the overall characteristics of the two products, they are sufficiently distinct from each other to satisfy ourselves that the likelihood of confusion will be low. I reiterate briefly the distinctions that exist between the products to the naked eye.

i. The labels of the two products slant in opposite directions.
ii. The Appellant's label is one piece covering two thirds of the bottle, whereas the Respondent's label is in two parts with a discernible gap with a discernible shape in the middle.
iii. In the Appellant's label, there is a wide green strip played obliquely at the bottom whereas with the Respondents the strip at the bottom is yellow and much wider
iv. The Appellant's label has the phrase "*Gone free extra strong*" written in red against a yellow background, whereas the Respondent's label does not.

v. The Appellant's label has "අති විශෙෂ" written in large bold lettering at the top of the label whereas the Respondent's label does not.

The next question is the extent to which it is necessary for the Respondent's name to be known to the general public in the context of this claim. Seeing that the product in question is not intrinsically unique, it is logical to infer that one method by which the public is capable of distinguishing between the Respondent's product and those of competitors is with reference to the name of the supplier. If this were the primary means by which the public would differentiate the Respondent's goods, then the scenario would be much simpler; in that the appearance of the goods would be less significant. However, this court is possessed of the fact that the public may, more often than not, distinguish the Respondent's goods by reason of the external appearance of the Respondent's goods. This is buttressed by the oral submissions made by Counsel for the Respondent to the effect that in a number of the wine stores in which both the Respondent's and Appellant's goods are sold, they are displayed on a shelf away and behind a counter from which the customers are served. The salesman then passes the selected purchase to the customer who then proceeds to complete the purchase. It is observed that there is an absence of evidence to establish the likelihood of the customer being given the Appellant's brand under the pretense of it being the Respondent's or that of a customer complaining of being deceived to fall within this limb of passing off.

Turning to the final pre-requisite in an action of passing off, it is for the Respondent to show that the misrepresentation by the Appellant caused damage to his identifiable goodwill, or that damage to the Respondent's goodwill is reasonably foreseeable, in which case the necessary safeguards need to be taken in a preventative form to shelter against the misappropriation of the Appellant's goodwill. The burden in showing this is on the Respondent, and the onus is therefore on them to adduce evidence to such an effect. This Court cannot ignore the fact that there appears to be a paucity of evidence in respect of this.

This court is of the view that there are several ways in which the Respondent may have sought to prove the damage sustained in an action of this nature, which will be briefly expanded on below for the sake of completeness. In this instance, both parties operate in a common field of activity, namely the supply of distilled coconut blended arrack. One type of evidence of damage would be proof of the diversion of sales. This, in the Court's view, may be illustrated by way of evidence to show a drop in sales of the Respondent's goods and a corresponding increase in the sales of the Appellant's goods. This would have gone to show that the Appellant's misrepresentation induced the public to buy the Appellant's products instead of purchasing the Respondent's as they usually would. It appears from the evidence before Court that the Respondent has traversed only part of the distance in establishing damages in this manner. It would appear that the Respondent was relying purely on the increase in the volume of sales of the Appellant's products as evidence of damage. This is observed in the oral evidence given by the Respondent's sole witness during cross-examination; stating that the claim is hinged on the fact that the Appellant has experienced higher sales. I am of the view that this evidence simpliciter is insufficient without more, since an increase in sales of the Appellant's product can be attributed to a whole range of other factors. There needs to be a linkage established by cogent evidence between the increase in sales of the Appellant's goods and the decrease in sales of the Respondent's goods in order to show with reasonable certainty that there has been a drop in the volume of sales of the Respondent's product which is attributable to the Appellant having passed off his goods as those of the Respondent. It would have been, therefore, an indispensable adjunct, to place the sales records of the Respondent for the consideration of the Court. It is the view of this Court that the failure to place such evidence must necessarily place the Respondent at a disadvantage. The public interest consequences in allowing a claim to be based on an assessment of damages structured only on a bare reference to an increase in the sales of competitors would, in my view, be inadequate.

Another head of damage under which the Respondent may have sought to rely on is the possibility of their goodwill being eroded by reason of the Appellant infringing their exclusivity of the association of the name, mark or get-up with the Respondent. Therefore, evidence to show an erosion of the distinctiveness of the Respondent's mark would also have been helpful. Learned President's Counsel for the Respondent, in his oral submissions, strenuously sought to canvas this point in the context of the evidence in the case, which did not lend him the support he would have liked to have had. I reiterate that this Court is of the view that the get up of the Respondent's goods and those of the Appellant are distinct enough on a simple comparison, which makes it clear that an average consumer will not be confused. Alternatively, as was held in the case of *Lego System v Lego M. Lemelstrich* [1983] F.S.R. 155, a properly conducted opinion survey could have been used by the Respondent in this case as evidence that the public is or is likely to get confused between the goods of the Respondent or those of the Appellant due to the alleged similarities in their get-up.

It is therefore clear to this Court that notwithstanding the several avenues that the Respondent could have placed before the Court to establish damage in an action of passing off, the qualitative nature of the evidence that was placed before the Court was inadequate in an action of this nature. The Respondent has couched their claim on the basis of there being a misappropriation, and not a misappropriation by misrepresentation, which is an integral ingredient of passing off. Further, the Respondent's reliance purely on the increase in sales of the Appellant's products, in the eyes of this court, is wholly insufficient. It therefore appears to this Court that the Respondent has failed to adduce adequate evidence to satisfy the third pre-requisite identified by Lord Oliver in the deliberation of the judgment in the *Rekitt* case, and therefore the case of the Respondent fails to satisfy the third criterion adumbrated by Lord Oliver for the claim of passing off to succeed. It must be observed that the underlying rationale in the aforementioned cases were not considered by the Learned High Court Judge

when deciding this case in the Commercial High Court. For the above reasons, this Court holds that the Respondents have not made out a case for passing off against the Appellants to a sufficient standard on a balance of probability.

Turning now to the question of unfair competition, while it is true that the ambit of the protection afforded under the mantle of unfair competition by Section 142 of the Code of Intellectual Property Act No. 52 of 1979 is wider than that of passing off, both actions stem from common principles in intellectual property law. They are bred for the same purpose; to promote healthy market growth and to allow for the limited curtailment of undesirable practices that go to undermine and inhibit such growth. Further it must be noted that unfair competition does not confer exclusive rights, it is designed only to protect parties against the unfair behaviour of competitors in the market.

The Respondent has submitted that the labels and/or bottles used by the Appellant constitute a breach of Section 142 of the Code of Intellectual Property Act No. 52 of 1979, which states, *"any act of competition contrary to honest practices in industrial or commercial matters shall constitute an act of unfair competition."* For the purposes of appreciating the full import of this section it must be broken down into two core components. The first component is that there must be an act of competition; whilst the second component is that such an act is contrary to the honest practices in industrial or commercial matters. In an attempt to shed light on the meaning of "honest practices in industrial or commercial matters", reference is made to the observations of the Supreme Court in *Sumeet Research and Holdings Ltd v Elite Radio and Engineering Co. Ltd* [1997] 2 SLR 393 at 402:

> *"what is meant by 'contrary to honest practices in industrial or commercial matters'? If this includes only conduct contrary to obligations imposed by statute law (criminal or civil) or common law (especially the law of delict), section 142 would seem to be superfluous - because anyway such conduct is prohibited by law. It seems arguable,*

therefore, that section 142 mandates higher standards of conduct - some norms of business ethics - and does not merely restate existing legal obligations. If so, what those standards of conduct are would be a matter for determination by the trial Judge. It is also arguable that the prohibition against unfair competition in section 142(2) must be interpreted not only in the context of protecting intellectual property rights, but also of safeguarding the rights and interests of consumers - by enabling consumers to know what exactly they are getting, without, for instance, being deceived, confused or misled as to the manufacturer, the source, the origin, and the quality of goods or services."

It appears to this Court, therefore, that there are certain overlapping elements between the operation of Section 142 of the Code of Intellectual Property Act No. 52 of 1979 on the one hand, and the tort of passing off on the other. In this respect, the Court in the case of *Hexagon Pvt Ltd. v Australian Broadcasting Commission* (1975) 7 ALR 233 13 expressed the following view:

"... unfair competition' is an extension of the doctrine of passing off, or, possibly, is a new and independent cause of action. It consists of misappropriation of what equitably belongs to a competitor ... in all these cases, English and American, the Court has found an element of fraud or inequitable conduct on the part of the defendant. The very description of the tort "unfair competition" leads one to a conclusion that there must be something underhand or sharp in the conduct of the defendant."

The above quotation touches on the possibility of unfair competition being regarded as its own cause of action. The question before this court today is whether, in the absence of a successful claim for relief, the provisions of Section 142 have a residual capacity; *viz*. whether it can be invoked in situations where the action of passing off fails. This court recognises that in theory, Section 142 of the Code of Intellectual Property Act No. 52 of 1979 is capable of being its own cause of action, for otherwise, its existence would

be unavailing. However, it is clear from the definition and the non-exhaustive list of examples of acts of unfair competition provided in the said Section, that the scope of unfair competition superimposes itself on to other causes of actions, such as passing off, in which case it would seem equally futile to allow relief to be granted under the guise of unfair competition, when such relief would not be available under the pre-existing legal principles governing the law of passing off.

Keeping the above in mind, allusion is made to the first in the list of acts of unfair competition prescribed in Section 142 of the Code of Intellectual Property Act No. 52 of 1979:

> "*All acts of such a nature as to create confusion by any means whatsoever with the establishment, the goods, services or the industrial or commercial actives of a competitor"* [emphasis added]

The inescapably wide ambit of this statement distinguishes itself from the tort of passing off, in that it indicates that the confusion created, need not be in relation to the source of the goods, but can be confusion as to the goods themselves. The difficulty for this Court is that the breadth of this provision needs to be balanced against the commercial interests of healthy and fair competition. The wide parameters in which this definition is couched is not designed for the purpose of this Section being used and manipulated for the commercial benefit of excluding competition and securing monopolistic interests. Therefore, the scope of acts that cause 'confusion' must be carefully considered. It must be noted that copying simpliciter does not prevent freedom of competition. Only when there is undue advantage gained as a result of the act of copying, will a party be entitled to the relief on the premise of unfair competition. It is not designed to protect a parties' market position, nor is it designed to regulate market affairs. It is simply a means of ensuring that there is fairness in the market place. It is therefore the view of this Court upon the reflection of the comparison made above between the physical appearance of the goods of the Appellant and the Respondent, that the Respondents have failed to establish

that the Appellant engaged in unfair trade practices for the purposes of Section 142 of the Code of Intellectual Property Act No. 52 of 1979.

The issues that materialised in this case touch on important chords in the development of Intellectual Property Law in Sri Lanka. This Court feels it pertinent, therefore, to reiterate the sentiments expressed by Professor Cornish in his book, *Intellectual Property: Patents, Copyright, Trade Marks and Allied Rights* (4th ed., 1999) at p. 15, in the following passage:

> "*One of the most fundamental assumptions about a competitive economy has been that once a product enters a market, exactly that type of imitation needs to be present, at least as a potentiality. For no other mechanism will so efficiently secure the welfare of consumers as the prospect of such competition. The intellectual property rights in ideas (patents, copyrights, etc.) exist by way of limited exception in order to encourage the mental effort and productive investment which will procure new products and services. To add to their scope by a right against misappropriation or unfair imitation is to place an amorphous impediment in the way of competition by imitation and that is an inherently controversial step".* [Emphasis added]

Having looked at the entirety of the evidence in this case, and in light of the reasons described above, this Court is of the view that the Respondent does not fall within this limited exception, as it has failed to establish a case against the Appellant under either of the causes of actions identified above, primarily due to the key common denominator in the Respondent's action, *viz*. the unlikelihood of confusion between the goods of the Appellant and Respondent companies in the minds of the consuming public. Further, this Court is strongly of the view that the Respondent is not entitled to use the law as a shield against competitors. In reference to Professor Cornish's statement above, competition of this kind is the best way in which to further the interests of the consuming public. A Court must therefore be slow to interfere with such market competition, for to do otherwise could well result in prejudice to the public interest.

For the reasons set out above, this appeal is allowed. I therefore make order setting aside the Judgment of the Commercial High Court dated 31.08.2010, and dismiss the Plaintiff's action with costs in a sum of Rs. 50,000/-.

CHIEF JUSTICE

EKANAYAKE, J

I agree.

JUDGE OF THE SUPREME COURT

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 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 Application under Chapter LIII of the Civil Procedure Code.

SC.CHC. Appeal No.19/2009

HC (Civil) No. 74/2002 (1)

Adamjee Lukmanjee & Sons Limited,
No. 140, Grandpass Road,
Colombo 14.

Plaintiff

Vs.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant

And

In the matter of an application under Section 839 read with Section 218 and 343 of the Civil Procedure Code.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant-Judgment-Debtor-Petitioner

Vs.

1. Adamjee Lukmanjee & Sons Ltd.
   No. 140, Grandpass Road,
   Colombo 14.

   Plaintiff-Judgment-Creditor-Respondent

2. Hatton National Bank,
   HNB Towers, No. 479,
   T.B. Jayah Mawatha,
   Colombo 10.

   Respondent

And

In the matter of an application under Section 298 and Section 300 of the Civil Procedure Code.

Adamjee Lukmanjee & Sons Limited,
No. 140, Grandpass Road,
Colombo 14.

Plaintiff-Petitioner

Vs.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant-Respondent

And Now

In the matter of an application for Special Leave to Appeal under Article 128(4) of the Constitution read with Section 5(2) of the High Court of the Province (Special Provisions) Act No. 10 0f 1996.

Samarasinghe Arachchige Premasiri,
No. 28/18, Bauddhaloka Mawatha,
Suwarapola,
Piliyandala.

Defendant-Judgment-Debtor-Petitioner-Appellant

Vs.

1. Adamjee Lukmanjee & Sons Ltd,
   No. 140, Grandpass Road,
   Colombo 14.

   Plaintiff-Judgment Creditor-Respondent-Respondent

2. Hatton National Bank
   HNB Towers, No. 479,
   T.B. Jayah Mawatha,
   Colombo 10.

   Respondent-Respondent

*** * * ***

BEFORE : **Eva Wanasundera, PC.J,**

Sisira J De Abrew,J. &

Sarath de Abrew,J.

COUNSEL : Saliya Pieris, with Palitha Yaggahawita for Defendant-Judgment-Debtor-Petitioner-Appellant.

M. Adamaly with J. Abeysundera for Plaintiff-Judgment-Creditor-Respondent-Respondent.

ARGUED ON : **24-06-2014**

WRITTEN SUBMISSIONS FILED ON THE PRELIMINARY OBJECTIONS : By the Defendant-Judgment-Debtor-Petitioner-Appellant on **22-07-2014.**

By the Plaintiff-Judgment-Creditor-Respondent-Respondent **22-07-2014.**

DECIDED ON : **29-09-2014**

*** * * * ***

Wanasundera, PC.J.

This application before the Supreme Court has arisen from an order of the Commercial High Court of Colombo dated 21.08.2008 in case No. HC. Civil 74/2002(1) to the effect that, the land and house bearing premises No. 28/18, Bauddhaloka Mawatha, Suwarapola, Piliyandala which was seized under a Writ of Execution was not the residential premises of the judgment-Debtor as claimed by him and it cannot be released from seizure under the Writ of Execution, in terms of Section 343(1) of the Civil Procedure Code.

The Writ of Execution was issued on 26.03.2003 for the recovery of the decreed sum of about Rs.3.7 million with interest from 30.11.2001 in default of the consent judgment entered between the parties for the judgment-debtor to pay only Rs.1.85 million in monthly instalments on or before 31.07.2004 to the Judgment-Creditor which the Defendant-Judgment-Debtor-Petitioner-Appellant defaulted by not paying a single instalment as agreed.

Leave to Appeal was granted by the Supreme Court on 18.06.2009 against the order dated 21.08.2008. At the same time, by agreement of parties, the 2nd Respondent, Hatton National Bank was discharged from the Supreme Court proceedings and the journal entry of 18.06.2009 reads thereafter, "**written**

submissions to be filed in terms of the Rules. Hearing is fixed for 24.09.2009". In the said order the questions of law were not specified meaning that all the questions of law as enumerated in the petition were allowed.

Written submissions of the Plaintiff-Judgment- Creditor-Respondent-Respondent (hereinafter referred to as the "Respondent") dated 09.09.2009 was filed on 10.09.2009. A motion dated 09.09.2009 was also filed by the Respondent bringing to the notice of Court that written submissions had not been filed at all even by that date, by the Defendant-Judgment-Debtor-Petitioner-Appellant (hereinafter referred to as the "Appellant"), in terms of the rules of the Supreme Court and as such the Respondent moved that any written submissions by the Appellant should be rejected by Court. The date fixed for hearing was 24.09.2009. The Petitioner had not filed written submissions on that date or before that date. In summary, the Petitioner failed to file written submissions on or before the date fixed for hearing, i.e. 24.09.2009.

On 24.09.2009 hearing was refixed for 11.05.2010 as the Supreme Court Bench that day did not have time to hear the case. The Appellant filed written submissions dated 18.11.2009 on 19.11.2009. The case got postponed many times thereafter till the date it was taken up for argument on 24.06.2014 when a preliminary objection was raised by the Respondent with regard to the Appellant's non-compliance of Supreme Court Rules 30 and 34. Oral submissions of Counsel for both parties were heard and written submissions on this preliminary objection have been tendered to Court.

The Respondent who raised the preliminary objection submitted that,

(a) the Appellant ought to have filed written submissions within 06 weeks from 18.06.2009, ie. on or before 30.07.2009 which he failed to do.

(b) the Appellant had failed up to date to furnish certified copies of documents X1 to X7 in terms of the Supreme Court Rules which he had pleaded in the Petition and undertaken to be filed and this act is further evidence of the failure to prosecute diligently and,

(c) the Appellant's appeal should be dismissed for failure to prosecute diligently disregarding the Supreme Court Rules.

The Appellant objecting to the preliminary objection submitted that,

(a) the present Appeal is not one which is covered by the Supreme Court Rules which deal with Special Leave to Appeal and Leave to Appeal applications from the Court of Appeal (such Court acting as an Appellate Court),

(b) the present Appeal is an Appeal as per the Leave to Appeal procedure found in the Civil Procedure Code when in the course of proceedings an original civil court makes a certain order and

(c) in terms of the latest decisions of the Supreme Court, when written submissions have been filed by the date of the argument and no prejudice has been caused to a party, the failure to file written submissions on the due date is not a ground for rejecting the entire Appeal.

In deciding on this preliminary issue, I would like to firstly consider the first objection taken up by the Appellant to the effect that Supreme Court Rules do not apply to Appeals from the Commercial High Court being an original Court from which the appeal has reached the Supreme Court.

Section 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 provides that **"Every appeal to the Supreme Court and every application 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)"**. It could be understood that the procedure in making an Appeal to the Supreme Court, which means the time limits within which the Appeal or the application for leave should be filed should be in compliance with the provisions in the Civil Procedure Code. The Act No. 10 of 1996, does not intend to do anything touching the Supreme Court Procedure with

regard to hearing of the Appeal. It only provides for procedure from the commencement, i.e. the filing of actions in the High Court to the point it leaves the High Court. An Act of Parliament has to be interpreted within the four corners of the Act. When Act No. 10 of 1996 was enacted, there could not have been any intention in the law-maker's mind to regulate the procedure once the case 'steps out the High Court'. I cannot agree with the contention of the Appellant that when a High Court decision is appealed on, that written submissions need not be filed in the Supreme Court. The moment any case enters the arena of the powers given to the Supreme Court from any forum, whether it is from an original Court or a Court of Appeal, it comes under the wing of the Supreme Court. That is the very basic reason behind the Supreme Court Rules. Regulating the manner in which the Supreme Court hears the case is done by the SC. Rules and no Act of Parliament could ever have intended to have a bearing as to how cases should be heard and the procedure that should be adopted in the Supreme Court. It does not make sense when one tries to differentiate between cases coming to the Supreme Court from another Appellate Court or another original Court. Before reaching the threshold of getting the Supreme Court to hear the case, permission has to be received whether it is a fit matter to be heard by the Supreme Court or not. That is the 'leave' stage. Once leave is granted the case enters the Supreme Court. Once entry is granted, the Rules to be applied cannot be any rules other than the Supreme Court Rules. The argument of the Appellant is untenable.

Secondly I consider the second objection taken up by the Appellant to the effect that the Supreme Court Rules as considered in the latest judgments are in favour of the Appellant in this case. In the instant case, leave was granted and I consider that the Appellant got entry to the Supreme Court to get his case heard on the merits, of course. Then comes the procedure which should be followed if anyone needs to get the Supreme Court to hear the case on its merits.

Rule 34 reads:-

> *"Where an appellant, or a petitioner who has obtained leave to appeal, fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal or application, the Court may, on an application in that behalf by a respondent, or of its own motion, on such notice to the parties as it shall think reasonable in the circumstances, declare the appeal or application to stand dismissed for non-prosecution, and the costs of the appeal or application and any security entered into by the appellant shall be dealt with in such* manner as the Court may think fit."

Rule 30(1) reads:-

> *"No party to an appeal shall be entitled to be heard, unless he has previously lodged five copies of his written submissions (hereinafter referred to as "submissions", complying with the provisions of this rule."*

Rule 30(6) reads:-

> *"The appellant shall within six weeks of the grant of special leave to appeal, or leave to appeal, as the case may be lodge his submissions at the Registry and shall forthwith give notice thereof to each respondent by serving on him a copy of such submissions."*

It is obvious that the Appellant has de facto failed to comply with the Rules of the Supreme Court. Yet he contends that the latest judgments are in his favour and thereafter even though filed late, his written submissions be accepted and the case should be heard on the merits.

The recent relevant judgments are ***A.C. Muthappan Chettiar Vs. M.R. Karunanayake and another*** SC. Appeal 69/2003 - reported in BALJ (2005) Vol. X1), ***Tissa Attanayake Vs. Commissioner General of Elections and 27 others*** (SC. Spl, LA. No. 55/2011.- SC. Minutes of 21.07.2011), ***Ananda Dharmasinghe Bandara and Another Vs. Herath Mudiyanselage Leelawathie Menike and Another*** (SC. Appeal 172/2011- SC. minutes of 22.01.2014) and ***Elias Vs.Gajasinghe & another*** (SC. Appeal 50/2008- SC. minutes of

28.06.2011), and ***Fernando Vs. Fernando*** (SC. Appeal 81/2009- SC. Minutes of 30.04.2010).

In the case of ***Muthappan Chettiar Vs. M.R. Karunanayake and another*** (supra), the then Chief Justice Dr. S. Bandaranayake, discussed the applicability of Rule 34 of the Supreme Court Rules of 1990 as follows:-

> "Although the appeal shall not be dismissed for the non-compliance of Rule 30(1) and the effect of such non-compliance would be the non-entitlement to be heard, such non-compliance would attract Rule 34 which clearly states that, an appellant who fails to show due diligence in taking all necessary steps for the purpose of prosecuting the appeal, the Court would declare the appeal to stand dismissed for non-prosecution".

It was further held that,

> "**Rule 30 of the Supreme Court Rules of 1990 deals with the written submissions that has to be filed prior to the date of the hearing.** Both Rules 30(1) and 30(6) refer to the filing of the written submissions regarding an appeal. Whilst Rule 30(1) refers to the need for filing of such submissions, Rule 30(6) clearly specifies the time period given for the filing of the said written submissions. A careful reading of both Rules indicates that the provisions stated in them are **mandatory**"….
>
> "In terms of these two rules, it is **necessary** for the Appellant to file five copies of his written submissions in the Registry and **this has to be carried within six weeks** of the grant of special leave or leave to appeal by this Court. **Also it is necessary that the appellant must take steps to give notice to each respondent of the lodging at the Registry of such submissions by serving on them a copy of his written submissions.** *Therefore the cumulative effect of Rules 30 (1) and Rules 30(6) would be that the Appellant* ***should*** *file five copies of his written submissions within six weeks of the grant of special leave or leave to*

appeal as the case may be, and a copy of such submissions has to be served to the respondent/s notifying of the said submissions."

In the instant case, the Appellant could have moved this Court for further time by way of a motion or by way of an oral request when the case came up before Court or explained why the written submissions were delayed so that this Court could have used its discretion and granted time. Even when written submissions was filed after the due time, the Appellant did neither give any reason for the delay nor mentioned that the written submissions be accepted by Court even though delayed.

In the aforementioned case of ***Muthappan Chettiar Vs. M.R. Karunanayake and another***, Chief Justice Dr. Bandaranayake observed,

> "**The appellant could have moved this Court stating valid and acceptable reasons and sought the leave of the court for further time** to furnish written submissions. However, it is to be borne in mind that the appellant had not sought to exercise the discretion of this Court, **but also had not given any valid reason even belatedly for this Court to consider using its discretion** ".

The rules are in place so that the Supreme Court would function smoothly. This aspect, if totally disregarded would lead to chaos in hearing the cases before the Supreme Court. In ***Tissa Attanayake Vs. Commissioner General of Elections and 27 others*** (supra) case, it was observed that,

> "The Supreme Court Procedure laid down by way of Supreme Court Rules made under and in terms of the provisions of the Constitution **cannot be easily disregarded as they have been made for the purpose of ensuring the smooth functioning of the legal machinery of this Court**"…. .
>
> "Through a long line of cases decided by this Court, a clear principle has been enumerated that 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 a serious erosion of well established Court procedure followed by our Courts throughout several decades.**"

Again, in the case of ***Fernando Vs. Sybil Fernando and others*** 1997 3 SLR 1, Justice Dr. A.R.B. Amarasinghe observed "Judges do not blindly devote themselves to procedures or ruthlessly sacrifice litigants to technicalities, although parties on the road to justice may choose to act recklessly".

In ***Ananda Dharmasinghe Bandara and Another Vs. Herath Mudiyanselage Leelawathie Menike and Another*** (supra) case, this Court over-ruled the preliminary objection of non-compliance with the SC. Rules distinguishing the facts of the case from those in Muthappan Chettiar case. Writing the judgment in Bandara's case, Justice Eva Wanasundera,PC observed that ,

"In this case 6 weeks from 28.10.2011 falls on 09.12.2011 and 12 weeks from 28.10.2011 falls on 13.01.2012. ***The Respondents have in fact filed their written submissions on 16.01.2012, i.e. three days after 13.01.2012.*** *The Appellant has filed his written submissions on 17.01.2012.* ***At the time of granting leave, this Court had fixed the date of hearing of this matter as 26.03.2012. Therefore, written submissions of both parties in fact were filed in Court before the date of hearing.****"*

"In **Annamalai Chettiar Muthappan Chettiar Vs. Mangala Karunanayake and another** SC. Appeal No. 69/2003 - SC Minutes of 06.06.2005, the Appellant had not filed written submissions for 1 year and 4 months after Court granted Special Leave to Appeal on 24.09.2003. **Even when the appeal was taken up for hearing on 17.02.2005, there was no written submissions of the Appellant on record. It was an obvious case on "not prosecuting diligently""**.

> "In the present case, the Appellants did not file the written submissions within 6 weeks according to SC. Rules but filed at the end of 12 weeks begging Court to accept the written submissions mentioning that the delay was due to inadvertence on the part of the Lawyers appearing for the Appellants. The explanation given for the delay is 'inadvertence' of the Lawyer. The meaning of 'inadvertence' according to the Blacks Law Dictionary is, "an accidental oversight" which could be construed as 'an oversight not having occurred as a result of anyone's purposeful act'. The Lawyers have apologetically accepted inadvertence on their part on behalf of the Appellants, in the motion with which the written submissions were submitted. The first date of hearing of the appeal fell on 26.03.2012 and the Appellants filed their written submissions on 17.01.2012 which was more than 2 months prior to the date of hearing. In the instant case, the Respondents are not prejudiced by the Appellant's non-compliance with Rule 30(6) of the SC. Rules, because of the written submissions of the Appellant was filed before Court two months prior to the date of hearing".

In the instant case, from the day that leave was granted and Court ordered that written submissions be filed in terms of the rules, the Appellant knew that he had to file written submissions according to the rules within 06 weeks. That was an order of Court. If he wanted more time he could have filed a motion and got more time at the discretion of Court. He failed to do so. Then at the end of 12 weeks the Respondent filed his written submissions and brought to the notice of Court that the Appellant had not filed the written submissions. Even at that time the Appellant did not give his mind to his failure and did not do anything about it. By the first date of hearing which was 24.09.2009 the written submissions of the Appellant was not before Court nor had he asked for an extension of time to do the same. In fact the Appellant was not ready with the submissions in place for the argument to be taken up on that day. He ran the peril of not being heard by the Supreme Court on 24.09.2009. It may be that he being under the impression that written submission was not necessary to be filed as it was, according to his line of arguments, that he was not bound by the SC. Rules but bound only by

the High Court (Special Provisions) Act No. 10 of 1996 where there is nothing mentioned anything regarding written submissions. He had hardly recognized that he was not complying with an order of Court to file written submissions according to the Rules of the Supreme Court. Having got leave, having come before the Supreme Court, the orders of Court should be complied with, and priviledges should be asked for and received from Court to the benefit of the parties. This Court would have never refused any reasonable request.

In addition to not having filed written submissions according to rules, at the beginning of the case, the Appellant has pleaded in paragraph 13 of the Petition and in paragraph 15 of the Affidavit that he will submit to Court certified copies of documents X1 to X7 which he has failed to do up to date. This fact also adds to due diligence not being taken to prosecute the case. He has not cared for any proper prosecution of his case. Now he cannot be heard to say that no prejudice was caused by not having tendered certified copies of documents. I hold that he has not prosecuted his case properly.

In the circumstances, I uphold the preliminary objection that the Appellant has failed to prosecute the case diligently under the Supreme Court Rules, 1990 and as such I dismiss the appeal. I order no costs.

Judge of the Supreme Court

Sisira J De Abrew,J.

I agree.

Judge of the Supreme Court

Sarath de Abrew,J.

I agree.

Judge of the Supreme Court

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

Gamini Ranasinghe,
No. 27, Kandawala Road,
Ratmalana.

PLAINTIFF - APPELLANT

-Vs-

SC (CHC) Appeal No. 29/2003
HC (Civil) Case No. 154/96(1)

Commercial Bank of Ceylon Limited,
No. 21, Bristol Street,
Colombo 01.

DEFENDANT - RESPONDENT

BEFORE	**:**	Hon. Saleem Marsoof, P.C. J, Hon. Priyasath Dep, P.C. J, and Hon. Rohini Marasinghe, J.
COUNSEL	**:**	G. Alagaratnam, P.C. with Suren Fernando and Mrs. M.A.S.J. Nayeem for Plaintiff-Appellant. S.A. Parathalingam, P.C. with N. Parathalingam for Defendant-Respondent**.**
Argued On	**:**	03.10.2013
Written Submissions On	**:**	23. 09.2013 (Defendant-Respondent) 31.10.2013 (Plaintiff-Appellant)
Decided On	**:**	17.12.2014

SALEEM MARSOOF, P.C. J,

This is an appeal filed in terms of Section 6 of the High Court of the Provinces (Special Provisions) Act No 10 of 1996, against the judgment of the High Court of the Western Province exercising commercial jurisdiction (hereinafter referred to as "the Commercial High Court") holden in Colombo dated 3rd October 2003. By the said judgment, the Commercial High Court dismissed the action filed by the Plaintiff-Appellant (hereinafter referred to as "the Appellant") against the Defendant-Respondent (hereinafter referred to as "the Respondent") seeking certain declarations regarding the alleged right of the Respondent to debit the Resident Foreign Currency Account bearing No. 9495285501 held by the Appellant in the Respondent Bank, a permanent injunction to restrain the said Respondent from debiting the said account and an order directing the Respondent bank to release the moneys that were deposited by the Appellant in the said account to him or his order.

Though the Appellant has in his petition of appeal based his appeal on several grounds, at the hearing of this appeal, the learned President's Counsel for the Appellant confined his submissions to two issues, namely, (a) the alleged discrepancies in the shipping documents presented to the Respondent bank for negotiation and (b) the alleged delay in presenting the said documents for negotiation. At the request of Court, the learned President's Counsel also made submissions on the question of the burden of proof. Before considering the submissions of the learned President's Counsel for the Appellant and the Respondent with respect to the aforesaid matters in detail, it will be useful to set out briefly the material factual circumstances that give rise to this appeal.

The Factual Matrix

Acting on behalf of his business, Malindu Timber Stores, a sole proprietorship, the Appellant placed an order on or about 8th June 1993 with Zenith Corporation SDN Berhad of Kuala Lumpur, Malaysia, for the purchase of certain quantities of sawn timber of mixed hard wood (100% tualang) in assorted sizes to the value of Singapore $161,245.11, and received a Proforma Invoice bearing No. 001/PRO/01/93 dated 8th June 1993 for the said amount. Thereafter, on the instructions of the Appellant, the Respondent Bank opened a Letter of Credit bearing No. 06/9305362 (P1A) for the said amount of Singapore $ 161,245.00 in favour of the said Zenith Corporation SDN Berhad.

It is important to note that for the purpose of persuading the Respondent Bank to open the aforesaid letter of credit, the Appellant issued a letter of set-off dated 10th June 1993 (V2). By the said letter of set-off, the Appellant consented, *inter alia* to the setting off by the Respondent Bank of all monies that may become due in connection with the opening of the said letter of credit and other banking charges against all monies lying to the credit of the Appellant in any current, fixed deposit, savings or other accounts including the funds available in a Resident Foreign Currency (RFC) Singapore Dollar Savings Account bearing No. 9495285501, which was opened by the Appellant on or about 31st May 1993 with an initial deposit of Singapore Dollars 132,247.44.

On the basis of an arrangement that had been agreed upon by all the relevant parties, the timber was eventually shipped by Shri Arvind Timber Sdn Bhd of Kuala Lumpur, Malaysia, which is a sister company of Zenith Corporation SDN Berhad, and which had been substituted as the beneficiary to the aforesaid Letter of credit with the knowledge and consent of the Appellant. The relevant shipping documents were presented to the Respondent Bank for negotiation in September 1993, and the Respondent accepted the said documents and made payment on the said Letter of Credit to the value of Singapore Dollars 161,245.00. Upon making payment on the aforesaid Letter of Credit, the Respondent, acting on the said letter of set-off dated 10th June 1993, purported to debit accounts of the Appellant in the Respondent Bank including the said RFC Singapore Dollar Savings Account No. 9495285501 with the amount purportedly paid by the Bank to honour the said letter of credit, and banking charges.

According to the Appellant, he had by his fax dated 25th August 1993 (P4) warned the Respondent Bank of certain "special conditions" relating to quantity and sizes of timber, and insisted that the proforma invoice and the certificate of inspection issued by the Malaysian Timber Board should be thoroughly checked before releasing payment on the letter of credit. It is the position of the Appellant

that no sooner he learnt that despite the fact that the quantity of timber ordered by him was wroth Rs. 5 million, only 5 containers consisting of 256 metric tons in 154 bundles worth Rs. 1 million had been shipped, he instructed the Respondent Bank by fax dated 14th September 1993 (P5) to reject the said documents.

It is evident that the Appellant visited the Respondent Bank on 14th September 1993 with a view of obtaining copies of the shipping documents, but got copies of the relevant bill of lading, commercial invoice, certificate of insurance and the certificate of the Malaysian Timber Industry Board only the following day. On 15th September 1993, he requested the Respondent Bank not to make payments upon the said Letter of credit until the Appellant checked all the relevant documents. Thereafter, having checked the said documents, the appellant instructed the Respondent by letter dated 16th September 1993 (P10) to reject the said documents and not to make any payment on the said Letter of credit because *inter alia "*the description of the goods in the Bill of lading differs from the Letter of credit as well as the Invoice".

The Respondent Bank, by its letters dated 17th September 1993 (P13) and 22nd September 1993 (P14) addressed to the Appellant, denied that there was any discrepancy in the documents that would justify the rejection of the documents, and went on to honour and make payment on the letter of credit. However, the Appellant, who has consistently taken up the position that the shipping documents did not comply with the instructions in the Letter of Credit, by his letter dated 13th October 1993(P16) addressed to the Respondent Bank, adverted to 5 discrepancies in the shipping documents, and contended that:-

(1) In terms of the said Letter of credit, the bill of lading should have been made out to order and endorsed to the Respondent Bank, instead of which the bill of lading was made directly to the order of the Bank;

(2) The goods described in the bill of lading differs from that of the said letter of credit.

(3) The said Letter of credit requires the insurance amount to be specified which condition has not been complied with in the Certificate of Insurance.

(4) Although the dated in the Certificate of Insurance has been altered, it has not been counter-signed by the authorized signatory; and

(5) The documents were not presented within the stipulated time in accordance with the stipulations in the said L/C.

The Trial and the decision of the Commercial High Court

The action instituted by the Appellant in the Commercial High Court was taken up for trial on the 23rd July 1997 on 22 issues raised on behalf of the Appellant of which issues 8,9 and 10, which are important for this appeal are reproduced below:-

8) As set out in paras. 13 & 14 of the Plaint, did the Plaintiff inform the Defendant of discrepancies in the documents and request the Defendant to reject the documents and not pay on the Letter of credit No. 06/9305362?

9) Nevertheless, did the Defendant pay the beneficiary on the said Letter of Credit No. 06/9305362?

10) If so, was such payment in violation of the Defendants duties and/or the provisions of the UCP?

The Respondent Bank raised 16 issues of which issue 25 was substantial, and is reproduced below:-

> "25) Are the alleged discrepancies set out in X16 (letter dated 13th October 1993 marked in evidence at the trial as P16), not discrepancies within the meaning of the Uniform Customs & Practices for Documentary Credits (ICC No. 400)?"

The Appellant testified on his own behalf and also called in evidence Mallika Senanayake, Investigator in the Bank Supervision Department of the Central Bank, Punchi Nilame Balasuriya, Senior Investigator in the Bank Supervision Department of the Central Bank and Patrick Valentine Kalendra Alahakoon, Deputy Controller of Exchange, gave evidence for the appellant, and the Appellant closed his case marking in evidence documents P1 to P18. The Respondent Bank did not lead evidence at the trial, except for marking documents V1-V3 in cross-examination.

In his impugned judgment dated 3rd October 2003, the learned Judge of the Commercial High Court has observed that the evidence of the 3 witnesses called on behalf of the Appellant is irrelevant to the matters in issue as "any decision of the Central Bank is not relevant to this case". He has also adverted to alleged discrepancies (1), (3) and (4) referred to by the Appellant in his letter dated 13th October 1993 ("P16"), were not pursued by the Appellant at the trial and accordingly, restricted his decision to alleged discrepancies (2) and (5).

In regard to the second discrepancy, which is that the goods described in the Bill of lading differs from that of the said Letter of credit, the Learned Judge concluded that there was "no discrepancy at all between the Bill of Lading and the Letter of Credit". With regard to the fifth discrepancy, which is that the documents were not presented within the stipulated time according to the stipulations in the Letter of credit, the learned Judge has held that that the appellant "has failed to prove that the documents were not forwarded on time".

On this basis, the learned Judge concluded that "the plaintiff has failed to prove that the defendant bank has made payments on the said Letter of Credit wrongfully". Moreover, relying on the case of *Indica Traders (Pvt) Ltd v Seoul Lanka Construction (Pvt) Ltd et al* [1994] 3 Sri LR 392, the learned Judge has concluded that "an irrevoceable Letter of Credit is an absolute undertaking by the bank to pay, and must pay according to the terms of the Letter of Credit, unless it has notice of clear fraud committed by the beneficiary. In the instant case, the plaintiff has failed to establish any fraud on the part of the beneficiary".

Submissions of Counsel at the Hearing of this Appeal

At the hearing of this appeal, learned President's Counsel for the Appellant argued that in terms of the Letter of credit, documents must be presented for negotiation within 16 days after shipment, and as this had not been complied with, the Respondent Bank was duty bound in terms of UCP 400 to reject the said documents. He further argued that in any event, there were serious discrepancies between the Letter of Credit and the Bill of Lading and the Respondent Bank could not have made payment on the Letter of Credit. Accordingly, the set-off of money allegedly due in respect of the said Letter of Credit from the Appellants accounts was wrongful and unlawful. Learned President's Counsel also stressed that the learned trial Judge has misinterpreted and misapplied the case of *Indica Traders (Pvt.) Ltd v Seoul Lanka Construction (Pvt.) Ltd, supra*.

Learned President's Counsel for the Respondent Bank submitted that it duly and properly paid the monies on the Letter of Credit as it was obliged as banker to do. The Respondent states that the Appellant was required to place funds in the bank with a letters of set off and indemnity as a condition for the bank to open the letter of credit and that the Respondent gave such letters of set off and indemnity, authority and indemnity *vide* documents A4a and A4b in the answer. Adverting to the decision of this Court in *Indica Traders (Pvt.) Ltd v Seoul Lanka Construction (Pvt.) Ltd, supra,* learned President's Counsel submitted that the learned trial Judge has correctly interpreted and applied the decision.

The main question that arises for decision in this appeal is whether the Respondent Bank had wrongfully made payments upon the said Letter of Credit and thereafter wrongfully set-off the amount paid on the said Letter of Credit from the funds in the Appellants RFC Account No. 9495285501. It is relevant to note that in the course of the testimony of the Appellant, he has admitted that he would not press the discrepancies listed in his letter addressed to the Respondent dated 13th October 1993 (P16) as items (1), (3) and (4), which left the Trial Judge as well as well as this Court to decide only on discrepancies (2) and (5), which related respectively to the discrepancy in describing the goods in the Letter of Credit and the question whether the presentation of the documents had been made to the Respondent Bank out of time.

Discrepancy in the Description of the Goods

With respect to the alleged discrepancy in the description of the goods shipped, the issue that arises is to what extent the principle of strict compliance may be applied in the circumstances of this case. It is noteworthy that documents relating to the underlying contract between the Appellant and the Malaysian supplier including the Proforma Invoice bearing No. 001/PRO/01/93 dated 08.06.1993 had not been put in evidence in this case. However, it appears from the Letter of Credit marked P1A and the contract of Marine Insurance marked P6 that the goods alleged to have been shipped to the Appellant was described as follows:-

Description of goods

MIXED HARDWOOD [100 PER CENT TUALANG] STANDARD AND BETTER GRADE,
2 INCHES X 4 INCHES TO 1 1/4 INCHES X 12 INCHES
C.I.F COLOMBO

However, in the Bill of Lading marked P7 the goods were described in the following manner:-

Description of goods

154 BDLS	MIXED HARDWOOD [100 PER CENT TUALANG] STANDARD AND BETTER GRADE, 2 INCHES X 4 INCHES TO 1 1/4 INCHES 12 INCHES C.I.F COLOMBO

Learned Presidents Counsel for the Appellant has contended forcefully that the absence of a multiplication mark (x) between "4 INCHES TO 1 1/4 INCHES" and "12 INCHES" in the bill of lading constitutes a material discrepancy which should have resulted in the documents being rejected by the Respondent Bank on the basis of non-conformity of documents. However, Learned Presidents Counsel for the Respondent has contended with great vigour that the absence of a multiplication mark (x) in the circumstances of this case does not give rise to a material discrepancy to justify the rejection of the goods.

It was admitted at the commencement of the trial that the Letter of Credit is governed by UCP 400. Article 15 of the UCP 400 states as follows:-

> "Article 15: Banks must examine all documents with reasonable care to ascertain that they appear on their face to be in accordance with the terms and conditions of the credit. Documents which appear on their face to be inconsistent with one another will be considered as not appearing on their face to be in accordance with the terms and conditions of the credit."

Admittedly, the description of the goods in the Letter of Credit marked P1a differs from the description of the goods in the Bill of Lading marked P7. The question is whether the absence of a multiplication mark (x) between 1 ¼ inches and 12 inches, and the fact that '12 inches' appears on the line below '2 inches x 4 inches to 1 ¼ inches' is sufficiently material to justify this Court applying the doctrine of strict compliance in the circumstances of this case.

The Negotiation of Documents

In any transaction involving a Letter of credit, the terms of the Letter of credit relating to the negotiation of documents become crucial. Before considering the terms of negotiation embodied in the Letter of credit marked P1A, it might be useful to refer to the following *dictum* of Lord Diplock in the decision of the House of Lords in *United City Merchants* v *Royal Bank of Canada* [1982] 2 WLR 1039:-

> "It is trite law that there are four autonomous though interconnected contractual relationships involved:-
>
> (1) the underlying contract for the sale of goods, to which the only parties are the buyer and the seller;

(2) the contract between the buyer and the issuing bank under which the latter agrees to issue the credit and either itself or through a confirming bank to notify the credit to the seller and to make payments to or to the order of the seller (or to pay, accept or negotiate bills of exchange drawn by the seller) against presentation of stipulated documents; and the buyer agrees to reimburse the issuing bank for payments made under the credit. For such reimbursements the stipulated documents, if they included a document of title such as a bill of lading, constitute a security available to the issuing bank;

(3) if payment is to be made through a confirming bank, the contract between the issuing bank and the confirming bank authorising and requiring the latter to make such payments and to remit the stipulated documents to the issuing bank when they are received, the issuing bank in turn agreeing to reimburse the confirming bank for payments made under the credit;

(4) the contract between the confirming bank and the seller under which the confirming bank undertakes to pay to the seller (or to accept or negotiate without recourse to drawer bills of exchange drawn by him) up to the amount of the credit against presentation of the stipulated documents."

The dispute between the Appellant and the Respondent arises from the contractual relationship which is adverted to by Lord Diplock in paragraph (2) of the above quoted *dictum* where the Appellant as the buyer has agreed to reimburse the Respondent as the issuing bank, for payment made under the credit against presentation of stipulated documents. The material stipulations in the Letter of credit marked P1A are noted below:-

"DOCUMENTS REQUIRED:-

1. MANUALLY SIGNED INVOICES QUADDUPLICATE - ORIGINAL INVOICE AND A COPY TO ACCOMPANY ORIGINAL SET OUT DOCUMENTS.
2. BENEFICIARIES DRAFTS AT SIGHT IN DUPLICATE DRAWN ON THE APPLICANTS.
3. FULL SET OF NOT LESS THAN TWO CLEAN ON-BOARD OCEAN BILLS OF LADING MARKED "FRIEGHT PAID" AND MADE OUT TO ORDER AND ENDORSED TO OUR ORDER, SHOWING NAME AND ADDRESS OF APPLICANT AS NOTIFYING PARTY. SHORT FORM BILLS OF LADING ARE NOT ACCEPTABLE.
4. TWO COPIES ON NON NEGOTIABLE BILLS OF LADING [ONE COPY TO ACCOMPANY ORIGINAL DOCUMENTS].
5. INSURANCE POLICIES OR CERTIFICATES IN DUPLICATE ENDORSED IN BLANK COVERTING MARINE INSTITUTE CARGO CLAUSES "A" [1.1.82], INSTITUTE STRIKE CLAUSES CARGO [1.1.82], INSTITUTE WAR CLAUSES CARGO [1.1.82] FOR CIF INVOICE VALUE PLUS TEN PER CENT. INSURANCE TO COVER FROM BENEFICIARY'S WAREHOUSE TO CONSIGNEE'S WAREHOUSE.

ADDITIONAL DOCUMENTS [as amended by P3];

1. CERTIFICATE FROM THE MALAYSIAN TIMBER INDUSTRY BOARD CERTIFYING THAT THE SHIPMENT IS IN ACCORDANCE WITH PRO FORMA NO.001/PRO/01/93 OF 08/06/1993."

Doctrine of Strict Compliance

The doctrine of strict compliance requires that tendered documents must strictly comply with the terms of the credit. Sealy and Hooley, *Commercial Law - Text, Cases and Materials*, (3rd Edition, London: LexisNexis Butterworths, 2003) at page 827-828 explains that the doctrine of strict compliance may be justified on the following grounds:-

> "First, the banks involved in checking the documents can only be expected to be familiar with banking practices and not the commercial practices and terminology of the parties to the underlying contract which may be reflected in terms of the credit itself. The bank cannot take the responsibility to decide which documents fulfill the underlying commercial purpose of the parties and which do not. Secondly, the banks act (at least in part) as agents of the applicant and must remain within the terms of their principal's mandate to be sure of reimbursement. In summary, for the protection of the issuing (or confirming) bank and the applicant, the bank is only obliged to pay against strictly conforming documents, and it is only entitled to reimbursement if the terms of the credit have been strictly complied with."

In the case of Viscount Sumner in *Equitable Trust Co of New York v Dawson Partners Ltd* (1927) 27 Lloyd's Law Rep 49, the credit called for payment against certain documents including:-

> "… a certificate of quality to be issued by experts".

The seller tendered a certificate of quality issued by a single expert. The seller was paid. When the issuing bank tendered the certificate to the buyers, they refused to pay on grounds of non-compliance with the credit. The House of Lords ruled in favour of the buyers stating, at page 52 that:-

> "There is no room for documents which are almost the same, or which will do just as well. Business could not proceed securely on any other lines. The bank's branch abroad, which knows nothing officially of the details of the transaction thus financed, cannot take upon itself to decide what will do well enough and what will not. If it does as it is told, it is safe; if it declines to do anything else, it is safe; if it departs from the conditions laid down, it acts at its own risk."

Similarly, in the case of *Moralice (London) Ltd v ED and F Man* [1954] 2 Lloyd's Law Rep 526, the seller tendered documents to the bank showing shipment of 499.7 metric tons of sugar. The credit called for documents showing shipment of 500 metric tons. The Court held that the bank was entitled to reject the documents. Similarly, in the case of *Beyene v Irving Trust Co Ltd* (1985) 762 Fed Rep 2d 4, United States Court of Appeal for the Second Circuit held the bank entitled to reject a bill of lading which described the notify party as 'Mohammed Soran' when the credit required 'Mohammed Sofan'. The Court Observed that:-

> "First, this is not a case where the name intended is unmistakably clear despite what is obviously a typographical error, as might be the case if, for example, "Smith" were misspelled "Smithh." Nor have appellants claimed that in the Middle East "Soran" would obviously be recognized as an inadvertent misspelling of the surname "Sofan." Second, "Sofan" was not a

> name that was inconsequential to the document, for Sofan was the person to whom the shipper was to give notice of the arrival of the goods, and the misspelling of his name could well have resulted in his non-receipt of the goods and his justifiable refusal to reimburse Irving for the credit."

The wording of the credit is of paramount importance. Even an apparently trivial discrepancy will justify rejection of the documents if the credit is specific as to that requirement. Hence, in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1993] 1 Lloyd's Rep 236, a confirmed irrevocable credit stipulated that all documents presented to the bank should bear the letter of credit number and the buyer's name. The seller presented documents to the advising bank and claimed payment. The advising bank refused to pay on the basis that one of the documents did not carry the letter of credit number and the buyer's name. The Court of Appeal refused to inquire as to the reason for this requirement, but held that the Court cannot ignore it. In the course of his judgment at page 240, Lloyd J observed:-

> "I cannot regard as trivial something which, whatever may be the reason, the credit specifically requires. I would not, I think, help to attempt to define the sort of discrepancy which can properly be regarded as trivial. But one might take, by way of example, *Bankers Trust Co v state Bank of India* [1991] 2 Lloyd's Rep 443, where one of the documents gave the buyer's telex number as 931310 instead of 981310. The discrepancy in the present case is not of that order."

However, the decision of the Court of Appeal was later reversed by the House of Lords on some other procedural ground, and after protracted litigation, the question of the discrepancy along with the issue as to the mode of communication of a rejection of documents, came up before Tucker J. in the Commercial Court, and on appeal from the decision of that Court in *Seaconsar Far East Ltd v Bank Markazi Jomhouri Islami Iran* [1999] 1 Lloyd's Rep 36, the Court Appeal arrived at the same conclusion with respect to the discrepancy, with Sir Christopher Staughton making the following observation at page 38 of his judgment:-

> "We would add that the discrepancies in the documents do not appear to be of any great significance. But that is neither here nor there. It is hornbook law for bankers that the documents must appear on their face to be precisely in accordance with the terms of the credit."

Of course, it is acknowledged that, as argued by the Respondent Bank, courts are willing to overlook a trivial defect in the tendered documents when there is a patent typographical error, or other obvious slip or omission. In *Hing Yip Hing Fat Co Ltd v Daiwa Bank Ltd* [1991] 2 HKLR 35 the Supreme Court of Hong Kong held that there had been a patent typographical error, and no discrepancy, when a document tendered to the issuing bank by the beneficiary gave the name of the applicant for the credit as 'Cheergoal Industrial Limited', when it should have been 'Cheergoal Industries Limited'. It is clear from this decision that the requirement of strict compliance is "not equivalent to a test of exact literal compliance in all circumstances and as regards all documents" (*Kredietbank Antwerp v Midland Bank plc* [1999] 1 All ER (Comm) 801) and the strict compliance rule cannot be applied in a mechanical or robotic way. How far a court can move from the strict compliance rule will depend on the precise

wording of the credit, whether a discrepancy is patently a typographical error or other obvious slip or omission and the consequentiality of the relevant discrepancy, such as, whether the discrepancy is inconsequential in nature and relates to a less important aspect of the document, eg: the buyers telex number, or whether the discrepancy relates to the goods themselves.

Prof. Lakshman Marasinghe, considers in his work *Principles of International Trade Law* (3rd Edition, 2013) at page 527 as to where the line can be drawn between a trivial discrepancy and one which is substantial, and makes the following pertinent observation:-

> "Whether a discrepancy is trivial or substantial is indeed a question of fact. There is an abundance of judicial pronouncements distinguishing those two extremes. A thin line that runs through those decisions is that where the discrepancy found in the documents *were to affect core elements of the contract* for which the credit was established, then such discrepancy is not trivial but substantial". (*emphasis added*)

In the present circumstances, the discrepancy relates to the description of the goods. Thus the discrepancy is not inconsequential. Further, it is not patently obvious that the error is a mere typographical error or obvious omission. The Appellant has argued that the error in description would have permitted the supply of tiny pieces of wood of even 2 inches x 1 ¼ inches. I do not necessarily agree with this interpretation. However, it is common knowledge that any timber would consist of 3 dimensions and is generally measured by reference to length, width and height, as it is done in this case. Thus, the description of the goods in the bill of lading could mean timber that is 2 inches x 4 inches x 1 ¼ inches or timber that is 2 inches x 4 inches x 1 ¼ inches to 12 inches, wherein a range is possible. The description is clearly ambiguous, and I observe that there is sufficient doubt in the description of goods found in the bill of lading which is of a substantial and not trivial nature which affects a core element of the contract.

I therefore hold that the omission of 'x' (multiplication sign) in the bill of lading and "12 inches" being relegated to the next line gives rise to material discrepancies, making it incumbent on the issuing bank to reject the documents.

Delay in Presentation of Documents for Negotiation

In terms of the Letter of Credit (P1A), documents "must be presented for negotiation within 16 days after shipment". This is in accordance with Articles 46 and 48 a. of UCP 400, which are quoted below:-

> "Article 46:-
>
> a. All credits must stipulate an expiry date for presentation of documents for payment, acceptance or negotiation.
> b. Except as provided in Article 48(a), documents must be presented on or before such expiry date.
> c. If an issuing bank states that the credit is to be available 'for one month', 'for six months' or the like, but does not specify the date from which the time is to run, the date of issuance of the credit by the issuing bank will be deemed to be the first day from which

such time is to run. Banks should discourage indication of the expiry date of the credit in this manner.

Article 48:-

a. If the expiry date of the credit and/or the last day of the period of time after the date of issuance of the transport document(s) for presentation of documents stipulated by the credit or applicable by virtue of Article 47 falls on a day on which the bank to which presentation has to be made is closed for reasons other than those referred to in article 19, the stipulated expiry date and/or the last day of the period of time after the issuance of the transport document(s) for presentation of documents, as the case may be, shall be deemed to be extended to the first following business day on which such bank is open."

Thus in terms of the UCP 400, the bank is duty bound to reject documents which have been presented for negotiation after the date specified in the letter of credit. In this regard, It is pertinent to note the wording of the Letter of Credit, which is quoted below:-

"SHIPMENT BY STEAMER FROM: MALAYSIA OR SINGAPORE TO COLOMBO, SRI LANKA.
SHIPMENT NOT LATER THAN : 1993 AUGUST 25
DATE AND PLACE OF EXPIRY : 1993, September 10 AT COUNTRY OF BENEFICIARY
DOCUMENTS MUST BE PRESENTED FOR NEGOTIATION WITHIN 16 DAYS AFTER SHIPMENT.
PARTIAL SHIPMENT : ALLOWED
TRANSHIPMENT : NOT ALLOWED
ALL BANK CHARGES OUTSIDE SRI LANKA FOR ACCOUNT OF OPENERS.
IMPORT LICENCE NO : SIL
B.T.N. NO. 4407.21.09

SHIPMENT PRIOR TO THE DATE OF THE LETTER OF CREDIT IS PROHIBITED.
ALL DOCUMENTS SHOULD BE DATED ON OR AFTER DATE OF LETTER OF CREDIT.
NO MAIL CONFIRMATION WILL FOLLOW.
CREDIT AVAILABLE AGAINST PRESENTATION OF DOCUMENTS DETAILED HEREIN."

It is noteworthy that the Letter of credit expressly stipulated that the "documents must be presented for negotiation within 16 days after shipment". The Appellant has not been able to elicit clear evidence as to the date of shipment, the dates on which the shipping documents were presented for negotiation to the Respondent bank or the date on which payment was made on the letter of credit. This position is aggravated by the fact that no attempt was made by the Respondent bank to lead any evidence at the trial, except for marking some documents in cross-examination of the Appellant's witness, it appears from a stamp on the Bill of Lading marked P7 that the goods were shipped on board on 15th of August 1993. However, it would appear from the certificate issued by the Malaysian Timber Industry Board that the timber had been inspected while on board on 21st August 1993. There is no evidence, documentary or otherwise, as to the actual date of shipment. But I note that in terms of the Letter of Credit marked P1A, shipment has to be not later than 25th August 1993. Since it is also stipulated in the letter of credit that the document must be presented for negotiation within 16 days after shipment, the final date for negotiation of documents would be 10th September 1993 or earlier

depending on the actual date of shipment. In its letter dated 24th September 1993 (P14) the Respondent has stated that "payment under this letter of credit has been effected to the negotiating bank in accordance with the reimbursement instructions, in due course". While it is clear from this letter that by 24th September 1993, payment under the letter of credit had been made, the actual date on which the Respondent in fact effected payment on the letter of credit and set-off the amount due on the Letter of credit from the Appellant's Resident Foreign Currency Account is shrouded in mystery. It is left to Court to speculate as to whether the negotiation of documents took place before or after 10th September 1993, and whether the negotiation of documents took place before the date specified in the letter of credit for negotiation or thereafter.

The Appellant has alleged that the presentation of documents to the Respondent Bank took place after the expiry of the stipulated period. No clear evidence exists with respect to the actual date of presentation of the documents at the issuing bank for negotiation. The Respondent Bank was very vague in responding to the allegation in the Appellant's letter dated 13th October 1993 that the documents had not been presented for negotiation in time, and in its letter dated 15th October 1993 at paragraph 5 has stated as follows:-

> "We deny that the documents had not been presented in accordance with the Letter of Credit. The date of presentation is not evident in the face of the document".

However, at paragraph 15 of the Respondent's written submissions in the Commercial High Court, the Respondent states that the bank has produced documents marked වි2 and වි3 and the date stamp on the said documents show clearly that the documents were presented within time. The documents marked as වි2 and වි3 are respectively the letters of set-off and indemnity. These documents have no relevance to the Appellant's allegation that the documents were not presented for negotiation within the time limit stipulated in the Letter of credit. Further, the shipping documents, namely, the Bill of lading, commercial invoice, marine insurance and certification by the Malaysian Timber Industry Board, copies of which were provided to the Appellant by the Respondent Bank on 15th September 1993, faintly bear a stamp with the words "Commercial Bank of Ceylon Ltd, Colombo-1". However, there is no date stamp on these documents.

It is trite as set out in Section 101 of the Evidence Ordinance No 14 of 1895, as amended that whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist. Accordingly, the General Rule is that when a person is bound to prove the existence of any fact, the burden of proof lies on that person. E.R.S.R. Coomaraswamy, in his work *The Law of Evidence* Volume II, Book 01, at page 250, commenting on Section 101 of the Evidence Ordinance states that:-

> "A party asks for judgment on the basis of a legal right or liability. The substantive law lays down the requirements of that right or liability. He must prove the existence of all facts which bring him within the substantive law of the subject. The burden of proof lies on him. Thus, the legal burden of proving all acts essential to their claims normally rests upon the plaintiff in a civil suit or the prosecutor in criminal proceedings."

In this context the question arises as to whether the burden of proof which would otherwise rest on the Appellant as the plaintiff in the action, would in any way be reduced due to his ignorance of what transpired within the four walls of the Respondent Bank when the documents were presented for payment.

Section 106 of the Evidence Ordinance enacts that:-

> "When any fact is especially within the knowledge of any person, the burden of proving that fact is upon him."

Explaining this provision, E.R.S.R. Coomaraswamy, in his work *The Law of Evidence* Volume II, Book 01 at page 262 observes as follows:-

> "The rule stated in section 106 is regarded in English Law as one of two exceptions to the rule that the burden of proof rests on the party substantially asserting the affirmative, the other exception being, the existence of a rebuttable presumption of law, or a *prima facie* case in his favour. Best says in reference to this rule:
>
> > "… the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his own knowledge, or of which he is supposed to be cognizant."
>
> He adds that the reason for the rule is that such party could at once put an end to litigation by producing that evidence, while requiring his adversary to do so would, if not amounting to injustice, at least be productive of expense and delay".

As Coomaraswamy observes at pages 262 to 263, in this context:-

> "The true object to be achieved by a court of justice can only be furthered with propriety by the testimony of the party who personally knowing the whole circumstances of the case can dispel the suspicions attached to it. The story can then be subjected in all its particulars to cross-examination."

Section 106 came up for consideration in *Sanitary Inspector, Mirigama v Nadar* 55 NLR 302, and Nagalingam A.C.J. made the following pertinent observation at page 305:-

> "When the section refers to a fact as being especially within the knowledge of a party, the term "especially" there means "almost exclusively" if not "altogether exclusively" within the knowledge of a party, and not that the fact is one within the knowledge of the one party as well as of the other."

It is common knowledge that when documents are presented at the desk of the issuing bank for negotiation, the said bank will, after examining the documents and if satisfied the documents are in order, make prompt payment on the letter of credit. When making such payment, the records available in the bank, whether electronic or otherwise, will show the date of presentation and the date

of payment in terms of the letter of credit, which invariably would be the same date. In the instant case, in view of the fact that the Appellant has issued a letter of set-off and indemnity, the bank would have made one or more debit entry in the Appellant's Singapore Dollar RFC account bearing No. 9495285501, as well as in his current and other accounts. These records are within the exclusive knowledge and control of the issuing bank which, in this instance, is the Respondent to this appeal. In those circumstances, it is clear that the burden of placing evidence in the Commercial High Court in regard to the date of presentation and payment, which is especially within the knowledge of the Respondent Bank, rested on the said bank.

It is evident that the burden of proving facts essential to the establishment of his claims normally vests upon the plaintiff in a civil suit. However, I agree with the Appellant that the exact details regarding the date of shipment, the date on which the documents were presented for negotiation and the date of payment of letter of credit, are facts that are especially within the knowledge of the Respondent Bank, and it is significant that the Respondent Bank did not seek to produce any evidence in regard to these matters. In these circumstances, I am compelled to draw a presumption adverse to the Respondent Bank, and hold that the presentation of the documents for negotiation to the Respondent Bank took place after 10th September 1993, and was therefore outside the period stipulated in the letter of credit. In my opinion the Respondent Bank should have rejected the documents, and therefore, in my opinion, the setting-off of the amount paid on the letter of credit from the Appellants Resident Foreign Currency Account was clearly wrongful.

Conclusions

For all these reasons, I hold that the Commercial High Court has seriously erred in its impugned judgment dated 3rd October 2003, which is hereby set aside. I specifically hold that the Defendant-Respondent had no right or reason to set off and indemnify any money under the letters of set off and indemnity dated 10th June 1993 marked V2 and V3.

I accordingly enter Judgment in favour of the Plaintiff-Appellant as prayed for in prayers (a), (f) and (g) of the plaint dated 29th March 1994, so however that the scope of the judgment would be restricted to the amount of money that was set off and indemnified under the letters of set off and indemnity marked V2 and V3 from and out of the Resident Foreign Currency Account bearing No. 9495285501 held by the Appellant in the Respondent Bank, with interest due up to the time the said amount of money is credited to the said Resident Foreign Currency Account, or is released to the Appellant.

I also award the Plaintiff-Appellant costs of this appeal in a sum of Rs. 75,000.00 payable by the Defendant-Respondent.

JUDGE OF THE SUPREME COURT

PRIYASATH DEP, P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

ROHINI MARASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT

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

National Development Bank PLC
Formerly of
National Development Bank Limited,
No. 40, Nawam Mawatha,
Colombo 2.

Plaintiff

SC/CHC/Appeal No. 39/2010

Commercial High Court
Case No. HC (Civil) 274/2007/MR

Vs.

1. Nelka Rupasinghe alias Rupasinghe Arachchilage Nelka alias R.A. Nelka Nanayakkara
   Galgodawatta, Talduwa,
   Ahangama.

2. Ahangama Gamage Nandawathie
   Galgodawatta,
   Talduwa, Ahangama.

1st & 2nd Defendants.

And

1. Nelka Rupasinghe alias Rupasinghe Arachchilage Nelka alias R.A. Nelka Nanayakkara
   Galgodawatta, Talduwa,
   Ahangama.

2. Ahangama Gamage Nandawathie
   Galgodawatta,
   Talduwa, Ahangama.

1st & 2nd Defendant-Appellants

Vs.

National Development Bank PLC
Formerly of
National Development Bank Limited,
No. 40, Nawam Mawatha,
Colombo 2.

Plaintiff-Respondent

* * * * *

BEFORE : **Tilakawardane, J.**
Sripavan.J. &
Wanasundera, PC.J.

COUNSEL : Rohan Sahabandu PC. for 1st & 2nd Defendant-Appellants.

Romesh de Silva, PC. with Geethaka Goonewardane for Plaintiff-Respondent.

ARGUED ON : **27-09-2013**

DECIDED ON : **21-03-2014**

* * * * *

SC/CHC/Appeal No. 39/2010

Wanasundera, PC.J.

This appeal has come up to the Supreme Court as an appeal from a judgment of the Provincial High Court of the Western Province holden at Colombo and exercising Civil Commercial Jurisdiction, as provided in Section 5 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996. The judgment of the aforementioned Commercial High Court of Colombo is dated 09.09.2010.

The Plaintiff-Respondent (hereinafter referred to as the Respondent-Bank) is the National Development Bank PLC of No. 40, Navam Mawatha, Colombo 2 and the 1st and 2nd Defendant-Appellants (hereinafter referred to as the Appellants) are Nelka Rupasinghe (hereinafter referred to as the 1st Appellant and Ahangama Gamage Nandawathie (hereinafter referred to as the 2nd Appellant) from Ahangama.

The facts of this case play an important role in deciding this appeal and as such I will place them here in summary form. The 1st Appellant became the owner of Lot 6 in Plan 1243 of an extent of 34A 0R 5P and Lot 8 of an extent of 15A 1R 30P by deeds of transfer No. 247 and 248. Altogether, the 1st Appellant was the owner of about 50 acres of land. The 2nd Appellant became the owner of Lot 4 , Lot 9 and Lot 10 of Plan 1243 of an extent of 25A 0R 27P, 0A 2R 18P and 25A 0R 27P by deeds of transfer 245, 249 and 250 adding up to again about 50 acres. The 1st Appellant applied for a loan of 7 million from the Respondent Bank for the project of replanting tea on her land and she mortgaged her land to the Respondent to get a loan of 7 million on 18.12.2000, by deed No. 183. On the same day, i.e. 18.12.2000, the 2nd Appellant also mortgaged her property to morefully secure the same loan of the 1st Appellant to be received from the Respondent Bank by deed No. 184. So, the 2nd mortgage deed No. 184 was a 'further and additional mortgage' as very well indicated on top of the document, i.e. deed No. 184.

By January 2001, the Respondent Bank had disbursed Rs.3.8 million to the 1st Appellant. She had continued to pay monthly the interest component for the month, but failed to pay off the loan capital component. Out of the full loan payment applied for by the 1st Appellant, Rupees 3.2 million was never disbursed to her. As she failed to pay back the loan actually given to her, i.e. 3.8 million, the Respondent auctioned both the lands of the 1st Appellant and the lands of the 2nd Appellant, i.e about 100 acres of land and the Respondent Bank bought the land for 1 million and issued a Certificate of Sale to the Respondent Bank itself and registered the Certificate of Sale dated 20.08.2003 in the Land Registry. The law requires that a Fiscal's conveyance be executed upon issuing a Certificate of Sale but this has not been done by the Respondent. Yet, it is registered in the Land Registry to establish the fact of ownership. The Certificate of Sale No. 443 include all the blocks of lands belonging to the 1st Appellant and all the blocks of lands belonging to the 2nd Appellant. But in the Schedule they are in two separate parts, namely Part I and Part II.

The main argument in this matter was in effect, questioning whether the Certificate of Sale obtained by the Respondent Bank on 20.08.2003 including the 1st Appellant's (the borrower) lands as well as the 2nd Appellant's (the guarantor, the 3rd party mortgagor) lands, prohibits in law, the Respondent-Bank, from filing a hypothecary action to recover the monies due from the 1st Appellant. The Appellants argued that according to the registered Certificate of Sale, the Respondent Bank is the owner of the mortgaged lands and as such the Respondent Bank cannot file a hypothecary action to recover the money from the mortgagors. The Respondent Bank argued that the Certificate of Sale for the said lands obtained by it earlier, is a nullity in law as per the judgment in SC. Appeal cases 05 and 09/2004(1) decided on 01.04.2005 by the Supreme Court and thus the Respondent Bank is not the owner of the lands and therefore it can recover the monies due, by way of a hypothecary action.

I observe that the cause of action i.e. non-payment of the instalments of the loan, arose in Colombo because it was agreed that monies shall be paid at the head office of the Respondent- Bank. Therefore the Commercial High Court had

jurisdiction to hear the case. The evidence before Court was that a loan of 7 million rupees was requested by the 1st Appellant from the Respondent- Bank and it was agreed that the loan would be given to replant tea on the estate that the 1st Appellant bought anew. (Which is in Part I of the Schedule to the Certificate of Sale). The Respondent Bank disbursed only Rs.3.8 million in 2 installments. At the time of this case, the 1st Appellant had paid about 4 lakhs of rupees to stop the sale but finally the Respondent Bank auctioned the lands of both the Appellants and bought the same for 1 million rupees and issued a Certificate of Sale in favour of the Respondent-Bank itself. It was registered on 20.08.2003 at the Land Registry. So, on the face of the record the OWNER of the lands after 20.08.2003 was the Respondent-Bank.

Thereafter on 06.08.2007, the Respondent Bank filed this hypothecary action in the Commercial High Court. By this time, the Respondent Bank appeared to be the owner of the lands, according to the entries in the Land Registry. The lands of the Appellants were owned by the Respondent-Bank. In other words, the hands of the Appellants were tied up not allowing them to touch the lands even to find a way to pay the bank, the money due and owing to the bank from the date of the Certificate of Sale i.e. 20.08.2003. There's no way that the Respondent Bank can ever claim any interest from the Appellants after 20.08.2003 because in the minds of the Appellants the Respondent-Bank was the owner of the lands. In the eyes of the world, the Respondent-Bank was the owner of the lands as the Certificate of Sale was registered in the Land Registry. The Respondent-Bank had closed the deal on 20.08.2003 and the Respondent-Bank could recover the dues with the property obtained, up to the maximum value of the land.

Thereafter, on 01.04.2005, which is 1 year and 8 months after the Certificate of Sale, the 5 Judge Bench judgment in 4 cases, taken up together, namely ***Chelliah Ramachandran and another vs. Hatton National Bank and 3 others,*** (SC. Appeal No. 05/2004), ***V. Anandasiva and 12 others Vs. Hatton National Bank and 3 others*** (SC. Appeal No. 9/2004), C***. Ukwatte and another Vs. DFCC Bank and another*** (SC. Spl. LA. No. 31/2004) and ***M.D. Karunawathie***

and 5 others Vs. DFCC Bank and another (SC. Spl. LA. No. 32/2004), was pronounced by the Supreme Court.

By that judgment, it was held that "**The Provisions of the Recovery of Loans by Bank (Special Provisions) Act No. 4 of 1990 will not apply in respect of a mortgage given by a guarantor or any person other than a borrower to whom a loan has been granted by a Bank for the economic development of Sri Lanka"**. It was thus held that the impugned resolutions of the Board of Directors of the Bank to sell the lands of a 3rd party mortgagor were in excess of statutory power granted by Act No. 4 of 1990. The mortgaged property of the guarantors which did not belong to the borrowers should not be subject to parate-execution to recover the loan due from the borrower.

It was submitted to this Court in the instant case, by the Respondent-Bank that due to the aforementioned judgment of SC. Appeal Nos. 05 & 09/2004, and SC. Spl. LA. Nos. 31/2004 & 32/2004, the Respondent-Bank, on its own, decided that the Certificate of Sale in the instant case is a nullity. The Respondent-Bank further submitted that this decision of the Respondent-Bank was informed to the Appellants by letter dated 20.03.2007 and thereafter the Respondent-Bank proceeded to file the present hypothecary action in the Commercial High Court.

The Respondent-Bank decided on its own, that the Certificate of Sale is a nullity. The Respondent-Bank did not want to let loose the property which they bought and already registered in the Land Registry. Instead, the Respondent-Bank wanted to go at the borrower and the guarantor a second time by way of a hypothecary action. The Respondent Bank could institute a hypothecary action to recover the balance due on the outstanding sum owed after the sale of the land in the 1st Schedule.

The Respondent-Bank's decision to auction the properties of the guarantor to recover the loan taken by the borrower is legally wrong as one can proceed by way of parate execution only against the borrower. They have, however, transgressed the boundaries when it comes to the guarantors in view of the decision in S.C. Appeal Nos. 5 & 9/2004 and SC. Spl. LA. Nos. 31 & 32/2004.

As such the auction to sell the guarantor's lands is not valid. The Respondent-Bank is entitled to auction only the borrower's properties which is in Part I of the Certificate of Sale.

By the Certificate of Sale No. 443 the Bank has legally become the owner of only the lands mentioned in Part I of the Schedule. I am of the view that the said Certificate of Sale should be amended to include only the borrower's lands and forwarded for registration, thus specifically releasing the lands in Part II of the Schedule from the ownership of the Respondent-Bank. The Respondent-Bank shall be entitled to have and to hold the lands referred to only in Part I of the Schedule to the Certificate of Sale No. 443. The said Certificate of Sale is valid against the first Appellant only.

For the reasons set out in this judgment, I set aside the judgment of the Learned Judge of the High Court (Civil) of the Western Province holden in Colombo in case No. HC.(Civil) 274/2007/MR dated 09.09.2010, subject to the above. The 1st Appellant [borrower] is entitled for costs in a sum of Rs. 100,000 (One Hundred Thousand) payable by the Respondent Bank.

Judge of the Supreme Court

Tilakawardane, 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

ARPICO FINANCE COMPANY PLC.

146, Havelock Road,

Colombo-05.

S.C (C.H.C) Appeal No. 41/2014

SC Case No. SC/HC/LA/55/2013

CHC Case No. HC (Civil) 10/2012 (IP)

Plaintiff

Vs.

RICHARD PIERIS ARPICO FINANCE LIMITED.

310, High Level Road,

Nawinna,

Maharagama.

Defendant

AND NOW

In the matter of an application for Leave to Appeal under and in terms of Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read together with Chapter LVIII of the Civil Procedure Code.

RICHARD PIERIS ARPICO FINANCE LIMITED

310, High Level Road,

Nawinna ,

Maharagama.

Defendant-Petitioner.

ARPICO FINANCE COMPANY PLC.

146, Havelock Road,

Colombo-05.

Plaintiff-Respondent

BEFORE: Dep PC. J

Aluwihare PC. J and

Sarath de Abrew J.

Counsel- Dr. Harsha Cabral P.C, with Buddika Illanganthilaka and Nishan Premathirathne, instructed by M/s. Julius & Creasy for the Defendant Petitioner.

A.R.Surendran P.C, with Shivan Kang-Iswaran instructed by M/s. Neelakandan & Neelakandan for the plaintiff- Respondent

Argued on- 25th June 2014, 26th June 2014 and 4th July 2014

Written Submissions – 21st July 2014

Decided on - 29th – September 2014

Aluwihare P.C J

The Plaintiff -Respondent (hereinafter referred to as the Respondent) instituted action before the High Court of Colombo exercising civil jurisdiction (herein after referred to as the High Court) alleging an infringement of rights relating to the trade name of the Respondent and sought *inter alia* the following relief against the defendant-Petitioner (hereinafter referred to as the Petitioner)

a. A declaration that the use of word "Arpico Finance" or any other trade name which in any way resembles Respondent's trade name i.e"Arpico Finance" and "Arpico Finance Company PLC" or any of their products and /or services and/ or in advertisements relating to their business activities by the Petitioner would constitute acts of Unfair Competition and unlawful acts within the meaning of Sections 160 and 144 respectively of the Intellectual Property Act No. 36 of 2003 (hereinafter referred to as the Intellectual Property Act) and passing off;

b. A permanent injunction restraining the Petitioner and /or its servants or agents from using the words "Arpico Finance" and/or any other name so nearly resembling the Respondent's trade name "Arpico Finance " and "Arpico Finance Company PLC" in relation to and in respects of its products and/or services and/ or advertisements concerning their business activities so as to constitute acts of Unfair Competition or un-lawful acts in relation to a protected trade name;

c. An Interim Injunction until the hearing and final determination of this action, restraining the Petitioner by itself , its servants or agents in any manner whatsoever or howsoever from using the word" Arpico Finance" and/or any other trade name as part of the trade name of the Petitioner or any other name so nearly resembling the Respondent's trade name "Arpico Finance " and "Arpico Finance Company PLC" in relation to and in respect of its products and/or services and/ or advertisements concerning their business activities so as to constitutes acts of Unfair Competition or unlawful acts in relation to a Protected Trade Name:

When the inquiry relating the application for interim injunction referred to in the paragraph "c" above was taken up before the High Court, both parties had agreed that the matter could be disposed of by written submissions and documents filed by the parties. Consequently the learned High Court Judge made order on 30th March 2013 granting an interim injunction as prayed for by the Respondent, restraining the Petitioner, by itself , it's servants or agents in any manner whatsoever or howsoever from using the word "Arpico Finance" and/ or any other trade name as part of the trade name of the Petitioner or any other name so nearly resembling the Respondent's trade name "Arpico Finance" and "Arpico Finance Company PLC" in relation to and in respect of its products and /or services and /or advertisements concerning their business activities so as to constitute acts of unfair competition or unlawful acts in relation to a protected trade name, until the final determination of the action filed before the High Court.

Being aggrieved by the said order of the learned High Court Judge, the Petitioner filed the instant application seeking leave to appeal from this court. When this matter was supported for leave, the court granted leave on the following questions:

a. Did the learned High Court Judge misdirect himself in the application of Section 122 of the Intellectual Property Act No. 36 of 2003 read with 144 (3) thereof:

b. Did the Learned High Court Judge misdirect himself in the application of the principles of Intellectual Property Law relating to confusion /misleading the public;

c. Did the Learned High Court Judge misdirect himself in failing to give consideration to the particular customers who use the services of the Petitioner and the Respondent.

d. Did the Learned High Court Judge misdirect himself in failing to consider the goodwill and reputation attached to the trademark/trade name/house mark ARPICO of the Richard Pieris Group.

e. Did the Learned High Court Judge misdirected himself in failing to consider the use of ' Richard Pieris ' in the name of the Petitioner would clearly distinguish the source of the services of the Petitioner from the Respondent;

f. Did the Learned High Court Judge err in law and misdirected himself failing to consider the irreparable loss and damage that would be caused to the Petitioner by granting the interim injunction;

The Respondent's main grievances against the Petitioner were-

(a) Infringement of the Respondent's trade name in terms of Section 144 of the Intellectual Property Act No. 36 of 2003.

And

(b) Unfair competition in terms of Section 160 of the same Act.

Section 144 of the Intellectual Property Act Reads thus:

I44 (1) - Notwithstanding the provisions of any written law providing for the registration of a trade name, such name shall be protected, even prior to or without registration, against any unlawful act committed by a third party.

(2) - ***Any subsequent use of a trade name by a third party,*** whether as a trade name or as a trade mark, service mark, collective mark or certification mark or any such use of similar trade name , trade mark, service mark or collective mark of certification mark ***likely to mislead the public shall be deemed to be unlawful.***(Emphasis added)

Section 160 (2) (a) of the Intellectual Property Act states ***any act or practice*** carried out or engaged in, in the course of industrial or commercial activities, ***that causes or is likely to cause confusion*** with respect to another's enterprise or its activities, in *particular the products or services offered by such enterprise*, shall constitute an act of Unfair Competition.

Paragraph (b) of the said section (i.e. Section160) which elaborates on aspects of confusion states that **"confusion"** may, in particular, be caused with respect to ***a trade name.***

In considering these aspects, the main thrust of the Respondent's case was that, if the Petitioner were to use the words "Arpico Finance" in their trade name, the use of such words would be in violation of the Respondent's rights in relation to Sections 144 and 160 of the Intellectual Property Act.

The Respondents' contention was that ownership of Arpico Finance changed hands in 1967 and the present owners of Richard Peiris & Company had no involvement whatsoever in its business and that the Arpico Finance Company carried on business activities as a wholly

separate and distinct business from Richard Peiris & Company. It was further contended that since 1951, the Respondent enjoyed the use of its trade names "Arpico Finance" & "Arpico Finance Company PLC" without any interruption and became well known in Sri Lanka in the field of financial services, having a customer deposit base of Rupees 2 billion.

The facts of the case are as follows:-

It is common ground that the Respondent (Arpico Finance) was incorporated in 1951 as an associate of Richard Pieris & Company Ltd, engaged primarily providing hire-purchase facilities for the products marketed by Richard Pieris Company Limited.

In the year 1967, Alliance Finance Company Ltd, purchased the entirety of the shareholding of the Respondent Company, from Richard Pieris & Company. Since its incorporation in 1951, the Respondent had been engaged in the business of a finance company and had enjoyed the uninterrupted use of its trade name "Arpico Finance & Arpico Finance Company PLC".

The Respondents had contended before the High Court, as well as before this court, that they had substantial goodwill and reputation among the public in relation to the said trade names "Arpico Finance" and Arpico Finance Company PLC".

Having come to know, that a company by the name of "Arpico Financial Services" had been incorporated, Respondent had taken steps to intimate to the Registrar General of Companies, that the incorporation of the company, under the name "Arpico Finance Services Limited" is contrary to the provisions of the Companies Act No. 7 of 2007. As a consequence of the said objection taken by the Respondent with the Registrar General of Companies, the name of the company was changed to "Richard Peiris

Arpico Finanace Ltd"from Arpico Finanace Services Ltd. The Respondent had lodged an objection again with the Registrar of Companies on the basis that, even the change of name from "Arpico Finanace Services" to "Richard Peiris Arpico Finanace Ltd" was manifestly similar to that of the Respondent company.The Respondent did not succeed in their objection to have the name changed with the Registrar of Companies and that led to the institution of action before the Commercial High court by the Respondent.

It was also the contention of the Respondent that the use by the Petitioner of the word "Arpico Finance" as part of its trade name is an act contrary to honest practices, unfair competition and likely to cause confusion in regard to commercial activities of the Respondent. In addition, Respondent further contended, by the use of the words "Arpico Finance", as part of its trade name, which is indistinguishable from the trade name of the Respondent, the Petitioner has thereby blurred the distinction between the two trade names. Thus, the Respondent claims, is likely to cause confusion in the mind of the public. The Respondent also contends that the Petitioner has done so, with the intent, not to distinguish its products and services, but for the purpose of passing off which in turn is likely to mislead the public as to the products or services offered by the Petitioner.

It is in this backdrop that the learned High Court Judge issued the interim injunction, which is now being challenged in these proceedings.

At this juncture what needs to be considered is whether the learned High court judge had correctly applied the criteria laid down by law to issue an interim injunction. Although both parties forwarded strenuous arguments supported by written submissions, at this stage, this court is only required to decide as to whether the learned High Court Judge was

correct in forming the view that the Respondent had met the criteria laid down in terms of Section 54 of the Judicature Act No 2 of 1978 as amended, by placing sufficient material before the court for the issuance of the interim injunction prayed for, by the Respondent.

For convenience Section 54 of the Judicature Act is reproduced below-:

(1) Where in any action instituted in a High Court, District Court or a Small Claims Court, it appears-

(a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or

(b) that the defendant during the tendency of the action is doing or committing or procuring or suffering to be done or committed, or threatens or is about to do or procure or suffer to be done or committed, an act or nuisance in violation of the plaintiffs rights in respect of the subject-matter of the action and tending to render the judgment ineffectual, or

(c) that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff, the Court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from-

(i) committing or continuing any such act or nuisance;

(ii) doing or committing any such act or nuisance;

(iii) removing or disposing of such property.

In terms of Section 54, if it appears to court that sufficient grounds exist for the court to form the view that one of the grounds enumerated in paragraphs (a), (b) or (c) of subsection (1) of section 54 prevails, the plaintiff is entitled to succeed. However, in a series of cases, the courts have held, that the court needs to consider three elements before relief sought under section 54 (1) of the Judicature Act can be granted. They are, whether the plaintiff has made out a prima facie case, does the balance of convenience lie with the applicant and whether equitable considerations favour the grant of an interim injunction.

The element of "prima facie case" was defined in the case of Indrani v. The Municipal Board Imphal A.I.R 1958 Manupuri 27 to mean no more than that "there is a serious question to be tried" and there is a possibility of success if the allegations of fact made out by the plaintiff are proved, and Justice Dalton in the case of Jinadasa v. Weerasinghe 31 N.L.R 33, placed a stricter burden on the plaintiff, when he held that the requirement for an interim injunction is that "the court must be satisfied that there is a serious question to be tried at the hearing and on the facts before it, there is a probability that plaintiff is entitled to relief".

As Row points out (Law of injunctions 8th Edition page 302) it would be sufficient for the plaintiff to show that he has a fair question to raise as to the existence of his right and that till the question is ripe for trial, a case is made out for the preservation of the property in *status quo*. Row goes on to say balance of inconvenience means the comparative mischief or inconvenience to the parties.

It was held in the case of Bhauroo Singh v. Mst Dulari And Anor 1992 1 Western Law cases 636 (Rajastan), that *" In deciding a matter for the grant of a temporary injunction, the court is not required to go into evidence with a critical attitude for its close scrutiny. It is only required to see that all three necessary ingredients for the grant of a temporary injunction exist and in whose favour."(Emphasis added)*

The position taken up by the Petitioner is that, Richard Peiris & Company Ltd. has been carrying on business for 81 years and it is a diversified group of companies comprising of more than 50 companies in various sectors and that the word "ARPICO" is the brand name /trade name /name mark of Richard Peiris group of companies . Petitioner has also contended that several companies of the Richard Peiris Group use the word ARPICO in their trade name and further the Richard Peiris Group has amassed substantial goodwill with long use of the word "Arpico".

The petitioner also has taken up the position that the learned High Court Judge had failed to consider that the Respondent has not established and does not have an exclusive right to use the word "ARPICO" and the use of the word "Richard Peiris" as part of the name clearly distinguishes the Petitioner Company from the Respondent Company. In the same breath the Petitioners contended that the word "FINANCE" is only descriptive of the services provided by both the Petitioner and the Respondent, and the Respondent has no exclusivity over the word FINANCE either. Under these circumstances the Petitioner argued that the Respondent cannot object the Petitioner from using the words"ARPICO FINANCE" as a part of their trade name.

However, it must be said that the Respondent did not argue the case on the footing that the Respondent has exclusivity over the words "ARPICO FINANCE" but on the basis that the use of the word "ARPICO FINANCE"

in the trade name of the Petitioner is a case of "passing off" and is a violation of the Petitioners rights, both under sections 144 and 160 of the Intellectual Property Act.

Petitioner relied on the decisions of Ceylon Insurance Corporation Vs. United Ceylon Insurance Company (48 NLR page 454) where it was held that there is no exclusive right to use the word "Insurance" and in addition it was also held that of the word "United" sufficiently distinguishes the Defendant Company.

I note, all the words that make up the names of the two entities in the case referred to above are common words which have an accepted meaning in common parlance. As opposed to this, the word "ARPICO" is an invented name. There would be a greater likelihood of confusion in the minds of the consumer, when a another entity which has a similar invented name offer similar services, as to its source.

Lord Halsbury, in the case of North Chesire and Manchester Brewery Company Ltd v. Manchester Brewery Co. Ltd. 1899 AC 83, held that "when I see that in the name of the Appellant company there is literally and positively the same name on that of the rival company as I will call it, and that it is only prevented from being identical in name by having another name associated with it, I should think myself that the inevitable result would be that anyone who saw the two names together would arrive at the conclusion without any doubt at all that the two companies , both with well known names, both in the particular neighborhood with which we are dealing, had been amalgamated , because it is so common a thing for companies to amalgamate that when I found two well-known names associated together as that of a new company being brought out, **I should have at once jumped to the conclusion, and so would everybody else, that the two companies were really amalgamating together and**

forming a new company. I have not the smallest doubt that everybody who knew the two names at all would come to that conclusion".

I have also considered the judgement in the case of Parle Products Pvt Ltd v. Parle Agro Pvt Ltd.2009 F.S.R 18 The parties to the suit happened to be companies incorporated by two groups of a family. Having started as a partnership, down the line the partnership split, but both parties continued to use the word "Parle" as part of their corporate name as well as the trademark.. When the party producing beverages expanded and started manufacturing and selling confectionery under the name Parle, plaintiff sought an interim injunction which was refused as there was no agreement between the parties, by which either of the parties is restrained from carrying on business under the family name "Parle". However, the court made an order directing the defendant to have the message *"…. having no relationship whatsoever with Parle products Private Limited"* on their their products.

I also wish to refer to the case of Adrema Vs. Adrema-Werke 1958 RPC 323 in which Danckwerts J held that the plaintiff is entitled to an injunction, and I find the circumstances of the said case somewhat similar to the case before this court. A German company, which manufactured "Adrema" addressing machines, had formed an English company Adrema Ltd before the outbreak of the World War II. This English subsidiary was allowed by the parent company to acquire the entire United Kingdom goodwill in the mark "Adrema". After the war broke out, the two companies ceased to be connected. At the end of the war the German Company (Adrema –Works GmbH) sought to use its name in trading its machines in the United Kingdom. The English Company sued the German Company for passing off and the court granted an injunction preventing the German company, the use of the name "Adrema".

It is not disputed that the Richard Peiris group of companies has operated a number of subsidiaries that used the word Arpico and it is contended two such subsidiaries namely "Arpico Ataraxia Asset Management (Pvt) Ltd. Arpico Insurance Ltd, provided financial services. Nevertheless, there is no evidence before this court to come to a finding that products/services provided by those subsidiaries are the same as the services / products provided by the Respondent. However the Petitioner had admitted that both the Petitioner and the Respondents are finance companies providing financial services.

It was argued on behalf of the Petitioner that customers who are obtaining financial services from financial institutions make informed choices and is unlikely to be either misled or confused. Petitioner relies on the case of HFC Bank PLC. V. Midland Bank PLC (200 RFS 176) and the First National Bank in Sioux Falls V. First National Bank South Dakota SPC. INC 2008 DSD 9.

Likelihood of consumers of being misled or confused undoubtedly may be negated to an extent due to consumer sophistication. However, whether consumer sophistication in this country is comparable to consumer sophistication in the United Kingdom in relation to financial services and products is a question of fact.

Petitioner quite correctly points out that the burden is on the Respondent to establish that the members of the public obtaining services from the Petitioner company do so due to the misrepresentation of the Petitioner company and in the belief that they are in fact services offered by the Respondent Company. This again is a question of fact which needs to be established through evidence.

As pointed out by Lord Halsbury in the case of Reddaway v. Banham 1896 A.C 199 "The principle of law may be very plainly stated, that nobody has any right to represent his goods as the goods of somebody else. How far the use of particular words, signs or pictures does or does not come up to the propersition enunciated in each particular case must always be a question of evidence…."

As referred to earlier, this court is only concerned as to whether the Learned High Court Judge misdirected himself in wrongly applying the law relating to issuing of an interim injunction.

Lord Jauncey quoting Lord Langdde, in the Jif- Lemon case (Reckitt &Coleman Products Ltd v. Borden 1990 R.P.C 341) observed:-

" It is not essential that the defendant should misrepresent his goods as those of the plaintiff. It is sufficient that he misrepresent his goods in such a way that it is reasonably foreseeable consequence of the misrepresentation that the plaintiff's business or goodwill will be damaged".

Given the facts and the circumstances of this case the court cannot fault the Learned High Court Judge in concluding that when one considers the invented names of the Petitioner and Respondent companies, that there appears to be a similarity in the names and would mislead and cause confusion in the mind of the public.

It is not disputed that the Petitioner company is of recent vintage and as at 30th April 2013 did not enjoy a deposits base of substantial value. In this respect, I find that the balance of convenience is also in favour of the Respondent.

I am of the view that the Learned High Court Judge had not erred in issuing an interim injunction and make order upholding the order of the learned High Court Judge dated 30th July 2013 in granting an interim injunction. I make a further order vacating the order made by this court in suspending the order of the Learned High Court on 2nd October 2013, staying the operation of the order of the learned High Court judge dated 30th April 2013.

I wish to reiterate that what was considered in this order is only as to whether the Respondent has satisfied the court of the criteria with regard to the grant of an injunction and no more.

Considering the importance of this case I direct the Learned High Court Judge to give utmost priority to this case and to make every endeavor to have this matter concluded without undue delay.

I wish to place on record my appreciation of the assistance given to this court by the learned counsel, Dr. Harsha Cabral P.C and A.R. Surendran P.C in deciding the issues in this not altogether straight forward case.

I make no order with regard to cost.

Judge of the supreme Court

Priyasath Dep PC J

I agree

Judge of the supreme Court

Sarath de Abrew

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 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 හාර 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 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 53/2006

1. Nihal Seneviratne,
   No. 22, Mile Post Avenue,
   Colombo 03.
2. Jeevana Priyantha Seneviratne,
   No. 11/1, Mahanuga Gardens,
   Colombo 03.

DEFENDANTS - APPELLANTS

-Vs-

State Bank of India,
No. 16, Sir Baron Jayatilaka Mawatha,
Colombo 01.

PLAINTIFF - RESPONDENT

BEFORE	**:**	Hon. S. Marsoof, P.C. J, Hon. K. Sripavan J, and Hon. E. Wanasundera P.C. J.
COUNSEL	**:**	S.P. Sriskantha with T. Sri Pathmanathan for the Defendants-Appellants Avindra Rodrigo with Ananda Tikitiratne and Ms. Raneesha de Alwis for the Plaintiff-Respondent
Argued On	**:**	5.11.2013
Decided On	**:**	17.12.2014

SALEEM MARSOOF, P.C. J,

This is an appeal filed in terms of Section 6 of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 against the judgment of the High Court of the Western Province exercising commercial jurisdiction (hereinafter referred to as the "Commercial High Court") holden in Colombo dated 19th September 2006. By the said judgment, the Commercial High Court has granted the relief sought by the Plaintiff-Respondent Bank (hereinafter referred to as "the Respondent") as prayed for in prayers (a) and (b) of the Plaint, to wit judgment against the first and second Defendants-Appellants (hereinafter referred to as "the Appellants") in the sum of Rs. 22,448,573.62 together with interest thereon at the rate of 27% per annum from the 1st of January 2002 to the date of the decree and thereafter on the aggregate sum of the decree at the same rate until the date of payment in full, and costs.

The Appellants have appealed against the judgment of the Commercial High Court on several grounds which shall be adverted to later in this judgment, and have submitted that the Commercial High Court

has grossly erred in granting relief to the Respondent. Learned Counsel for the Appellant has submitted that the Commercial High Court should have dismissed the action and learned Counsel for the Respondent has made submissions to the contrary.

Before adverting to these submissions and examining them in detail, it might be useful to summarise the factual background.

The factual matrix

The Appellants are Directors of Nihal Brothers Marketing (Pvt.) Ltd (hereinafter referred to as "the company"), which is a company incorporated in Sri Lanka which carries on business as a trader and importer of various items of goods. In consideration of the financial and banking facilities granted to the said company by the Respondent in connection with certain imports of sugar, the Appellants executed a Guarantee Bond dated 23rd September 1997, marked P9. The said financial and banking facilities granted by the Respondent to the said company included what is known as a "trust receipt facility" which provided an additional form of security for financial advances made by the Respondent to enable the said company to pay for and clear certain consignments of sugar against trust receipts issued by the company.

Between the period 23rd June 2000 to 18th September 2000, the said company obtained certain advances of money against 4 Trust Receipts to the value of Rs. 17,221,000/-. Details concerning the said Trust Receipts are as follows:-

TR 2000/48: Rs. 3,621,000 Date: 23rd June 2000
TR 2000/52: Rs. 4,172,000 Date: 12th July 2000 (P2)
TR 2000/63: Rs. 4,646,000 Date: 6th September 2000 (P3)
TR 2000/68: Rs. 4,879,000 Date: 18th September 2000 (P4)

While the first of the four trust receipts was not marked in evidence, the next three receipts were marked respectively as P2, P3 and P4. The Respondent, by letter demand dated 25th January 2001 marked as P10, demanded that the company repay the sum of Rs. 17,221,000 which was lawfully due and owing to the Respondent as at 18th December 2000. The Respondent also demanded from each of the Appellants on the Guarantee Bond, the payment of the said sum of Rs. 17,221,000 by two letters, both dated 25th January 2001, marked respectively as P11 and P12.

Subsequent to this, the company further obtained loans by way of Trust Receipts marked as P5 and P6, the details of which are as follows:-

TR 2001/10: Rs. 2,198,000 Date: 20th February 2001 (P5)
TR 2001/12: Rs. 2,198,000 Date: 27th February 2001 (P6)

The sum claimed by the Respondents before the Commercial High Court was a sum of Rs. 22,448,573.62/-. This sum comprises of Rs. 17,036,000/- which reflects the aggregate of the principal sums allegedly granted to the company by way of Trust Receipts marked as P2, P3, P4, P5 and P6 and the interest charged on the principal sum of Rs. 17,036,000/-. From the proceedings before the Commercial High Court, it is evident that full repayment of Trust Receipt No. 2000/48 (which was not marked in evidence) and a partial payment of Rs. 1,057,000 in respect of Trust Receipt No. 2000/52 (P2) has been made, and these sums have been deducted from the sum which was claimed by the Respondent.

On 17th October 2001 by way of letter marked as P13, the company, through its Attorneys-at-law, replied the letters demand marked as P10 stating *inter alia* that the claim made by the Respondent was not just or equitable and therefore to desist from instituting any legal action in respect of such claim.

By Plaint dated 25th January 2002, the Respondents instituted action before the Commercial High Court against the Appellants without making the principal debtor, Nihal Brothers Marketing (Pvt.) Ltd, a defendant to the action. The Appellants filed answer and the case went to trial. At the conclusion of the trial, by its judgment dated 19th September 2006, the Commercial High Court pronounced judgment as prayed for by the Respondent. In the said judgment, the learned Judge of the Commercial High Court observed as follows:-

> "Since the evidence of Vijewadani Jesudasan has not been impeached, on a balance of probability, I am compelled to accept the evidence adduced through her which is quite consistent with the document marked in this case. The defendants have not proved that the Guarantee Bond marked P1 is bad in law. They have also failed to prove that the Attorneys-at-law failed to explain to them the meaning of and the effect of the clauses '*beneficium ordinis sue excussionis' and* '*beneficum divisionis'.*
>
> As regards the right of the Plaintiff to sue the Defendants since the Plaintiff has demanded the monies due from Nihal Brother Marketing (Pvt.) Ltd by document marked as P10, it is my considered view that the action against the two Defendants is maintainable."

Aggrieved by the said decision of the Commercial High Court, the Appellants have by their petition of appeal dated 16th November 2006 sought appellate relief on the following grounds:-

(a) The learned Judge had made a very serious misdirection and a fundamental error in not correctly considering the fundamental nature of the case;
(b) The learned Judge has filed to differentiate between personal transactions and commercial transactions;
(c) The learned Judge has gravely erred in fact and in law in that the commercial High Court was devoid of jurisdiction in hearing and determining this matter as the cause of action was based strictly on personal guarantees;
(d) The learned Judge had misinterpreted and has misdirection himself on the evidence placed before him;
(e) The learned Judge had erred in law in failing to address his mind altogether that in the absence of a claim and / or action against the principal debtor the claim against the secondary parties cannot be sustained.
(f) The learned Judge had erred in law in failing to address his mind altogether to the Written Submissions settled by the Counsel for the Defendants; and
(g) The learned Judge had gravely erred in failing to have addressed his mind to the fact that the sums claimed on the particular transaction had in fact been paid and settled by the principal debtor and, therefore no action could be maintained against the Defendants as guarantors.

At the hearing before this Court, learned Counsel for the Appellants confined his submissions to only four main grounds, which are that (i) the Commercial High Court lacked subject matter jurisdiction to entertain and decide the action instituted by the Respondent; (ii) the plaint did not disclose a cause

action in that the Appellants were sued on the basis of secondary liability as surety without first having recourse to the primary debtor, Nihal Brothers Marketing (Pvt) Ltd, which is not a party to these proceedings; (iii) the failure of the Commercial High Court to consider whether in the absence of a demand prior to the institution of action, there existed any cause of action against the Appellants to justify the award of relief to the Respondent on the Guarantee Bond on the basis of which action had been instituted; and (iv) the failure to establish, by evidence, the liability of the primary debtor, Nihal Brothers Marketing (Pvt.) Ltd, in order to sustain the claim on the said Guarantee Bond.

(i) The Question of Jurisdiction

The learned Counsel for the Appellants has contended that the Commercial High Court had no jurisdiction to entertain and give relief on the action filed in that court by the Respondent bank. He submitted that the subject matter jurisdiction of the Commercial High Court in the instant case is referable to section 2(1) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with the First Schedule thereto. In terms of section 2(1) of the said Act the High Court for the Western Province holden in Colombo has exclusive jurisdiction to "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". The First Schedule referred to above (as amended) is as follows:-

FIRST SCHEDULE

(1) All actions where the cause of action has arisen out of *commercial transactions* (including causes of action relating to banking, the export and import of merchandise, services affreightment, insurance, mercantile agency, mercantile usage, and the construction of any mercantile document) in which the debt, damage or demand is for a sum exceeding one million rupees or such other amount as may be fixed by the Minister from time to time, by Notification published in the *Gazette,* other than actions instituted under the Debt Recovery (Special Provisions) Act, No. 2 of 1990.
(2) All applications and proceedings under sections 31, 51, 131, 210 and 211 of the Companies Act, No. 07 of 2007.
(3) All proceedings required to be taken under the Intellectual Property Act, No. 36 of 2003 in the High Court established under Article 154 P of the Constitution.

Learned counsel for the Appellants submits that the action was on a personal guarantee given by the appellants and is secondary to the transaction of loan between the Respondent Bank and Nihal Brothers Marketing (Pvt.) Ltd, the principal company. He stresses the personal nature of the guarantee and submits that by no stretch of imagination could it be deemed to be a commercial transaction. He relies on the decision in *Phillip v Commissioner of Inland Revenue,* 1 Sri Skantha's Law Reports 133 in which it was held that a director of a company is not personally liable in regard to the liabilities of a company.

Learned counsel for the Respondent has relied on the language used in section 2(1) of the High Court of the Provinces (Special Provinces) Act No. 10 of 1996 and the First Schedule thereto, which he submits includes the power to hear and determine any dispute arising from a "commercial transaction", including mercantile and/or banking documents. He also cited Black's Law Dictionary which defines a "commercial transaction" as '*any type of business or activity which is carried for profit*', and Webster's Third New International Dictionary which defines the term as *'to engage in conduct, practices or make use of for profit seeking purpose as distinguished from participation, practices or use for spiritual or*

recreational purposes or for other non-pecuniary satisfaction'. He also relied on the decision of the Court of Appeal in *Brunswick Exports Ltd v Hatton National Bank* [1999] 1 Sri LR 219 which related to a mortgage bond executed as security for a loan where it was held that:-

> "… 'the media' upon which the plaintiff has instituted action was a commercial transaction and therefore, action must necessarily stand removed to the High Court".

In the said case, the Court of Appeal was asked to determine whether an action on a Mortgage Bond would fall within the definition of a "commercial transaction", and it was the opinion of Weerasuriya J held that since the Mortgage Bond was entered in to in the course of normal banking business, the it fell within the definition of a 'Banking document'.

The phrase "commercial transaction", as found in the First Schedule to the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 was considered by this Court in *Cornell and Company Limited v Mitsui and Company Limited* [2000] 1 Sri LR 57, wherein this Court took the view the jurisdiction of the Commercial High Court should be construed widely. In this connection, it may be useful to refer to the decision of the Supreme Court of India in *R.M. Investment & Trading Co. Pvt. Ltd. v. Boeing Co. and Another* [1994]1 SCR 837. In that case the Court was called upon to consider the provisions of Foreign Awards (Recognition and Enforcement) Act, 1961, in the context of which the question arose as to whether there was a *commercial* relationship between the parties as defined in Section 2 of the said Act and whether the Act would apply. In that case, an Indian Company entered into an agreement with a Company registered in USA. The Indian Company agreed to provide Boeing with consultancy services for sale of Boeing Aircraft in India. An agreement for the purchase of two Boeing Aircrafts was executed. A dispute arose and the appellant claimed compensation and remuneration for consultancy services. In view of arbitration clause, the matter was referred to arbitrator. It was contended by the foreign Company that there was no `*commercial* element' and hence the application was liable to be dismissed. This Court, however, rejected the contention, and held that the agreement to render consultancy service by the appellant to the respondent was *commercial* in nature and there was a commercial relationship between the parties. Referring to earlier cases, Court stated:-

> "It is not disputed that the sale of aircraft by Boeing to customers in India was to be a commercial transaction. The question is whether rendering of consultancy services by RMI for promoting such *commercial transaction* as consultant under the Agreement is not a "*commercial transaction*". We are of the view that the High Court was right in holding that the agreement to render consultancy services by RMI to Boeing is commercial in nature and that RMI and Boeing do stand in commercial relationship with each other. While construing the expression "*commercial*" in Section 2 of the Act it has to be borne in mind that the Act is calculated and designed to subserve the cause of facilitating international trade and promotion thereof by providing for speedy settlement of disputes arising in such trade through arbitration and any expression or phrase occurring therein should receive, consistent with its literal and grammatical sense, a liberal construction."

The above passage was cited with approval in the more recent decision of the Indian Supreme Court in *Comed Chemicals Ltd., v C.N Ramchand* AIR 2009 SC 494.

In the light of these decisions, it is clear that the expression "commercial" should therefore, be construed broadly having regard to the manifold activities which are integral to banking and commerce. In those circumstances, there is no doubt that the Commercial High Court did not err in assuming and exercising jurisdiction in this case.

(ii) Failure to Disclose a Cause of Action

It has been contended on behalf of the Appellants that the plaint did not disclose a cause action in that the Appellants were sued on the basis of secondary liability as surety without first having recourse to the primary debtor, Nihal Brothers Marketing (Pvt) Ltd, which is not a party to these proceedings.

Learned Counsel for the Appellants has strenuously submitted that a guarantor, to whom no money has been lent, cannot be held liable for a debt when no steps have been taken to recover such money from the principal debtor. He has relied on De Coylar's *Law of Guarantee* which, citing Pothier on Contracts, states at page 210:-

> "As the obligation of sureties is, according to our definition, an obligation accessory to that of a principal debtor, it follows that it is of the essence of the obligation that there should be a valid obligation of a principal debtor; consequently if the principal is not obliged, neither is the surety, as there can be no accessory without a principal obligation according to the rule of law".

Learned Counsel for the Respondents has argued that, in terms of clause 22 of the Guarantee bond, the Respondent Bank was at liberty to file action against both the borrower (the company) or the Appellants, or the Appellants jointly or severally for the sum remaining due upon loans granted to the company.

Clause 22 of the Guarantee Bond signed by the Appellants states as follows:-

> "22. I/we specifically agree that you shall be at liberty either in one action to sue the borrower and me/us or each or any of us and also any other person or persons all jointly and severally or to proceed in the first instance against me/us or each or any of us only and further that *I/we hereby renounce the right to claim that the Borrower should be excused or proceeded against by action in the first instance and the right to claim that you should divide your claim* and bring actions against me/us or each or any of us or any other person or persons whosoever each for his portion *pro rata* and the right to claim in any action brought against me/us or each or any of us without all or any other persons that you should only recover from me/us or each or any of us a pro rata share of the amount claimed and all other rights and benefits to which sureties are or may be by law entitled IT BEING AGREED that I am/we are liable in all respects hereunder as principal debtor/debtors to the extent aforementioned including the liability to be sued before recourse is had against the Borrower." *(emphasis added)*

For the avoidance of doubt, I note that within the Guarantee Bond, the term Borrower refers to the company. The Guarantee Bond was signed by the Appellants in their personal capacity.

Further, the final page of the Guarantee Bond states as follows:-

"The benefits and privileges of sureties referred to in the within written guarantee are as follows:

1) The *beneficium ordinis sue excussionis* is the privilege whereby a surety is entitled to claim that as his liability may be regarded to be of an accessory character it shall not be enforced against him until the creditor has unsuccessfully endeavoured to obtain satisfaction from the principal debtor.

2) The *beneficum divisionis* is the privilege whereby when several persons are sureties for a debt each of them may when sued for the whole amount require the creditor to divide the claim and bring his action in so far as the other are not insolvent.

By the renunciation of the above rights and all other privileges to which a surety is by law entitled the creditor is entitled to treat the surety as a Principal for all purposes.

I/we have read the above explanation of the rights of a surety and have understood the effect of my/our renouncing these privileges and of all other privileges to which I/we am/are entitled." (*emphasis added)*

The Appellants have waived the privileges usually available to sureties under the common law. It is clear from the Bond that the renunciation of the privileges of sureties has been read over and explained to the Appellants. In these circumstances, the submissions of the learned Counsel for the Appellants are devoid of merit.

(iii) Absence of Demand based on each Trust Receipt

Learned Counsel for the Appellants has submitted that the Commercial High Court erred in failing to consider whether in the absence of a demand prior to the institution of action, a cause of action could arise against the Appellants on the Guarantee Bond on the basis of which action had been instituted.

Learned Counsel for the Appellants has submitted that the letters demand sent to Nihal Brothers Marketing (Pvt.) Ltd marked P10 and similar letters demand sent to the 1st and 2nd Appellants marked respectively P11 and P12, all of which are dated 25th January 2001, only dealt with four Trust Receipts namely P2, P3, P4 and TR 2000/48 (not marked in evidence as the sum due on this Trust Receipt has been paid in full). Neither in evidence, nor in the plaint filed before the Commercial High Court has the Respondent established that it has sent either Nihal Brothers Marketing (Pvt.) Ltd or the Appellants letters demand in respect of P5 and P6, which related to Trust Receipts issued to the said company after the letters demand marked P10, P11 and P12 were dispatched.

At Clause 1 of the Guarantee Bond, the Appellants promised and undertook:-

"To pay to you in Colombo *on demand* all and every the sums and the sum of money which may now be or which shall at any time and from time to time be or become due or owing and remain unpaid to you anywhere by the Borrower upon or in respect of any current or loan or other account whether resulting from any Overdraft or Advance or from Bills of Exchange or Promissory Notes being purchased discounted or negotiated or from any Trust Receipt of any nature whatsoever executed by the Borrower and under which any money becomes due to you by the Borrower or from credits being made to or opened by or for the accommodation or at the request of the Borrower or from any other debt or liability (including obligations current though not then sue and payable) or other demands legal or equitable which may have against the Borrower or which the law of set off or debit and credit of mutual accounts would in any case admit or from any transaction of any kind whatsoever between the Borrower and you including every renewal or extension of any of the foregoing kinds of transactions whether any such renewal or extension be made or effected with or without the consent of or notice to me/us or each or any of us together with discounts banker's charges and expenses of every description all in accordance with your usual course of business and interest at such time or rates as may be fixed or charged by the Bank from time to time and all legal and other charges and expenses

whether taxable or not occasioned by or incidental to all or any of the foregoing or by or to the enforcement of this or any other security for the same on the recovery thereof." *(emphasis added)*

I find there is merit in the submissions of the learned Counsel for the Appellants to the extent that it is trite law that no cause of action could arise in terms of clause 1 of the Guarantee Bond with respect to any claim where no demand has been made. There is no evidence that a demand had been sent with respect to Trust Receipts bearing Nos. TR 2001/10 dated 20th February 2001 (P5) and TR 2001/12 dated 27th February 2001 (P6). It is also necessary to note that although the letters demand marked P10, P11 and P12 also includes TR 2000/48, there is clear evidence that the amount due on such Trust Receipt has admittedly been paid. It is also admitted that there has been a partial payment of Rs. 1,057,000 which was due in respect of TR 2000/52 (P2). Accordingly, the principal amounts due is an aggregate of Rs. 12,640,000. The computation of this sum is as follows:-

TR 2000/52 dated 12th July 2000 (P2):	Rs. 3,115,000 (Rs. 4,172,000- Rs. 1,057,000)
TR 2000/63 dated 6th September 2000 (P3):	Rs. 4,646,000
TR 2000/68 dated 18th September 2000 (P4):	Rs. 4,879,000
Total amount due:	Rs. 12,640,000

Accordingly, subject to what will be said under the following section of this judgment, entitled "Failure to Establish the Liability of the Primary Debtor, Nihal Brothers Marketing (Pvt.) Ltd", the aggregate principal sum, established by evidence at the trial, was only Rs. 12,640,000.

(iv)The Failure to Establish the Liability of the Primary Debtor, Nihal Brothers Marketing (Pvt.) Ltd

Learned Counsel for the Appellants has submitted that the Respondent Bank has failed to establish, by evidence, the liability of the primary debtor, Nihal Brothers Marketing (Pvt.) Ltd, which, it has been submitted, is necessary to sustain the claim on the said Guarantee Bond, against the Appellants. However, it is evident that the Appellants have produced several documents marked D3 to D32 and D35 to D39, which were counter foils of deposit slips issued by the Respondent Bank to the said company. Based on these documents, the learned Counsel for the Appellants argued that there was no sum outstanding to be repaid to the Respondent by the principal company, and therefore the issue of secondary liability on the guarantee bond does not arise.

Learned Counsel for the Respondent titles this as a "new defence", as this issue was not taken up on behalf of the company and the Appellants by letter dated 17th October 2001 (P13) sent by Messrs. Abdeen Associates, which was written in response to the letters demand dated 25th January 2001 marked P10, P11 and P12, issued by Messrs. F.J. & G. De Saram on behalf the Respondent. There was also no issue raised on this regard at the commencement of the trial.

Furthermore, learned Counsel for the Respondent relied on the document marked P17, which was a bank statement pertaining to Nihal Brothers Marketing (Pvt.) Ltd, and items therein marked P17a to P17x to establish that the deposits made by the said company and the Appellants, as evidenced by D3 to D32 and D35 to D39 were in respect of other Trust Receipts and transactions which do not come within the purview of this action and which are totally irrelevant to the Trust Receipts marked P2 to P4.

In these circumstances, I am of the opinion that the liability of the principal company, Nihal Brothers Marketing (Pvt.) Ltd, to the extent set out in the penultimate and final paragraphs of section (iii) of this judgment, which add up to an aggregate sum of Rs. 12,640,000 has been established by evidence.

Conclusion

It appears from the impugned judgment of the Commercial High Court dated 19th September 2006, that the principal amount with respect to which relief was granted by that Court was Rs. 17,036,000, which when interest and other dues were added, aggregated to Rs. 22,448,573.62. In view of the finding in section (iii) of this judgment headed "Absence of Demand based on each Trust receipt" that the principal sum due is only Rs. 12,640,000, it appears that the Commercial High Court has allowed a sum of Rs. 4,396,000 in excess of the amount due as principal.

In these circumstances, I am of the opinion that the judgment of the Commercial High Court should be varied by reducing from the aggregate sum of Rs. 22,448,573.92 awarded to the Respondent by the Commercial High Court inclusive of interest, the aggregate sum of Rs. 4,396,000, which amount I find the Appellants are not liable to pay to the Respondent. I would accordingly affirm the judgment of the Commercial High Court subject to the variation that the principal sum due with interest, as on the date of the judgment of the Commercial High Court dated 19th September 2006, was only Rs. 18,052,573.62.

The appeal is allowed, and the impugned judgment of the Commercial High Court is varied as aforesaid. Accordingly, I enter judgment against the Appellants, in the sum of Rs. 18,052,573.62, together with interest thereon at the rate of 27% per annum, from the date of the judgment of the Commercial High Court, namely 19th September 2006, to the date hereof, and on the aggregate sum thereof, further legal interest from the date hereof until payment in full.

In all the circumstances of this case, I do not award any costs.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

E. WANASUNDERA, P.C., 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 appeal under and in terms Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Centre for Policy Alternatives (Guarantee) Ltd.,
   No. 24/2, 28th Lane, off Flower Road,
   Colombo 7.

2. Dr. Paikiasothy Saravanamuttu,
   No. 03, Ascot Avenue,
   Colombo 5.

SC (FR) Application No. 23/2013

PETITIONERS

Vs.

1. D.M. Jayaratne,
   Prime Minister,
   Prime Minister's Office,
   No. 58, Sir Ernest De Silva Mawatha,
   Colombo 7.

2. Chamal Rajapakse,
   Speaker of Parliament,
   Parliament of Sri Lanka,
   Sri Jayawardenapura Kotte.

3. Ranil Wickremasinghe,
   Leader of the Opposition,
   No. 115, 5th lane,
   Colombo 3.

4. A.H.M. Azwer,
   Member of Parliament,
   No. 4, Bhathiya Road,
   Dehiwala.

5. D.M. Swaminathan,
   Member of Parliament,
   No. 125, Rosmead Place,
   Colombo 7.

6. Mohan Pieris,
   President's Counsel,
   No. 3/144, Kensey Road,
   Colombo 8.

7. The Attorney General,
Attorney General's Department,
Hulftsdorp,
Colombo 12.

RESPONDENTS

BEFORE	**:**	Hon. Saleem Marsoof, PC. J, Hon. Chandra Ekanayake J, Hon. Sathyaa Hettige, PC. J, Hon. Eva Wanasundera, PC. J, and Hon. Rohini Marasinghe J.
COUNSEL	**:**	Viran Corea with Ganeshathasan for the Petitioners. Palitha Fernando, PC., Attorney-General, with Shavindra Fernando, PC., Addl. SG, Sanjay Rajaratnam, DSG., Dilip Nawaz, DSG., Nerin Pulle, SSC., and Manohara Jayasinghe, SC, for the 7th Respondent.
Argued On	**:**	30.10.2013
Decided On	**:**	24.03.2014

SALEEM MARSOOF, PC. J,

This is an application filed in terms of Articles 17 and 126 of the Constitution seeking redress for the alleged violation of Article 12(1) of the Constitution. The 1st Petitioner, is a body corporate incorporated in Sri Lanka, and registered under the Companies Act No. 7 of 2007, and the 2nd Petitioner, who is a citizen of Sri Lanka, is an Executive Director of the 1st Petitioner company. The said Petitioners have stated in their petition that they make this application in their own right and in the public interest with the objective of safeguarding the rights and interests of the general public of Sri Lanka and securing due respect, regard for, and adherence to, the Rule of Law and the Constitution, which is the supreme law of the land.

The 1st to 5th Respondents are members of the Parliamentary Council established by Article 41A(1) of the Constitution as amended by the Eighteenth Amendment to the Constitution. The 6th Respondent is the incumbent Chief Justice of Sri Lanka, who has been described in paragraph 7 of the petition as the person whom the Petitioners, at the time of filing this application, were reliably aware was named by the President of Sri Lanka in his communication to the said Parliamentary Council, to fill the vacancy in the office of Chief Justice. It is common knowledge that after the removal of the 43rd Chief Justice of Sri Lanka purportedly under Article 107(2) and (3) of the Constitution, the 6th Respondent was appointed as the 44th Chief Justice of Sri Lanka purportedly in terms of Article 107(1) of the Constitution, and currently holds office as such. The 7th Respondent is the Attorney General of Sri Lanka.

Mr. Viran Corea, who appeared at the hearing for the Petitioners, stated that he was only appearing to reiterate what has been set out in the Petitioners' motion dated 18th September 2013, namely that "the Petitioners are placed in a position where they do not wish to participate in the further disposal of this matter which pertains inter-alia to vital issues affecting the integrity of the judicial process." Since the Petitioners have invoked the jurisdiction of this Court in their own right and on behalf of the public interest, I consider it appropriate to deal with the only submission made by Mr. Corea after carefully considering the substantive application of the Petitioners without the benefit of his assistance. Of course, this Court will have to first deal with the preliminary objections that have been taken up by the learned Attorney General, who is the 7th Respondent to this application, and consider the application on its merits only if the preliminary objections are overruled.

The Basis of the Petition

For a fuller understanding of the grievances of the Petitioners, it is useful to summarize at the outset, the main averments of the petition filed by them.

The Petitioners have stated in their petition dated 15th January 2013 that (i) the Order Paper of Parliament of 6th November 2012 included a resolution for the appointment of a Parliamentary Select Committee(hereinafter sometimes referred to as "PSC") to look into certain allegations against the 43rd Chief Justice of Sri Lanka, Hon. (Dr.) Upathissa Atapattu Bandaranayke Wasala Mudiyanse Ralahamilage Shirani Anshumala Bandaranayake, who shall hereinafter be referred to as "(Dr.) Shirani Bandaranayake"; (ii) that for considering these allegations, the Speaker of the House of Parliament, purported to appoint in terms of Article 107(2) and (3) of the Constitution and Order 78A(2) of the Standing Orders of Parliament, a PSC consisting of certain persons who are not respondents to the present application; (iii) that Order 78A of the Standing Orders of Parliament was challenged in several writ applications filed in the Court of Appeal by several petitioners other than the Petitioners to the present fundamental rights application and the members of the purported PSC were party respondents to those writ applications; (iv) that the Court of Appeal made a reference to the Supreme Court in terms of Article 125 of the Constitution seeking interpretation of Article 107(3) of the Constitution; (v) that in the meantime, the purported PSC found Chief Justice (Dr.) Shirani Bandaranayke guilty of 3 charges by its purported report dated 8th December 2012; (vi) that on 1st January 2013, the Supreme Court in SC Reference 3/2012 determined that "it is mandatory under Article 107(3) of the Constitution for Parliament to provide by law the matters relating to the forum before which the allegations are to be proved, the mode of proof, the burden of proof and the standard of proof of any alleged misbehavior or incapacity and the Judge's right to appear and to be heard in person or by representative in addition to matters relating to the investigation of the alleged misbehavior or incapacity"; and (vi) that the Court of Appeal, by its judgment in CA (Writ) Application No. 411/2012 dated 7th January 2013 issued a mandate in the nature of *certiorari* quashing the said PSC report dated 8th December 2012.

It is in this backdrop that the Petitioners allege in their petition that their fundamental right to equality before the law and equal protection of the law enshrined in Article 12(1) of the Constitution has been violated. The petitioners complain (a) that notwithstanding the determination of the Supreme Court and the judgment of the Court of Appeal, the Speaker of Parliament purported to entertain the purported PSC Report including its findings; and (b) that the Members of Parliament purported to debate the

purported PSC Report and that on 11th January 2013, the Members of Parliament purported to vote on the resolution before Parliament. The Petitioners have quoted in full Article 107(3) of the Constitution, and thereafter asserted that in view of the provisions of Article 4(c) of the Constitution, all matters relating to the investigation and proof of the alleged misbehavior referred to in Article 107(3) could only be carried out by a body established by law, since such investigation clearly involves the exercise of judicial or quasi-judicial powers, and since no law has been enacted by Parliament, the PSC could not have carried out the investigations and arrived at any findings as contemplated by Article 107(3). For these reasons, and in view of the determination of the Supreme Court and the Judgment of the Court of Appeal as aforesaid, the Petitioners assert that Parliament could not have proceeded to pass a resolution calling upon the President of the Republic to remove the 43rd Chief Justice Hon. (Dr.) Shirani Bandaranayake. They have also stated that the Order Paper of Parliament of 10th and 11th January 2013 did not contain a resolution calling upon the President to remove the Chief Justice Hon. (Dr.) Bandaranayake, nor did the agenda include an item for taking a vote on the resolution.

By way of relief, the Petitioners have sought (a) leave to proceed with their application, and several declarations from this Court *inter-alia* to the effect that *unless and until the incumbent Chief Justice retires and / or is found guilty by a competent court, tribunal or institution established by law* (b) the 1st – 5th Respondents cannot in their capacity as the Parliamentary Council and / or as members thereof, make observations to the President in terms of Article 41A of the Constitution with regard to the appointment of a Chief Justice, (c) the 6th Respondent cannot accept the office of Chief Justice or exercise the functions thereof, (d) any attempt by the 1st to 5th Respondents to make observations to the President, in terms of Article 41A of the Constitution, with regard to the appointment of a Chief Justice, would be an infringement of Article 12(1) of the Constitution, and (e) any attempt by the 6th Respondent to accept the post of Chief Justice and / or exercise the functions thereof would be an infringement of Article 12(1) of the Constitution. They have also sought certain restraining orders including interim orders against the 1st to 6th Respondents, which would have the effect of preventing the 6th Respondent from accepting the office of Chief Justice if appointed to it in terms of Article 107(1) or performing any functions of that office. No interim relief has so far been granted by this Court to the Petitioners as prayed for by them.

The Realm of Common Knowledge

It is common knowledge, but unfortunately there is no mention in the petition filed by the Petitioners dated 15th January 2913, that when the Court of Appeal by its aforesaid judgment in CA (Writ) Application No. 411/2012 dated 7th January 2013 issued a mandate in the nature of *certiorari* quashing the said PSC report dated 8th December 2012, the Court of Appeal very clearly explained that insofar as Hon. (Dr.) Shirani Bandaranayake, who was the Petitioner to the said writ application, had failed to cite as party respondent to her writ petition, the 117 Members of Parliament who had signed and presented to the 1st Respondent-Respondent the impeachment motion under consideration, "the quashing of the impugned decision [of the PSC] will not affect the members who subscribed to the impeachment motion, *as it does not prevent the Parliament from proceeding with the said motion to impeach the petitioner*." Since the Court of Appeal had deliberately, and for very good reasons, refrained from prohibiting Parliament from proceeding with the impeachment motion before it, the resolution to remove Chief Justice Hon. (Dr.) Shirani Bandaranayake was debated in Parliament, and passed on 11th

January 2013, with 155 Members of Parliament voting for it, and 49 voting against it. This paved the way for an address of Parliament for the removal of the Chief Justice to be presented to the President of Sri Lanka as required by Article 107(2) of the Constitution and Order 78A(9) of the Standing Orders of Parliament, and thereupon, on or about 12th January 2013, the President made order in terms of Article 107(2) of the Constitution removing the Petitioner-Respondent from the office of Chief Justice of Sri Lanka

While this Court will take judicial notice of the aforesaid omitted facts, this Court will also take note of the fact that the vacancy that arose in the office of Chief Justice of Sri Lanka consequent to such removal, was filled by a warrant issued by the President of Sri Lanka under his hand on 15th January 2013 in terms of Article 107(1) of the Constitution appointing the 6th Respondent as the 44th Chief Justice of Sri Lanka.

It is also noteworthy that by the decision of a Five Judge Bench of this Court (Marsoof J., Ekanayake J., Hettige J., Wanasundera J., and Marasinghe J.) in *The Attorney General v Hon. (Dr.) Shirani Bandaranayke and Others* SC Appeal No. 67/2013 (SC Minutes dated 21.2.2014), the decision of the Court of Appeal in CA (Writ) Application No. 411/2012 dated 7th January 2013 to issue a mandate in the nature of *certiorari* quashing the said PSC report dated 8th December 2012, was set aside. It is also noteworthy that in the course of arriving at its decision, the Five Judge Bench considered the correctness of the determination of a Three Judge Bench of this Court (Amaratunga J.,Sripavan J., and Dep J.,) in SC Reference 3/2012 (SC Minutes dated 1.1.2013), and went on to overrule the same.

The Preliminary Objections

Certain preliminary objections were raised by the learned Attorney General on 16th July 2013 when this case came up for support for leave to proceed, and on the direction of this Court, the said preliminary objections were later set out in a motion dated 19th July 2013 in order to give adequate notice of these objections to the Petitioners as well as the other Respondents to this case. In the light of the submissions made by the learned Attorney General at the hearing into these preliminary objections, I shall for convenience formulate these in the following manner:-

(1) Insofar as the 6th Respondent has been appointed as the Chief Justice of Sri Lanka by a warrant issued by the President in terms of Article 107(1) of the Constitution, can any of the relief prayed for by the Petitioners be granted in these proceedings in view of the immunity of the President contained in Article 35(1) of the Constitution?

(2) Insofar as the 6th Respondent, having been appointed in terms of Article 107(1) of the Constitution of Sri Lanka, now holds office and exercises the functions of that office, can this Court grant any of the relief prayed for by the Petitioners that would have the effect of removing the said Respondent from office?

Before dealing with these preliminary objections, I would like to mention that the main relief sought by the Petitioners to this application, have been summarized earlier in this judgment under the heading "The Basis of the Petition", and indeed some of the relief prayed for would not be granted by any court of law as it would be futile to do so. For instance, although certain declarations and restraining orders

have been sought against the 1st to 5th Respondents who constituted the Parliamentary Council that was considering the suitability of the appointment of the 6th Respondent to hold office as Chief Justice, the observations of the said Council in regard to the said matter have already been made, and the 6th Respondent has been appointment to the office in question. As such, the only relief that has been prayed for by the Petitioners that could still have any practical import would, apart from prayer (a) of the Petition that relates to the grant of leave to proceed, would be the declarations sought by prayers (e) and (g) and the restraining order sought by prayer (i) to the petition. By these prayers, the Petitioners have prayed that this Court be pleased to make order granting-

(a) the Petitioners *leave to proceed* with this application;

(e) a declaration that *any attempt by the 6th Respondent to accept the post / office of Chief Justice*, *and/or to exercise the functions thereof* (unless and until the incumbent Chief Justice retired and / or unless and until the incumbent Chief Justice is found guilty by a competent court, tribunal or institution established by LAW and a Resolution is subsequently passed by Parliament, calling upon the President to remove the said incumbent Chief Justice), would amount to an infringement of the Fundamental Rights guaranteed to the Petitioners by Article 12(1) of the Constitution and involves imminent infringement of the fundamental rights guaranteed to the Petitioners by Article 12(1).

(g) a declaration that in the given circumstances, *any act of acceptance by the 6th Respondent of any appointment to act or function as Chief Justice* (unless the incumbent Chief Justice retires and/or unless and until the incumbent Chief Justice is found guilty by a competent court, tribunal or institution established by LAW and a Resolution is subsequently passed by Parliament calling upon the President to remove her from office) involves a violation of the Constitution of the Democratic Socialist Republic of Sri Lanka, which constitutes infringement of the fundamental rights of the Petitioners and other citizen guaranteed under Article 12(1) of the Constitution and involves imminent infringement of the fundamental rights guaranteed to the Petitioners by Article 12(1).

(i) an order *restraining the 6th Respondent from accepting the post/office of Chief Justice and/or from exercising the functions thereof,* unless and until the incumbent Chief Justice retires and/or unless and until the incumbent Chief Justice is found guilty by a competent court, tribunal or institution established by LAW and a Resolution is subsequently passed by Parliament, calling upon the President to remove the said incumbent Chief Justice. (*Emphasis added*)

I shall now consider the preliminary objections raised by the learned Attorney General, who has after referring to the relevant constitutional provisions, relied on the decision of a Five Judge Bench of this Court ((S.W.B.Wadugodapitiya J., P.R.P. Perera J., Shirani Bandaranayake J., D.P.S.Gunasekera J., and Ameer Ismial J.) in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309, and submitted that the said decision dealt extensively with both points raised by him, and that this Court need not look any further in disposing of this application.

For the reasons already briefly noted, and with which I shall deal with fully in later on in this judgment, Mr. Viran Corea did not make any submissions on the preliminary objections. However, this Court is bound to carefully examine both preliminary objections taken up by the learned Attorney General,

particularly since the Petitioners have sought to invoke the jurisdiction of this Court not only on their own behalf, but purportedly on behalf of the People of Sri Lanka.

(1) The Presidential Immunity

This preliminary objection is based on Article 35(1) of the Constitution, which occurs in Chapter VII of the Constitution of the Democratic Socialist Republic of Sri Lanka, under the heading "The Executive" and the sub-heading "The President of the Republic." However, although the learned Attorney General has placed reliance only on Article 35(1), for the purpose of carefully examining this provision, I consider it desirable to quote Article 35 in its entirely. This article provides as follows:-

(1) *While any person holds office as President,* no proceedings shall be instituted or continued against him in any Court or tribunal in respect of anything done or omitted to be done by him *either in his official or private capacity*.

(2) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, the period of time during which such person holds the office of President shall not be taken into account in calculating any period of time prescribed by that law.

(3) *The immunity conferred by the provisions of paragraph (1) of this Article shall not apply to any proceedings in any Court in relation to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph (2) of Article 44* or to proceedings in the Supreme Court under paragraph (2) of Article 129 or to proceedings in the Supreme Court under Article 130(a) [relating to the election of the President or the validity of a referendum or to proceedings in the Court of Appeal under Article 144 or in the Supreme Court, relating to the election of a Member of Parliament].

Provided that any such proceedings in relation to the exercise of any power pertaining to any such subject or function shall be instituted against the Attorney- General. (*Emphasis added*)

The Presidential Immunity embedded in Article 35(1) of the Constitution has been considered by this Court in several decisions, but one of the most significant was the decision of this Court in *Mallikarachchi v. Shiva Pasupathy. Attorney-General* (1985) 1 SRI LR 74. In this case, a Five Judge Bench of this Court (Sharvananda CJ., Wanasundera J., Colin-Thome J., Ranasinghe J., and Abdul Cader J.) considered, amongst other things, the immunity of the President under Article 35(1) of the Constitution in the context of a challenge in fundamental rights proceedings under Article 17 and 126 of the Constitution, to the validity of certain orders made by the President proscribing the Janatha Vimukthi Peramuna (JVP) under certain Emergency Regulations made in terms of the Public Security Ordinance. Sharvananda C.J., who pronounced the main judgment of this Court, at page 77 of his judgment, sought to explain the rationale of the Presidential Immunity in the following words:-

"Article 35(1) confers on the President *during his tenure of office*, *an absolute immunity in legal proceedings in regard to his official acts or omissions, and also in respect of his acts or omissions in his private capacity.* The object of the Article is to protect from harassment the person holding the

high office of the Executive Head of the State in regard to his acts or omissions either in his official or private capacity during his tenure of the office of President.

Such a provision as Article 35(1) is not something unique to the Constitution of the Democratic Socialist Republic of Sri Lanka of 1978. There was a similar provision in Article 23(1) of the Constitution of Sri Lanka of 1972. The corresponding provision in the Indian Constitution is Article 361. The principle upon which the President is endowed with this immunity is not based upon any idea that, as in the case of the King of Great Britain, he can do no wrong. *The rationale of this principle is that persons occupying such a high office should not be amenable to the jurisdiction of any but the representatives of the people, by whom he might be impeached and be removed from office, and that once he has ceased to hold office, he may be held to account in proceedings in the ordinary courts of law.*

It is very necessary that when the Executive Head of the State is vested with paramount power and duties, he should be given immunity in the discharge of his functions."(*Emphasis added*)

Sharvananda CJ., in the course of his exhaustive judgment, explored both the width and the depth of the Presidential Immunity, and explained therein at pages 78 and 79 that the immunity afforded by Article 35 (1) is personal to the President and is limited to the duration of his office. Furthermore, as His Lordship went on to explain at page 79 of his judgment, it is clear from Article 35 (3) of the Constitution that the Presidential Immunity conferred by Article 35(1) will not apply to any proceedings in court in relation to the exercise of any power pertaining to any subject or function assigned to the President, or remaining in his charge under paragraph (2) of Article 44, and that in relation to the exercise of any power, pertaining to any such subject or function, it is competent to institute any such proceeding against the Attorney-General. Addressing this question in great detail, Sharavananda J observed as follows at page 79 of his judgment:-

"Article 44 (1) empowers the President to appoint Ministers of Cabinet and assign subjects and functions to such Ministers. Article 44 (2) gives a discretion to the President to assign to himself any subjects or functions and vests him with the residual power to remain in charge of any subject or function, not assigned to any Minister under the provisions of Article 44 (1). It follows that in respect of actions or omissions of the President which are not referable to the exercise of any power pertaining to any subject or function assigned to the President or remaining in his charge under paragraph 2 of Article 44, proceedings cannot be instituted against the Attorney-General.

Thus though the President is personally immune from legal proceedings in a court in respect of anything done or omitted to be done by him in his official or private capacity, his acts or omissions in relation to the category of matters referred to in Article 35 (3) can be questioned in court in proceedings instituted against the Attorney-General. Thus in proceedings in respect of such acts or omissions of the President, the Attorney-General can properly be made the defendant or respondent.

Article 35 (3) exhausts the instances in which proceedings may be instituted against the Attorney-General in respect of the actions or omissions of the President in the exercise of any powers pertaining to subject or functions assigned to the President or remaining in his charge under that

paragraph 2 of Article 44. It is only in respect of those acts or omissions of the President, that it is competent to proceed against the Attorney-General. *The Attorney-General is thus made constitutionally liable to defend such acts or omissions but his liability does not however extend to acts or omissions of the President committed in the exercise of powers not covered by Article 44 (2) of the Constitution, but in the purported exercise of powers vested in him otherwise*."(*Emphasis added*)

It is also clear that the Constitution does not bar altogether legal redress with respect to any grievance that arises from any act or omission of the President during his tenure of office, as such a grievance may be redressed according to law after he ceases to hold office, for which purposes article 35(2) expressly provides that the running of prescription would stand suspended during his tenure of office.

In *Edward F William Silva and Others v. Shirani Bandaranayake* (1997) 1 Sri LR 92, when a preliminary objection was taken up by the Attorney General before a Five Judge Bench of this Court (M.D.H Fernando J., A.R.B.Amerasinghe J., Ramanathan J., S.W.B Wadugodapitiya J., and P.R.P Perera J.) against a challenge of the appointment of Hon. (Dr.) Bandaranayake as a Judge of the Supreme Court in fundamental rights proceedings, P.R.P. Perera J., who set out in a separate judgment his own reasons for agreeing with the decision of the other four judges who heard the case, observed at page 99 of his judgment as follows:-

"We are of the view therefore that having regard to Article 35 of the Constitution, an act or omission of the President is not justiciable in a Court of Law, more so where the said act or omission is being questioned in proceedings where the President is not a party and in law could not have been made a party. . . *It is only the President who could furnish details relating to the said appointment. . . Such a matter cannot be canvassed in any Court*. Accordingly, we are of the view that this application cannot be entertained by this Court and must be dismissed *in limine*."

In *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri L.R. 309, a Five Judge Bench of this Court (S.W.B.Wadugodapitiya J., P.R.B. Perera J., Shirani Bandaranayake J., D.P.S.Gunasekera J., and Ameer Ismial J.) considered the question of Presidential immunity in the context of a fundamental rights application seeking to challenge to the appointment of Hon. Sarath N. Silva as the Chief Justice of Sri Lanka. The Court was, in that case, confronted with an argument that was founded on a decision of this Court that was made eighteen months before by a Three Judge Bench of this Court (G.P.S de Silva CJ., Fernando J., and Gunasekera J) in *Karunathilaka v. Dayananda Dissanayake*, *Commissioner of Elections et al (1)* (1999) 1 Sri LR 157 in which the challenge that was made in fundamental rights proceedings was to the inaction on the part of the Commissioner of Elections to hold elections with respect to five Provincial Councils the term of office of whose members had come to an end in June 1998.

The facts of *Karunathilaka's* case were quite interesting. The Commissioner of Elections had taken the necessary steps to fix the date of the poll as 28th August 1998, and the issue of postal ballot papers was fixed for 4th August 1998, but by telegram dated 3rd August 1998 the returning officers suspended the postal voting. No reason was given. The very next day, namely on 4th August 1998, the President purported to issue a Proclamation under Section 2 of the Public Security Ordinance and promulgated an Emergency Regulation which had the effect of cancelling the date of the poll that had been previously scheduled for 28th August 1998. Thereafter the Commissioner of Elections took no steps to fix a fresh

date for the poll and as a result, there was a failure to hold elections for the said Provincial Councils. The Petitioners in that case had alleged violations of Articles 12(1) and 14(l)(a) of the Constitution, by reason of the indefinite postponement of the said elections, citing the Commissioner of Elections as the 1st Respondent to the proceedings. M.D.H Fernando J., with G.P.S. de Silva, C.J. and D.P.S. Gunasekera J. concurring, made a very cryptic observation in the course of his judgment at page 176 to 177, which was very much relied upon by learned Counsel for the Petitioners in the *Victor Ivan* case:-

> "What is prohibited is the institution (or continuation) of proceedings against the President. *Article 35 does not purport to prohibit the institution of proceedings against any other person, where that is permissible under any other law***.** It is also relevant that immunity endures only "while any person holds office as President". It is a necessary consequence that immunity ceases immediately thereafter; …….I hold that Article 35 only prohibits the institution (or continuation) of legal proceedings against the President while in office; it imposes no bar whatsoever on proceedings (a) against him when he is no longer in office, and (b) other persons at any time**.** That is a consequence of the very nature of immunity: *Immunity is a shield for the doer, not for the act***.** Very different language is used when it is intended to exclude legal proceedings which seek to impugn the act. *Article 35, therefore, neither transforms an unlawful act into a lawful one, nor renders it one which shall not be questioned in any Court. It does not exclude judicial review of the lawfulness or propriety of an impugned act or omission, in appropriate proceedings against some other person who does not enjoy immunity from suit;* as, for instance, a defendant or a respondent who relies on an act done by the President, in order to justify his own conduct." (*Emphasis added*).

Having referred to the above observation of Fernando J. in *Karunathilaka's* case, Wadugodapitiiya J. who proceeded to examine the contention of the Attorney-General that by virtue of Article 35 of the Constitution, the President enjoyed absolute immunity from suit in any Court of Law, observed as follows at page 24 of his judgment:-

> This case confirms the proposition that the President's acts cannot be challenged in a Court of law in proceedings against the President. However, *where some other official performs an executive or administrative act violative of any person's fundamental rights, and in order to justify his own conduct, relies on an act done by the President, then, such act of such officer, together with its parent act are reviewable in appropriate judicial proceedings*. (*Emphasis added*)

It is therefore necessary to examine, apart from the 6th Respondent, who is alleged by the Petitioners to be performing the functions of the office of Chief Justice in violation of their fundamental rights, who else has been cited as respondents to this application, and in what capacities, as it is only one or more of those persons, who can be called upon to justify his or her conduct of violating the alleged fundamental rights of the Petitioners, if they in the above quoted words of Fernando J., rely "on an act done by the President".

As has been already noted, the Court of Appeal in CA (Writ) Application No. 411/2012, by its order dated 7th January 2013 issued a mandate in the nature of *certiorari* purporting quash the report of the Parliamentary Select Committee dated 8th December 2012 and its findings, but that court not only declined the further relief sought by the predecessor to the 6th Respondent to restrain Parliament

proceeding with the impeachment resolution before it, but expressly stated that the decision of that court would not prevent Parliament from taking further steps pursuant to the said resolution. Parliament moved on to debate the resolution, and with the requisite majority, passed the resolution to remove Hon. (Dr.) Bandaranayake from her office as Chief Justice. The President then made order as he lawfully might, for removing her from office in terms of Article 107(2) of the Constitution. It was in these circumstances that steps had to be taken to fill the vacancy in the office of the Chief Justice.

The 1st to 5th Respondents to this application are the members of the Parliamentary Council established by Article 41A(1) of the Constitution, as amended by the Eighteenth Amendment to the Constitution, which presumably made observations as contemplated by the said Article 41A(1) read with Schedule II Part I item 1 thereof, *prior* to the appointment of the 6th Respondent as the Chief Justice of Sri Lanka by the President of Sri Lanka upon his predecessor Chief Justice being removed from office. It is *not alleged by the Petitioners in their petition that they performed any act relying on the President's act of appointing the 6th Respondent as Chief Justice of Sri Lanka in terms of Article 107(1) of the Constitution.* The only other respondent to this application, besides the 1st to 6th Respondents, is the 7th Respondent Attorney-General, but it is clear from the petition that he has been cited respondent as required by Article 126 read with Article 134(1) of the Constitution and not in terms of the proviso to Article 35(3) of the Constitution.

The distinction is important, as noticing the Attorney General as required by Article 134(1) is to provide him an opportunity of being heard, if he wishes to make submissions in appropriate cases, but he is not called upon to defend any party or person. However, where as contemplated by the proviso to Article 35(3), proceedings are instituted against the Attorney-General instead of the President of Sri Lanka, who as noted earlier enjoys immunity from suit under Article 35(1), when the President is alleged to have performed any function *qua* Minister in circumstances outlined in Article 35(3) of the Constitution, he is called upon to defend the action of the President in his capacity as a Minister in terms of Article 44 of the Constitution. This is not such as case, as what is sought to be impugned in these proceedings, is the President's act of appointing the 6th Respondent as the 44th Chief Justice of Sri Lanka in terms of Article 107(1) of the Constitution, with respect to which act, he enjoys absolute immunity, as so well explained by Shavananda CJ in a passage already quoted from his judgment in *Mallikarachchi v. Shiva Pasupathy, Attorney-General* (1985) 1 SRI LR 74 at page 79. As Sharvananda J. went on to explain at page 80 of that judgment,

> The Attorney-General cannot be called upon to answer the allegations in the petitioner's application. *He does not represent the President in proceedings which are not covered by the proviso 1 to Article 35 (3), and is not competent or liable to answer the allegations in the petition.* Counsel for the petitioner sought to justify the citation of the Attorney-General as respondent by reference to Rule 65 of the Supreme Court Rules [now replaced by Rule 44 of the Supreme Court Rules, 1990] which provides that in proceedings under Article 126 of the Constitution, the Attorney-General shall be cited as Respondent. This Rule 65 was designed to meet the mandate of Article 134 which states that the Attorney-General shall be noticed and have the right to be heard in all proceedings in the Supreme Court in the exercise of its jurisdiction. *That Rule does not visualise the Attorney-General being made a sole party- respondent to answer the allegations in the petition.* Since infringement of fundamental right by executive or administrative action is alleged, the Attorney-General is noticed

only to watch the interests of the State. He is not cited as the person who has committed the alleged infringement. (*Emphasis added*)

For the reasons outlined above, preliminary objection (1) based on the Presidential Immunity from suit has to be upheld.

(2) Removal of the Chief Justice

In view of the decision to upheld preliminary objection (1) taken up by the Attorney General, it is not strictly necessary to deal with the next preliminary objection taken up by him, but as all leaned Counsel have made extensive submissions on the point, I shall advert to it, albeit briefly.

As noted by Wanasundera J. in *Visuvalingam and others v. Liyanage and Others No. (1),* (1983) 1 Sri LR 203 at pages 248 to 249 and Wadugodapitiya J. in *Victor Ivan and Others v. Hon. Sarath N. Silva and Others* (2001) 1 Sri LR 309 at page 331, the process outlined in Article 107(2) and (3) is the "only method of removal" of a Superior Court Judge found in the Constitution, and is not vested exclusively in Parliament or the President, and requires Parliament and the President, to act in concurrence. In other words, neither the President of Sri Lanka, nor Parliament, can by himself or itself remove the Chief Justice, a Judge of the Supreme Court, the President of the Court of Appeal or a Judge of the Court of Appeal, and the Constitution requires *two organs of State*, *both elected by the People*, *to act together* in the important process of impeaching a Superior Court Judge. This Court has no jurisdiction under the Constitution or any other law to remove a Chief Justice, Judge of the Supreme Court, President of the Court of Appeal or a Judge of the Court of Appeal, nor does it have the jurisdiction or power to grant any prayer in the petition which seeks to directly or indirectly have the effect of removing the 6th Respondent from the office which he now holds as the Chief Justice of Sri Lanka.

In these circumstances and for these reasons, I am of the opinion that preliminary objection (2) too has to be upheld.

Conclusions

I accordingly make order that in view of both preliminary objections taken up by the Attorney General being upheld, the application filed by the Petitioners should stand dismissed. In all the circumstances of this case, I do not make any order for costs. However, before parting with this judgment, I wish to add that Mr. Viran Corea has informed Court that as stated in a motion filed by the Petitioners dated 18th September 2013, he is under instruction from the Petitioners not to participate in the further disposal of this application, and did not make any other submission before this Court. In my view, to seek to withdraw from this case at this stage is an abuse of the judicial process, particularly in the context that the Petitioners had initially invoked the jurisdiction of this Court in their own right and in the public interest. This Court has in these circumstances, given anxious consideration to all matters that arise from the pleadings of the Petitioners, as it is in law bound, in arriving at its decision.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake, J,

I agree.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Eva Wanasundera, PC., J,

I agree.

JUDGE OF THE SUPREME COURT

Rohini 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 application under and in terms of Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. FR. No. 37/2013

1. Galabada Gamage Sunethra Arambawela.

2. Nihinsa Senuli Arambawela

   Both of 109/10, Fife Road, Colombo 5.

Petitioners

Vs.

1. Mrs. Dhammika C.A. Jayanetti
   Principal
   Sirimavo Bandaranaike Vidyalaya,
   Stanmore Crescent
   Colombo 7.

2. Mr. S.M. Gotabaya Jayaratne
   Secretary to the Ministry of Education,
   Ministry of Education ,
   surupaya,
   Battaramulla.

3. Hon. Bandula Gunawardhana (M.P.)
   Minister of Education,
   Ministry of Education,
   Isurupaya,
   Battaramulla.

4. The Interview Board (on admissions to Grade 1, 2013),
   C/O, Sirimavo Bandaranaike Vidyalaya,
   Stanmore Crescent
   Colombo 7.

5. Mr. J.H.M.W. Ranjith
6. Ms. B.G.I. Kalani Hemali
7. Ms. A.D.M.P. Gunasekara
8. Mr. P. Wickremasinghe
9. Ms. Ranjana Perera

   All members of the Appeal Interview Board (on admissions to Grade 1, 2013) for Sirimavo Bandaranaike Vidyalaya,
   Stanmore Crescent
   Colombo 7.

10. Hon. Attorney General
    Attorney General's Department,
    Hulftscdorp
    Colombo 12.

Respondents.

* * * * * *

Before : Marsoof, PC. J.
Hettige, PC. J. &
Wanasundera, PC,J.

Counsel : Viran Corea for the Petitioners.
Dr. Avanti Perera, SC. for the Respondents.

Argued On : 20.12..2013

Decided On : 20.01.2014

* * * * *

SC. FR. No. 37/2013

Wanasundera, PC.J.

The Petitioners have come before this Court by way of a petition dated 1st February, 2013, complaining that their fundamental rights guaranteed under Article 12(1) of the Constitution have been violated by one or more of the Respondents by not admitting the 2nd Petitioner to Grade 1 of Sirimavo Bandaranaike Vidyalaya, Colombo. The 1st Petitioner is the mother of the minor girl child, the 2nd Petitioner. Leave to Proceed was granted by this Court on 03.7.2013.

The Petitioners applied to this school under the category of "children of residents in close proximity to the school". The address of the Petitioners as given is No. 109/10, Fife Road, Colombo 5. They claim that this place was leased by the 2nd Petitioner child's father in 2003 and that they have been living there since then. The child's paternal grand parents reside at No. 10, Andiris Silva Mawtha, Rawatawatta, Moratuwa and the objections filed on behalf of the Respondents seem to suggest that the Petitioners live in Moratuwa and not in Colombo 5.

The facts pertinent to the subject matter are as follows:- The 2nd Petitioner girl child's brother, elder to her is schooling at Isipathana Vidyalaya, Colombo 5. Both these children attend the Dhamma School held on Sundays at the Vajiraramaya Temple, Colombo 4. The 2nd Petitioner and her brother were born in Colombo hospitals in 2007 May and 2003 April. The birth certificates indicate the address of the informant, father, Sundara Chandra Arambewela, as No. 109/10, Fife Road, Colombo 5. This place No. 109/10, is described in the deeds of lease as Lot 1 in Unit 6 of a condominium property depicted in Condominium Plan No. 1675- CH/0/1650/975 dated 08.03.1974. The upper floor of Lot 1 was the leased out premises belonging to one M.H.B. Lalith Herath. The lessee is the father of the 2nd Petitioner child. Initially, the lease period was 5 years from 01.8.2003 to 31.7.2008, and the monthly rental was Rs.8000/- per month for the first two years and Rs.10,000/- per month for the following three years. There was a

refundable deposit of Rs.20,000/- also paid to the lessor. A second lease was executed for another 5 years from 01.8.2008 to 31.7.2013. The rent was increased to Rs. 12000 per month for 2 years and Rs. 14000 per month for the rest 3 years and the deposit was also increased to Rs.40,000/-. Both leases were registered. The National Identity Cards of both parents of the child issued in 2006 and 2008 also bear the address of 109/10, Fife Road, Colombo 5. The Hatton National Bank current accounts from 2007 February of the 1st Petitioner also show the same address. The Dialog telephone bills as well as the Grama Niladari reports confirm that the family is living there. The 2nd Petitioner child's father's business registration in 2006 bears the same address. The older brother's health record card when he was only 3 years give the same address. There are several other affidavits of neighbours of different categories to confirm that the family is living there.

The 1st Respondent has filed an affidavit of objections with two home-visit-reports at different times which contains a record of the presence of the Petitioners at whatever time and day visited at the address, 109/10, Fife Road, Colombo 5. Yet the short comment at the end of the report states "it cannot be said for certain that this is the place of permanent residency". The wording shows that the home-visitors to check the residency mention that they have only a doubt. They fail to say that it is certainly not the permanent residence of the Petitioners. It's only a doubt in their minds, which doubt is not explained at all. They do not give any reasons for the doubt either. There has not been any considered reason to conclude that the Petitioners are not permanently resident there. The Respondents have even gone to the extent of Police inquiries done unofficially in the night, to check whether the Petitioners are in the Moratuwa address, where the minor child's father's old parents live, according to the counter objections affidavit filed by the 1st Petitioner. The Respondents have not given any consideration to evidence on record such as the documents produced at the interview for which good marks to reach the total of 84 out of 100 was granted by the Interview Board. The 1st Respondent has not weighed the evidence on the balance. Moreover, the Respondents

have failed to file and opted not to file the list of others who were admitted to the school, in January, 2013 for this Court to see the clear picture.

In the teeth of the evidence produced before this Court, I observe that the Respondents should not have set aside the 84 marks given at the interview, and having not given any reason for setting aside the said marks, they have acted arbitrarily and in a discriminating manner in not admitting the 2nd Petitioner to Grade 1 of Sirimavo Bandaranaike Vidyalaya. In my opinion, the fundamental rights of the Petitioners guaranteed under Article 12(1) of the Constitution have been infringed by the Respondents. I would therefore make order that the 2nd Petitioner be admitted to Grade 2 of the Sirimavo Bandaranaike Vidyalaya at the very beginning of 2014. I grant the Petitioners costs fixed at Rs. 20,000/- payable by the State to the Petitioners.

Judge of the Supreme Court

Marsoof, PC. 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 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 Articles 17 & 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka

SC. FR. Application No. 73/2012

Natasha Dulmi Hewagama,
'Vikumsiri',
Gurukanda,
Kathaluwa,
Ahangama.

Petitioner

Vs.

1. Secretary,
   Ministry of Higher Education,
   No. 18, Ward Place,
   Colombo 07.

2. Chairman,
   University Grants Commission,
   No. 20, Ward Place,
   Colombo 07.

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

Respondents.

* * * * *

SC. (FR) 73/2012

Before : **Mohan Pieris, PC. C.J.**
Priyasath Dep, PC.J. . &
Eva Wanasundera, PC,J.

Counsel : Ravindranath Dabare for the Petitioner.

Ms. Indika Demuni de Silva DSG., for the Respondents.

Argued On : **27-01-2014 & 17-02-2014**

Decided On : **03-10-2014**

* * * * *

Eva Wanasundera, PC.J.

Leave to proceed was granted in this matter for the alleged infringement of Article 12(1) of the Constitution on 25.05.2012. The matter was argued on 27.01.2014 and 17.02.2014. Written submissions as directed by this Court have been filed by both parties.

The Petitioner was a student of Southlands Balika Vidyalaya, Galle who sat for the G.C.E. Advanced Level Examination in 2010 in the Biology Stream. She had obtained 2As and 1B and an Z score of 1.9375. She was in the 99th position from the Galle District and her Island-Rank was 901.

She claims that she should have been taken into the 'Medicine' stream or the 'Dental' stream for the year 2010/2011 and the Respondents have violated and are in continuous violation of her fundamental rights by not having done so.

Even though the 2nd Respondent pleaded preliminary objections to this application namely that it was time barred and not in conformity with the SC. Rules, no arguments with regard to the said objections were considered by this Court since this Court preferred to hear this application only on merits.

It was common ground that the policy on admission to National Universities is decided from time to time by the University Grants Commission with the concurrence of the Government.

The criteria analysed by the Petitioner was based on the document ' me3' filed with the Petition, which is the hand book issued by the University Grants Commission for the year 2010/2011. It is the same as 2R1 filed by the 2nd Respondent. The Petitioner submitted that selection of students should have been done according to the hand book which the 2nd Respondent failed to do and it amounts to a violation of her fundamental rights and her legitimate expectations to enter the University to do Medicine or Dental Surgery. The Petitioner and her father had filed applications in this regard before the Human Rights Commission and the Human Rights Commission had recommended to the Respondents that the Petitioner be admitted to the ' Medicine' stream.

Admission criteria was contained in Section 3.1 of the hand book and applicable criteria for medicine and Dental Surgery was contained in 3.2.3.2. The vacancies for students selected island wide for Medicine was 1165 and 80 for Dental Surgery. The Petitioner's Island-basis rank was 901 and District basis rank was 99. The Petitioner claims that according to the District rank 99, she should be selected for Medicine or Dental Surgery.

The Respondent's submissions were made to the effect that the results obtained by the Petitioner at the G.C.E. (A.L.) Examination held in 2010 were inadequate for her to be selected for a course of study in either Medicine or Dental Surgery.

The focal point in this matter is ***Section 3.2.3.2*** in the hand book ' me3' = 2R1. May I reproduce the same below for a clear picture of the analysis.

Section 3.2.3.2:

*Admission to **all courses other than the courses stated in 3.2.3.1 above** will be made on dual criteria, namely:*

- *All Island Merit*
- *Merit on District basis*

Under All Island Merit criteria:

(i) Up to 40% of the available places will be filled in order of Z Scores ranked on an all island basis.

Under District Merit Criteria:

(i) Up to 55% of the available places in each course of study will be allocated to the 25 administrative districts in proportion to the total population, that is, on the ratio of the population of the district concerned to the total population of the country.

(ii) A special allocation up to 5% of the available places in each course of study will be allocated to the under-mentioned 16 educationally disadvantaged districts in proportion to the population, that is, on the ratio of the population of each such districts to the total population of the 16 districts;

1. *Nuwara Eliya*
2. *Hambantota*
3. *Jaffna*
4. *Kilinochchi*
5. *Mannar*
6. *Mullaitivu*
7. *Vavuniya*
8. *Trincomalee*
9. *Batticaloa*
10. *Ampara*
11. *Puttalam*
12. *Anuradhapura*
13. *Polonnaruwa*
14. *Badulla*
15. *Monaragala*
16. *Rathnapura*

The number of places allocated on the district merit quota given in (i) and (ii) above will be filled in order of Z Scores ranked on the district basis.

Note 1

In selecting students for a given course of study, it will be ensured that the quota allocated to any district under (i) and (ii) above will not be below the quota in the base Academic year, namely 1993/94.

Note 2

It should be noted that the actual numbers selected could vary from the proposed figures mentioned in the paragraph 2.1 above, because of practical problems encountered in allocating students to Universities and other unavoidable factors. The approximate distribution of the above numbers among different universities is given in

Section 3.3:

A limited number of students will also be admitted on special grounds as specified in Paragraph 18 (a), (b), (c), (d), (e) and paragraph 19 in PART TWO of this Handbook, subject to the Conditions set out therein.

Petitioner has calculated 40% of the students under the all-island basis to be 466 [1165 x 40% = 466] , 55% from the said number to be 641 [1165 x55% = 640.71] and 5% of the said number to be 58 [1165 x 5% = 58.25]. The Petitioner states that population ratio of the Galle District is 0.052406322 and when it is multiplied by 1165 the answer

is 33.64 and therefore 34 students should be admitted to the Medical faculty from Galle District under the District Merit System.

It is to be noted that under the District merit criteria **"up to 55%** of the available places in each course of study had to be allocated to the 25 Administrative Districts. It is not to be understood as being an equivalent to 55% of the available places …….". In addition to this criteria there are two Notes emphasized in italics and colour under 3.2.3.2 of the hand book. Furthermore 3.3 states that a limited number of students will also be admitted on special grounds as specified in paragraphs 18(a), (b), (c), (d) and (e) and in paragraph 19 in Part II of the hand book. The Petitioner has been oblivious to these Notes 1 and 2 of Section 3.2.3.2 and 3.3 of the hand book in all the calculations she has given in the Petition.

It is this Court's view that the contention of the Petitioner that "the intake for the course of study in medicine for the academic year 2010/2011 should be based solely on the all Island merit and District merit criteria" is erroneous. It is only after the consideration of 3.2.3.2, Note1 and Note 2 and 3.3 of the hand book, namely, (a) the all Island merit ,(b) District merit, (c) the intake which was set apart for the Foreign, Defence and Sports Quota, (d) the quota allocation in the base academic years 1993/1994 and 2002/2003 and (e) the practical difficulties which arose due to clustering of students on the same marks, that the number of students to follow the course of study in Medicine under the different criteria in the hand book could be determined. The proper numbers therefore are as follows:-

(1) All Island merit	-	456
(2) District Merit	-	691
(3) Special grounds	-	18
		1165
		=====

Out of this intake, the all Island merit quota for Galle District is 61 places and District merit quota for Galle District is 33 places resulting in 94 students being admitted for

Medicine from Galle District. Accordingly in Dental Surgery 80 students were selected under the following categories.

(1) All Island Merit	28
(2) District Merit	49
(3) Special grounds	03
	80
	==

Under 'All Island Merit' criterion, no students were taken for Dental surgery but 2 places were allocated under the District Merit criterion. Altogether 94+2= 96 students from Galle District were admitted to Medicine and Dental surgery.

The Petitioner was ranked 99 in the Galle District. Neither the rank 97th student nor the rank 98th student were admitted to Medicine or Dental Surgery.

The calculations are vividly explained in the documents filed by the 2nd Respondent and I observe that there are no hypothetical figures taken into account at any stage of the calculations.

I observe that when the Human Rights Commission called for a reply from the University Grants Commission, the whole gammut of explanation regarding the calculations had been sent to the Human Rights Commission which unfortunately has not been considered by the Human Rights Commission. I find that the Human Rights Commission had not come to the correct decision as consideration had neither been given to the wording "up to _% " nor to the Notes 1 and 2 and other considerations as mentioned in Section 3.3 of the hand book.

The Petitioner appears not to have appreciated the contents in Section 3.2.3.2 which was meant to be read as a whole with the Notes 1 and 2 therein. I hold that the expectations of the Petitioner was founded on wrong assessment and wrong understanding of the criteria mentioned in the hand book. The provisions made out in the hand book as criteria for selection of students for Medicine and Dental Surgery is no

easy task to be practically put into effect but I am satisfied with the detailed explanations given by the 2nd Respondent in the affidavit of Objections, that mathematically the method is correct and in compliance with the material placed in the Sinhalese and English copies of the hand book. No prejudice has been caused to the Petitioner in the method of calculations and the subject matter taken into account in reaching the final decision.

I hold that there is no infringement of fundamental rights of the Petitioner under Article 12(1) of the Constitution. This application is dismissed without costs.

Judge of the Supreme Court

Mohan Peiris, PC. CJ.

I agree.

Chief Justice

Priyasath Dep, PC.

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 Democratic Socialist Republic of Sri Lanka

SC. FR. Application No. 74/2012

H.W. Rajitha Udakara Sampath,
316G, Bajjagodawatta,
Hayley Road,
Aththiligoda,
Galle.

Petitioner

Vs.

1. Secretary,
   Ministry of Higher Education,
   No. 18, Ward Place,
   Colombo 07.

2. Chairman,
   University Grants Commission,
   No. 20, Ward Place,
   Colombo 07.

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

Respondents.

* * * * *

SC. (FR) 74/2012

Before : **Mohan Pieris, PC. C.J.**
Priyasath Dep, PC.J. . &
Eva Wanasundera, PC,J.

Counsel : Ravindranath Dabare for the Petitioner.

Ms. Indika Demuni de Silva DSG., for the Respondents

Argued On : **27-01-2014 & 17-02-2014**

Decided On : **03-10-2014**

* * * * *

Eva Wanasundera, PC.J.

Leave to proceed was granted in this matter for the alleged infringement of Article 12(1) of the Constitution on 25.05.2012. The matter was argued on 27.01.2014 and 17.02.2014. Written submissions as directed by this Court have been filed by both parties.

The Petitioner was a student of Mahinda College, Galle who sat for the G.C.E. Advanced Level Examination in 2010 in the Biology Stream. He had obtained 2As and 1B and an Z score of 1.9405. He was in the 98th position from the Galle District and his Island-Rank was 893.

He claims that he should have been taken into the 'Medicine' stream or the 'Dental' stream for the year 2010/2011 and the Respondents have violated and are in continuous violation of her fundamental rights by not having done so.

Even though the 2nd Respondent pleaded preliminary objections to this application namely that it was time barred and not in conformity with the SC. Rules, no arguments with regard to the said objections were considered by this Court since this Court preferred to hear this application only on merits.

It was common ground that the policy on admission to National Universities is decided from time to time by the University Grants Commission with the concurrence of the Government.

The criteria analysed by the Petitioner was based on the document ' fm3' filed with the Petition, which is the hand book issued by the University Grants Commission for the year 2010/2011. It is the same as 2R1 filed by the 2nd Respondent. The Petitioner submitted that selection of students should have been done according to the hand book which the 2nd Respondent failed to do and it amounts to a violation of his fundamental rights and his legitimate expectations to enter the University to do Medicine or Dental Surgery. The Petitioner had filed applications in this regard before the Human Rights Commission and the Human Rights Commission had recommended to the Respondents that the Petitioner be admitted to the ' Medicine' stream.

Admission criteria was contained in Section 3.1 of the hand book and applicable criteria for Medicine and Dental Surgery was contained in 3.2.3.2. The vacancies for students selected island wide for Medicine was 1165 and 80 for Dental Surgery. The Petitioner's Island-basis rank was 893 and District basis rank was 98. The Petitioner claims that according to the District rank 98, he should be selected for Medicine or Dental Surgery.

The Respondent's submissions were made to the effect that the results obtained by the Petitioner at the G.C.E. (A.L.) Examination held in 2010 were inadequate for him to be selected for a course of study in either Medicine or Dental Surgery.

The focal point in this matter is ***Section 3.2.3.2*** in the hand book ' fm3' = 2R1. May I reproduce the same below for a clear picture of the analysis.

Section 3.2.3.2:

Admission to ***all courses other than the courses stated in 3.2.3.1 above*** *will be made on dual criteria, namely:*

- *All Island Merit*
- *Merit on District basis*

Under All Island Merit criteria:

(i) Up to 40% of the available places will be filled in order of Z Scores ranked on an all island basis.

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(i) Up to 55% of the available places in each course of study will be allocated to the 25 administrative districts in proportion to the total population, that is, on the ratio of the population of the district concerned to the total population of the country.

(ii) A special allocation up to 5% of the available places in each course of study will be allocated to the under-mentioned 16 educationally disadvantaged districts in proportion to the population, that is, on the ratio of the population of each such districts to the total population of the 16 districts;

1. *Nuwara Eliya*
2. *Hambantota*
3. *Jaffna*
4. *Kilinochchi*
5. *Mannar*
6. *Mullaitivu*
7. *Vavuniya*
8. *Trincomalee*
9. *Batticaloa*
10. *Ampara*
11. *Puttalam*
12. *Anuradhapura*
13. *Polonnaruwa*
14. *Badulla*
15. *Monaragala*
16. *Rathnapura*

The number of places allocated on the district merit quota given in (i) and (ii) above will be filled in order of Z Scores ranked on the district basis.

Note 1

In selecting students for a given course of study, it will be ensured that the quota allocated to any district under (i) and (ii) above will not be below the quota in the base Academic year, namely 1993/94.

Note 2

It should be noted that the actual numbers selected could vary from the proposed figures mentioned in the paragraph 2.1 above, because of practical problems encountered in allocating students to Universities and other unavoidable factors. The approximate distribution of the above numbers among different universities is given in Table 01.

Section 3.3:

A limited number of students will also be admitted on special grounds as specified in Paragraph 18 (a), (b), (c), (d), (e) and paragraph 19 in PART TWO of this Handbook, subject to the Conditions set out therein.

Petitioner has calculated 40% of the students under the all-island basis to be 466 [1165 x 40% = 466] , 55% from the said number to be 641 [1165 x55% = 640.71] and 5% of the said number to be 58 [1165 x 5% = 58.25]. The Petitioner states that population ratio of the Galle District is 0.052406322 and when it is multiplied by 1165 the answer is 33.64 and therefore 34 students should be admitted to the Medical faculty from Galle District under the District Merit System.

It is to be noted that under the District merit criteria **"up to 55%** of the available places in each course of study had to be allocated to the 25 Administrative Districts. It is not to be understood as being an equivalent to 55% of the available places …….". In addition to this criteria there are two Notes emphasized in italics and colour under 3.2.3.2 of the hand book. Furthermore 3.3 states that a limited number of students will also be admitted on special grounds as specified in paragraphs 18(a), (b), (c), (d) and (e) and in

paragraph 19 in Part II of the hand book. The Petitioner has been oblivious to these Notes 1 and 2 of Section 3.2.3.2 and 3.3 of the hand book in all the calculations she has given in the Petition.

It is this Court's view that the contention of the Petitioner that "the intake for the course of study in medicine for the academic year 2010/2011 should be based solely on the all Island merit and District merit criteria" is erroneous. It is only after the consideration of 3.2.3.2, Note1 and Note 2 and 3.3 of the hand book, namely, (a) the all Island merit ,(b) District merit, (c) the intake which was set apart for the Foreign, Defence and Sports Quota, (d) the quota allocation in the base academic years 1993/1994 and 2002/2003 and (e) the practical difficulties which arose due to clustering of students on the same marks, that the number of students to follow the course of study in Medicine under the different criteria in the hand book could be determined. The proper numbers therefore are as follows:-

(1) All Island merit	-	456
(2) District Merit	-	691
(3) Special grounds	-	18
		1165

Out of this intake, the all Island merit quota for Galle District is 61 places and District merit quota for Galle District is 33 places resulting in 94 students being admitted for Medicine from Galle District. Accordingly in Dental Surgery 80 students were selected under the following categories.

(1) All Island Merit	28
(2) District Merit	49
(3) Special grounds	03
	80

Under 'All Island Merit' criterion, no students were taken for Dental surgery but 2 places were allocated under the District Merit criterion. Altogether 94+2= 96 students from Galle District were admitted to Medicine and Dental surgery.

The Petitioner was ranked 98 in the Galle District. Even the rank 97th student was not admitted to Medicine or Dental Surgery.

The calculations are vividly explained in the documents filed by the 2nd Respondent and I observe that there are no hypothetical figures taken into account at any stage of the calculations.

I observe that when the Human Rights Commission called for a reply from the University Grants Commission, the whole gammut of explanation regarding the calculations had been sent to the Human Rights Commission which unfortunately has not been considered by the Human Rights Commission. I find that the Human Rights Commission had not come to the correct decision as consideration had neither been given to the wording "up to _% " nor to the Notes 1 and 2 and other considerations as mentioned in Section 3.3 of the hand book.

The Petitioner appears not to have appreciated the contents in Section 3.2.3.2 which was meant to be read as a whole with the Notes 1 and 2 therein. I hold that the expectations of the Petitioner was founded on wrong assessment and wrong understanding of the criteria mentioned in the hand book. The provisions made out in the hand book as criteria for selection of students for Medicine and Dental Surgery is no easy task to be practically put into effect but I am satisfied with the detailed explanations given by the 2nd Respondent in the affidavit of Objections, that mathematically the method is correct and in compliance with the material placed in the Sinhalese and English copies of the hand book. No prejudice has been caused to the Petitioner in the method of calculations and the subject matter taken into account in reaching the final decision.

I hold that there is no infringement of fundamental rights of the Petitioner under Article 12(1) of the Constitution. This application is dismissed without costs.

Judge of the Supreme Court

Mohan Peiris, PC. CJ.

I agree.

Chief Justice

Priyasath Dep, PC.

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 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 Democratic Socialist Republic of Sri Lanka

SC. FR. Application No. 261/2013

Alagaratnam Manoranjan
22/1, Racca Lane,
Racca Road,
Chandukuli, Jaffna.

Petitioner

Vs.

1. Hon. G.A. Chandrasiri
   Governor, Northern Province,
   Governor's Secretariat,
   Old Park,
   Kandy Road,
   Chundukuli, Jaffna.

2. Ms. R. Wijialudchumi
   Chief Secretary,
   Chief Secretary's Secretariat,
   Northern Province Council,
   187, Adiyapatham Road,
   Thirunelvely, Jaffna.

3. Dr. Dayasiri Fernando,
   Chairman

4. Mr. Palitha Kumarasinghe, PC.
   Member.

5. Mrs. Sirimavo A. Wijeratne
   Member

6. Mr. S.C. Mannapperuma
   Member

7. Mr. Ananda Seneviratne
   Member

8. Mr. N.H. Pathirana
   Member

9. Mr. Thillai Nadarajah
   Member

10. Mr. D.W. Ariyawansa
    Member

11. Mr. Mohamed Nahiya
    Member

All of

Public Service Commission
177, Nawala Road,
Narahenpita,
Colombo 5.

12. The Hon. Auditor General
    306/72, Polduwa Road,
    Battaramulla.

13. Secretary to the Treasury, and Secretary to the Ministry of Finance and Planning,
    The Secretariat,
    Colombo 01.

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

Respondents.

15. Hon. Justice C.V.Vigneswaran
    Chief Minister-Northern Province,
    Chief Minister's Office,
    26, Somasumderam Avenue,
    Chundukuli, Jaffna.

15th Added Respondent

SC. (FR) 261/2013

Before : Saleem Marsoof, PC. Acting C.J.
Chandra Ekanayake J. &
Eva Wanasundera, PC,J.

Counsel : Senani Dayaratne with Mrs. Nishanthi Mendis for the Petitioner.

J.C. Weliamuna with Pulasthi Hewamanne for the 15th Added Respondent.

Nerin Pulle, DSG., for the 1st, 2nd, 13th and 14th Respondents.

Argued On Preliminary Objections : **23-06-2014**

Written Submissions filed : By the Petitioner on **09-07-2014**
By the 1st, 2nd, 13th &14th Respondents on **04-07-2014**

Decided On : **11-09-2014**

* * * * *

Eva Wanasundera, PC.J.

Having heard the parties, and having gone through the written submissions tendered by the parties, this order deals with the preliminary objection taken by the 1st, 2nd, 13th and 14th Respondents that the Petitioner's application to this Court is time barred.

For the purpose of dealing with this preliminary objection, it is crucial to determine the date on which the Petitioner's right to seek relief from this Court for the alleged infringement of the Petitioner's fundamental rights starts to run. The provisions of law

with regard to this matter are contained in Article 126(2) of the Constitution and Section 13 of the Human Rights Commission of Sri Lanka Act No. 21 of 1996.
Article 126(2) of the Constitution reads as follows:-

> "Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, **within one month thereof,** in accordance with such rules of Court as may be in force, **apply to the Supreme Court …..**".

Section 13(1) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996 reads as follows:-

> " 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."

The Petitioner's contention is that the letter of transfer he seeks to challenge is not 'P12' dated 08-01-2013 but 'P17', which is dated 04th April 2013 and that he has made an application to the Human Rights Commission within one month thereof and due to that reason, according to Section 13 of the Human Rights Commission Act, 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 the Petitioner in terms of Article 126(2) of the Constitution.

The Petitioner alleges in paragraph 9 of the Petition, that he was wrongfully transferred from the Post of Deputy Chief Secretary/Finance, in the Provincial Treasury of the Northern Provincial Council. The Petitioner alleges that by letter dated 8th January

2013 marked 'P12', he was informed by the 2nd Respondent, pursuant to a direction of the 1st Respondent, that he was temporally attached to the Chief Secretary's Secretariat with immediate effect until further orders are made. By document marked 'P15', dated 27.02.2013 the Petitioner wrote to the 1st Respondent through the 2nd Respondent specifically stating that the Petitioner has complied with the Order made by the 1st Respondent, which was intimated to him by the 2nd Respondent by letter dated 8th January 2013, meaning that he has reported to the Chief Secretary's Secretariat, having left the former place of work, as Deputy Chief Secretary-Finance, Provincial Treasury of the Northern Provincial Council. Thereafter he made an appeal requesting that he be authorized to resume duties in his former office. It is clear from the Petitioner's letter 'P15' that by the time he wrote that letter, he had accepted the transfer to the Chief Secretary's Secretariat in compliance with the order of transfer contained in 'P12' dated 08-01-2013.

The Petitioner had worked at the Chief Secretary's Secretariat for almost theree months before he was appointed as Officer-in-Charge, Training Centre, Management Development and Training Institute, Mannar by 'P18', dated 04-04-2013 by P15 dated 27-02-2013, the Petitioner complained to the 1st Respondent that he should be allowed to resume his duties as Deputy Chief Secretary/Finance, which position he lost as far back as 8th January 2013. It is more than evident from the pleadings of the Petitioner contained in the Petition that he was complaining of him being transferred out of the position of the Deputy Chief Secretary-Finance which occurred on 08-01-2013.

The application before the Human Rights Commission was filed on 10.04.2013. This date is more than three months after the date of the alleged infringement of the fundamental right. Furthermore, by 'P31' dated 06-05-2013 the 2nd Respondent, the Chief Secretary of the Northern Provincial Council has informed the Human Rights Commission that the Petitioner has never assumed duties at the Training Centre, Manner as directed by the 2nd Respondent's letter dated 04-04-2013, but he was attached to the Governor's Office even at that time. Thereafter, whatever happened at the Human Rights Commission has not been placed before Court. In fact the Petitioner has failed to adduce evidence to establish that there was an inquiry pending before the

Human Rights Commission at the time this application was filed before this Court. Even at the time of arguing this matter on 23-06-2014 the Petitioner did not attempt to make available to Court any evidence to show that there was an inquiry pending before the Human Rights Commission. Any way no application was filed before the Human Rights Commission within one month from the date of transfer, i.e. 08-01-2013.

It can be seen quite clearly that 'P17' is not the letter by which the Petitioner was tranferred. It is a letter which was issued long after the letter of transfer which is 'P12' dated 08th January 2013 of which the Petitioner had knowledge. When the Petitioner received P12 dated 08-01-2013, he came to know the fact that he was transferred out of the post he held in the Provincial Office and out of the place he was working as Deputy Chief Secretary-Finance. He is seeking to challenge the decisions taken by the Respondents at that time and he is praying in the Petition, to be placed back in that post and in that place.

I wish to discuss what is meant by a "transfer". Black's Law Dictionary describes a transfer as "removal of a person or thing from one place to another". In the instant case, the Petitioner is complaining of getting transferred out of the Provincial Treasury – Northern Provincial Council where he was working as Deputy Chief Secretary Finance. He states that he was transferred out of that place to the Training Centre, Mannar Management and Development Training Institute on 04-04-2013 which is totally factually incorrect. He was transferred out of the Provincial Treasury on 08-01-2013 to the Chief Secretary's Secretariat where he worked for 3 months. It was, 3 months afterwards, that the Petitioner was transferred to the Management and Development Training Institute by P17 dated 04-04-2013 from the Chief Secretary's Secretariat. Therefore the transfer that the Petitioner is complaining of, occurred on 08-01-2013 and not on 04-04-2013. The complaint to the Human Rights Commission was made on 10-04-2013. Incidentally it is also observed by this Court that the Petitioner never reported to the Management and Development Training Institute as directed by P17 and was by 10-04-2013 still attached to the Chief Secretary's Secretariat.

Going through the authorities namely, ***Roshan Mahesh Ukwatta Vs. Sub Inspector Marasinghe, OIC Crime, Welikada Police Station and Others*** SC(FR) 252/2006 S.C. Minutes of 15-12-2010, Justice Ekanayake overruled the preliminary objection on the basis that the Petitioner was incarcerated even at the time the petition was filed and he had been tortured. She quoted Justice Sharvananda CJ. in ***Namasivayam Vs. Gunawardena 1989 1 SLR 394***, as the basis for over- ruling the preliminary objection which I would like to quote again " *To make the remedy under Article 126 meaningful to the applicant, the one month prescribed by Article 126(2) should be calculated from the time that he is under no restraint. If this liberal construction is not adopted for petitions under Article 126(2) the Petitioner's right to his constitutional remedy under Article 126 can turn out to be illusory. It could be rendered nugatory or frustrated by continued detention*".

In ***Subasinghe Vs. IGP.*** SC.(Spl) Application 16/1999, SC. Minutes of 11.09.2000, Justice S.N. Silva CJ. upholding the preliminary objection observed that "The Petitioner had failed to adduce any evidence that there has been an inquiry pending before the Human Rights Commission. In the circumstances we have to up-hold the preliminary objection raised by the Learned State Counsel".

In ***Divalage Upalika Ranaweera Vs. Sub Inspector Vinisias SC***. Application No. 654/2003 SC. Minutes of 13-05-2008, Justice Gamini Amaratunga analysed Section 13(1) of the Human Rights Commission Act No. 21 of 1996 as well as Section 14 of the said Act read with Article 126(2). He has mentioned that there was no material placed before Court by the Petitioner to show that there had been an inquiry before the Human Rights Commission into his complaints. The preliminary objection relating to the time bar was upheld and the Petitioner's application was dismissed.

In ***Kariyawasam Vs. Southern Provincial Road Development Authority and 8 Others*** 2007, 2 SLR 33, Justice Amaratunga again analysed the relevant provisions of the law. The impugned transfer was dated 14-03-2006. The application to the Human Rights Commission was on 27-03-2006. It was within one month. The HRC had acted upon the complaint and called for observations from the authorities which were not

replied but set in motion the process of holding an inquiry and the inquiry was pending before the HRC. The Fundamental Rights application was filed on 02-05-2006 but since the inquiry before the HRC was pending, the Supreme Court held that, "In those circumstances the Petitioner is entitled to claim the benefit conferred by Section 13(1) of the Human Rights Commission Act. The Petitioner's application to the Supreme Court was not time barred". In the instant case, the Petitioner has not filed a complaint to the HRC within one month from 08-01-2013. The complaint was filed on 10-04-2013 clearly after one month, and is in contrast to the facts in the ***Kariyawasam Vs. Southern Provincial Road Development Authority and 8 Others*** case.

I am of the opinion that Section 13 of the Human Rights Commission Act No. 31 of 1996 should not be interpreted and/or used as a rule to suspend the one month's time limit contemplated by Article 126(2) of the Constitution, particularly when the person alleging the violation of his fundamental rights has not made his complaint to the HRC. within one month of the alleged violation. A citizen of this country is protected by the Constitution with regard to his fundamental rights. The Provisions of an ordinary Act of Parliament should not be allowed to be used to circumvent the provisions in the Constitution.

Thus, having considered the facts placed by the documents before this Court and the submissions made by the parties with regard to Article 126(2) of the Constitution as well as Sections 13 and 14 of the Human Rights Commission, I hold that the Petitioner has failed to complain to the HRC within one month of the date of the transfer as well as to come by way of a Fundamental Rights Application to this Court within one month of the impugned infringement of a fundamental right. I uphold the preliminary objection that the application is time barred. The application is dismissed in limine. I make no order for costs.

Judge of the Supreme Court

Saleem Marsoof, PC. Acting C.J.

I agree.

Acting Chief Justice

Chandra Ekanayake 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

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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.

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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

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

B.P. Udawatta
No.239/15A,Mada Mawatha
Sri Sumanagala Road
Pannipitiya

Petitioner

SC FR No. 349/2011

Vs.

1. National Water Supply & Drainage Board
   Galle Road, Ratmalana.

2. K.L.L. Premanath
   General Manager,
   National Water Supply & Drainage Board, Galle Road, Ratmalana.

3. A. Abeygunasekera
   Ministry of Water Supply & Drainage
   "Lakdiya Medura, No. 35, Pelawatta
   Battaramulla.

4. K. Hettiarachchi
5. K.D. Gamini Gunaratne
6. N.P. Thibbotumunuwa
7. Dr. P.G. Mahipala
8. A.K. Seneviratne
9. P. Sanath Panawennage

   4th to 9th All of National Water Supply & Drainage Board, Galle Road, Ratmalana.

10. M.P. Fernando
    No. 118/36, Uyana Road, Uyana,
    Moratuwa.

11. K.A.D.S. Nanayakkara
No. 59, Kanduboda, Delgoda.

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

Respondents

Before	:	Marsoof, PC, J Dep, PC. J & Marasinghe, J
Counsel	:	J.C. Weliamuna with Pasindu Silva for the Petitioner M.A. Sumenthiran with J. Arulananthan for the 10th Respondent. Viraj Dayaratne , DSG for 1-9th and 12th Respondents.
Argued on	:	10.07.2014
Decided on	:	27.11.2014

Priyasath Dep, PC, J

The Petitioner at all times material to this application was serving as the Chief Accountant of the Finance Division of the National Water Supply and Drainage Board (hereinafter referred to as 'NWSDB' or 'the Board')). M.P. Fernando the 10th Respondent was the Deputy General Manger (Finance) of the Board and he was the immediate superior of the Petitioner during the period the financial transaction that resulted in disciplinary action taken against the Petitioner had taken place.

The Petitioner in this application challenged the arbitrary, irrational and malicious decision of one or more of the respondents and /or of the authorities to retire the Petitioner from service disregarding the recommendations and /or the decisions of the relevant authorities to reinstate him in service.

Petitioner states that after serving in various statutory boards he joined the NWSDB as an Accountant (Revenue) and whilst serving in the Board he obtained promotions at various times and in 1995 he was appointed as the Chief Accountant of the Finance Division. The 10th Respondent was his immediate superior. The Petitioner was sent on compulsory leave by a letter dated 12.03.2009 alleging that the Petitioner on or about 13-01-1997 had deposited a cheque for Rs. 1,792,992.49 in a private account maintained at the People's Bank, Borella Branch which is an amount payable to Colombo Municipal Council in 1996. Subsequently by letter dated 8.6.2009 he was interdicted and he was served with a charge sheet and an inquiry was held against him. At the time the inquiry commenced he was on his first extension and in view of the inquiry his subsequent extensions were not granted.

As regards to the allegation of issuing a cheque to a person not entitled to it he had given an explanation justifying his conduct. He stated that on 13-01-1997, the 10th Respondent who was his immediate superior, in the course of his ordinary duty called him to his office room and informed him that the Mayor of Colombo had made a request to deposit the cheque to the account furnished by the Mayor. The 10th Respondent gave a direction in writing to credit that money to the account number 1070097208. Petitioner also made a minute below the instructions given by the 10th Respondent. He stated that the general practice is to draw the cheque in favour of the Treasurer , Colombo Municipal Council. This cheque was addressed to Manager, Bank of Ceylon, Dehiwala. He states that to the best of his knowledge no inquiries were made either by the Colombo Municipal Council or other authorities. The 10th Respondent resigned from NWSDB in 2005.This fraud was detected in 2009 after his resignation. Investigations revealed that the 10th Respondent was involved in a similar fraud when he was serving in Ampara branch of the NWSDB.

The Petitioner states that on 23.01.2009 he was summoned by Acting DGM(Audit) and he met him and he was shown a payment voucher(P3) and he said that the cheque referred to in the voucher was deposited in the personal account of the 10th Respondent. He was asked to make a statement and he gave a statement. Thereafter statements of other officers who were involved in preparing vouchers, writing and signing the cheque were recorded.

He was interdicted and an inquiry was held. After the inquiry he was found guilty by the inquiring officer and his recommendations were submitted to the Board. The Disciplinary Committee of the Board considered the report and after discussing with the inquiring officer and DGM(Finance), strongly recommended that the Petitioner be reinstated with back wages.

The Petitioner states that he was surprised to receive a letter dated 25.7.2011 informing him that he had been retired from service. In that letter marked P15, the Petitioner was informed by the General Manager of the 1st Respondent Board that the Board of Directors had decided on 16.6.2011to retire him with immediate effect.

The Petitioner states that the Board has erroneously reported that he was on compulsory leave with pay and the Petitioner to be reinstated. He states that the General Manager of the Board is the disciplinary authority in respect of the employees and the Disciplinary Committee has no authority to take decisions in disciplinary matters. Petitioner states that by his letter dated 10th August 2011 he preferred an appeal to the Secretary to the Minister of Water Supply and Drainage but did not receive a reply.

The main relief claimed by the Petitioner consists of declarations that his fundamental right to equality guaranteed by Article 12 of the Constitution has been violated and that the decision of the 2nd Respondent reflected in P15 is contrary to law and null and void.

The 2nd Respondent K.L.Lal Premanath , the General Manager of the 1st Respondent Board filed an affidavit on his behalf and on behalf of the Board refuting the allegations made by the Petitioner. He stated that the inquiring officer found the Petitioner guilty of all charges and his report was handed over to the Disciplinary Committee which had a discussion with the inquiring officer and was of the view that the Petitioner alone cannot be blamed for the said fraud and was of the view that the Petitioner should be reinstated. As it was not possible for him to reinstate the Petitioner without a decision from the Board regarding the extension of the Petitioner's services, he sought the approval of the Board.

Thereafter the matter was considered by the Board of Directors on 16.6.2011 and the Board decided to reinstate the Petitioner with immediate effect and to send him on retirement. The 2nd Respondent by his letter dated 25-7-2011 marked P15 informed the Petitioner that the Board of Directors had decided on 16.6.2011to retire him with immediate effect.

It is apparent from the Board minute marked 2R3 that the board also directed the General Manager / Deputy General Manager (Personal and Administration) to write to the People's Bank to investigate whether the bank officers were involved in the aforesaid fraud.

The Petitioner had submitted an appeal dated 10.8.2011 to the 3rd Respondent, the Secretary to the Ministry of Water Supply and Drainage against the decision of the Board to retire the Petitioner, mainly on the basis that he was entitled to his final extension of service. The 3rd Respondent in his affidavit stated that he referred the Appeal to the Appeals Board in the Ministry. In paragraph 7 of the affidavit he stated that in considering the appeal the Appeal Board had considered the charges framed against the Petitioner, the evidence led at the inquiry, report of the inquiring officer, his recommendations and matters stated in the appeal.

The 3rd Respondent having considered the recommendations of the Appeals Board and considering the attendant circumstances decided to retire the Petitioner with effect from the last date on which he had worked. The 3rd Respondent , by his communication dated 3.10.2011 (3R2) informed the Board of his decision.

Learned Counsel for the Petitioner had submitted that the said decision of the Secretary is not consistent with the decision of the Disciplinary Committee and the decision of the

Board of Directors and by retiring the Petitioner with effect from the last date he worked would cause him serious prejudice. The Board in its decision dated 16-6-2011 (P15) decided to reinstate the Petitioner and send him on retirement from that date whereas the 3rd Respondent by his communication dated 3-012011 decided to retire the Petitioner from the last date he worked in the Board that is 8.06. 2009, the date been the date of interdiction. Therefore it is apparent that the terms in 3R2 is less favourable than the terms in P15.

Although in the reasoned communication of the Secretary(3rd Respondent) marked 3R2, he has emphasized that as the Chief Accountant, the Petitioner had the responsibility to ascertain whether he was crediting money to the correct account of the person intended to receive the same, it is also necessary for this court to take into consideration the position of the Petitioner who claims that the account number was furnish to him by the 10th Respondent who was his superior officer whom he had trusted. It is significant that the 10th Respondent was the Deputy General Manager (Finance) of the 1st Respondent Board and that he had resigned from service few years after the crediting of money into his account and long before the fraud was detected.

In all the circumstance of this case ,I am in agreement with the view of the Secretary to the Ministry which also appears to be the view of the Inquiry Officer, Disciplinary Committee, and the Board of Directors that it may not be appropriate to continue the Petitioner in service. However, since the Board of Directors has decided to retire him with effect from the date of the decision of the Board of Directors, namely 16.6.2011, in my view it would be equitable to pay him all arrears of salary up to that date.

It appears that the petition in this case was filed on 25.8.2011 and the decision of the Secretary to the Ministry was made after the institution of proceedings in this Court. The Petitioner has only prayed that P15 be declared a nullity and is violative of his fundamental rights. Hence, the Petitioner had no opportunity of praying for any relief against the decision of the Secretary to the Ministry dated 3.10.2011 (3R2). This decision too had been taken on the basis that the Petitioner has been negligent in the discharge of his duty, but the prejudice caused to the Petitioner by this decision was that he was deprived of two years back wages.

In all the circumstances of this case, I am of the view that the decision conveyed by P15 is justified as the facts demonstrate negligent on the part of the Petitioner. Hence, while dismissing the Petition, in the exercise of the equitable jurisdiction of this Court, the Respondents may be directed to give effect to the decision taken by Board of Directors that the date of retirement should be 16.6.2011 and not the last date on which the Petitioner had worked.

It is to be observed that just and equitable orders are not alien to industrial disputes. If the Petitioner filed an application in the Labour Tribunal against the termination of his employment, the Labour Tribunal under section 31B of the Industrial Disputes Act has the power to make a just and equitable order. There are instances where appropriate Labour Tribunals had granted relief to applicants in applications where termination was held to be justified.

For the reasons stated above, we direct the 1st Respondent namely the National Water Supplies and Drainage Board to give effect to its decision dated 16-06-2011 communicated in the letter dated 25-07-2011 marked P15. Subject to this direction the application is dismissed.

No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.
I agree.

Judge of the Supreme Court

Rohini Marasinghe, 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 of the Democratic Socialist Republic of Sri Lanka.

Hewawasam Sarukkaligae Rathnasiri Fernando
07 D, Warapitiya
Darga Nagaraya

Petitioner

SC (FR) Application
No. 514/2010

Vs.

1. Police Sergeant Dayarathna
   (Service No. 501)
   Police Station,
   Welipenna

2. Police Constable Madusanka
   (Service No. 501)
   Police Station,
   Welipenna.

3. Jayasinghe
   Police Staff Assistant
   Police Station,
   Welipenna

4. Police Inspector A.D. Kariyawasam
   Officer-in-Charge
   Police Station,
   Welipenna

5. Inspector General of Police
   Police Headquarters
   Colombo 01.

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

Respondents

Before	:	Marsoof, PC, J Ekanayake, J & Dep, PC J
Counsel	:	Shantha Jayawardena with Duleeka Imbuldeniya for the Petitioner Shyamal A. Collure for the 1st to 3rd Respondents. S. Wijesinghe, SSC for the 4th to 6th Respondents.
Argued on	:	14.03.2013
Decided on	:	15.12.2014

Priyasath Dep, PC, J

When this application was taken up for hearing the Learned Counsel for the 1st to the 3rd Respondents raised a preliminary objection. The objection is to the effect that the jurats of the affidavit of the Petitioner filed with the petition dated 08.09.2010 as well as the counter affidavit of the Petitioner dated 06.10.2011 are defective and that the affidavits have to be rejected in limine. The main basis of the contention of learned Counsel for the 1st to the 3rd Respondents is that the jurat does not state clearly that the affirmant affirmed to and sign before the Justice of the Peace after the affidavit was read over or explained to the affirmant by the Justice of the Peace, and that the affirmant understood the contents therein. He also submits that it is not stated that the signature of the affirmant was placed after he affirmed to the said affidavit.

The learned Counsel for the Petitioner states that he was taken by surprise as this objection has not been taken up in the statement of objections.

The learned Counsel for the Petitioner states that according to the decision of Kumarasinghe Vs. Rathnamumara , SC Application No. 57 of 1983, SC minutes of 15/12/1983, an Application under Article 126 of the Constitution should not be dismissed merely on the basis that the affidavit of the Petitioner is defective or that there is no valid affidavit from the Petitioner, if the averments of the Petition are supported by the other affidavits filed by the Petitioner in the case.

The only question that has to be decided before this matter is heard on the merits is whether the Petitioner's affidavit and counter affidavit should be rejected in terms of Rule 44 (1) (C) of the Supreme Court Rules 1990.

The learned Counsel for the 1st to the 3rd Respondents submits that under Article 126(2) of the Constitution a person who alleges that his fundamental rights has been infringed or about to be infringed, in accordance with the Rules of the Court shall apply by way of a petition in writing addressed to such court praying for relief or redress.

Article 126(2) of the Constitution read as follows:

> 'Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action he may himself or by an Attorney-at-law on his behalf , within one month thereof, in accordance with such rules or court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement……'

Article 126 refers to a petition only but it states that in accordance with such rules of court as may be in force. Article 136 (1) of the Constitution provides that

> 'subject to the provisions to the constitution and of any law the Chief Justice with any three judges of the Supreme Court nominated by him, may, from time to time make rules regulating generally practice and procedure of the Court …' .

The Supreme Court had made rules in 1990 and Part 1V applies to the applications under Article 126 and Rule No. 44 (a) requires that a person alleging infringement or imminent infringement of fundamental rights shall 'set out in his petition a plain and concise statement of the facts and circumstances relating to such right and the infringement or imminent infringement thereof, including particulars of the executive or administrative action whereby such right has been, or is about to be infringed ….'

Rule No. 44 (1) (3) requires that a person alleging infringement or imminent infringement of fundamental rights 'tender in support of that petition such affidavits and documents as are available to him'.

The learned Counsel for the 1st-3rd Respondents submits that under rule No. 44 petition has to be supported by an affidavit. He submits that the jurat of the affidavit of the instant application is defective and for that reason there is no valid affidavit to support the allegation contained in the petition.

The Rules does not provide forms or formalities for administration of oaths and affirmation. Our Courts generally follow provisions of the Oaths Ordinance No. 9 of 1895 as amended and sections 179 to 183 and sections 437 to 440 of the Civil Procedure Code.(dealing with evidence given on Affidavits)

The Learned Counsel for the 1st to 3rd Respondent cited following cases where affidavits were rejected as it was found to be defective namely. *Clifford Ratwatte vs. Thilanga*

Sumathipala and others . (2001) 2 SRI. L.R. 56, *Kumarasiri and another vs. Rajapakse* (2006) 1 SRI.LR. Page 360, *Mark Rajendran vs. First Capital Ltd., formally, Commercial Capital Ltd.,*(2010) 1 SRI. LR. 60, *Simon Singho vs. Government Agent*, W.P. 47 NLR 545 *King vs. Ponnasamipillai* 28 NLR 156.

In *Clifford Ratwatte Vs. Thilanga Sumathipala* and others . (2001) 2 SRI. L.R 56. It was held 'the deponents state that he is a Christian and makes oath, the jurat clause and the end of the affidavit states that the deponent has affirmed. The affidavit is defective.'

In *Mark Rajendran vs. First Capital Ltd., formally, Commercial Capital Ltd*.,(2010) 1 SRI. LR. Page 60 an objection was taken to the validity of the affidavit filed by the petitioner who is a Christian had made oath and in the Jurat he had affirmed to the averments before the justice of peace. The court upheld the objection and dismissed the petition on the basis that affidavit filed by the Petitioner is not in terms with the provisions contained in the Oaths Ordinance.

A different view was expressed by M.D.H.Fernndo J in *Rozana Michael vs. Saley*, 2002 1SLR 345 and *Sooriya Enterprise vs.Michael White&Co.Ltd* (2002) 3 SLR 371 at 373. In Sooriya Enterprise vs.Michael White&Co.Ltd. (supra) M.D.H.Fernando J (Perera J. and Wijethunge J agreeing) citing with approval the judgment in Rustomjee vs. Khan 18 NLR 120 observed thus:-

> 'This view that "may" in section 5 is permissive, rather than mandatory, is supported by sections 7 and 9 of the Ordinance, which manifest a legislative intention to allow a witness or a deponent some choice as to whether he will swear or affirm; so much so that the substitution of an oath for an affirmation (or vice versa) will not invalidate proceedings or shut out evidence. The fundamental obligation of a witness or deponent is to tell the truth (section 10), and the purpose of an oath or affirmation is to reinforce that obligation'.

This decision was followed cited with approval by Marsoof,P.C.,J. (S.N.Silva, P.C.,C.J and R.A.N.G.Amaratunge ,J. agreeing) in *Facy vs..Sanoon* and 5 others 2006 BLR58.

These cases refer to a situation where a Christian in the preamble (first paragraph)having stated that he had taken oath and in the jurat had affirmed before signing the affidavit which involves the interpretation of sections 4 and 5 of the Oaths Ordinance.

In the case before us the affidavit was filed in English by a person who cannot understand the English Language. Therefore, Section 439 of the Civil Procedure Code is relevant to this affidavit. Section 439 reads thus:

> " In the event of the declarant being a blind or illiterate person, or not able to understand writing in the English Language, the affidavit shall at the same time be read over or interpreted to him in his own language, and the Jurat shall express that it was read over or interpreted to him in the presence of the court, Justice of the peace, or Commissioner; and

that he appeared to understand the contents; and also that he made his mark or wrote his signature in the presence of the court, Justice of the Peace, or Commissioner……..”

The Jurat of the Affidavits submitted by the Petitioner in this application reads as follows:

“ Having read over, explained	)	
and understood the contents	)	
hereof signed and affirmed to	)	
at Colombo on this eighth Day of	)	sgd
September 2010”.	)	

BEFORE ME
Sgd

JUSTICE OF THE PEACE/
COMMISSIONER FOR OATHS

The learned counsel for the 1st to 3rd Respondents submits that the Jurat is not clear as to who read over the affidavit and to whom it was read over and who understood the contents therein. According to the jurat affirmation has taken after signing the document. Therefore, the affidavit is defective. He cited several cases dealings with the validity of the affidavit.

In *Kumarasiri and another Vs. Rajapakse* (2006) 1 SRI.LR. Page 360 it was held

‘On an examination of the Affidavit, it is clear that the Jurat therein is not in conformity with the law. It is rather confusing and incorrectly worded it does not state where the affidavit was affirmed” . Somavansa J. remarked that ‘it is the flesh and blood of the affidavit which gives life to the Skelton in the Petition’

It is to be observed that the affidavit tendered in the instant application has similar defects.

In *Simon Singho vs. Government Agent, W.P.* 47 NLR 545 It was held that:-

“ in the absence of the Jurat in an Affidavit where the declarent is unable to understand writing in the English Language makes the affidavit valueless and inadmissible.”

Having considered the provisions in the Oaths Ordinance and section 439 of the Civil Procedure Code and the cases cited above, I hold that the affidavit tendered to court by the Petitioner in the instant case is not a valid affidavit as the Jurat is defective.

The next question that arises is whether a fundamental rights application could be dismissed due to want of an affidavit or defective affidavit. In civil cases regulated by the Civil Procedure Code whenever there is a requirement to file a petition, the petition should be supported by an Affidavit or accompanied by an affidavit. In Article 126(2) of the Constitution a person who invokes the jurisdiction of the Court can do so by way of a petition. The rules require the parties to tender in support of the petition affidavits and documents available to him. There is no requirement that a petition should be supported by an affidavit . The question that arises is whether an affidavit is a mandatory requirement or not. According to the rules under certain circumstances a person could invoke the jurisdiction of the Court by submitting a statement or a complaint. Rule 44(7) states by way of writing a person could bring to the notice of the court an alleged infringement or imminent infringement of a fundamental rights by executive or administrative action the court could treat the statement/complaint as a petition and initiate action.

In fundamental rights applications at the time of filing a petition it need not be supported by an affidavit. Rule 44.(1) (c) states 'tender in support of such petition such affidavits and documents available to him', Therefore rule requires the petitioner or the complainant to provide affidavits and documents available to him. However for the court to act on facts stated in the complaint or petition in the absence of other material there should be evidence. That evidence has to be placed by way of an affidavit. On the other hand for the court to deal with a person under section 11 of the Oaths Ordinance for giving false evidence there should be a valid affidavit. In King vs. Ponnasamipillai 28 NLR 156 refers to a case where a person is charged with having made a false statement in an affidavit submitted by him in a civil suit and there was no indication that the affidavit had been read over and explained to him. The affidavit was rejected and he was acquitted of the charge. (In that case affirmant could not read, write or understand English.)

In order to establish the facts and circumstances stated in the petition/complaint there is a need to place the evidence by way of an affidavit. The court could call for affidavits if necessary.

The question that arises is whether a petition could be dismissed due to a want of an affidavit or defect in the affidavit. In order to answer this question we have to consider the jurisdiction of the Supreme Court and its role in fundamental rights applications. There is a difference in the exercise of fundamental rights jurisdiction and appellate and other jurisdiction by the Supreme Court.

At this stage it is relevant to refer to article 3 and 4 of the Constitution which deals with sovereignty and the exercise of sovereignty of the people.

Article 3 of the Constitution reads thus:-

> 'In the Republic of Sri Lanka sovereignty is in the people and is inalienable. Sovereignty includes the powers of government, fundamental rights and the franchise.'

Article 4(d) reads thus:-

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

The fundamental rights are recognized as part of the sovereignty of the people and inalienable. It shall be respected ,secured and advanced by all organs of the government. In order to secure and advance fundamental rights, the Supreme Court is given wide powers. When the Supreme Court exercises fundamental rights jurisdiction it has power to grant just and equitable relief. The Supreme Court is not hamstrung by a rigid procedure and rules. When Article 126 read with the Rule 44 (7) is considered, not only the party whose rights are violated but a third person in respect of that person or an Attorney-at-law can file a petition or complaint. Under Rule 44(7) a person could by way of writing bring to the notice of the court alleged infringement or imminent infringement of a fundamental rights by executive or administrative action and the court could treat the complaint as a petition and initiate action. Further, the Courts have expanded the locus standi doctrine to include public interest litigation. Similarly, court had extended the time limitation under certain circumstances.

In the circumstances if the affidavit is defective and it is vital to the determination of the application , the Supreme Court without dismissing the application can adjourned the inquiry and direct the Petitioner to file a fresh affidavit. A similar application where the affidavit is defective was considered by Mark Fernando, J. in Rozana Michael vs. Saley, 2002 1SLR 345. It was held that:-

'----However, the Commissioner's attestation confirms that the document was signed under oath in his presence. Had that affidavit been vital, I would have adjourned the hearing and given the petitioner an opportunity of correcting that formal defect, but that was unnecessary as the other affidavits were more than adequate.'

I hold that the affidavit is defective. However in view of the fact that this is a fundamental rights application, I grant time to the Petitioner to file a fresh affidavit complying with the provisions of Oaths Ordinance and the relevant provisions of the Civil Procedure Code pertaining to affidavits.

This application was filed in 08-09-2010 and the 1st to the 3rd Respondent filed statement of objection referring to each and every averment of the affidavit and petitioner in response to that filed a counter affidavit. When the Application was taken up for argument the learned Counsel for the 1st to the 3rd Respondents for the first time raised an

objection to the validity of the affidavit which objection he could have taken up at the earliest opportunity .

As the affidavit of the Petitioner in vita for the determination of the Application, we adjourn the hearing and the Petitioner is granted three week's time to file a fresh affidavit. Statement of objections to be filed within three weeks of the receipt of the fresh affidavit and the counter affidavit if any to be filed within three weeks from the receipt of statement of objections.

The preliminary objection overruled. No costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.

I agree.

Judge of the Supreme Court

Chandra Ekanayake,J.

I agree.

Judge of the Supreme Court

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

SC [FR] Application 637 / 2009

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

1. Lake House Employees Union
2. B.M.D. Athula, President
3. Dharmasiri Lankapeli,
   General Secretary

All of Lake House Employees Union,
35, D.R. Wijewardena Mawatha,
Colombo 10.

PETITIONERS

-Vs-

1. Associated Newspapers of Ceylon Ltd,
   No.35, D.R. Wijewardena Mawatha,
   Colombo 10.
2. B. Padmakumara,
   Chairman / Managing Director.
3. Captain P. B. L. Silva,
   Deputy Security Manager,
   Associated Newspapers of Ceylon Ltd,
   No.35, D.R. Wijewardena Mawatha,
   Colombo 10.
4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENTS

BEFORE	**:**	Hon. Saleem Marsoof, P.C., J, Hon. Eva Wanasundera, P.C., J, and Hon. Buwaneka Aluwihare, P.C., J.
COUNSEL	**:**	J.C. Weliamuna with Pulasthi Hewamanna for the Petitioners. Palitha Kumarasinghe, P.C., with Priyantha Alagiyawanne for the 1st to 3rd Respondents. Nerin Pulle, Deputy Solicitor General, for the Attorney General.
Argued On	**:**	25.8.2014
Written Submissions	**:**	24.10.2011 (Respondents) 28.10.2011 (Petitioners)
Decided On	**:**	17. 12. 2014

SALEEM MARSOOF, P.C., J,

In this case, leave to proceed was granted to the Petitioners against all the Respondents for the alleged violation of their fundamental rights enshrined in articles 12(1), 14(1)(a) and 14(1)(c) of the Constitution. However, after the filing of objections and counter-affidavit, when the case was taken up for hearing on 19th September 2011, two preliminary objections relating to the maintainability of the application were raised by learned President's Counsel appearing for the 1st to 3rd Respondents and the learned Senior State Counsel appearing for the 4th Respondent. The preliminary objections that were raised were (1) that the application of the Petitioners is time barred, and (2) that the Petitioners are not entitled in law to complain of a violation of their fundamental rights based on an illegality which has been perpetrated by them.

After hearing submissions of learned President's Counsel for the 1st to 3rd Respondents and learned Senior State Counsel appearing for the 4th Respondent on the said preliminary objections, Court indicated to learned Counsel that since some of the matters relevant to decide on the preliminary objections overlap with the matters that are relevant for the purpose of considering the substantive application of the Petitioners alleging violations of their fundamental rights, that it would be prudent to rule on the preliminary objections after hearing the Counsel fully on the merits as well. Accordingly submissions of Counsel were first heard with respect to the preliminary objections and thereafter on the merits within somewhat of a restricted time frame agreed upon by Counsel in Court. Detailed Written submissions were also filed by all Counsel with respect to the preliminary objections as well as on the merits.

It is convenient to deal with the two preliminary objections raised on behalf of the Respondents at the outset, but before doing so, it will be useful to outline the factual background that had led to filing of this application by the Petitioners seeking relief in terms of Article 126 of the Constitution for the alleged violations of their fundamental rights.

Factual Background

The Petitioners have alleged that their fundamental rights enshrined in Articles 12(1), 14(1)(a) and 14(1)(c) of the Constitution have been violated by the Respondents. Article 12(1) of the Constitution provides that all persons are equal before the law and are entitled to the equal protection of the law. Article 14(1)(a) guarantees to every citizen the freedom of speech and expression including publication. Article 14(1)(c) guarantees to every citizen the freedom of association. These fundamental rights are of vital importance to a trade union such as the 1st Petitioner, the Lake House Employees' Union, as well as the 2nd and 3rd Petitioners, who are respectively the President and the General Secretary of the said trade union. The 1st Respondent is a public limited liability company, known as the Associated Newspaper of Ceylon Ltd (hereinafter sometimes referred to as ANCL), which employs over 2200 employees. The 2nd and 3rd Respondents are respectively the Chairman and the Deputy Security Manager of ANCL.

It is common ground that there are several major trade unions operating within the premises of ANCL, which include the Jathika Sevaka Sangamaya (Lake House branch), Inter-Companies Trade Union, Sri Lanka Nidahas Sevaka Sangamaya and the Lake House Employees Trade Union, which is the 1st Petitioner to this application. It appears from all the affidavits and documents filed in this Court that ANCL recognised the right of its employees to have membership in a trade union and to actively engage in trade union activities, and provided in its premises at its own expense, two notice boards for each of the said trade unions to facilitate such activities. These notice boards were provided for the purpose of

enabling the communication of union notifications and related information to the members of the unions and to keep the membership informed of union activities.

The Petitioners have in their petition and affidavit set out in some detail the actions taken by the 1st Petitioner union with a view to enhance the working conditions of the employees of ANCL, which included the entering into several collective agreements by the said union with the management of ANCL. They have also referred to the circumstances in which SC FR Application No. 109 / 2008 was lodged with the objective of having certain shares of ANCL divested to broad base its ownership. The Petitioners state that although they did not succeed in the said application as this Court refused leave to proceed, these activities did contribute to the development of some amount of hostility between the union and the management.

In paragraph 8 of their petition and affidavit, the Petitioners have also averred that such hostility resulted in the transfer of union activists to branch offices in or outside Colombo. The Petitioners have specifically stated that copies of the transfer letter dated 29th January 2009 marked P(8)(c) and the transfer letters dated 24th July 2009 marked P(8)(a) and P(8)(b) which were placed on the notice boards for the information of the members of the union were forcibly removed by the management of ANCL. They have alleged in paragraph 9 of the said petition and affidavit that certain correspondence exchanged between the 1st Petitioner trade union and various authorities including the President of Sri Lanka and the Minister for Information and Media during the period 16th December 2008 to 16th July 2009 marked P9(a) to P9(h), were also forcibly removed from the notice boards allocated to the 1st Petitioner trade union in violation of its fundamental rights.

It has been alleged in the affidavits filed by the Respondents that increasing incidents of certain trade unions using the notice boards assigned to them to publish false allegations and other defamatory statements against rival trade unions as well as the management of ANCL, made it necessary for ANCL to regulate the use of the notice boards by all trade unions. Admittedly, ANCL circulated a Notice dated 14th May, 2004 requiring that prior approval of the management of ANCL should be obtained for publishing notifications and other material on the assigned notice boards. The said circular is reproduced below in full:-

Ref. No. 0002/33/2004

NOTICE

> Prior approval from *the Chief Executive Officer or The Company Secretary* should be obtained for all notices (General notices or Union notices) which need to be displayed in the relevant Notice Boards.
>
> Sgd. / Company Secretary
> 14th May 2004

It is also common ground that the above Notice was amended by the subsequent Notice dated 6th January, 2006 which is also reproduced below in full:-

Ref. No. 0002/01/2006

NOTICE

> Prior approval from *the Chairman* should be obtained for all notices (General notices or Union notices) which need to be displayed in the relevant Notice Boards.
>
> Sgd. / Company Secretary
> 6th January 2006

It is in this context relevant to note that there is no express averment in the petition or the affidavit of the Petitioners or in their counter affidavit that the said communications had been placed on the notice boards with the approval of the Chairman of ANCL or that at least an attempt was made to obtain his permission as contemplated by the circular dated 06th January 2006. On the contrary they have clearly taken up the position that the aforesaid circulars were never implemented by the management of ANCL.

Be that as it may, it appears from paragraph 10 of the affidavit of the 3rd Petitioner filed on behalf of all the Petitioners, that the said Petitioner had made inquiries from the Security Department of ANCL as to why some of the communications referred to in paragraphs 8 and 9 of the said affidavit were forcibly removed from the notice boards by the management of ANCL. The Petitioners have produced marked P10(a) a letter dated 17th July 2009 received in response from the Deputy Security Manager of ANCL addressed to the Secretary of the 1st Petitioner union, which is reproduced below:-

ආරක්ෂක දෙපාර්තමේන්තුව,
2009/07/17.

අතුල ධර්මශ්‍රී,
ලේකම්,
ලේක්හවුස් සේවා සංගමය.

ආයතනය තුල දැන්වීම් පුවරුවේ ලිපි ප්‍රදර්ශනය කිරීම.

01. ආයතනයේ දැන්වීම් පුවරුවල ලිපි හෝ දැන්වීම් පළකිරීම පිළිබඳව පාලනාධිකාරිය මගින් 2006/01/06 වන දින නිකුත් කර ඇති අංක 0002/01/2006 දරණ චක්‍ර ලේඛනය සිහිගන්වම්. (පිටපත අමුණා ඇත)

ආයතනයේ ගරු සභාපතිතුමා වෙත යොමු කරන ලද ලිපි ගරු සභාපතිතුමාගේ ලිඛිත අවසරයකින් තොරව දැන්වීම් පුවරුවල මහජන ප්‍රදර්ශනය කිරීම සපුරා තහනම්.

මහජන ප්‍රදර්ශනය කිරීම සඳහා අවශ්‍ය වන්නේනම්, එම ලිපි ගරු සභාපතිතුමාගේ ලිඛිත අනුමැතිය ලබා ගත යුතුයි.

කපිතාන් පී. බී. එල්. එස්. සිල්වා, USP (විශ්‍රාමික)
නියෝජ්‍ය ආරක්ෂක කළමණාකරු.

In the above quoted letter, the ANCL management has taken up the position that in terms of the Notice dated 6th January 2006, a copy of which was also attached, the display of correspondence addressed to the Chairman of ANCL in the notice boards without his prior approval is prohibited.

The Petitioners have alleged in their petition that the aforesaid Notices are arbitrary and seek to confer an unfettered discretion on an executive officer of ANCL. They also allege that the forced removal of various notifications and documents from the notice boards allocated to them have resulted in the violation of their fundamental rights. The Respondents have denied these allegations, and have taken up the aforesaid preliminary objections against the maintainability of the application filed by the Petitioners. These preliminary objections have to be considered at the outset, as it will be unnecessary to go into the merits of the substantive application filed by the Petitioners complaining of the alleged violation of their fundamental rights, if one or both preliminary objections are upheld by this Court.

First Preliminary Objection - The Time Bar

As already noted, the first of the two preliminary objections taken up by the learned President's Counsel for the 1st – 3rd Respondents related to the time bar. It was submitted by learned President's Counsel that none of the communications alleged to have been forcibly removed from the notice boards were removed within the month preceding the date of filing this application. He pointed out that the communications marked P9(a) to P9(h) alleged to have been so removed from the notice boards are dated between 16th December 2008 and 16th July 2009, whereas the jurisdiction of this Court was invoked only on 25th August 2009, outside the mandatory time limit of one month set out in Article 126 of the Constitution.

Learned Counsel for the Petitioners has in response submitting that it was their case that the forced removal was not confined to the communications referred to in paragraphs 8 and 9 of the affidavit of the 3rd Petitioner, and that these were few of the several communications which had been removed from the notice boards. He has submitted that since the complaint of the Petitioners was in essence one of continuous violation of their fundamental rights, no time limitation can be reasonably be drawn based on the few communications expressly referred to in paragraph 9 of the said affidavit. He further submitted that the gravamen of the application filed by the Petitioners in this case is that the notice dated 6th January 2006 is arbitrary and seeks to confer an unfettered discretion on the Chairman of ANCL.

It is obvious that if the case of the Petitioners was that the Notice dated 6th January 2006 is arbitrary and confers an unfettered discretion on the executive, then the jurisdiction of this Court should have been invoked within one month from the date of the said Notice and not in the year 2009. In fact, as was submitted by the learned President's Counsel for the 1st to 3rd Respondents, even if the one month period applicable to a fundamental rights application such as this is computed from the date of the letter dated 17th July 2009, by which the attention of the relevant union was invited to the Notice dated 6th January 2006, still the application filed in this Court is out of time.

The learned Counsel for the Petitioners has sought to overcome this difficulty by submitting that the said Notice dated 6th January 2006, was never implemented by ANCL and hence the continuing conduct on the part of the management of ANCL of forcibly removing notifications and other documents placed in the notice boards amounted to a continuing violation of the fundamental rights of the Petitioners. He further submitted that in any event, the Notice dated 6th January, 2006 as well as its predecessors amounted to an unlawful pre-censorship of the publications of the 1st Petitioner in the exercise of its trade union rights in violation of Article 14(1)(a) of the Constitution. Accordingly, since the said continuing conduct of ANCL amounted to a continuing violation of the Petitioners' fundamental rights, and as such it did not attract any time limitation.

Learned President's Counsel for the 1st to 3rd Respondents responded to the submissions of learned Counsel for the Petitioner by stressing that the Petitioners have not sought to evoke the jurisdiction of this Court on the footing that there was any continuing violation of the Petitioners' fundamental rights. He submitted that the complaint of the Petitioners was that the particular communications adverted to in paragraph 9 of the Petition and marked P(9)(a) to P(9)(h) had been forcibly removed from the notice boards in question. He further submitted that as it is common ground that all the said communications were placed on the notice boards on the dates specified in them and that they were forcibly removed on the same day, and since the latest document in chronological order was a letter dated 16th July 2009, it must be presumed that it was removed on the same day, namely 16th July 2004, and hence the filing of

the application seeking relief under Article 126 of the Constitution on 25th August 2009 was outside the mandatory time limit of one month specified in the Constitution for making an application under the said article.

He also invited the attention of Court to the decision of this Court in *Samarasinghe v The Associated Newspaper of Ceylon Ltd and others* (2011) B.L.R 46, which is directly on point. In this case, the Petitioner who was a journalist attached to ANCL, and who also held office as the branch Secretary of the Jathika Sevaka Sangamaya, challenged his transfer to the outstation office of ANCL in Anuradhapura allegedly on the basis that he had violated the Notice dated 6th January, 2006 in posting notices and other material on the notice board allocated to that union without the prior approval of the Chairman of ANCL. Although the transfer order was made on 17th March 2008, the fundamental rights application was filed only on 6th May 2009. Dealing with the time bar issue, Sripavan J. made the following pertinent observation:-

> "The petitioner in paragraph 21 of the petition states that the Company Secretary of the first respondent Company on 17.03.2008 directed the petitioner to forward an explanation as to why disciplinary action should not be taken against the petitioner for the violation of the Notice dated 6th January 2006. Having averred in paragraph 22 of the petition that the petitioner or the Trade Union he represents have not received any such Notice dated 06.01.2006, the petitioner in paragraph (f) of the prayer to the petition seeks to quash the Notice dated 06.01.2006 marked P19(5) issued by the Secretary to the first respondent Company.
>
> If the petitioner's fundamental right has been violated by the direction issued on 17.03.2008 for not complying with the Notice dated 6th January 2006, the petitioner should have applied to this Court within one month from 17.03.2008 as provided in Article 126 (2) of the Constitution. The present application was filed on 06.05.2009. Having slept over his right for more than one year the petitioner cannot now be heard to complain of a direction dated 17.03.2008. I do not see any merit in the petitioner's application....."

It is equally clear that if the basis on which the Petitioners seek relief in this case is the alleged violation of their fundamental rights resulting from the forced removal of the particular communications dated 16th December 2008 to 16th July 2009 marked P9(a) to P9(h) referred to in paragraph 9 of the 3rd Petitioner's affidavit, their application has been filed outside the mandatory time limit of one month from the dates of the respective communications. It is noteworthy that the 3rd Petitioner has expressly stated in paragraph 9 of his affidavit that each of the said communications was placed on the notice boards on the very day it was despatched, and that each such letter was forcibly removed by ANCL Security on the same day, so the breaches would have occurred on the dates of the said communications.

It is in these circumstances that the learned Counsel for the Petitioners has strenuously argued that no time limitation would apply to the facts and circumstances of this case as what is complained by the Petitioners is a continuous violation of their fundamental rights as opposed to particular acts constituting a violation of such rights, has therefore to be considered carefully in all its seriousness, as otherwise this application is clearly time barred. Learned Counsel for the Petitioner has submitted that the Notice dated 6th January 2006 as well as its predecessor dated 14th May 2004 imposed a prior restraint in violation of the Petitioners' fundamental rights to expression enshrined in Article 14(1)(a) of the Constitution. Learned Counsel for the Petitioners relied on the decision of this Court in *Vasudeva Nanayakkara v Choksy & Others* (2008) 1 SLR 134 at 137.

In my opinion, if the gravamen of the complaint of the Petitioners is the prior restraint alleged to have been effected by the Notice dated 6th January 2006, then the application to this Court for relief under Article 126 should have been sought within one month from the date of the said circular, and would be time barred. However, the question arises in view of the submission of learned Counsel for the Petitioner that that the question of prior restraint should be considered in combination with the other submission of learned Counsel that this is a case of continuing violation of the fundamental rights of the Petitioners, arising from the alleged removal of the Notices and other material placed on the Notice-board.

In the absence of any decision of this Court on this point, I wish to adopt the distinction recognised by the courts in the United States between discreet acts of discrimination and continuing violations through a series of such acts. In *National Railroad Passenger Corp. v Morgan* 536 U.S. 101, at page 122, the United States Supreme Court grappled with the nuances of the continuing violation doctrine in a case brought under Title VII of the Federal Civil Rights Act of 1964. The plaintiff in *Morgan* alleged both discrete retaliatory and discriminatory acts, and a racially hostile work environment. In analyzing the statute of limitations issue, the Court differentiated between discrete acts and continuing violations, noting that some discrete acts, "such as termination, failure to promote, denial of transfer, or refusal to hire are easy to identify."The Court held that such incident of discrimination and each retaliatory adverse employment decision constitutes a separate actionable 'unlawful employment practice, and that accordingly, for limitations purposes, a discrete retaliatory or discriminatory act occurs on the day that it happens. In contrast, Court described a continuing violation as "a series of separate acts that collectively constitute one unlawful employment practice", and went on to hold that "such a cause of action accrues *on the date on which the last component act occurred*."

Adopting the reasoning of the United States Supreme Court in Morgan's case discussed above, I am inclined to the view that any complaint based on a continuing violation of fundamental rights may be entertained by this Court if the party affected invokes the jurisdiction of this Court within the mandatory period of one month from the last act in the series of acts complained of. In the circumstances of this case, the last act of the series of acts occurred on 16th July 2009, and therefore the filing of the application in this Court on 25th August 2009 is clearly time-barred.

Second Preliminary Objection - The Question of Illegality

The second preliminary objection taken up on behalf of the 1st to 3rd Respondents and the 4th Respondent is that the Petitioners are not entitled in law to complain of a violation of their fundamental rights based on an illegality which has been perpetrated by them. Although detailed submissions were made by learned Counsel in this connection, it is not necessary to rule on this matter in view of the fact that the petition has been filed out of time.

Conclusion

Due to the first of the two preliminary objections being upheld by this Court, the application of the Petitioners has to be dismissed, and it would not be necessary to deal with the merits of this case with respect to which submissions were made at the hearing.

Accordingly, I make order dismissing the application of the Petitioners, without costs.

JUDGE OF THE SUPREME COURT

EVA WANASUNDERA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

P. BUWANEKA ALUWIHARE, 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 and in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Adam Bawa Issadeen,
55/16, A3, Peiris Road,
Mt. Lavinia.

Petitioner

SC FR Application No. 248/2011

Vs.

1. Sudharma Karunaratne,
   Director General of Customs,
   Customs House,
   Sri Lanka Customs,
   Bristol Street,
   Colombo 1.

And 20 others.

Respondents

Before : S. Marsoof PC. J
Rohini Marasinghe, J &
Priyantha Jayawardena PC. J

Counsel : A.S.M. Perera PC with Neville Ananda for the Petitioner

Rajitha Perera SC for the Respondents

Argued on : 25.11.2014

Decided on : 17.12.2014

Priyantha Jayawardena, PC, J

The Petitioner has made this application in terms of Article 126 (1) of the Constitution alleging violation of his fundamental rights guaranteed under Article 12(1) of the Constitution by reason of the Petitioner not being absorbed to post of Deputy Superintendent of Customs.

Petition

The Petitioner in his Petition stated that he applied to the Sri Lanka Customs to join as an Assistant Superintendent of Customs Class II consequent to a Gazette Notification. Thereafter, the Petitioner had sat for an open competitive examination conducted for the purpose of recruitment to the aforesaid post by the Commissioner of Examinations on 22nd August, 1992. As he was successful at the said examination he had been then required to come for an interview which was held on 27.03.1993. Though the Petitioner had performed well at the said interview he had not been selected for appointment.

A Political Victimization Committee had been established in 1994 and the Petitioner had submitted a written complaint to the said Political Victimization Committee. The Additional Secretary to the Ministry of Finance, Planning, Ethnic Affairs and National Integration had called the Petitioner for an interview at the Ministry of Planning, Ethnic Affairs and National Integration, "Sethsiripaya" which was conducted by the said Political Victimization Committee in the presence of custom officials representing the Department of Sri Lanka Customs. All the documents pertaining to the said interview held for the purpose of recruiting officers to the posts of Assistant Superintendent of Customs Class II had been disclosed by the custom officials before the committee. Those documents revealed that the cut off mark for selection of candidates for the said post was 99 marks and that the Petitioner had been placed 7th in the order of merit securing 113 marks. It was also revealed that candidates who had got lesser marks than the Petitioner had been recruited to the said post overlooking the Petitioner. Thus, the Political Victimization Committee has recommended to appoint the Petitioner to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992 without back wages. The Cabinet approved the said decision of the Political Victimization Committee and he was appointed to the said post with effect from 31.08.1992. The Petitioner has produced a copy of his

letter of appointment to the post of Assistant Superintendent of Customs Class II dated 21.07.1999.

The Petitioner further stated that he is not entitled to the back wages as during the period from 01.04.1992 to 15.06.1998 he was employed as a Plan Implementation Officer and later absorbed as a Project Officer at the Divisional Secretariat, Akkaraipattu which he had held as a public servant. The Petitioner stated that he stood appointed to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992.

The members of the same batch as the Petitioner who had attended the same interview and the examination had been recruited with effect from 15.07.1993 whereas the date of appointment of the Petitioner has been ante-dated as 31.08.1992, based on the aforesaid political victimization committee recommendation approved by the Cabinet of Ministers. The Petitioner had been then requested by some Customs officers of the 1993 batch to give a letter stating his willingness to accept his seniority at 7th place of 1993 batch. As a result the Petitioner had consented to have him placed at the 7th place in the seniority of 1993 batch.

Later, interviews had been held for the absorption of Assistant Superintendents of Customs Class II officers to the post of Deputy Superintendants of Customs and the 315 most senior officers except the Petitioner had been called for such interviews. The Petitioner had not received a letter calling him for such interview. Therefore, he addressed a letter to the Additional Director General of Customs (Administration) informing him that his name was omitted in the list of officers that were to be called for interviews and had sought a clarification with regard to any amendments in the seniority list by the Department of Sri Lanka Customs. Subsequently, the 3rd Respondent had issued a letter calling him over for an interview held for the purpose of absorbing candidates to the post of Deputy Superintendent of Customs.

The Petitioner had attended the interview for absorption to the post of Deputy Superintendent of Customs. However, upon the apprehension that he had not been absorbed into a post of Deputy Superintendent of Customs he had written to the 1st Respondent requesting to take steps to have him absorbed to the post of Deputy Superintendent of Customs but up to now no action has been taken in response to that request.

In the circumstances, the Petitioner prayed that a declaration be made that his fundamental rights guaranteed by Article 12(1) of the Constitution have been violated and to direct the respondents to absorb the Petitioner to the post of Deputy Superintendent of Customs and place him at the appropriate position in the seniority list.

This Court has granted leave to proceed for the alleged violation of Article 12(1) of the Constitution.

Statement of Objections of the 1A Respondent

The 1A Respondent stated in his Objections that the other applicants who were successful and recruited were appointed with effect from 15.07.1993 and had assumed duties on or around the said date.

He further stated that the Petitioner had assumed duties on 15.06.1998 in the post of Assistant Superintendent of Customs Class II and that in terms of Section 1.9 of Chapter II Volume I of the Establishment Code the effective date of the Appointment of the Petitioner was on 15.06.1998. The said section of the Establishment Code states as follows;

> *' The effective date of an appointment or promotion is the date specified in the letter of appointment or the date on which the officer first assumes the duties of his new post, whichever is later, subject to Section 1.10, but in no case should it be earlier than the date on which this post was created or on which it was rendered vacant. '*

He also stated that the Petitioner cannot be considered for the 1993 batch as he had assumed duties only in 1998.

He produced a copy of the interview schedule which stated that interviews had been held for the purpose of recommending Assistant Superintendent of Customs Class II to the post of Deputy Superintendent of Customs. He further contended that the promotions were given on seniority and merit and that there were many others who were senior to the Petitioner in service and furnished a list of officers who had assumed duties before the Petitioner.

Statement of Objections of the 5th Respondent

The 5th Respondent stated in his Statement of Objections that he was one of the five members of the interview board which was held to absorb the Assistant Superintendents of Customs Class II to the posts of Deputy Superintendents of Customs. He averred that the Petitioner was called before the said interview board not as a candidate to be considered for the absorption to the post of Deputy Superintendents of Customs, but to clarify the appeal made by the Petitioner. The 5th Respondent annexed a copy of the extract of the marks of the interview board which states

"Called to clarify". He further contended that the Petitioner was notified that though he was appointed with effect from 31.08.1992 he had assumed duties on 15.06.1998.

He also stated that other recruits of the examination relevant to the Petitioner's appointment had assumed duties on 15.07.1993 and therefore the others are senior than the Petitioner for the reason that they had assumed duties earlier than the Petitioner.

Counter affidavit of the Petitioner

Thereafter, the Petitioner filed his counter affidavit and produced an abstract of the committee report of the committee set up to consider cases relating to political victimization within the Department of Sri Lanka Customs.

The Petitioner also stated that the reason for assuming duties with effect from 15.06.1998 was beyond his control. Based on the marks he had obtained at the open competitive examination and the interview he was placed 7th in the order of merit and accordingly he should have been appointed as an Assistant Superintendent of Customs Class II with effect from 15.07.1993. However, consequent to a decision of the Cabinet of Ministers to appoint the Petitioner as an Assistant Superintendent of Customs Class II in order to rectify a wrong caused to him, he was appointed as an Assistant Superintendent of Customs Class II and the date of appointment was ante dated to 31.08.1992 by the Public Service Commission. The Petitioner further stated that therefore neither the Director General of Customs nor any other officer attached to Customs and / or the Ministry of Finance can alter the said date.

The Petitioner further asserted in his counter affidavit that the post of Assistant Superintendent of Customs, Class II was vacant at the time he was appointed to such post and that he had joined Government Service with effect from 31.08.1992 and has continued as such government servant up to date.

The Petitioner also stated that the Interview Board constituted to recruit candidates for the posts of Deputy Superintendents of Customs did not have any power or authority to sit as an appellate body in relation to the Petitioner's application for promotion as a Deputy Superintendent of Customs. The Petitioner asserted that he was called for the interview conducted for the purpose of absorbing candidates for the posts of Deputy Superintendents of Customs.

Redress of Political Victimization Committee in the constitutional setting

Arising for determination in this application is the question of whether the Department or a public officer can by reference to provisions of the Establishment Code, override a decision made by the Cabinet of Ministers to rectify a wrong caused by such Department to a public officer, which wrong involves *inter alia* violations of the Establishment Code in the first instance.

Therefore, I will first consider the applicable provisions of the Establishment Code.

In terms of Article 55(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka the power of appointment to the Public Service is vested in the Cabinet of Ministers. However, certain powers of the Cabinet of Ministers are delegated to the Public Service Commission.

The recruitment procedure is set out in Chapter II of the Establishment Code (Volume I). In terms of Sections 5:3:1 and 5:3:2 the appointments will have to be made in the order of merit ascertained according to the marks obtained by the candidates at the written examination and the interview. (Emphasis added).

Section 1:9 of the Establishment Code states that;

> *' The effective date of an appointment or promotion is the date specified in the letter of appointment or the date on which the officer first assumes the duties of his new post, whichever is later, subject to Section 1.10, but in no case should it be earlier than the date on which this post was created or on which it was rendered vacant.'*

It is now necessary to consider the powers of the Cabinet of Ministers with regard to the appointment, promotion, transfer, disciplinary control and dismissal of public servants. In terms of Article 55 of the Constitution the appointment, promotion, transfer, disciplinary control and dismissal of all heads of department is vested in the Cabinet of Ministers. Subject to the provisions of the Constitution some of those powers have been vested with the Public Service Commission. Article 57 of the Constitution has permitted delegation of the powers of the Public Service Commission subject to the approval of the Cabinet of Ministers.

The Establishment Code has been issued by the Ministry of Public Administration under the authority of the Cabinet of Ministers. It is pertinent to note that the procedure in respect of the appointment, promotion, transfer, disciplinary control and dismissal have been stipulated in the Establishment Code with the approval of the Cabinet of Ministers. Therefore, I am of the view any failure to comply with the provisions of the Establishment Code by an authority or officer can be rectified by the Cabinet of Ministers.

The question there is whether the fundamental rights of the Petitioner declared and recognized by Chapter 3 of the Constitution have been infringed, by executive or administrative action - in this instance, Article 12(1) of the Constitution.

In the instant application the candidates applied for vacancies for the post of Assistant Superintendents of Customs Class II. The vacancies were to be filled on the basis of merit. Applicants had to sit for a competitive exam and successful candidates were called for an interview. It is common ground that notwithstanding the fact that the Petitioner had been placed 7th in the order of merit at the examination held to recruit Assistant Superintendents of Customs Class II, he was not appointed to the said post along with the other candidates who were successful at the said examination, contrary to the provisions of the Establishment Code which requires the candidates to be appointed in order of merit. The marks of the interview were not published.

The plain meaning of "merit" is the quality of deserving well, excellence, or worth; it is derived from the Latin "mereri", meaning to earn, or to deserve. "Merit" must be considered in relation to the individual officer, as well as the requirements of the post to which he seeks appointment or promotion. In the instant application there were no grounds to deviate from the merit principle that can be justified for the non-appointment of the Petitioner to the post of Assistant Superintendent of Customs Class II.

Subsequently, consequent to a recommendation made by a Political Victimization Committee the Cabinet of Ministers decided to appoint the Petitioner to the said post without back wages with effect from 31.08.1992. The Public Service Commission gave effect to the said decision of the Cabinet of Ministers and approved appointment accordingly.

However, the Department of Customs did not place him in the 7th place in the order of merit of his initial batch (1993 batch) on the basis that the ante dating of the Petitioner's date of appointment would violate Section 1:9 of the Establishment Code (Volume I). The Petitioner's position is that the failure to back date his appointment and to place him in the order of merit in his original batch (1993) has affected his promotional prospects, namely, for the absorption of him to the post of Deputy Superintendent of Customs and he is challenging the non absorption of himself to the post of Deputy Superintendent of Customs in these proceedings.

Therefore, it is necessary to consider the applicability of Section 1:9 of the Establishment Code in the light of the recommendation made by the Cabinet of Ministers to appoint the Petitioner to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992 without back wages. Particularly, the powers of the Cabinet of Ministers to grant redress to those whose

rights have been infringed due to the non compliance of the provisions of the Establishment Code.

Appendix 4 of the Establishment Code Volume I contains draft letters of appointment. The applicable letter of appointment to the instant case is contained in Specimen I of the said appendix.

Clause 1 of the said draft states as follows;

> 'You are appointed to the post of …… in this Department / in …… (with effect from ……).'

However, the letter of appointment issued to the Petitioner on 21.05.1998 has the following clause;

> 'You are hereby informed that you have been appointed as an Assistant Superintendent of Customs Class II, with effect from 31.08.1992 as per Cabinet decision of 22.04.1998'. (Emphasis added).

Prior to the issuing of the said letter of appointment the Department of Customs has obtained the approval of the Public Service Commission to appoint the Petitioner to the post of Assistant Superintendent of Customs Class II with effect from 31.08.1992 without back wages.

Therefore, it is pertinent to note that the Director of Customs (Administration) has thought it fit to deviate from the normal draft of a letter of appointment given in the Establishment Code and incorporate the reason for the issuing of the said letter of appointment and backdating the same.

I am of the view that the decision taken by the Cabinet of Ministers pursuant to a recommendation made by the Political Victimization Committee has been incorporated into the contract of employment of the Petitioner and the said clause has become a condition in the letter of appointment issued to the Petitioner. Further, the conditions in the said letter of appointment supersede Section 1:9 of the Establishment Code as the said condition was introduced to the letter of appointment consequent to the said decision of the Cabinet of Ministers to grant redress to the Petitioner due to an injustice caused to him.

The Department of Customs has had an interview to absorb Assistant Superintendent of Customs Class II as Deputy Superintendent of Customs. However, the Petitioner was not called for the said interview. Consequent to an appeal made by the Petitioner he was requested to be present before the said interview board that was established to interview Assistant Superintendents of

Customs Class II for absorbing them as Deputy Superintendents of Customs. The Respondents furnished the mark sheet of the said interview along with the objections filed in this application. In the 1st column which deals with the date of appointment of the candidates it has been stated as 15th June, 1998 and in the priority column it has been stated 'called to clarify'. After the conclusion of the interview the panel of interviewers has sent the marks to the 6th Respondent. In that they have stated No. 307 (Petitioner) 'was called for the interview to examine his appeal by the Board'.

This has been done despite the fact that the Petitioner was issued with a letter to be present before the interview board for an interview for the post of Deputy Superintendents of Customs. I am of the view that the interview board had no authority or power to consider the said appeal submitted by the Petitioner. On the contrary, the said interview board should have interviewed the Petitioner for the post of Deputy Superintendent of Customs based on his seniority stated in the letter of appointment issued to him.

Article 12 of the Constitution deals with the equality before the law and equal protection of the law. What is postulated in the said article is equality of treatment to all persons in disregard of race, religion, language, caste, sex, political opinion, place of birth, or one of such grounds. I am of the view that the non-appointment of the Petitioner to the post of Assistant Superintendent of Customs Class II along with the others recruited in the 1993 batch denied him equal protection of law. This does not end the matter. Considerable prejudice has been caused to the Petitioner.

Administrative processes such as recruitment and public examinations must be carried out with due regard to the rights and interests of the public, and errors should be corrected. Such correction of errors shall redress an undue harm, loss or prejudice caused to a person. An authority vested with discretion must act fairly and equitably.

The wide powers vested in those responsible for recruitment and promotions have to be exercised in the public interest and for the benefit of public. The powers granted to the appointing authority are public in nature, to be held in trust for the public, and to be exercised for the benefit of public. Failure in the exercise of these powers according to the stipulated rules warrants the intervention of courts. Further, the power to make appointments and promotions should be exercised without discrimination and any violations of the procedure. The delay in rectifying an error would display lack of concern for the rights and interests of candidates constituting a denial of the equal protection of law.

Article 55(4) of the Constitution states that;

> ‘ Subject to the 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.”

This is a constitutional recognition of the concept of Rule of Law, in particular, that the administration should be conducted within the framework of recognized rules and principles and that, in general, the decisions should be predictable and the citizen should know where he is which in turn restricts arbitrary action or discrimination. The provisions of the Establishment Code are in conformity with this concept and through Article 55(4) are made complementary to Article 12 of the Constitution.

It was submitted to Court that the selection was effected on the basis of merit. In this case the criteria adopted in making the appointments have failed to give due weightage to the marks obtained by the Petitioner and his order of “merit”. I am of the view that in situations where express provisions are made for the adoption of guidelines or procedures they must be followed. Further, the Cabinet has the power to grant redress to employees of the Public Service who are denied of their rights due to the failure to adhere to the provisions of the Establishment Code. In such an instance the Cabinet has the power to direct the relevant authorities to rectify the injustice as done in the instant case and in such a situation the relevant authority is bound to give effect to the said decision of the Cabinet. In this instance, I am of the view that the decision of the Cabinet is not subject to Section 1:9 or any other provision of the Establishment Code as the Cabinet has taken the decision under consideration to grant redress to an employee of the Public Service whose rights were denied due to non compliance of the provisions of the Establishment Code, namely, to appoint the candidate according to the order of merit as required by the Establishment Code. However, the Petitioner was not placed in the order of merit in the 1993 batch as decided by the Cabinet of Ministers by the Department of Customs. The view taken by the 1st Respondent effectively deprives the Petitioner the benefits attached to his appointment granted by and in terms of the said decision of the Cabinet of Ministers. In this instance he has been denied his promotional prospects.

For the foregoing reasons, I declare that the Petitioner’s fundamental rights guaranteed by Article 12(1) of the Constitution have been violated by the denial to ante-date his appointment to the post of Assistant Superintendent of Customs Class II to be effective from 15.07.1993, and the

Petitioner consequentially being deemed ineligible for consideration for the post of Deputy Superintendent of Customs.

I further declare the Petitioner was entitled to be placed 7th in the order of the list of persons appointed on 15.07.1993 (1993 batch) to the post of Assistant Superintendent of Customs Class II and to have the said seniority be considered for all purposes pertaining to his employment with the Department of Customs, and was therefore entitled to be considered for the post of Deputy Superintendent of Customs, at the interviews held for such purpose, taking 15.07.1993 as his effective date of appointment to the post of Assistant Superintendent of Customs Class II.

I accordingly direct the 1st Respondent to forthwith place the Petitioner at the 7th place in the order of the list of persons appointed on 15.07.1993 (1993 batch) to the post of Assistant Superintendent of Customs Class II, and that the said seniority be considered for all purposes pertaining to his employment with the Department of Customs.

Since the Petitioner was not considered for the post of Deputy Superintendent of Customs at the interviews already held for that purpose I hereby direct the 1st Respondent to have the Petitioner interviewed for the post of Deputy Superintendent of Customs forthwith, by a suitable interview panel constituted for the purpose, with instructions to the said interview panel to review the Petitioner's eligibility for appointment for such absorption, taking 15.07.1993 as his effective date of appointment to the post of Assistant Superintendent of Customs Class II.

I further direct the 1st Respondent, subject to the outcome of such interview, and to the availability of vacancies, to appoint the Petitioner to the post of Deputy Superintendent of Customs, which appointment shall be effective from the same date that the 1993 batch of Assistant Superintendent of Customs Class II have been appointed to the post of Deputy Superintendent of Customs, but without back wages.

In all the circumstances of this case, I order no costs.

Judge of the Supreme Court

Saleem Marsoof, PC, J

I agree

Judge of the Supreme Court

Rohini 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 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

Kumarapatti Pathiranalage Freeda Doreen Peiris (After marriage Gunathilaka,
No. 117/4,
Thalapathpitiya Road,
Udahamulla,
Nugegoda.
Present Address:
No. 06, Albert Place,
Hopperskrossin, Victoria,
Australia.

Plaintiff

S.C./H.C CA/L.A./137/12.
High Court Case No. WP/HCCA/MT/07/2011(L.A.)
D.C. Nugegoda Case No. 44/2008/L Vs.

1. Kumarapatti Pathrannehelage Namal Rohitha Peiris,
No. 320, Thalawathugoda Road,
Madiwela, Kotte.

2 Kumarapatti Pathrannehelage Sunil Jackson Peiris,
No. 320, Thalawathugoda Road,
Madiwela, Kotte.

Defendants

AND

1. Kumarapatti Pathrannehelage Namal Rohitha Peiris,
No. 320, Thalawathugoda Road,
Madiwela, Kotte.

2 Kumarapatti Pathrannehelage Sunil Jackson Peiris,
No. 320, Thalawathugoda Road,
Madiwela, Kotte.

Defendants-Petitioners

Vs.

Kumarapatti Pathiranalage Freeda Doreen Peiris, (After marriage Gunathilaka),
No. 117/4,
Thalapathpitiya Road,
Udahamulla,
Nugegoda.
Present Address:
No. 06, Albert Place,
Hopperskrosin, Victoria,
Australia.

Plaintiff-Respondent

AND NOW BETWEEN

In the matter of an application for Leave to Appeal under Section 5(c) of the High Court of Provinces (Special Provisions) (amendment) Act No. 54 of 2006 read with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. *Kumarapatti Pathrannehelage Namal* Rohitha Peiris,
No. 320, Thalawathugoda Road,
Madiwela, Kotte.

2 Kumarapatti Pathrannehelage Sunil Jackson Peiris,
No. 320, Thalawathugoda Road,
Madiwela, Kotte.

Defendants-Petitioners-Petitioners

Vs.

Kumarapatti Pathiranalage Freeda Doreen Peiris,(After marriage Gunathilaka),
No. 117/4,
Thalapathpitiya Road,
Udahamulla,
Nugegoda.
Present Address:
No. 06, Albert Place,
Hopperskrosin, Victoria,
Australia.

Plaintiff-Respondent-Respondent

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

COUNSEL : Dr. Sunil Coorey with Henmantha Boteju, H.A.M. Dayaratna for the 1st and 2nd Defendants- Petitioners- Petitioners.

Athula Bandara Herath With Shashika de Silva instructed by Sanath Wijewardene for the Plaintiff-Respondent-Respondent.

ARGUED ON : 28.04.2014

WRITTEN SUBMISSIONS
FILED : By the Defendants-Petitioners- Petitioners on 28.05.2014
By the Plaintiff-Respondent-Respondents on 21.05.2014

DECIDED ON : 25.09. 2014

K. SRIPAVAN, J.

On 28.04.14 learned Counsel for the Plaintiff-Respondent-Respondent (hereinafter referred to as the Respondent) took up a preliminary objection on the ground that the petition filed by the Defendants-Petitioners-Petitioners (hereinafter referred to as the "Petitioners") has not been filed in terms of 8(3) of the Supreme Court Rules 1990. Counsel submitted that the Petitioners have filed only the petition and affidavit without tendering with their application such number of notices as are required for service on the Respondent. Counsel further submitted that at the time of filing the petition the Petitioners have failed to prescribe a date for the support of the leave to appeal application.

It is not in dispute that the petition of appeal, affidavit and documents were filed on 09.04.2012. However, Counsel for the petitioners submitted that by an inadvertence, the notices and suitable dates for support of the application had not been tendered along with the petition. The notices were tendered to the Registry on 03.05.12 almost 24 days after filing the petition affidavit and documents.

Learned Counsel for the "Petitioners" sought to rely on the decision of this Court in the case of *Ediriwickrema* Vs. *Ratnasiri* (S.C. Appeal No. 85/2004 – S.C. Minute of 22.2.13) where Marsoof, J. stated as follows :-

> "*Since no objections had been taken to 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"

It could be seen that a preliminary objection was raised in *Ediriwickrema's* case after submissions had been made on merits and nine years after filing the amended petition. The Court having considered the question of undue delay and the failure to raise the preliminary objection at the earliest possible opportunity refused to entertain such objection.

As noted by Wijetunga, J. in the case of *Priyani E. Soysa* Vs. *Rienzie Arsecularatne* (1999) 2 S.L.R. 179 at 203, in dealing with the procedure applicable to applications – we are here concerned particularly with the requirements of the Rules at the stage when the Court decides whether or not leave should be granted. However, in the present application, the preliminary objection was raised before the matter was taken up for support. Hence, the decision in *Ediriwickrema's* case does not apply to the case in hand.

Learned Counsel for the Petitioners submitted in their written submissions that when determining whether an appeal can be dismissed

for failure to comply with a Rule, one must see the context of that Rule, the object of the Rule as well as the circumstances of the default. However, the Petitioners have failed to explain to the satisfaction of Court the reason why they did not tender the notices for service on the Respondent at the stage of filing the petition. Even if non compliance had not been explained, the Court has a discretion to make an order in an appropriate case considering the need to maintain the discipline of the law. The order complained of was made by the High Court of Mt. Lavinia exercising Civil Appellate jurisdiction on 28.02.12. Any party aggrieved by the said order has the right to invoke the jurisdiction of this Court within six weeks of the judgment. (Vide *Priyanthie Chandrika Jinadasa* Vs. *Pathma Hemamali & Others* (2011) 1 S L R 337). The six week period lapsed on 11.04.12.

The Petitioners only filed the petition of appeal, affidavit and documents on 09.04.12 and filed the required notice together with the stamp and the envelope to be served on the Defendant only on 03.05.12. Thus, the entire process of filing the petition of appeal, affidavit, documents and the notice to be served on the Respondent became complete only on 03.05.12 which is outside the appealable six weeks period. It is therefore abundantly clear that the defendant has failed to invoke the jurisdiction of this Court in the manner provided by Rule 8 of the Supreme Court Rules 1990 on or before 11.04.12.

It may be appropriate to consider the observation made by Shirani A. Bandaranayake, J. (as she then was) in the case of *Hon. A.H.M. Fowzie &*

two Others Vs. *Vehicles Lanka (Pvt.) Ltd.* (2008) B.L.R. 127.

> *"An examination of Rule 8(3) clearly specifies the necessity to tender the relevant number of notices along with the application for service on the respondents. The said Rule, not only specifies the need to tender notices, but also describes the steps that have to be taken in tendering such notice. It is also to be borne In mind, that in terms of Rule 8(3), tendering of such number of notices for service has to be done, at the time the petitioner hands over his application and it appears that the said requirement is mandatory. The purpose of Rule 8(3) is to ensure that, the respondents are notified that a Special Leave to Appeal application is lodged in the Supreme Court. The Rule clearly stipulates that such notice should be given along with the filing of the application. The need for serving notice on the respondents, is further emphasized in Rule 8(5).*
>
> (emphasis added).

As stated earlier, the Petitioners have not filed the requisite notice along with their petition, which was filed on 09.04.12. If the Petitioners were in need of further time to comply with Rule 8(3), they should have made an application in terms of Rule 40, immediately after filing the leave to appeal application. It is not disputed that the Petitioners had not taken any steps to issue notice on the respondent at the time of filing of this application for leave to appeal on 09.04.12. Moreover, they had not taken any steps to issue notice until 03.05.12. Therefore it is evident

that the Petitioners had failed to comply with Rule 8(3) of the Supreme Court Rules, 1990. The Supreme Court Rules made in terms of the provisions of the Constitution cannot be disregarded especially when an objection is raised with regard to its non-compliance.

Considering the totality of the circumstances, it is not possible for the Court to exercise its discretion in favour of the Petitioners. I uphold the preliminary objection raised and dismiss the Petitioners' application for leave to appeal.

JUDGE OF THE SUPREME COURT.

MOHAN PIERIS, P.C., C.J

I agree.

CHIEF JUSTICE

E. 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 appeal in terms of Article 128 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka read with Section 9 (A) of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD (1) of the Industrial Disputes Act from a Judgment of the Provincial High Court of the Western Province (Holden in Colombo).

SC/HC/LA 02 /2014

HCALT 80/2009

LT Colombo No. 1/Addl. /49/06

IN THE LABOUR TRIBUNAL

K.H.S Pushpadeva,

No.233/33,

Mahawatta Road,

Colombo-14.

Applicant.

Senok Trade Combine Ltd.,

No. 03,

R.A. de Mel Mawatha,

Colombo-05.

Respondent.

In the provincial High Court of the Western Province (Holden in Colombo).

K.H.S Pushpadeva,

No. 233/33, Mahawatta Road,

Colombo-14.

Applicant-Appellant.

Vs.

Senok Trade Combine Ltd.,

No. 03,

R.A. de Mel Mawatha,

Colombo-05.

Respondent-Respondnet.

AND NOW

In the Supreme Court

Senok Trade Combine Ltd.,

No.03,

R.A. de Mel Mawatha

Colombo-05.

Respondent-Respondent-Petitioner.

Vs.

K.H.S. Pushpadeva,

No.233/33, Mahawatta Road,

Colombo-14.

Applicant-Appellant-Respondent.

BEFORE: Saleem Marsoof PC. J

Marasinghe J.

Aluwihare P.C., J

COUNSEL; Suren de Silva instructed by Ms. M.N.T Pieris for Respondent-Respondent-Petitioner.

A. Sri Nammuni for Applicant-Appellant-Respondent.

ARGUED ON: 05.03.2014

WRITTEN SUBMISSIONS: 2. 04. 2014 and 6. 05. 2014

DECIDED ON: 4. 09. 2014

ALUWIHARE J.

This is an application for leave to appeal challenging the judgment pronounced by the learned High Court Judge of Colombo in exercising appellate jurisdiction in respect of an order of the Labour Tribunal of Colombo.

When this application was taken up for support, learned counsel for the Applicant–Appellant Respondent (hereinafter the Respondent) raised the preliminary objections referred to below and moved court that the affidavit filed by the Respondent –Respondent Petitioner (hereinafter the Petitioner) in this application be rejected:-

(1) The purported affidavit of Jerome Anil Ratnayake, is not an affidavit known to law as at the commencement of the said affidavit, there is no affirmation and also it has been formulated as a mere statement.

(2) In any event the affirmant to the purported affidavit has not specified his religion and has not taken an oath or affirmation.

Both parties filed written submissions relating to the preliminary objections raised, having been directed by this court.

The learned counsel for the Respondent elaborating on the objections raised, contends that the "office of the attesting person" is not clearly disclosed, in that, the words "Before me Justice of Peace/ Commissioner for Oath" appear just below the Jurat and a person cannot be a Justice of Peace and a Commissioner of Oath at the same time.

This court observes that the Commissioner for Oaths who attested the affidavit has affixed the seal and the same clearly conveys that that the person who attested the affidavit is a Commissioner for Oaths and I see no ambiguity as to the capacity of the person who attested the affidavit.

The learned counsel for the Respondent has also taken up the position that the Jurat of the affidavit is false in that, paragraph 18 of the affidavit makes reference to the Petitioner seeking special leave to appeal from this court whereas the nature of these proceedings are for Leave to Appeal and not Special Leave. The learned counsel for the Respondent further contends that the Commissioner for oath being an Attorney-at-law ought to have advised the deponent to consult his lawyer on this aspect. The learned Counsel for the Respondent invites this court to draw the conclusion that such a step was not taken by the Commissioner for Oaths for the reason that the deponent was not present before the Commissioner for Oaths and the affidavit is false for that reason. Upon close scrutiny of the position taken up on behalf of the Respondent I am of the view that the attendant circumstances do not warrant the drawing of such a conclusion by this court, and in any event the submission advanced by the learned counsel for the Respondent go beyond the ambit of the preliminary objections raised by him.

The learned counsel for the Respondent further contends that the affidavit had not been read over to the deponent before he placed his signature, although the jurat of the affidavit makes reference to the affidavit having been read over to the affirmant. To substantiate this position, the attention of this court has been drawn to Form 75 of the Civil Procedure Code, which prescribes that it is a mandatory requirement that the place of residence of the deponent should be set forth in the affidavit. The learned counsel for Respondent contends that the address of the deponent in the affidavit is stated as "No.3 R.A. De l Mawatha, Colombo 5" whereas in the caption the address is given as "No.3 R. A. De Mel Mawatha Colombo 5". The learned counsel for the Respondent raises two issues based on this irregularity. Firstly, there is noncompliance with the requirements of Form 75 of the Civil Procedure Code as the affirmant had not set forth the correct residential address, and secondly, this error further strengthens the Respondent's position that the affidavit was not read over to the affirmant in that, had it been read over the defect would have come to light and would have been rectified.

In response to the above contention of the Respondent, the learned counsel for Petitioner whilst admitting the error relating to the address, submits that the error is a result of an oversight.I am of the view that this irregularity referred to above by the learned counsel for the Respondent is of technical nature and in all probability may have been the result of lack of diligence on the part of the Attornry –at law who was responsible for drafting the affidavit.His Laordship Justice Marsoof President Court of Appeal as he then was has observed " Court should not non-suit a party where the non compliance with the Rules takes place due to no fault of the party" (*Senanayake v Commissioner of National Housing and Others 2005 1 SLR 182)*. I hold that the irregularity is not sifficiently grave to have an effect on the validity of the impugned affidavit.

It is also contended on behalf of the Respondent that the impugned affidavit does violence to Form 75 of the Civil Procedure Code in that the deponent has neither affirmed nor sworn and that the affidavit is invalid for that reason.

The impugned affidavit commences with the words " I Jerome Anil Ratnayake of No.3, R.A. De l Mawatha, Colombo 5 sates as follows.....". However Form 75 requires an affidavit to carry the words after the name and address of the deponenet , … "sincerely, and truly affirm and declare (or if the deponent is a Christian, make oath and say) as follows:" and to this extent the affidavit is not in conformity with Form 75. However, the fact that the affirmant has affirmed before the Commissioner for Oaths, is clearly reflected in the Jurat to the affidavit. In the case of *De Silva and others Vs. L.B. Finanace Ltd 1993 1 SLR 371,* Chief Justice G.P.S De Silva, in considering whether the absence of the word "affirmed" in the jurat makes the affidavit invalid, held that section 438 of the Civil Procedure Code does not require that the fact of affirmation should be expressly stated in the Jurat of the affidavit. His Lordship, in the same case, went on to observe that "there is no reference to Form 75 in section 438 of the Civil Procedure Code. Only the marginal note in Form 75 makes reference to section 438 and that compliance with Form 75 is not essential."

Although, the learned counsel for the Respondent challenged the validity of the affidavit filed in this application on the basis that the affidavit has not specified the religion of the affirmant when this application was taken up for support, he has not referred to this aspect in his written submissions.

In the case of *Trico Freighters (PVT) Ltd v. Yang Civil Engineering Lanka (PVT) Ltd 2000 2 SLR 136*, Justice Eddusuriya President Court of Appeal, as he then was, expressed the view that "an affirmation is not bad in law merely because the deponent has made an affirmation without stating that he is a Buddhist, Hindu or Muslim". As observed by his lordship Justice Fernando, in the case of *Sooriya Enterprises (International) Limited v Michael White & Company Ltd 2002 3 SLR 371*, "the fundamental obligation of a witness or a deponent is to tell the truth and the purpose of the oath or affirmation is to reinforce that obligation".

Accordingly, I hold that, the fact that an affidavit does not state the religion of the affirmant, does not make the affidavit invalid.

It is further contended on behalf of the Respondent that the affirmant does not have the capacity to swear an affidavit on behalf of the Petitioner and relies on Section 183A (b) of the Civil Procedure Code to substantiate this position.

Section 183A (b) reads as follows:-

> *"Where the action is brought by or against a corporation, board, public body, or* ***company****, any secretary,* ***director*** *or other principal officer of such corporation, board, public body or company;……..*
>
> *..may make an affidavit in respect of these matters, instead of the party to the action:*
>
> *Provided that in each of the foregoing cases the person who makes the affidavit instead of the party to the action, must be a person having personal knowledge of the facts of the cause of action……* (emphasis added)

The learned counsel for the Respondent has argued that the term Director is defined in Section 529 (1) of the Companies Act and where the Petitioner is a company and a party to an action, if an affidavit is to be made, such an affidavit can only be made by a person holding one of the positions referred to in section 183A (b) of the Companies Act. He has further submitted that the affirmant is not a Director of the Petitioner company within the meaning of section 529 (1) of the Companies Act though he is called the *Director* in charge of Human Resources and Administration.

Section 183A (b) does not only stipulate that the affidavit must be from a person holding the position of secretary, director or **other principal officer** as the case may be but the said provision also requires that the affidavit must

emanate from a person who has personal knowledge of the facts of the cause of action. In view of the second requirement in Section 183A (b) that I have referred to, the statute permits **any principal officer** of the organization to swear an affidavit in instances where a company is a party to a litigation if such person has personal knowledge of the facts of the cause of action.

A principal officer of an organisation is an officer who heads a high level office in an organisation or an officer who is at the same level as a department head.

As the capacity of the affirmant is Director of Human Resources and Administration, of the Petitioner company, I see no reason as to why the affirmant cannot be considered as a principal officer, especially in a matter concerning a workman of the Petitioner company. In this context, I hold that the affirmant, in the eyes of the law, is a person having capacity to make an affidavit within the meaning of section 183A (b) of the Civil Procedure Code.

As observed by Justice Sharvannda as he then was, in the case of *Kobbekaduwa V Jayawardene 1983 1 SLR 419* "The function of an affidavit is to verify the facts alleged in the petition. The affidavit furnishes prima facie evidence of the facts deposed to in the affidavit. Section 13 of the Oaths and Affirmation Ordinance (Cap.17) furnishes the sanction against a false affidavit by making the deponent guilty of the offence of giving false evidence. In an affidavit a person can depose only to facts which he is able of his own knowledge and observation to testify".

Affidavits are valuable documents in presenting evidence in court not only when a witness is unable to testify in person, but also when the procedure (appellate) lays down that evidence that is material, be placed before court by way of affidavits effectively shutting out oral evidence from such legal proceedings. Thereby, when a litigant is aggrieved by an order of court and seeks redress by way of an appeal such a person has no option other than to follow the procedure laid down by law which is to present his case through

the medium of an affidavit. This court is mindful of the fact that litigants who are not fully conversant with the procedures established by law have no option but to rely on legal advice not only regarding the nature of redress, but also regarding the procedure to be followed in placing their case before the forum vested with jurisdiction to adjudicate on the matter.

Although the infirmities referred to by the Respondent are, in my view technical in nature, I wish to state that in the instant application, in making the affidavit in question, the Attorney-at –Law on record has failed to exercise due diligence required of him. Such conduct should not be condoned. He has failed to discharge his professional duty as an attorney-at-law and has shown scant concern for the interest of his client whom he is professionally bound to serve.

Justice Nanayakkara observed in the case of *Distilleries Company V Kariyawasam & Others 2001 SLR 119* "the object of the Civil Procedure is to prevent civil proceedings from being frustrated by any kind of technical irregularity or lapse which has not caused prejudice or harm to a party. A rigid adherence to technicalities should not prevent a court from dispensing justice."

In the case of *Mohamed Facy Vs. Mohamed Azath Sanoon Sally and Others* S.C.Appeal 4/ 2004 (BASL Law Journel 2006 pg 58) his Lordship Justice Marsoof, in considering the impact of defects of technical nature of an affidavit, observed in reference to Section 9 of the Oaths Ordinanace, that the said section is a salutary provision which was intended to remedy such maladies.

In conclusion It must be said that the infirmities and irregularities in the affidavit of the petitioner referred to by the Respondent are technical in nature that can be cured by application of Section 9 of the Oaths Ordinance and therefore do not impact on the validity the affidavit.

For the reasons set out above, I reject the preliminary objections raised by counsel for the Respondent and hold that the impugned affidavit filed in this application is valid before the law.

JUDGE OF THE SUPREME COURT

Saleem Marsoor, PC J

I agree

JUDGE OF THE SUPREME COURT

Rohini Marasinghe, 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 for Leave to Appeal from the Judgment of the High Court of Colombo dated 14.5.2012 made under and in terms of the Arbitration Act No. 11 of 1995.

SC (HC) LA 58/2012

HC Colombo Case No.
HC/ARB/1254/2002

Board of Investment of Sri Lanka
World Trade Centre,
West Tower, 15-17 Floors,
Echelon Square,
Colombo 1.

RESPONDENT-PETITIONER

-Vs-

Million Garments (Pvt) Ltd,
No. 14/7, Saparamadu Mawatha,
Nugegoda.
At present Head Office situated at:-
A/14/2/3/, Matha Para,
Narahenpita.

PETITIONER-RESPONDENT

BEFORE	:	Hon. S. Marsoof, P.C. J, Hon. K. Sripavan, J, and Hon. E. Wanasundera, P.C. J.
COUNSEL	**:**	Romesh de Silva, P.C. with Hiran de Alwis for Respondent-Petitioner. Gamini Marapana, P.C. with Navin Marapana for Petitioner-Respondent.
Argued On	**:**	29.1.2014
Written Submissions On	**:**	28.2.2014 (Respondent-Petitioner) 17.3.2014 (Petitioner-Respondent)
Decided On	**:**	24.10.2014

SALEEM MARSOOF, P.C. J,

When this application for leave to appeal against a Judgment of the High Court of Sri Lanka holden in the judicial zone of Colombo dated 14th May 2012, whereby the said High Court decided to file of record the arbitral award sought to be enforced and pronounced judgment and entered decree in terms of the said award as provided for in Section 31(6) of the Arbitration Act No. 11 of 1995, was mentioned before this Court on 2nd September 2013, learned President's Counsel for the Petitioner-Respondent (hereinafter

referred to as the "Respondent") gave notice of a preliminary objection intended to be taken up on behalf of the Respondent. The said preliminary objection was that insofar as the judgment of the High Court was pronounced on 14th May 2012, the lodging of the application for leave to appeal in the Registry of this Court on 26th June 2012, on the forty-third day after the pronouncement of the impugned judgment, was outside the time limit prescribed by law for making such an application, and that the application is therefore time-barred.

When the application seeking leave to appeal was thereafter taken up for support on 29th January 2014, the learned President's Counsel for the Respondent formally took up the said preliminary objection and made brief submissions thereon, and the learned President's Counsel for the Respondent-Petitioner (hereinafter referred to as the "Petitioner") also made brief submissions in regard to the objection. Both learned President's Counsel were also granted further time to file written submissions, and they have both filed written submissions as well.

Time limit for filing applications for leave to appeal under Section 37(2) of the Arbitration Act

In this context it is important to note that the only provisions in the Arbitration Act No. 11 of 1995 that deal with appeals are Sections 37 and 43(a) of the said Act. The first two sub-sections of Section 37 provide as follows:-

> "37 (1) Subject to subsection (2) of this section, no appeal or revision shall lie in respect of any order, judgment or decree of the High Court in the exercise of its jurisdiction under this Act except from an order, judgment or decree of the High Court under this Part of this Act.
>
> (2) An appeal shall lie from an order, judgment or decree of the High Court referred to in subsection (1) to the Supreme Court only on a *question of law* and with the *leave of the Supreme Court* first obtained."*(Emphasis added)*

It is noteworthy that the impugned judgment of the High Court was pronounced in terms of Section 31(6) of the Arbitration Act, which falls within Part VII of the Act within which the above quoted Section 37 too is found. Hence, undoubtedly, the impugned judgment is appealable, but Section 37(2) of the Act which confers the right to invoke the appellate jurisdiction of this Court by way of an application for leave to appeal, does not specify any time limit for the lodging of the application seeking leave to appeal. Of course, Section 43(a) of the Arbitration Act does empower this Court to make rules with respect to "any application or appeal made to any Court under this Act and the costs of such application or appeal", but no rules have so far been made by this Court in terms of Section 43(a) of the Arbitration Act prescribing any period of time within which any application for leave to appeal against any order, judgment or decree of the High Court may be lodged.

There are however certain rules made by the Supreme Court, which is empowered by Article 136 of the Constitution to *inter alia* make rules regarding all matters pertaining to appeals to the Supreme Court and the Court of Appeal, which include as specifically provided in sub-article (b) thereof, "the time which such matters may be instituted or brought before such Courts and the dismissal of such matters for non-compliance with such rules". Rules 2 to 6 of the Supreme Court Rules, 1990 which appear in Part 1 - A of

the said rules under the heading "Special Leave to Appeal", contain provisions regarding the manner of lodging applications seeking special leave to appeal to this Court from any order or judgment of the Court of Appeal, and Rule 7 thereof provides as follows:-

> "7. 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.*"(Emphasis added)*

The application filed by the Petitioner is of course for leave to appeal against a decision of the High Court, and It is in these circumstances that learned President's Counsel for the Respondent has submitted that despite the absence of any express provision in the Arbitration Act or any rule made under Section 43(a) of the said Act, it would be reasonable to regard the six weeks period that is prescribed in Rule 7 of the Supreme Court Rules, 1990 for the filing of an application seeking special leave to appeal against an order or judgment of the Court of Appeal as being applicable to any application seeking leave to appeal under Section 37(2) of the Arbitration Act. Learned President's Counsel has referred to the decisions of this Court in *Tea Small Factories Ltd. v Weragoda* (1994) 3 SLR 353, *Mahaweli Authority of Sri Lanka v United Agency Construction* (2002) 1 SLR 8, *George Stuart & Co. Ltd. v Lankem Tea & Rubber Plantations Ltd.* (2004) 1 SLR 246 *Priyanthi Chandrika Jinadasa v Pathma Hemamali* (2011) 1 SLR 337, and *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya* SC HC/CA/LA No. 137/2010 SC Minutes of 4.10.2012 (unreported) in support of his submission that the application of the Petitioner in the instance case is time-barred.

Learned President's Counsel for the Petitioner responded to these submissions by pointing out that where there is no applicable law or rule setting out a mandatory time period for preferring an appeal, the matter of time-bar should be considered *sui generis,* and that it is clear from the decisions of this Court in *Mahaweli Authority of Sri Lanka v United Agency Construction* (2002) 1 SLR 8 and *George Stuart & Co. Ltd. v Lankem Tea & Rubber Plantations Ltd.* (2004) 1 SLR 246 that in such circumstances, a reasonable period of time should be permitted for such appeals, and that in determining whether any application for leave to appeal has been filed within a reasonable time, Court should consider the circumstances of the case. He also submitted that the purported arbitral award sought to be enforced in the instant case arose from a settlement reached before the arbitral tribunal and that the said purported award is tainted with fraud and is a nullity inasmuch as the amount sought to be recovered from the Petitioner is more than double the amount of the settlement reached, and that this is a material circumstance that may be taken into consideration in determining whether the application seeking leave to appeal has been lodged within a reasonable time. For this proposition, he relied additionally on decisions of this Court such as *Vithana v Weerasinghe* (1981) 1 SLR 52 and *Lanka Orix Leasing Company Limited v Pinto and Others* (2002) 2 SLR 115.

An important question that arises in this appeal is, given that there are no rules made by this Court as contemplated by Section 43(a) of the Arbitration Act, whether the period of six weeks (42 days) prescribed in Rule 7 of the Supreme Court Rules, 1990 for the filing of an application for special leave to appeal against an order, judgment, decree or sentence of the Court of Appeal, will apply to the application filed by the Petitioner seeking leave to appeal against the decision of the High Court under Section 37(2) of the Arbitration Act.

In this context, it is instructive to note that Part 1 of the Supreme Court Rules 1990, consists of three sub-parts which are headed respectively as A - Special Leave to Appeal, B – Leave to Appeal and C – Other Appeals, and that whilst applications to the Supreme Court seeking special leave to appeal from decisions of the Court of Appeal are dealt with in sub-part A, instances where the Court of Appeal has granted leave to appeal to the Supreme Court from any final order, judgment, decree or sentence of the Court of Appeal are dealt with in Part 1– B. All miscellaneous types of appeals to the Supreme Court that do not fall within the purview of sup-parts A and B are governed Part 1 – C of the Supreme Court Rules, and there can be no doubt that the instant application filed by the Petitioner seeking leave to appeal falls within that part.

Part 1 – C of the Supreme Court Rules consist of only Rule 28, of which sub-rule (1) provides as follows:-

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

It is noteworthy that whilst sub-rules (2) to (6) of Rule 28 set out in detail the procedure for the filing of proxy, notice of appeal and petition of appeal, tendering notices for service and subsequent steps to be taken in the Registry for preparing the appeal briefs, and filing of written submissions, rule 28(7) provides that "the provisions of rule 27 shall apply *mutatis mutandis* to such appeals". However, since neither Rule 27 nor Rule 28 contain any provision in the lines of Rule 7 which sets out a time limit for filing an application for leave to appeal, the question arises as to whether the Petitioner is free to invoke the appellate jurisdiction of the Supreme Court against the impugned judgment and decree *ad infinitum*, or whether the law imposes any constraints of time on the Petitioner's right to seek leave to appeal as contemplated by Section 37(2) of the Arbitration Act.

Learned President's Counsel for the Petitioner has contended that since neither the Arbitration Act nor any rule made in terms of under Section 43(a) of the said Act prescribe any mandatory time limit for presenting an application for leave to appeal, there can be no "automatic imposition" of a rule such as Rule 7 of the Supreme Court Rules to debar the application filed by the Petitioner. He has submitted that any limitation of time for preferring an application for leave to appeal under Section 37 of the Arbitration Act can only be lawfully imposed by a rule made by this Court in terms of Section 43(a) of the Arbitration Act, and that no rules have been made so far by this Court in accordance with this provision.

I have difficulty in agreeing with learned President's Counsel for the Petitioner because the application filed by the Petitioner seeking leave to appeal from a decision of the High Court does not fall within Part 1-A or 1-B of the Supreme Court Rules, 1990, and must necessarily be considered to fall within the purview of Part 1-C of the said Rules, which in the absence of any contrary legislative provision, will apply to all "other appeals" to the Supreme Court from "any order, judgment, decree or sentence of the Court of Appeal *or any other court or tribunal*." When conferring a limited rule-making power on this Court by the enactment of Section 43 of the Arbitration Act, the legislature was presumably aware that by Article 136 of the Constitution, an even wider rule-making power has been conferred on this Court, and that in the absence of any time limit for appeals in Section 37 of the Arbitration Act, the rules of wider import made

by this Court under Article 136 of the Constitution may be applied, if this Court does not chose to make any rules in terms of Section 43(a) of the said Act. I note that both in Article 136 of the Constitution and Section 43 of the Arbitration Act, the non-imperative and permissive language of "may" has been used, and it would be absurd to contend that since this Court has not made rules under Section 43(a), it cannot insist on compliance with the rules framed by it under Article 136 of the Constitution.

Furthermore, the question before this Court in this case is covered by ample authority both in the context of appeals under Section 37(2) of the Arbitration Act as well as in the wider context of "other appeals" falling within the purview of Part 1-C of the Supreme Court Rules. The learned President's Counsel for the Respondent has invited our attention to the decision of this Court in *Tea Small Factories Ltd. v Weragoda* (1994) 3 SLR 353 in which this Court had to deal with an application for leave to appeal from a judgment of the High Court for the Province filed in terms of Section 31DD of the Industrial Disputes Act No. 43 of 1950 as amended by Acts Nos. 32 of 1990 and 11 of 2003, where neither Section 31DD of the Industrial Disputes Act nor any other applicable law stipulated a period of time within which an aggrieved party may invoke the appellate jurisdiction of the Supreme Court. This Court held that in these circumstances, Rule 7 of the Supreme Court Rules 1990, which prescribed a period of six weeks for invoking the appellate jurisdiction of this Court, will apply despite the fact that neither Section 31DD of the said Act nor Part 1-C, Rule 28 of the Supreme Court Rules 1990 which was considered to be applicable to such an appeal, stipulated a period of time within which an aggrieved party may invoke the appellate jurisdiction of the Supreme Court.

More in point are the decisions of this Court in *Mahaweli Authority of Sri Lanka v United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 and *George Stuart & Company Limited v Lankem Tea and Rubber Plantation Ltd.* (2004) 1 SLR 246, which involved applications seeking leave to appeal filed against decisions of the High Court of Sri Lanka in terms of Section 37 of the Arbitration Act No. 11 of 1995. In the first of these cases, namely *Mahaweli Authority of Sri Lanka v United Agency Construction (Pvt) Ltd*, the application for leave to appeal was filed fifty-five days after the pronouncement of judgement, and this Court held that the application for leave to appeal fell within Part 1-C of the Supreme Rules. Since the Arbitration Act was silent on the question of the appealable period, and no rules had been framed under Section 43(a) of the said Act, this Court held that the appeal must be preferred within a reasonable time, and adverted by way of analogy to the time limit of six weeks specified in Rule 7 of Part I-A of these Rules. In *George Stuart & Company Limited v Lankem Tea and Rubber Plantation Ltd.*, this Court arrived at a similar decision where the application for leave to appeal had been lodged after 108 days of the order of the High Court under the Arbitration Act. This Court held that the application seeking leave to appeal has been filed after the expiry of an unreasonable period of time, and rejected the same.

Similarly, in *Priyanthi Chandrika Jinadasa v Pathma Hemamali* (2011) 1 SLR 337 and *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya* SC HC/CA/LA Appl. No. 137/2010 draft minutes of the Supreme Court dated 4.10.2012 (unreported), the time limit applicable for applications seeking leave to appeal against orders and judgments of the High Court of the Provinces established by Article 154P of the Constitution exercising civil jurisdiction was considered by this Court. In the first of these cases, the application seeking leave to appeal was filed forty-eight days after the pronouncement of the impugned judgment, and in the second, the application for leave had been filed on the fifty-sixth day after the delivery of the judgment. Section 5C(1) of the High Court of the Provinces (Special Provisions)

(Amendment) Act No. 54 of 2006, which conferred a right of appeal subject to leave of the Supreme Court first had and obtained, did not specify any time limit for lodging the application for leave to appeal, and this Court in those circumstances held that the application was time-barred since it fell within Part 1-C of the Supreme Court Rules and had to be filed within a reasonable time, which in the opinion of Court, could not exceed the period of six weeks prescribed in Rule 7 of the Supreme Court Rules. In the course of her judgment in *Priyanthi Chandrika Jinadasa,* her Ladyship Dr. Shirani A. Bandaranayake, CJ, (with whom P.A. Ratnayake, P.C., J. and Chandra Ekanayake, J. concurred) observed at page 346 that:-

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

In my judgment in *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya, supra,* with which N.G. Amaratunge, J. and Chandra Ekanayake J. concurred, I arrived at the same decision adopting the reasoning of Edussuriya, J. (with whom Wadugodapitiya, J. and Yapa, J agreed) expressed so well in the below quoted passage from his judgment in *Mahaweli Authority of Sri Lanka v United Agency Construction (Pvt) Ltd* (2002) 1 SLR 8 at page 12:-

> "In my view, the clear inference is that the Supreme Court in making the rules did not consider it necessary to go beyond a maximum of forty-two days for making an application for special leave to the Supreme Court. In deciding on these periods within which such applications for leave to appeal should be made we must necessarily conclude that the Supreme Court fixed such periods as it was of the view that such periods were reasonable having regard to all relevant circumstances, and also that the Supreme Court acted reasonably in doing so."

In the light of the approach adopted in the aforementioned decisions of this Court, I am bound to hold that the application for leave to appeal filed in this case should have been filed within six weeks of the pronouncement of the impugned judgment and the entering of decree in terms of it. This is a mandatory time limit which knows no exceptions, and I see no merit in the submission of learned President's Counsel for the Petitioner the special circumstances of the case may be taken into consideration in permitting an application filed outside this time limit to be maintained. In my view, the decision of this Court in *Vithana v Weerasinghe* (1981) 1 SLR 52, cited by leaned Counsel for the Petitioner, has no application to this case as that decision was concerned with an appellant who had complied with Section 754(4) of the Civil Procedure Code and given notice of appeal within the prescribed period of 14 days but had failed to file the petition of appeal within 60 days as required by Section 755(3) of the said Code, and the Court found that the provisions of Section 759(2) of the Code wide enough to excuse the omission to file the petition in time. On the contrary, in cases which fall within mandatory time limits set by the Supreme Court Rules for the lodging of appeals or applications for leave to appeal, this Court has consistently refused to take into consideration special circumstances of the case as it did in its decisions in *L.A. Sudath Rohana v Mohomed Zeena and others* (SC HCCA LA 111/2010 – SC Minutes of 17.3.2011 (unreported), *Chandrika Jinadasa v Pathma Hemamali, supra* and *Karunawathie Wickremesinghe Samaranayake v Ranjanie Warnakulasuriya, supra.*

I am fortified in my decision that an application for leave to appeal challenging a decision of the High Court to file of record an arbitral award and pronounce judgment and enter decree accordingly has to be lodged within six weeks of the said judgment and decree, since the language of Section 37(1) of the Arbitration Act manifests a clear legislative intent to curtail appeals from orders and awards of arbitral tribunals with a view to giving full effect to the concept of party autonomy and maintaining the efficacy of the arbitral process. More so, because Section 37(2) of the said Act seeks to confine appeals to any order, judgment or decree of the High Court made under Part VII of the Act relating to the enforcement and setting aside of arbitral awards by limiting them to those involving a question of law and imposing the further requirement of obtaining the leave of the Supreme Court for proceeding with the same, with the same objectives in mind. To hold otherwise and hold that there is no time limit prescribed by law, or to apply a more flexible test of reasonableness that would vary from case to case would be to perpetrate the kind of mischief which her Ladyship Bandaranayake J (as she then was) adverted to in her judgment in *George Stuart & Company Limited v Lankem Tea and Rubber Plantation Ltd*. (2004) 1 SLR 246 at page 254 in the following words:-

> "……such a situation would lead to an absurdity if a 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. Such a situation would lead to an absurd system, where it would not be possible for the Arbitration Act to work as stipulated."

Having said that, I now come to the question whether the application for leave to appeal filed in this case time barred.

Computation of time

It is instructive to note that Rule 7 of the Supreme Court Rules, 1990 requires an application seeking leave to be filed "within *six weeks of the order, judgment, decree or sentence*." The following passage of Maxwell, *The interpretation of Statutes*, (12th Edt.) page 309, will apply with respect to the method of computation to be adopted in calculating the period of six weeks specified in Rule 7.

> "A "week" may according to context, be a calendar week beginning on Sunday and ending on Saturday or *any period of seven days*." *(Emphasis added)*

According to the Strouds Judicial Dictionary Vol. III page 2890 (6th Edt.) –

> "Though a "week" usually means any consecutive seven days, it will sometimes be interpreted to mean the ordinary notion of a week reckoning from Sunday to Sunday (*Bazalgette v. Lowe* 24 L.J. Ch. 368, 416). And, probably, a "week" usually means seven clear days…."

The above quoted passages, albeit from earlier editions, have been cited with approval in several decisions of this Court including the judgments of Kulatunga J. in *Tea Small Factories Ltd. v Weragoda* [1994] 3 SLR 353 and *Sitamparanathan v Premaratne and Others* [1996] 2 SLR 202. In the *Tea Small Factories Ltd* case the Supreme Court relied on the decision of the Supreme Court of India in *Shah v*

Presiding Officer, Labour Court, Coimbatore and Others AIR 1978 SC 12 at page 16 where Jaswant Singh, J observed that the term "week" has to be taken to "signify a cycle of seven days including Sundays."

When applying Rule 7 of the Supreme Court Rules, it may also be useful to refer to the following passage in Maxwell, *The interpretation of Statutes*, (12th Edition) page 309:-

> "Where a statutory period runs "from" a named date "to" another, or the statute prescribes some periods of days of weeks or months or years within which some act has to be done, although the computation of the periods must in every case depend on the intention of Parliament as gathered from the statute, *generally the first day of the period will be excluded from the reckoning, and consequently the last day will be included"*. *(Emphasis added)*

Hence, the term "of" as used in the Rule 7 is synonymous with "from", and "six weeks *of* the order, judgement" etc., means the same as "six weeks *from* the order, judgment" etc. A similar view was adopted by this Court in *Kailayar v Kandiah* 59 NLR 117 in which Sinnetamby J. (with whom Weerasooriya J. concurred) held that the relevant period should be calculated by excluding the date of the judgment appealed from and including the date of filing the application for leave to appeal.

Applying these principles of computation, I have excluded from the count Monday, 14th May 2012, on which day the impugned judgment of the High Court was pronounced and decree entered, and counted from Tuesday, 15th May to Monday, 25th June 2012, on which day the period of six weeks prescribed by Rule 7 read with Rule 28 for the filing of the application for leave to appeal in terms of Section 37(2) of the Arbitration Act, would come to an end. In fact, Monday, 25th June 2012 is the 42nd day from the impugned judgment and decree. Accordingly, I hold that the lodging of the application seeking leave to appeal in the Registry of this Court on Tuesday, 26th June 2012 was clearly out of time.

Conclusion

For all these reasons, I uphold the preliminary objection raised by the learned President's Counsel for the Respondent and dismiss the application seeking leave to appeal. In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

K. SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT

E. 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 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 leave to appeal under and in terms of Section 5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 read with Chapter LVIII of the Civil Procedure Code.

Wajira Prabath Wanasinghe,
No. 120/1, Balagalla,
Diwulapitiya.

SC (HC) LA Application No. 68/2012

PLAINTIFF-PETITIONER

Commercial High Court

Case No. HC (Civil) 689/2010 (MR)

-Vs-

Janashakthi Insurance Company Limited,
No. 47, Muttiah Road,
Colombo 02.

DEFENDANT-RESPONDENT

BEFORE : Hon.Saleem Marsoof PC, J,
Hon. Sathyaa Hettige PC, J, and
Hon. Eva Wanasundera PC, J.

COUNSEL: Harsha Amarasekera for the Plaintiff-Petitioner.

Nigel Hatch, PC with Ms. P. Abeywickrama and Ms. S. Illangage for the Defendant-Respondent.

ARGUED ON : 23.11.2012

WRITTEN SUBMISSIONS ON : 07.02.2013

DECIDED ON : 26.03.2014

SALEEM MARSOOF J:

When the petition filed by the Petitioner in this Court dated 27th July 2012 was taken up for support for leave to appeal on 23rd November 2012, the Defendant-Respondent (hereinafter referred to as the 'Respondent') raised the following preliminary objections on the basis that the said petition cannot be maintained by the Plaintiff-Petitioner (hereinafter referred to as the 'Petitioner') having regard to-

(a) the alleged suppression in the said petition of the fact that the Petitioner had *previously* invoked the jurisdiction of this Court by way of final appeal; and / or
(b) the fact that the impugned order of the Commercial High Court dated 13th July 2012 can only be canvassed by way of final appeal.

By the said petition dated 27th July 2012, the Petitioner had sought leave to appeal against the order of the High Court of the Western Province holden in Colombo exercising civil jurisdiction and hearing commercial

matters (hereinafter referred to as the "Commercial High Court") dated 13th July 2012, whereby the Commercial High Court had dismissed the action filed by the Petitioner on the ground that the said High Court had no jurisdiction to entertain the same, in view of section 5 of the Arbitration Act No 11 of 1995, which provided as follows:-

> Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the Court shall have *no jurisdiction* to hear and determine such matter *if the other party objects to the court exercising jurisdiction in respect of such matter*. (*Emphasis added*)

This Court can consider whether leave to appeal against the impugned order of the Commercial High Court should be granted in the circumstances of this case only after first dealing with the preliminary objections raised by the learned President's Counsel for the Respondent, and only in the event that the said objections are overruled. It is therefore necessary to consider these preliminary objections at the outset.

(a) Suppression of fact of prior Invocation of jurisdiction of Court

The first preliminary objection raised by learned President's Counsel for the Respondent is that the Petitioner has suppressed in his petition dated 27th July 2012, the fact that the Petitioner had previously invoked the jurisdiction of this Court by way of final appeal. Significantly, learned President's Counsel has not referred to any specific Rule of the Supreme Court, which requires the disclosure of this fact. In any event, it appears that the Petitioner has in paragraph 13 of his petition dated 27th July 2012 expressly pleaded that he has not invoked the jurisdiction of this Court *previously* in this matter.

Learned President's Counsel for the Respondent has submitted that the said averment of the petition dated 27th July 2012 is false, as the Petitioner has filed a notice of appeal on 23rd July 2012 (R1) and followed it up with a petition of appeal dated 10th September 2012 (R2), thereby invoking the jurisdiction of this Court by way of final appeal. Copies of the Notice of Appeal marked R1 and the Petition of Appeal marked R2 were tendered to this Court only with the written submissions of the Respondent filed in this Court dated 7th January 2013 unsupported by any affidavit. Be that as it may, it appears that even if this Court is to rely upon these documents, only the said Notice of Appeal marked R1 was lodged in the Registry of the Commercial High Court *prior* to the date of the petition of the Petitioner dated 27th July 2012 seeking leave to appeal, and that the Petition of Appeal marked R2 was filed subsequently on 10th September 2012.

In these circumstances, the question arises as to whether the Petitioner had invoked the jurisdiction of this Court by way of final appeal *prior to the date of his petition seeking leave to appeal dated 27th July 2012 filed in this Court.* The provisions applicable to the lodging of a Notice of Appeal are to be found in subsections (3) and (4) of section 754 of the Civil Procedure Code, with which is juxtaposed subsection (2) of that section and section 755 which deals with applications for leave to appeal applicable to interlocutory orders of a court exercising original jurisdiction. The procedure for filing a Notice of Appeal is found in section 754(4), which is quoted below:-

> (4) The Notice of Appeal shall be presented to the court of first instance for this purpose, by the party appellant or his registered attorney within a period of fourteen days from the date when the decree or

order appealed against was pronounced, exclusive of the day of that date itself and of the day when the petition is presented and of Sundays and public holidays, and the court to which the notice is so presented shall receive it and deal with it as hereinafter provided. If such conditions are not fulfilled, the court shall refuse to receive it.

The provisions of sections 754 and 755 and indeed all provisions in Chapter LVIII of the Civil Procedure Code are made applicable by section 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996 to appeals and application for leave to appeal from the Commercial High Court under Section 5 of that Act, for which the appropriate appellate court is the Supreme Court, the word "Court of Appeal" that occur in Chapter LVIII should be understood to be a reference to the "Supreme Court".

It is clear from the above quoted provision that the Notice of Appeal has to be filed in the original court, which in this case is the Commercial High Court, and that court has to deal with it as provided by law. A person who files such a Notice of Appeal does not thereby invoke the jurisdiction of the appellate Court, which in this case is the Supreme Court, to which it is intended to appeal. The Jurisdiction of the appellate court will be invoked only if the Notice of Appeal fulfils all conditions and requirements laid down in the Civil Procedure Code, and is followed by a Petition of Appeal, which too has to be lodged in the original court, and transmitted to the appellate court by the Registry of the original court if all requirements of the law are duly fulfilled. In particular, the mere lodging of the Notice of Appeal in the original court will be of no avail if no Petition of Appeal is filed within the period stipulated for this purpose in section 755(3) of the Civil Procedure Code. If, for instance, the Petition of Appeal is not filed within time, there can be no valid appeal before the appellate court. Learned President's Counsel for the Respondent in fact conceded that much, when he submitted that "the lodging of the Notice of Appeal is the very first step to be taken in the process of appealing".

Thus in *Wickremasinghev v. De Silva* (1978/79) 2 SLR 65, it was held that where the Petition of Appeal was not filed within 60 days in terms of Section 755(3) of the CPC there was non-compliance with a mandatory requirement, and that the Petition of Appeal liable to be rejected. Of course, in the instant case I find that the Petition of Appeal appears to have been lodged in time on 10th September 2012, but that was *after* the Petitioner had invoked the jurisdiction of this Court by his application for leave to appeal dated 27th July 2012. Hence, there was no final appeal before this Court on the date the Petitioner filed his leave to appeal application, and the Petitioner cannot therefore be faulted for suppression or misrepresentation of any material fact.

This preliminary objection is accordingly overruled.

(b) Is the Impugned Order capable of being canvassed only by way of Final Appeal?

The learned President's Counsel for the Respondent has submitted that the impugned order of the Commercial High Court dated 13th July 2012 can only be canvassed by way of final appeal, and not by way of application for leave to appeal. He has correctly pointed out that by reason of section 6 of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, the provisions of Chapter LVIII of the Civil Procedure Code would apply to appeals and application for leave to appeal to this Court from the Commercial High Court under Section 5 of that Act. Accordingly, Section 754 (2) and section 755 of the Civil Procedure Code would apply to applications for leave to appeal, and this application has been filed on that basis. However, learned

President's Counsel for the Respondent has submitted that the Petitioner has followed the wrong procedure, as the impugned order is in essence a "judgment" and is not a mere "order" as defined in section 754(5) of the Civil Procedure Code, and that in those circumstances, the impugned order can only be canvassed by way of final appeal.

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

> "The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, I think that for the purposes of these rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory. "

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

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

A similar conflict of judicial opinion existed in Sri Lanka as well, where in *Siriwardena v. Air Ceylon Ltd.* [1984] 1 Sri LR 286, Sharvananda, J. (as he then was) chose to follow the approach adopted by Lord Alverstone, C.J. in *Bozson v. Altrincham Urban District Council*, while in *Ranjit v. Kusumawathie* [1998] 3 Sri LR 232, Dheerarathne, J. preferred the opinion of Lord Esher, M.R. in *Salaman v. Warner*. As these Sri Lankan decisions both emanated from Divisional Benches which consisted of three Judges, the conflict of judicial opinion was referred to a Bench of five Judges in *Rajendran Chettiar and Two Others v. S. Narayanan Chettiar* 2011 BALJR 25 which put the controversy at rest by its decision to follow the test adopted by Lord Esher, M.R. in *Salaman v. Warner* and applied by Dheerarathne, J. in *Ranjit v. Kusumawathie*.

Learned President's Counsel for the Respondent has attempted to justify this on the basis that the Commercial High Court dismissed the action only after trial had commenced and certain admissions were recorded along with issues, and that the Court with the consent of learned Counsel for both parties decided to take up the issue as to the maintainability of the action in view of Section 5 of the Arbitration Act for determination first. However, as pointed out by learned President's Counsel for the Petitioner, the fact remains that had for whatever reason, such as for the failure to take up the objection to jurisdiction on the first available occasion, the said issue had been answered against the Respondent, the trial would have continued to a conclusion.

In my opinion, if one adopts the approach of Lord Esher, M.R. in *Bozson v. Altrincham Urban District Council, supra,* which was favoured by the Five Judge Bench of this Court in *Chettiar's* case, the answer to the question at hand depends on what would be the consequence of the impugned order of the Commercial High Court. If the Commercial High Court had held that the preliminary issue must be answered in favour of the Petitioner, the trial would have continued to final conclusion. However, if the High Court, as it did in this case, decided in favour of the Respondent, the action will come to an end. Hence, as Lord Esher, and five judges of this Court unanimously decided in *Chettiar's* case the impugned order was an interlocutory order, and the application for leave to appeal can be lawfully maintained.

For these reasons, this preliminary objection too has to be rejected.

Conclusion

I accordingly overrule both preliminary objections taken up in this case, and make order that the application of the Petitioner for leave to appeal may be re-fixed for support when it is mentioned in Court for this purpose on 28th April 2014. The Registrar is directed to have this application listed for mention on 28th April 2014.

In all the circumstances of this case, I do not make any order for costs.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC., J,
I agree.

JUDGE OF THE SUPREME COURT

Eva 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 for Leave to Appeal to the Supreme Court of the Democratic Socialist Republic of Sri Lanka preferred under the provisions of Section 754 Part V111 of the Civil Procedure Code , as subsequently amended , vide High Court of the Provinces (special provisions) Act No. 10 of 1996, to be read together with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(L.A.) Application S.C.(HC)LA 42/2013
Case No. CHC/18/2013/MR

Munasinghege Don Eranga Indrajith
105/4, 1st Lane Parakrama Mawatha
Thalahena, Malabe.

Plaintiff-Petitioner

Vs.

George Steuart Finance Limited
"City Office"
No. 15, Station Road
Colombo 03.

Defendant-Respondent

Before	:	Dep, PC J R. Marasinghe, J & B.P. Aluwihare, PC J
Counsel	:	Panduka Abeynayake with Yalith Wijesundera for the Plaintiff-Petitioner. Shanaka de Livera, for the Defendant-Respondent Instructed by Livera Associates.
Supported on	:	28.04.2014
Decided on	:	24.10.2014

Priyasath Dep, PC, J

The Plaintiff- Petitioner (hereinafter sometimes referred to as the "Plaintiff") filed this application to obtain leave to appeal to set aside the judgment dated 07.05.2013 delivered by the High Court of Colombo established under High Court of Provinces (Special Provisions) Act No. 10 of 1996 commonly referred to as the Commercial High Court.

The Plaintiff filed action in the High Court claiming reliefs against the arbitrary and wrongful termination of the rescheduled lease agreement No. FL 1107 KAL 00048 RS 01. The Petitioner obtained a leasing facility under contract No. FL 1107 KAL 00048 from Asia Commerce Ltd., to acquire a Toyota Allion motor car valued at Rs. 6,900,000/-.The Asia Commerce Ltd. was first succeeded by Divasa Finance Ltd. which was succeeded by the George Steuart Finance(PVC) Ltd, the Defendant-Respondent(hereinafter sometimes referred to as "Defendant") The Defendant rescheduled the loan under a new number FL 1107 KAL 00048 RS 01 (by the addition of 'RS 01' to the existing number) with effect from 14th November 2012. The Plaintiff submitted that the Defendant contrary to law repossessed the vehicle on 19th November 2012. The Plaintiff filed action in the High Court claiming the following reliefs:

i. A declaration to the effect that the defendant arbitrarily determined the rescheduled contract.

ii. Order the defendant to pay a sum of Rs. 3,215,953/- with legal interest (the sum paid under the contract.)

iii. Alternatively prayed for restitutio in integrum of the motor vehicle .

iv. Grant an enjoining order and an interim injunction restraining sale of the motor vehicle.

The Plaintiff obtained an enjoining order restraining the Defendant from selling the vehicle. The Defendant filed a statement of objections and objected to the extension of the enjoining order and granting of an interim injunction.

By way of preliminary objections the Defendant pleaded that:

(a) The Plaintiff cannot have and maintain this action in as much as inter alia;

   i. The Plaint does not disclose a cause of action for the Plaintiff to sue the Defendant.
   ii. The Plaint does not conform to the imperative provisions of Sections 40 and 46 of the Civil Procedure Code.
   iii. The reliefs prayed for by the Plaintiff are in any event relief that the Plaintiff is not entitled in law to pray for in this action.
   iv. The Court has no jurisdiction to hear and determine this action as there is an Arbitration clause in the lease Agreement and the Defendant has not consented and is objecting to the Court exercising jurisdiction in this matter.

(b) In any event, the Plaintiff is not entitled to an interim injunction and/or to an extension of the Enjoining Order in- as-much as:-

i. The Plaintiff has not made out a prima facie case;
ii. The Plaintiff has obtained the Enjoining Order issued in this case by the suppression and misrepresentation of material facts and
iii. The balance of convenience lies with the Defendant.

The Defendant submitted that the Plaintiff violated the lease agreement which was marked as V3by the Defendant (marked as P1 in the plaint) and neglected to pay the defendant the lease rentals as agreed . The Defendant admitted that as the absolute owner in order to minimize the damages re-possessed the vehicle. The Defendant further submitted that the Plaintiff contrary to the agreement had handed over the possession of the vehicle to a 3rd party and the Defendant repossessed the vehicle when it was hidden.

The learned High Court Judge took up the preliminary objection as regard to the maintainability of this action. It is the position of the Defendant that in view of the arbitration clause the Court has no jurisdiction to hear and determine the action. Both parties filed written submissions in respect of the preliminary objection raised by the Defendant. In his order dated 7th May 2013 the learned High Court Judge upheld the preliminary objection and dismissed the plaint subject to costs. The High Court held that section 36 of the lease agreement marked P1(V3) has an arbitration clause and in view of the arbitration clause under section 5 of the Arbitration Act No. 11 of 1995 the High Court has no jurisdiction to hear and determine this case. The learned High Court Judge in support of his order referred to the case of Elgitread Lanka (Pvt) Ltd., vs. Bino Tyres (Pvt) Ltd. (2011) Bar Association Law Reports at page 130. The learned High Court Judge upheld the preliminary objection and dismissed the Plaintiff's action.

The Plaintiff- Petitioner is seeking leave to appeal to set aside the order of the Learned High Court Judge. When this matter was taken up for support the counsel for the Defendant-Respondent raised the following preliminary objections:

i. This matter was not referred to Arbitration.

ii. The Plaintiff-Petitioner cannot maintain this application as the order made by the Learned High Court Judge is a final order and therefore the proper remedy is by way of an appeal.

First I will deal with the second preliminary objection dealing with the maintainability of this application in this court. It is the contention of the Defendant –Respondent that the plaintiff–Respondent should have preferred an appeal instead of filing a leave to appeal application.

The learned High Court Judge having considered the preliminary objection raised by the Defendant dismissed the Plaint on the basis that High Court has no jurisdiction to hear and determine the action. The question is whether this order of dismissal is a judgment or an order. In other words whether the impugned order is a judgment or a final order under section 754 (1) read with 754 (5) of the Civil Procedure Code or an order made in the course of the

action (interlocutory order) within the meaning of section 754 (3) read with(5) of the Civil Procedure Code. There is no doubt that this order is not given on the merits of the case. On the other hand if the preliminary objection was overruled the court has to proceed to trial. The order will be an order finally disposing the case provided the aggrieved party does not appeal against the order.

In Siriwardena vs. Air Ceylon Ltd.(1984) 1SLR 286, Sharvananda J held that for an order to have the effect of a final judgment under section 754(5) of the Civil Procedure Code it must be an order finally disposing of the rights of the parties. The approach adopted in this case is referred to as 'order approach'. In the present case if the aggrieved party did not appeal the order, had the effect of finally disposing of the rights of the parties. If the reasoning of Siriwardena vs Air Ceylon Ltd (supra) is accepted the order of dismissal made by the learned High Court Judge could be considered as a final order or a judgment.

In Ranjith vs. Kusumawathi (1998 3 Sri.LR 232) a different approach was adopted. In that case Dheerarathne J adopted the 'application approach' applied in the English case of Salamon vs. Warner and others (1881) 1QB 734 where lord Esher held that '----whichever way it is given, will it stands, finally dispose of the matter in dispute, I think for the purpose of these rules it is final. On the other hand , if their decision , if given in one way will finally dispose of the matter in dispute , but given in the other way, will allow the action to go on , then I think it is not final, but interlocutory'

A divisional bench of five judges in S.R. Chettiar and others Vs S.N.Chettiar 2011, Bar Association Law Journal at 25 followed Ranjith vs Kusumawathi (supra) and applied the 'Application Approach' in deciding whether an order is a judgment or not.

In the present case if the High Court rejected the preliminary objections it has to proceed with the trial and the order of dismissal cannot be considered as a final Order. Therefore, Petitioner had correctly invoked the jurisdiction of the Supreme Court by filing a Leave to Appeal Application. Therefore, we overrule the objection raised by the Defendant-Respondent and proceed to consider the leave to appeal application on its merits.

The first preliminary objection relates to the fact that the matter has not referred to arbitration. This same objection was raised in the High Court with clarity and precision in the following manner.

> 'The Court has no jurisdiction to hear and determine this action as there is an arbitration clause in the lease Agreement and the Defendant has not consented and is objecting to the Court exercising jurisdiction in this matter'.

The Learned High Court Judge held with the Defendant and dismissed the Plaintiff's action and the said order is challenged in these proceedings. This Court has to consider whether the said order is in accordance with the law or not or whether this court should grant leave or not.

There is no dispute regarding the fact that the Defendant –Respondent is the successor of Divasa Finance Ltd. which succeeded Asia Commerce Ltd. The lease agreement was entered into between Asia Commerce Ltd and the Plaintiff- Petitioner. The said agreement was marked as P1 in the Plaint and V3 in the Statement of Objections of the Defendant-Respondent. The said lease agreement was rescheduled by the Defendant-Respondent. Rescheduling was done under the original agreement and in respect of the payment of the balance sum. Both parties agree that the lease agreement govern the rights and liabilities of the parties. Section 36 of the lease agreement has an arbitration clause requiring parties to the agreement to refer disputes arising from the contract for arbitration. Therefore it attracts section 4 of the Arbitration Act No 11 of 1995. Section 4 reads thus:

' Any dispute which the parties have agreed to submit to arbitration under an arbitration agreement may be determined by arbitration unless the matter in respect of which the arbitration agreement is entered into is contrary to public policy or is not capable of determination by arbitration.'

The Plaintiff –Petitioner did not submit the dispute to arbitration which is mandatory and instead filed action in the Commercial High Court. Therefore section 5 of the Arbitration Act No. 11 of 1995 applies to the disputes arising from the lease agreement. Section 5 of the Arbitration Act read as follows:

"Where a party to an arbitration agreement institutes legal proceedings in a court against another party to such agreement in respect of a matter agreed to be submitted for arbitration under such agreement, the court shall have no jurisdiction to hear and determine such matter if the other party objects to the court exercising jurisdiction in respect of such matter.'

In the lease agreement referred to above, the parties have agreed to submit any dispute for arbitration. The Defendant –Respondent objected to the High Court exercising jurisdiction to hear and determine the case. In view of section 5 of the Arbitration Act, the High Court has no jurisdiction to hear and determine this action. The order made by the High Court upholding the preliminary objections and dismissing the Plaintiff-Petitioner's action is in order. Therefore I refuse to grant leave. The leave to appeal application is dismissed. No costs.

Judge of the Supreme Court

R.Marasinghe, J.
I agree

Judge of the Supreme Court

B.P.Aluvihare, 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

M. Tudor Danister Anthony Fernando
No. 475, Colombo Road, 3rd Kurana
Negombo.

Plaintiff

SC/HCCA/L.A Case No. 279/2012

HCCA Gampaha Appeal No. 203/07 (F)

DC. Negombo Case No. 4851/L

Vs.

Rankiri Hettiarachchige Fredie Perera
No. 587/10, Colombo Road, 3rd Kurana,
Negombo.

Defendant

AND BETWEEN

Rankiri Hettiarachchige Fredie Perera
No. 587/10, Colombo Road, 3rd Kurana,
Negombo.

Defendant-Appellant

Vs.

M. Tudor Danister Anthony Fernando
No. 475, Colombo Road, 3rd Kurana
Negombo.

Plaintiff-Respondent

AND NOW BETWEEN

M. Tudor Danister Anthony Fernando
No. 475, Colombo Road, 3rd Kurana
Negombo.

Plaintiff-Respondent-Petitioner

Vs.

Rankiri Hettiarachchige Fredie Perera
No. 587/10, Colombo Road, 3rd Kurana,
Negombo.

Defendant-Appellant-Respondent

Before	: Saleem Marsoof, PC J
	B. Aluwihare, PC J
	Priyantha Jayawardene, PC J
Counsel	: Gamini Marapana, PC with Navin Marapona for the Plaintiff-Respondent-Petitioner
	Romesh de Silva, PC with Sugath Caldera for the Defendant-Appellant-Respondent
Argued on	: 24th June, 2014
Decided on	: 17th December, 2014

Priyantha Jayawardena, PC., J,

The Plaintiff-Respondent-Petitioner (hereinafter referred to as the Petitioner) filed a Plaint in the District Court of Negombo stating inter-alia that he is entitled to the right of way more fully described in the third schedule to the Plaint and prayed for a permanent injunction preventing the Defendant-Appellant-Respondent from obstructing that right of way etc.

The Defendant-Appellant-Respondent (hereinafter referred to as the Respondent) filed his Answer and stated inter-alia that Petitioner's action be dismissed and included a counter claim for a declaration that his land described in the schedule to his Answer is owned by him without being subject to any right of way or any other servitude, for a permanent injunction preventing the Petitioner from entering his land and for costs.

The matter was fixed for trial and admissions and issues were recorded. The Petitioner commenced his case and gave evidence and led the evidence of several other witnesses on his behalf. Once the Petitioner's case was closed the Respondent gave evidence and he too called a witness to give evidence on behalf of him. Once the trial was concluded the learned District Judge delivered her judgment in favour of the Petitioner. The Respondent being aggrieved by the said Judgment lodged an Appeal to the High Court of Civil Appeals of the Western Province holden in Gampaha.

The High Court allowed the appeal and dismissed the Petitioner's action. The Petitioner being aggrieved by the said Judgment preferred an application for leave to appeal to this Court. The said application was filed by way of a Petition and supported by an Affidavit as required by the rules of this court.

When this matter was taken up for support a preliminary objection was taken up by the learned President's Counsel for the Respondent on the basis that there is no proper affidavit before court. i.e.,

> ' The affidavit of the Petitioner dated 11/07/2012 states at the commencement of that he being a Christian "do hereby make oath" whereas in the jurat, it is stated that he "affirms". '

Thus, the issue in this application is to determine the validity of the affidavit filed by the Petitioner in this application.

The affidavit filed by the Petitioner in the Supreme Court along with his Petition commences as follows;

' I, Malnaidelaage Tudor Danister Anthony Fernando of No. 475, Colombo Road, 3rd Kurana, Negombo being a Christian do hereby make oath and state as follows:

1. I am the deponent above named and the Plaintiff-Respondent-Petitioner named herein. I filed plaint in the District Court of Negombo praying, that I be declared entitled to the right of way more fully described in the third schedule to my plaint and for a permanent injunction preventing the Defendant-Appellant-Respondent from obstructing that right of way, for damages and for cost of the case. ' (emphasis added)

At the end of the said affidavit which consisted of 19 paragraphs, the Petitioner has placed his signature and the said signature has been attested by the Commissioner for Oaths. The jurat is as follows;

Foregoing having being read over by me to the)
within named deponent and he having appeared)
to appeared to understood same, affirmed)
and set his hand unto this on this 11th day of July,)
2012 at Colombo.)
(emphasis added)

Before me

Sgd. /

Attorney-at-Law, Notary Public,
Commissioner for Oaths, Company Secretary

Supreme Court Rules

It is necessary to consider the need to file an affidavit in this application. Rule 2 of the Supreme Court Rules of 1990 states as follows;

> ‘ Every application for special leave to appeal to the Supreme Court shall be made by a petition in that behalf lodged at the Registry, together with affidavits and documents in support thereof as prescribed by rule 6, and a certified copy, or uncertified photocopy, of the judgment or order in respect of which leave to appeal is sought. Three additional copies of such petition, affidavits, documents and judgment or order shall also be filed;
>
> Provided that if the petitioner is unable to obtain any such affidavit, document, judgment or order, as is required by this rule to be tendered with his petition, he shall set out the circumstances in his petition, and shall pray for permission to tender the same, together with the requisite number of copies, as soon as he obtains the same. If the Court is satisfied that the petitioner had exercised due diligence in attempting to obtain such affidavit, document, judgment or order, and that the failure to tender the same was due to circumstances beyond his control, but not otherwise, he shall be deemed to have complied with the provisions of this rule. ’

Rule 6 states as follows;

> ‘ Where any such application contains allegations of fact which cannot be verified by reference to the judgment or order of the Court of Appeal in respect of which special leave to appeal is sought, the petitioner shall annex in support of such allegations and affidavit or other relevant document (including any relevant portion of the record of the Court of Appeal or of the original court or tribunal). Such affidavit may be sworn to or affirmed by the petitioner, his instructing attorney-at-law, or his recognized agent, or by any other person having personal knowledge of such facts. Every affidavit by a petitioner, his instructing attorney-at-law, or his recognized agent, shall be confined to the statement of such facts as the 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. ’

It is pertinent to note though the said Rule refers to an affidavit in support thereof, the Supreme Court Rules have not provided a format of an affidavit that should be filed with the Petition. Therefore, it is necessary to consider the relevant legislation and the law relating to affidavit in order to determine the question involved with the preliminary objection.

Oaths and Affirmation Ordinance

The English rules of evidence were gradually introduced to Sri Lanka and they were generally adhered to within the country. However, they were not expressly established by positive enactment. Thus, the Ordinance No. 6 of 1834 was brought in declaring English Rules of Evidence to be in force in Sri Lanka, unless in cases otherwise expressly provided for by law.

Section 1 of the said Ordinance of No. 6 of 1834 provided that ‘the Rules of Evidence as the same are by law established in that part of the United Kingdom of Great Britain and Ireland called England shall continue to be the Law of Sri Lanka and its dependencies, both in civil and criminal cases, except where the same have been altered or modified by express law.’

Thereafter, the Oaths and Affirmation Ordinance No. 6 of 1841 was brought in to require persons professing other than the Christian Religion to make solemn Affirmations in lieu of Oaths. The said Ordinance states that;

> “much inconvenience was caused from peculiar forms of Oath being required to be administered to persons professing other than the Christian Religion, and it is expedient to provide a form of solemn Affirmation which may be applicable to such persons instead of any Oath or Declaration now authorized or required by law, every person not professing the Christian faith shall make Affirmation to the following effect:

"I solemnly affirm, in the presence of Almighty God, that what I shall state be the truth, the whole truth, and nothing but the truth." '

The Oaths and Affirmation Ordinance No. 6 of 1841 was repealed by the Oaths and Affirmation Ordinance No. 3 of 1842 which substituted a solemn affirmation in lieu of every oath hitherto required to be taken by persons professing other than the Christian religion, and by Quakers, Moravians and Jews.

The Section 2 of the Oaths and Affirmation Ordinance No. 3 of 1842 provided as follows;

' Every individual not professing the Christian faith and every Quaker, Moravian or Jew, shall, on all occasions whatsoever where an oath is required by the existing or by any other law hereafter to be made, make a solemn affirmation or declaration in lieu thereof, and every such affirmation or declaration shall be of the same force and effect as an oath taken in the usual form, anything in the Ordinance No. 6 of 1834, entitled an "Ordinance declaring English rules of evidence to be in force in this island unless in cases otherwise expressly provided for by law; and prescribing the course by which evidence is to be obtained in certain cases," to the contrary notwithstanding : Provided always that every such affirmation or declaration shall commence with the following words, or words to that effect, "I, A. B. , do solemnly, sincerely, and truly declare and affirm. '

Later, the Oaths and Affirmations Ordinance No. 9 of 1895 was enacted consolidating the laws relating to oaths and affirmations in judicial proceedings and for other purposes. This Ordinance is in force at present and thus, applicable to the instant application.

Said Ordinance authorizes all courts and persons having by law or consent of parties, the authority to receive evidence to administer by themselves, or by an officer empowered by them in this behalf, oaths and affirmations in discharge of the duties or in exercise of the powers conferred upon them respectively by law.

Section 5 of the Ordinance states as follows;

' Where the person required by law to make an oath –
(a) is a Buddhist, Hindu or Muslim, or of some other religion according to which oaths are not of binding force ; or
(b) has a conscientious objection to make an oath, he may, instead of making an oath, make an affirmation. '

According to the Ordinance, all oaths and affirmations shall be administered according to such

forms and with such formalities as may be from time to time prescribed by rules made by the Supreme Court under Article 136 of the Constitution, and until such rules are made according to the forms and with the formalities now in use. However, no rules have been prescribed by the Supreme Court and therefore it is necessary to consider the forms and the formalities in use at that time.

Further, Section 9 of the said Ordinance provides as follows;

> ‘ No omission to take any oath or make any affirmation, no substitution of any one for any other of them, and no irregularity whatever in the form in which any one of them is administered, shall invalidate any proceeding or render inadmissible any evidence whatever or in respect of which such omission, substitution, or irregularity took place, or shall affect the obligation of a witness to state the truth. ’

It also provides that every person giving evidence on any subject before any court or person hereby authorized to administer oaths and affirmations shall be bound to state the truth on such subject.

A comparison of the law relating to affidavits in Sri Lanka shows that the legislator has been conscious of the fact that Sri Lanka has a multi - racial and a multi - religious population and amended the law relating to oaths and affirmations to suit the requirements of the society. Therefore, it is necessary to be conscious of the said fact in interpreting the Oaths and Affirmation Ordinance. This approach is reflected in the case of *Rustomjee v. Khan* 18 NLR 120 where Pereira J. held that “under the Oaths Ordinance, 1895, it is open to a non-Christian who believed in God to swear rather than affirm.”

Who is an affirmant?

G.P.S. de Silva C.J. in the case of *De Silva and Others v. L.B. Finance Ltd.* (1993) 1 SLR 371 held that “the word ‘affirmant’ is not infrequently found in affidavits filed in the courts. Its meaning is well known and accepted in this country even though it does not find a place in the Oxford Dictionary (1983 Ed.) Webster’s Collegiate Dictionary (3rd Ed.) and Odhams Dictionary.”

Civil Procedure Code

A format of an affidavit is found in the Civil Procedure Code No. 2 of 1889 as amended. Section 438 of the Civil Procedure Code states as follows;

‘ Every affidavit shall be entitled as in the court and action in which it is to be used, and shall be signed by the declarant in the presence of the court, Justice of the Peace, or Commissioner before whom it is sworn or affirmed. ’

The format of an affidavit that is required to be filed in terms of the said section is found in Form No. 75 of the 1st Schedule to the Civil Procedure Code. i.e.

No. 75
FORMAL PARTS OF AN AFFIDAVIT IN AN ACTION

In the Supreme Court of the Republic of Sri Lanka

(or)

In the { District Court / Primary Court } of Colombo (or as the case may be).

(Title)

I, A. B. (full name and description of deponent, and if a married woman, full name and description of her husband), of (place of residence) (and if a party, say so, and in what capacity), being a Buddhist (or being a Hindu or being a Muslim etc., as the case may be, or having a conscientious objection to making an oath) solemnly, sincerely, and truly affirm and declare (or if the deponent is a Christian, make oath and say) as follows:-

1. …….
2. …….

Affirmed (or Sworn), [or if there are more than one deponent, Affirmed (or Sworn) by the deponents A. B.] at …….., this ……., day of ……

Before me (name and office of person administering the affirmation or oath).

G.P.S. de Silva, C.J. in the case of *De Silva and Others v. L.B. Finance Ltd.* (1993) 1 SLR 371 held that “there was no reference to Form 75 in section 438 of the Civil Procedure Code. Only the marginal note in Form 75 makes reference to section 438. Compliance with Form 75 is not essential.”

In the absence of a prescribed format that is required to be filed in a Special Leave to Appeal Application the said format may be used as a guideline for an affidavit.

Validity of the Affidavit

In the affidavit filed by the Petitioner in the instant application he states that;

‘ I, Malnaidelaage Tudor Danister Anthony Fernando of No. 475, Colombo Road, 3rd Kurana, Negombo being a Christian do hereby make oath and state as follows: ’

The above shows that the Petitioner is a Christian and he is stating the facts stated in the affidavit under oath.

What is an oath ?

According to Stroud’s Judicial Dictionary of Words and Phrases, Sixth Edition (Volume 2) oath is defined as follows;

> ‘An oath is a religious asseveration, by which a person renounces the mercy and imprecates the vengeance of Heaven if he do not speak the truth (*R. v. White*, Leach, 430, 431)’.
>
> ‘Proof made upon oath’ (Solicitors Act 1843 (c. 73), s. 32): “I think that admits proof on affidavit, but is not confined to it” (*per* Esher M.R., *Osborne v. Milman*, 56 L.J.Q.B. 264).’

The Oxford Dictionary of Law, Seventh Edition defines the word oath as follows;

> ‘A pronouncement swearing the truth of a statement or promise, usually by an appeal to God to witness its truth. An oath is required by law for various purposes, in particular for *affidavits and giving evidence in court. The usual **witness’s oath** is: “I swear by Almighty God that the evidence which I shall give shall be the truth, the whole truth and nothing but the truth”. Those who object to swearing an oath, on the grounds that to do so is contrary to their religious beliefs or that they have no religious beliefs, may instead *affirm.’

As defined in Wharton's Concise Law Dictionary, Fifteenth Edition:

> 'Oath is an appeal to God to witness the truth of a statement. It is called a *corporal oath,* where a witness, when he swears, places his right hand on the Holy Evangelists.'

Collins Dictionary of the English Language defines oath as follows;

> 'a solemn pronouncement to affirm the truth of a statement or to pledge a person to some course of action, often involving a sacred being or object as witness'.

Compact Oxford English Dictionary, Second Edition by Oxford University Press oath is defined as:

> 'a solemn promise, especially one that calls on a deity as a witness'.

According to Longman Dictionary of Contemporary English an oath is defined as:

> 'a formal promise to tell the truth in a court of law'.

As stated above in the first paragraph of the affidavit the Petitioner has stated ' I am the <u>deponent</u> above named and ……..' (emphasis added)

Who is a deponent?

The term 'deponent' as defined in various dictionaries.

> According to Oxford Dictionary of Law Seventh Edition, deponent means 'a person who gives testimony under oath, which is reduced to writing for use on the trial of a cause'.
>
> Wharton's Concise Law Dictionary, Fifteenth Edition defines deponent as 'a person who makes an affidavit; a witness; one who gives his testimony in a Court of Justice. The person who made an affidavit used formerly to speak of himself throughout the affidavit as the deponent.'
>
> According to Collins Dictionary of the English Language deponent 'is a person who makes an affidavit; a person esp. a witness, who makes a deposition.'
>
> Compact Oxford English Dictionary, Second Edition by Oxford University Press defines deponent as 'a person who makes a deposition or affidavit under oath'.

First paragraph in the affidavit too shows that the Petitioner has stated the facts in the affidavit under oath. It is pertinent to note that the word ' affirmant ' has not been used in this paragraph as normally used in an affidavit of non-Christians or affidavits filed by persons who are not

inclined to take an oath. Up to this point the affidavit filed in this case is in conformity with the law and the accepted practices in this country.

However, the preliminary objection raised in this application is ' The affidavit of the Petitioner dated 11/07/2012 states at the commencement of that he being a Christian "do hereby make oath" whereas in the jurat, it is stated that he "affirms" '. Therefore, it is now necessary to consider the jurat of the affidavit filed in this application.

The jurat is as follows;

Foregoing having being read over by me to the)
within named deponent and he having appeared)
to appeared to understood same, affirmed)
and set his hand unto this on this 11th day of July,)
2012 at Colombo.)
(emphasis added)

The jurat contains the words " deponent " and " affirmed ". Therefore, it is necessary to consider the meaning of the word affirmed. The word " affirmed " is found in the format No. 75 of the 1st Schedule to the Civil Procedure Code. As stated above the word ' affirm ' has been introduced by the legislator in order to facilitate the people who are not willing to make an oath. This position is now reflected in the said format given in the Civil Procedure Code.

The objection taken up in this case is that instead of the word ' sworn ' jurat contains the word ' affirmed '.

In *Kanagasabai v. Kirupamoorthy* 62 NLR 54 it was held that "when affidavits are filed in the course of civil proceedings, it is the duty of Judges, Justices of Peace and Proctors to see that the rules governing affidavits in section 181, 437, &c., of the Civil Procedure Code are complied with." The court further held that it is the duty if the Justice of the Peace before whom an affidavit is sworn to see that the jurat is properly made.

In *Mohamed Rauf Mohamed Facy v. Mohamed Azath Sanoon Sally* SC minutes S.C. Appeal No. 4/2004 Marsoof J. analyzed Section 9 of the Oaths and Affirmation Ordinance and stated ' This is a salutary provision which was intended to remedy the very malady that has occurred in this case, and clearly covers a situation in which there is a substitution in the jurat of an affirmation for an oath. '

Edussuriya J. in *Trico Freighters (Pvt) Ltd. v. Yang Civil Engineering Lanka (Pvt). Ltd* (2000) 2 SLR 136 was of the view ' Substitution of an oath for an affirmation (or vice versa) will not

invalidate proceedings or shut out evidence. The fundamental objection of a witness or the deponent is to tell the truth and the purpose of an oath is to enforce that obligation. ‘

However, in the case of *Mark Rajandran v. First Capital Ltd. Formerly, Commercial Capital Ltd.* (2010) 1 SLR 60 it was held that the Petitioner has clearly averred that he is a Christian in the affidavit and making oath, in the jurat, the Petitioner had affirmed to the averments before the Justice of Peace. It is therefore, clearly evident that since the petitioner does not come within the category of religions referred to in Section 5 of the Oaths and Affirmation Ordinance, the exception would not be applicable to him to make an affirmation instead of the oath he should have made.

I am inclined to agree with the cases of *Mohamed Rauf Mohamed Facy v. Mohamed Azath Sanoon Sally* and *Trico Freighters (Pvt) Ltd. v. Yang Civil Engineering Lanka (Pvt). Ltd* and not with the decision in the case of *Mark Rajandran v. First Capital Ltd. Formerly, Commercial Capital Ltd.*

Further, neither the case of *Clifford Ratwatte v. Thilanga Sumathipala and Others* (2001) 2 SLR 55 nor the case of *Jeganathan v. Safyath* (2003) 2 SLR 372 has an application to the instant application as the main issue in those two cases were that there was no material to show that an oath or affirmation was in fact administered by the Justice of the Peace when the affidavit was signed by the deponent. Therefore, Section 9 of the Oaths and Affirmation Ordinance has no application to those two cases.

Coming back to the instant application, it is pertinent to note that the jurat states that ‘ foregoing having being read over by me to the within named deponent and he having appeared to appeared to understood same, affirmed and set his hand unto this on this 11th day of July, 2012 at Colombo. (emphasis added).

In the affidavit filed along with the instant application, the jurat expressly sets out the place and date on which the affidavit was signed. These are essential requirements of an affidavit. There is no dispute that the affidavit was signed before a Commissioner of Oaths and she had the authority to do so.

What is essential in an affidavit is to state that the person who is stating the facts therein does so after taking an oath or affirmation as an affidavit is considered as evidence in law. Therefore, it is necessary to show that the person who swears or affirms to the facts stated in the affidavit did so before a competent authority or a person. For this reason the place of swearing or affirmation, the date on which the affidavit was signed are essential parts of the jurat.

There is specific reference in the jurat that the affidavit was "read over to the within named deponent…." The disputed part of the affidavit is the use of the word 'affirmed' instead of ' sworn ' in the remaining portion of the jurat.

Apart from stating that the Petitioner signed the affidavit before a Commissioner for Oaths, Jurat states the place and the date on which the affidavit was signed. Jurat in an affidavit is an integral part of an affidavit and it cannot be considered in isolation. In other words an affidavit should be considered in its totality. In applying this test and considering the totality of the affidavit and applying the relevant law and accepted practices, the fair conclusion that could be arrived is that the Petitioner has stated the facts in the affidavit under oath before the Commissioner for Oaths as demonstrated at the beginning of the affidavit and, the affidavit filed along with the instant Petition fulfills the requirements of the Oaths and Affirmation Ordinance. Thus, the preliminary objection is over-ruled.

I order no costs in this matter.

Judge of the Supreme Court

Saleem Marsoof, PC, J

I agree

Judge of the Supreme Court

B. Aluwihare 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 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

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 Section5(2) of the High Court of the Provinces (Special Provisions) Act No. 10 of 1996, read with chapter LVIII of the Civil Procedure Code and provisions of the Constitution.

Case No. SC (CHC) LA

Application No. 37/13

HC Case No. CHC 531/2011/WR

Ranjith Wagaarachchi

No. 246, Thissa Road,

Wali Ara, Netolpitiya.

PLAINTIFF

Vs.

Union Assurance P.L.C

Union Assurance Centre

No. 20, St Michal Road,

Colombo 03.

DEFENDANT

AND NOW BETWEEN

Ranjith Wagaarachchi

No. 246, Thissa Road,

Wali Ara, Netolpitiya.

PLAINTIFF - PETITIONER

Union Assurance P.L.C

Union Assurance Centre

No. 20, St. Michal Road,

Colombo-03.

DEFENDANT- RESPONDENT

BEFORE: WANASUNDERA, PC, J

MARASINGHE, J

ALUWIHARE, PC, J

COUNSEL: Ian Fernando with Saman Liyanage for the Plaintiff-Petitioner.

S.A. Parathalingam, PC with N. Parathalingam for the Defendant-Respondent.

ARGUED ON: 31-03 -2014

WRITTEN SUBMISSIONS- 30th - 04-2014 and 30th -05 -2014

DECIDED ON: 17-07-2014

ALUWIHARE PC, J

When this Leave to Appeal application was taken up for support on 31st March 2013, the learned Counsel for the Defendant Respondent(hereinafter the Respondent) raising a preliminary objection, contended that the Plaintiff Petitioner (hereinafter the Petitioner) has filed this application 'out of time' and therefore this application should be dismissed *in limine.*

As directed by this court, both parties have tendered written submissions stating their respective positions regarding the preliminary objection raised by the Respondent.

The Petitioner has filed this application to have set aside an interlocutory order made by the learned High Court judge of the Western Province exercising civil jurisdiction.

In view of the fact that the objection raised is purely technical in nature and has no bearing whatsoever on the facts of the matter to which this application relates, I do not wish to dwell on them.

The Respondent contends that the time period stipulated by law to file an application of this nature is fourteen days and the respondent takes up the position that the petitioner has filed this application in the Supreme Court, thirty days after the pronouncement of the interlocutory order of the learned Judge of the High court and therefore the appeal is clearly out of time.

The certified copy of the impugned order (annexed marked A5 to the affidavit of the petitioner) indicates that the order of the High Court had been delivered on the 7th of May 2014 and the present application has been lodged with the registry of this court on the 10th of June 2014 according to the date stamp affixed by the Supreme Court registry. It is evident that the instant application had been filed thirty three days after the delivery of the order of the learned High Court judge.

Section 5 (2) of the High Court of the Provinces (Special Provisions) Act No. 10 0f 1996 (hereinafter the 1996 Act) lays down that:-

> *"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"*

Whilst Section 6 of the said Act stipulates:-

> *"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". (emphasis added).

The applicable provision under Chapter LVIII of the Civil Procedure Code is Section 757 (1) of the Code which is reproduced below for convenience:

"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 on 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)*

It is the contention of the Petitioner that, as opposed to the word "shall" in Section 5 (3) of the 1996 Act, the use of the words ***"as nearly as may be"*** in Section 6 of the Act makes it optional whether or not to follow the procedure prescribed by Chapter LVIII of the Civil Procedure Code in making appeals to the Supreme Court and thereby that it is not obligatory for a party appealing or filing a leave to appeal application under section 5 of the Act of 1996 to strictly follow the provisions of Chapter LVIII of the Civil Procedure Code.

In considering this issue, it would be pertinent to examine the intention of the

legislature in enacting the provisions embodied in Sections 5 and 6 of the 1996 Act.

A close scrutiny of the provisions in Chapter LVIII of the Civil Procedure Code makes it abundantly clear that the provisions in the said chapter deal with the procedure relating to the referring of Appeals and Revisions to the Court of Appeal arising from decisions of the District Courts. In terms of Sections 5 and 6 of the Act of 1996, the provisions in Chapter LVIII were also made applicable to appeals to the Supreme Court from the decisions of the High Courts exercising civil jurisdiction. In my view, by the use of the words "as nearly as may be" in Section 6, the legislature, only intended to permit the parties to make whatever changes that are necessary to the prescribed formats and to the procedure so as to satisfy compliance with the Rules applicable to the Supreme Court and no more. Thereby a party who wishes to invoke the jurisdiction of the Supreme Court under Sections 5 and 6 of the 1996 Act is strictly required to adhere to the provisions of Chapter LVIII of the civil procedure Code. Parties certainly are not at liberty to deviate from the procedure in Chapter LVIII of the Civil Procedure Code.

The Supreme Court observed, in an application for leave to appeal under Section 5 (2) and 6 of the 1996 Act, "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[1].

In considering this very issue, Justice Sripavan observed[2]

> *" Thus, Act No. 10 of 1996 in Section 6 provides the procedure for appeal to the Supreme Court and when enacted for the public good and for advancement of justice an expression which appear to belong to the*

[1] Haji Omar Vs. Wickramasinghe & Others 2001 3 S.L.R 61
[2] Kamkaru Sevana and others V.Kingsly Perera and others SC. H.C.(L.A) 86/ 12

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 permits the interpretation of 'shall' as 'may'.

In the case referred to above, the Supreme Court having considered Sections 5 (2) and 6 of the 1996 Act held that an application for leave to appeal should be lodged within a period of fourteen days as stated in section 757 (1) of the Civil Procedure Code. On the other hand, if the position taken up by the petitioner is upheld, that, it is not obligatory to follow the procedure prescribed by Chapter VLIII of the Civil procedure Code then there is no prescribed time limit within which to file an application for leave to appeal.

Dr. Bandaranayke J (as she then was) observed[3] *"……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 applications 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…"*

It is abundantly clear that the period of fourteen days prescribed by Section 757 is mandatory and time should run from the date of the order which is 7th May 2013. Any delay in my view has to be justified by the application of the principle *"lex non cogit ad impossibillia".* The Petitioner, however, has not offered any explanation for the undue delay in filing the instant application.

[3] George Stuart &Co.Ltd Vs. Lankem tea & Rubber Plantations Ltd 2004 1 S.L.R 246

I hold therefore that the Petitioners' application for leave to appeal was filed long after the expiry of the period of time prescribed in Section 757(1) of the Civil Procedure Code. The preliminary objection raised by the learned President's Counsel for the Respondents is upheld. The application is, accordingly dismissed. I make no order as to costs.

JUDGE OF THE SUPREME COURT

Wanasundera PC, J

I agree.

JUDGE OF THE SUPREME COURT

Marasinghe, 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 against Judgement of the Provincial High Court of the Western Province dated 11/06/2013 in Case No. HC Negombo Case No. HCA 217/2011 M.C. Case No. 2456/Maintenance.

SC Spl LA No. 169/2013
HC Negombo Case No. HCA 217/11
M.C. Case No. 2456/Maintenance

Wewalwalahewage Hemantha AriyaKumara
No. 63/B "Wasana" Tower Side City,
Kandawala, Katana.

Defendant-Respondent-Appellant-Petitioner

Vs.

Kaluappu Kankanamalage Dona Bernadeth Yamuna Rani Karunarathne, of No. 31/4 , Temple Road, Negombo

Plaintiff-Petitioner-Respondent-Respondent

Before : Marsoof, PC, J
Hettige, PC, J &
Dep, PC J

Counsel : Dr. Sunil Cooray for the Defendant-Respondent-Appellant- Petitioner

W.A. Fernando instructed by P.D.R.S. Panditharatne for the Plaintiff-Petitioner-Respondent-Respondent

Argued on : 09.12.2013

Decided on : 26.03.2014

Priyasath Dep, PC., J.

This is a Special Leave to appeal Application filed by Defendant-Respondent-Appellant-Petitioner (hereinafter referred to as Petitioner) to the Supreme Court seeking special leave to appeal against the judgment of the High Court of Negombo exercising appellate jurisdiction in HC Negombo Case No. HCA 217/11.

When the Special Leave to Appeal application was taken up for support, the Counsel for the Plaintiffs-Petitioner-Respondent-Respondent(hereinafter referred to as the Respondent) raised a preliminary objection stating that Petitioner cannot maintain this appeal in view of the fact that the Article 154(P) (6) confers jurisdiction on the Court of Appeal to hear and determine appeals from the High Court. Learned Counsel for the Respondent referred to the Judgment in *Abeywardana Vs. Ajith de Silva* 1998 (1) SLR 134.
The learned Counsel for the Petitioner submitted that there is a different appellate procedure regarding judgments or orders given by the High Court when exercising appellate jurisdiction and when exercising revisionary jurisdiction. The learned Counsel submits that the decision in Gunaratne Vs. Thambinayagam 1993 (2) SLR 355 and several other subsequent decisions have authoritatively dealt with this matter and resolved the question based on which this preliminary objection is taken up.

The Counsel for the Respondent submits that under Article 154 (P) 6, the Appeal lies to the Court of Appeal and not to the Supreme Court. At this stage it is relevant to examine the appellate and revisionary jurisdiction of the High Court under article 154(P) (3) (b) of the Constitution. Article 154P(3) (b) reads thus:

> " notwithstanding anything in Article 138 and subject to any law, exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary courts within the Province.

Thus the article 154P introduced by the Thirteenth Amendment to the Constitution for the first time conferred appellate and revisionary jurisdiction on the High Courts referred to as Provincial High Courts. The article 154(P) 6 which is given below deals with the jurisdiction of the Court of Appeal to hear appeals from the final order, judgment or sentence of the High Court in the exercise of jurisdiction under article 154 (P)3(b), (3) (c) and (4).

> " Subject to the provisions of the Constitution and any law, any person aggrieved by a final order, judgment or sentence of any such Court, in the exercise of its jurisdiction under paragraphs (3) (b) or (3) (c) or (4), may appeal therefrom to the Court of Appeal in accordance with Article 138."

This section is subject to the provisions of the Constitution and any law as expressly stated in the section. Therefore before the enactment of High Court of Provinces (Special Provisions) Act No. 19 of 1990, any person aggrieved by a final order, judgment or sentence made by the High Court, in the exercise of its jurisdiction under paragraphs (3) (a), (3) (b), (3) (c) or (4), may appeal to the Court of Appeal in accordance with the Article 138.

This situation was fundamentally changed with the enactment of High Court of Provinces(Special Provisions) Act No. 19 of 1990. Under Section 9 of the High Court of Provinces(Special Provisions) Act No. 19 of 1990 the aggrieved party is given a right of appeal to the Supreme Court .Section 9 reads thus

> Subject to the provisions of this Act or any other law any person aggrieved by –
> (a) a final order, judgment, decree or sentence of a High Court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of any aggrieved party to such matter or proceedings.

According to the proviso to this section ,the Supreme Court in its discretion could grant special leave to appeal to the Supreme Court, if the High Court has refused to grant leave to appeal or where in the opinion of the Supreme Court, the case or matter is fit for review by the Supreme Court. Further under section 10 of the Act, the Supreme Court is given appellate jurisdiction in respect of orders, judgment decrees or sentences made by the High Court in exercising appellate Jurisdiction. These two sections do not give jurisdiction to the Supreme Court to hear appeals from the High Court when exercising its revisionary jurisdiction.

In this case the Defendant – Petitioner filed this appeal against the dismissal of the appeal bearing No. HC Appeal 217/11 by the High Court .The Appeal was filed under section 9 of High Court of Provinces(Special Provisions) Act No. 19 of 1990 which gives a right of appeal to the Supreme Court against order, judgment or decree of the High Court exercising its appellate jurisdiction.

Therefore it is clear that when the High Court exercises original criminal jurisdiction under article 154 P (3) (a) or revisionary jurisdiction under Article 154P (3) (b) of the Constitution , the appeal lies to the Court of Appeal. On the other hand if it exercises appellate jurisdiction, appeal lies to the Supreme Court. The case of *Gunaratne Vs. Thambinayagam* 1993 (2) SLR 355 settled the law on this issue. This decision was followed in *Abeywardana Vs. Ajith de Silva* 1998 (1) SLR 134.*Wickremasekara v Officer in Charge, Police Station, Ampara* (2004) 1 SLR 257 .

Therefore, the Defendant- Respondent- Appellant –Petitioner has a right of appeal against the order made by the High Court in the exercise of appellate jurisdiction to the Supreme Court and correctly invoked the jurisdiction of this Court. For the reasons set out above, I overrule the preliminary objection as to the maintainability of this Special Leave to Appeal Application raised by the Counsel for the Plaintiff-Petitioner-Respondent-Respondent. The Defendant-Respondent-Appellant-Petitioner is permitted to support this Application for Special Leave to Appeal.

Judge of the Supreme Court

Saleem Marsoof, PC., 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 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 for special leave to Appeal under and in terms of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka..

Jeneeta Martel Loren Perera
Nee Cooray,
No. 8 Block M,
Government Flats,
Bambalapitiya,
Colombo 4

Plaintiff

Vs.

SC Spl LA No. 198/2011
C.A 624/2001 (F)
D.C. Colombo Case No. 17515/L

1. Francis Rajeev Perera

2. Rexy Alfred Perera

3. Reginold Perera

4. Mary Violet Perera
(deceased)

4(a) Princy Priyadarshanie

5. Henry Leonard Perera,

All at No. 1600, Cotta Road,
Colombo 08.

Defendants

And between

Jeneeta Martel Loren Perera
Nee Cooray,
No. 8 Block M,
Government Flats,
Bambalapitiya,

Colombo 4

Plaintiff-Appellant

Vs

1. Francis Rajeev Perera
(Deceased)

1(a) Weerasinghe Arachchige
Amarawathie,

2. Rexy Alfred Perera
(Deceased)

2(a) Karunawathie Ranasinghe

3. Reginold Perera
(Deceased)

3(a) M.W. Dharmawathie

4. Mary Violet Perera
(Deceased)

4(a) Princy Priyadarshanie

5. Henry Leonard Perera,
(Deceased)

5(a) Bopitiya Gamage Kapila
Dilhan Perera,

All at No. 1600, Cotta Road,
Colombo 08.

Defendant-Respondents

And Now Between

1(a) Weerasinghe Arachchige
Amarawathie,

2(a) Karunawathie Ranasinghe

3(a) M.W. Dharmawathie

4(a) Princy Priyadarshanie

5. Henry Leonard Perera

All at No. 1600, Cotta Road,
Colombo 08.

Defendant-Respondent-Petitioners

Vs.

Jeneeta Martel Loren Perera
Nee Cooray,
No. 8 Block M,
Government Flats,
Bambalapitiya,
Colombo 4 .

Plaintiff-Appellant-Respoindent

Before : Marsoof, PC, J
Dep, PC J
Sisira J. de Abrew J.

Counsel : Wijeyadasa Rajapakse, PC, with Gamini Hettiarachchi for the Defendant-Respondent-Petitioners

Gamini Marapana, PC, with Kirthi Sri Gunawardana and Navin Marapana for the Plaintiff-Appellant-Respondent.

Argued on : 13-10- 2014

Decided on : 10-12-2014

Priyasath Dep, PC, J

This Special Leave to Appeal Application was filed by the 1-5th Defendant-Respondent-Petitioners on 14th November 2011 against the judgment of the Court of Appeal dated. 3rd October 2011. It was disclosed that the 5th Defendant Henry Leonard Perera had died in 2007 when the appeal was pending in the Court of Appeal. He was substituted in the Court of Appeal. The Caption to the Special Leave to Appeal Application included the name of the deceased as the 5th Defendant –Respondent –Petitioner. This defect was subsequently detected and the Petitioners filed an amended petition on 23.01.2013 by amending the caption by including the name of Bopitiyagamage Kapila Dilhan Perera as 5A Substituted- Defendant-Respondent-Petitioner. Attorney-at-law for the Plaintiff-Appellant-Respondent filed a statement of objections and moved to dismiss the original petition and also the amended petition on following grounds:

a) Original petition had cited a dead person as a petitioner rendering the petition a nullity and for that reason defect is not curable.
b) The Petitioners had failed to obtain the permission of court to amend the petition.
c) Although the court had directed the Petitioners to serve the amended petition to the Respondent through the registry, it was not complied with.
d) In the motion filed by Defendant-Respondent Petitioners there is no reference to the proposed amendment.
e) The amended petition filed on 23rd January 2013 more than one year after the date of filing of Petition dated 14th November2011 and there is an inordinate delay.

Both parties filed written submissions regarding the preliminary objections raised by the Plaintiff-Appellant-Respondent. The Petitioners admitted that there was a mistake which is a bona fide mistake and submitted that it did not cause prejudice to the Respondent. Petitioners submit that though 5th Defendant-Respondent was substituted in the Court of Appeal, the Court of Appeal in its judgment due to inadvertence had included the name of the 5th Defendant who is dead. As the appeal is against the said judgment the Petitioners had adopted the same caption.

The Respondent's main contention is that the petition is bad in law for citing a dead person as a party and for that reason the application should be dismissed. The learned President counsel appearing for the Plaintiff-Appellant-Respondent had cited several decisions of this court in support of his argument.

In SC. SPL. LA. No. 39/2010, (Supreme Court Minutes dated 14.05.2010) then, Chief Justice J.A.N. de Silva (Sripavan J. and Ekanayake J. agreeing) dismissed the application upholding a preliminary objection that the application is defective for the reason that a dead person has been made a party.

In *Mariam Bee Bee vs. Seyed Mohamed* (68 NLR 36)it was held that ' A partition decree which allots a share to a party, but which is entered without knowledge of the death of that party is a nullity'

In *Bastian Vs. Andiris* (14 NLR 437) it was held that ' A fiscal transfer in the name of the purchaser after his death passes no title'

In *Ilangakoon Mudiyanselage Gnanathileke Illangakoon Vs. Anula Kumarihamy* S.C.H.C.L.A. 277/11, (SC Minutes of 21-012013,) Sripavan J (Hettige P.C. J. and Dep P.C.J. agreeing) upheld the preliminary objection and dismissed the Plaintiff's leave to appeal application for noncompliance with Rule 28 (2) of the Supreme Court Rules of 1990. In that case it was held that the Plaintiff has failed to set out the full title in the application which includes all the persons cited as parties in the proceedings below.

It is settled law that a party seeking relief and praying for a judgment should include all parties that will be affected by the judgment as Defendants. The question is whether this applies only to Petitioners or Plaintiffs. The learned President's Counsel for the Respondent argue that this will apply to both parties and especially when appealing against a judgment or Order the parties cited in the Court below should be included in the Caption. I agree with the submissions of the learned President's Counsel for the Respondent.

The learned President's Counsel for the Plaintiff-Appellant –Respondent, in addition to the cases cited above, in support of his argument cited the cases of *Munasinghe and another Vs. Mohomad Jabeer Nawaz Karim* (1990 2 SLR page 163) *Abeysinghe v Abeysekera* (1995 2SLR 104) and *Waduganathan Chettiar v Sena Abdul Casim* (55NLR 184))

The learned President's Counsel for the Petitioners submitted that in the Court of Appeal, the 5th Defendant-Appellant who is dead was substituted and the caption was amended. However in the judgment of the Court of Appeal the original Defendant –Respondent was cited as the 5th Defendant-Respondent due to inadvertence or a mistake on the part of the Court. The same mistake was reflected in the caption to the petition due to the reason that the names were taken from the Court of Appeal judgment.

According to the Court of Appeal judgment, the judgment is against defendants respondents including a person who is dead. None of the counsel appearing for the respective parties submitted that the judgment is a nullity. This may be due to the fact that the substitution was duly effected in the Court of Appeal and the error was due to the fault of the Court.

In *Sivapathlingam vs. Sivasubramaniam* (1990) (1) SLR 378 following a long line of authorities held that:-

> ' 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 decision in *Gunasena vs. Bandarathileke* 2000 (1) SLR 293 followed the decision in *Sivapathlingam vs.Subramaniam* cited above.

In the case before us the initial mistake was done by the Court of Appeal by including in the judgment the name of the 5th Defendant Respondent who is dead. Petitioners had followed the same caption in the Application. I am of the view that the remaining Petitioners should not be non suited on account of this mistake. Therefore I overrule the preliminary objection and permit the remaining Defendant – Respondent Petitioners to proceed with this application.

The Plaintiff- Appellant –Respondents objected to the Court accepting the amended petition which included the substituted 5th Defendant-Appellant. The application to amended the petition was filed more than one year after the filing of the Petition and without indicating the nature of the proposed amendment and without notice to the Respondent in spite of clear directions given by this Court to issue notice on the Respondents. The Learned President's Counsel for the Plaintiff- Appellant-Respondent submitted that the Application to amend the Petition was made one year after the filing of the original petition and long after the appealable period has lapsed and for that reason the court should not exercise its discretion and allow the application.

The question that arises in this case is when the Court of Appeal by mistake or due to inadvertence included a deceased party in the caption, could a Petitioners on their own without following the same Caption rectify the mistake. The proper course of action appears to be that the Petitioner should have moved the Court of Appeal to rectify the error in the first instance or use the same caption and seek permission of this court to substitute or to delete the name of the deceased person and include the substituted party. The Petitioners belatedly followed the second course to amend the caption by adding the substituted 5th Defendant-Respondent-Petitioner.

The learned President 's Counsel for the Plaintiff-Appellant -Respondent in support of his argument cited the case of *Waduganathan Chettiar v Sena Abdul Casim* (54 NLR 185) where it was held that:-

> 'a court will refuse to allow a plaint to be amended so as to include a new cause of action if such amendment, by its relation back to the original date of the plaint is prejudicial to a plea of prescription which may be raised by the defendant in respect of the new cause of action.'

I find that the application to amend the caption was made belatedly without following the proper procedure. This is not an appropriate case for this court to exercise its discretion and accept the amended petition. I uphold the objection and reject amended petition which included the name of the 5th substituted Defendant –Responded –Petitioner .

However In view of the special circumstances of this case, this court exercising its inherent powers deletes the name of Henry Leonard Perera the 5th Defendant since deceased from the names of Defendant-Respondent-Petitioners included in the Petition. The Application dated 14th November 2011 to be fixed for support on a date agreed by the parties and subject to the convenience of this Court.

No Costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J.

I agree

Judge of the Supreme Court

Sisira J. de Abrew, 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 order of the High Court of the North Western Province.

Dassanayake Mudiyanselage Ranbanda,
"Dharshana"
Narammala Road
Wadha Kada

Applicant-Respondent-Petitioner

Vs.

SC Spl LA No. 229/11
NWP/HCCA/KUR/37/2010 LT Appeal
LT No. 23/Ku/7850/2002

Peoples' Bank
P.O.Box 728
Colombo 02

Respondent-Appellant-Respondent

Before : Marsoof, P.C., J,
Sripavan, J &
Dep, P.C., J.

Counsel : Geoffrey Alagaratnam, PC and Ms. S. Jayatunga for Applicant –Respondent-Petitioner

Ms Manoli Jinadasa with Tharanga Ambepitiya for Respondent-Appellant-Respondent

Argued on : 08.08.2012

Decided on : 17.07.2014

Priyasath Dep, PC, J

The Applicant –Respondent –Petitioner (hereinafter referred to as Applicant –Petitioner) filed an application in the Labour Tribunal alleging that his services were wrongfully and unjustly terminated by the Respondent-Appellant –Respondent (hereinafter referred to as the Respondent Bank).

The learned President of the Labour Tribunal by his order dated 28.10. 2010 granted to the Petitioner pension benefits without back wages as if his services were not terminated. The learned President held that the Respondent Bank had failed to prove several charges made against the Applicant-Petitioner and that the termination of employment is an excessive punishment. However reinstatement was not ordered as at the time of making of the order the Applicant had reached the retirement age. The Respondent Bank appealed against the order of the Labour Tribunal. The High Court set aside the order of the Labour Tribunal and dismissed the Application of the Applicant – Petitioner made to the Labour Tribunal.

Being aggrieved by the said order of the learned High Court Judge, the Applicant-Petitioner filed a Special Leave to Appeal application to the Supreme Court on 23-12-2011. When this application was taken up for support on 15.03.2012, the learned counsel for the Respondent Bank raised the following preliminary objections regarding the maintainability of the Application:

(a) Non- compliance with the relevant laws;

(b) Non- compliance with the specific rules.

Thereafter it was re-fixed for support on 23.05.2012 to consider the preliminary objections. On 23.05.2012 it was recorded that both learned counsel moved that they be permitted to file written submissions on the preliminary objections before the matter is taken up for consideration before a bench of which oral submissions will be made.

On 08.08.2012 the case was taken up for support and counsel appearing for both parties made submissions and the order was reserved.

Counsel appearing for both parties had filed comprehensive and lengthy written submissions on the two preliminary objections:

(a) Non-compliance with the relevant laws

(b) Non- compliance with the Supreme Court Rules.

The caption of the application which invokes the jurisdiction of the court reads thus:

> "In the matter of an Application for Special Leave to Appeal from the order of the High Court of the North Western Province".

It does not refer to any Law. According to the learned Counsel for the Respondent Bank this is the only averment that pleads jurisdiction of the Court. The Respondent Bank

submits that the Applicant -Petitioner failed and/or neglected to specify under which act or law he has invoked the jurisdiction of the Supreme Court. Applicant -Petitioner merely pleads that he is making a Special leave to Appeal application from the High Court of North Western Province to the Supreme Court.

Although the title to the Petition refers to the Supreme Court which is the proper forum, the Applicant- Petitioner had failed to mention the relevant law and the section which enable him to apply for leave from the Supreme Court. The question that arises is whether or not the failure or omission is fatal or curable. The learned counsel for the Respondent Bank further submitted that the application to the Supreme Court should be a Leave to Appeal in terms of section 31DD of the Industrial Disputes Act as amended by Act No 32 of 1990 and not a Special Leave to Appeal Application under High Court of the Provinces (Special Provisions) Act No 19 of 1990.

It is appropriate at this stage to refer to the legislative history briefly. Before the enactment of the 13th Amendment to the Constitution, the Court of Appeal was the only Court that had jurisdiction to hear appeals directly from the Magistrate Courts, Primary Courts. Labour tribunals etc. At that time High Court of Sri Lanka was the highest court of criminal jurisdiction and was devoid of appellate or revisionary jurisdiction. This situation was fundamentally changed by the 13th amendment to the Constitution by establishing High Courts for the Provinces. Under Article 154P(2) the Chief justice was required to nominate among judges of the High Court of Sri Lanka to the High Court of the Provinces. Article 154P (3) confers the jurisdiction in the High Court of the Province on following matters. 154P(3) reads thus:

> Every such High Court shall-
>
> (a) exercise according to law, the original criminal jurisdiction of the High Court of Sri Lanka in respect of offences committed within the Province;
>
> (b) notwithstanding anything in Article 138 and subject to any law , exercise, appellate and revisionary jurisdiction in respect of convictions, sentences and orders entered or imposed by Magistrates Courts and Primary Courts within the Province;
>
> (c) exercise such other jurisdiction and powers as Parliament may, by law, provide.

The High Court of Provinces (Special Provisions) Act No. 19 of 1990 makes provision regarding the procedure to be followed in, and the right to appeal to and from the High Court established under Article 154P of the Constitution.

Section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 gives jurisdiction to the High Court to hear appeals from Labour Tribunals and orders made under Agrarian Services Act.

Section 3 reads thus:

> " A High Court established by Article 154P of the Constitution for a Province shall, subject to any law, exercise appellate and revisionary jurisdiction in respect

of orders made by Labour Tribunals within the Province and orders made under section 5 or section 9 of the Agrarian Services Act, No. 58 of 1979, in respect of any land situated within that province."

Section 9 of the Act reads thus:

9. Subject to the provisions of this Act or any other law, any person aggrieved by-

(a) a final Order, judgment, decree or sentence of a High court established by Article 154P of the Constitution in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or Section 3 of this Act or any other law, in any matter or proceeding whether civil or criminal which involves a substantial question of law, may appeal therefrom to the Supreme Court if the High Court grants leave to appeal to the Supreme Court *ex mero motu* or at the instance of any aggrieved party to such matter or proceedings:

Provided that the Supreme Court may, in its discretion, grant special leave to appeal to the Supreme Court from any final or interlocutory order, judgment, decree or sentence made by such High Court, in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P of the Constitution or Section 3 of this Act, or any other law where such High Court 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 further that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to be decided is of public or general importance; and

At the commencement of Section 3 of the High Court of the Provinces(Special Provisions) Act No. 19 of 1990 it is stated that this section is 'subject to any law exercise appellate and revisionary jurisdiction ' and similarly the section 9 of the same Act also states that 'subject to the provisions of this Act or any other law'. The Act No. 19 of 1990 provides the general procedure regarding appeals to the Supreme Court from the High Court in exercising appellate jurisdiction. This Act does not prohibit any other law providing right of appeal or providing procedure for appeals. The Industrial Disputes Act have provided for the right of appeal to the Supreme Court from the judgments of the High Court exercising appellate jurisdiction. Maintenance Act No. 37 of 1999 has similar provisions . Therefore, there is no conflict between section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 and Section 31DD of the Industrial Disputes Act amended by Act No. 32 of 1990.

The learned Counsel for the Applicant –Petitioner strenuously argued that the relevant law applicable to appeals to and from the High Court is the High Court of the Provinces (Special Provisions) Act No 19 of 1990 and the application should be a Special Leave to Appeal application. On the other hand the learned Counsel for the Respondent- Bank argued that application to the Supreme Court should be a leave to Appeal application under Section 31DD of the Industrial Disputes Act as amended by Act No 32 of 1990.

The question that arises in this application is whether the appeal should be preferred under High Court of the Provinces (Special Provisions) Act No. 19 of 1990 or Industrial Dispute (Amendment) Act No. 32 of 1990. High Court of the Provinces (Special Provisions) Act No. 19 of 1990 was enacted according to its preamble, 'to make provision regarding the procedure to be followed in, and the right to appeal to and from the High Court establish under Article 154P of the Constitution. ..' Section 3 of the Act gives jurisdiction to the High Courts to hear appeals in respect of orders made by Labour Tribunals. Section 9 of the said Act provides for an appeal to the Supreme Court from an order made by the High Court in the exercise of appellate jurisdiction vested in it by section 3 of this Act which involves a substantial question of law. The manner and the procedure in appealing to the Supreme Court is spelt out in this section.

(A) If the High Court grants leave to appeal to the Supreme Court ex mero motu or at the instance of an aggrieved party

(B) If the High Court refused to grant leave to appeal, the aggrieved party may invoke the jurisdiction of the Supreme Court to exercise its discretion and grant special leave to appeal.

(C) If a special leave to appeal is preferred to the Supreme Court and the Supreme Court is of the opinion that the matter is fit for review it may grant, Special Leave to Appeal .

The remedies provided in (B) and (C) above are discretionary in nature and cannot be granted as a matter of course. The Supreme Court will grant special leave only if the case or matter before it in the opinion of the Supreme Court is fit for review by the Supreme Court.

Provided further, that the Supreme Court shall grant leave to appeal in every matter or proceeding in which it is satisfied that the question to decided is of public or general importance.

On the contrary section 31DD of the Industrial Disputes Act merely states that a party aggrieved by any final order of the High Court in relation to an order of a Labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained.

There is no doubt as to the fact that appeals to the High Court and appeals to the Supreme Court from the High Court should be preferred under High Court of the Provinces (Special Provisions) Act No. 19 of 1990. However, Section 9 of the Act dealing with appeals from the High Court to the Supreme Court states that it is subject to the provisions of that Act or any other law. The question that arises is whether any other law could also provide for appeals to and from the High Court. High Court of the Provinces (Special Provisions) Act No.19 of 1990 was certified on 15th May 1990. The learned Counsel for the Respondent -Bank strenuously argued that the appeal to the Supreme Court should be preferred under Industrial Dispute (Amendment) Act

No. 32 of 1990 which was certified on 31st August 1990 subsequent to the enactment of High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

The Industrial Dispute Act before it was amended by Act No. 32 of 1990 had only one section that is section 31D dealing with appeals. Under this section the aggrieved party can appeal to the Court of Appeal from an order of the Labour Tribunal on a question of Law. The provisions of Code of Criminal Procedure Act dealing with appeals from the Magistrates Court applied to appeals to the Court of Appeal from the Labour Tribunal in regard to all matters connected with hearing and disposal of appeals. On the other hand Industrial Dispute Act(Amendment) Act No. 32 of 1990 has several new provisions regarding the procedure applicable to appeals to the Supreme Court from the High Court. Section 31DD(1) deals with right of appeal to the Supreme Court from the High Court and 31DD (2) refer to the jurisdiction and powers of Supreme Court to hear appeals.

The section 31DD of the Industrial Disputes (Amendment) Act, No.32 of 1990 reads thus:

> 31DD. (1) Any workman, trade union or employer who is aggrieved by any final order of a High Court established under Article 154P of the Constitution, in the exercise of the appellate jurisdiction vested in it by law or in the exercise of its revisionary jurisdiction vested in it by law, in relation to an order of a Labour tribunal, may appeal therefrom to the Supreme Court with the leave of the High Court or the Supreme Court first had and obtained.

Therefore one could argue that a party aggrieved by the final order of the High Court exercising Appellate jurisdiction in relation to an order of the labour Tribunal could appeal to Supreme Court under Section 31DD of the Industrial Disputes Act with the leave of the High Court or the Supreme Court first had an obtained. The section 31 DD (1) is the section that enables or provides the right of appeal to the aggrieved party to appeal to the Supreme Court. This is similar to the section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990. Section 31DD (2)refers to the powers of the Supreme Court in appeal. This section is similar to 10(2) of the High Court of Provinces(Special Provisions) Act19 of 1990. Therefore it is clear that the High Court of the Provinces(Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment) Act No 32 of 1990 has similar provisions if not identical provisions. The question that arises is whether these provisions overlaps, supplements each other or has an independent existence or a co-existence.

In view of this ambiguity or confusion created by the legislation or the draftsmen different forms of applications are filed in the Supreme Court. The litigants should not be penalized or non suited due to this ambiguity.

There are special leave to appeal applications filed under the High Court of the Provinces (Special Provisions) Act No 19 of 1990. In some instances leave to appeal applications are filed under section 31DD of the Industrial Disputes (Amendment) Act No 32 of 1990. In some applications due to an abundance of caution reference is made to both High Court of the Provinces (Special Provisions) Act No 19 of 1990 and Industrial Disputes (Amendment Act) No 32 of 1990.There has been no consistent practice in this regard. In the case before us we are called upon to deal with an application which has no reference to any law in the caption. It merely states " In the

matter of an application for Special Leave to Appeal from the order of the High Court of the North Western Province"

Therefore the question that arises in this case is whether the application to the Supreme Court should be a special leave to appeal application under High Court of the Provinces (Special Provisions)Act No 19 of 1990 or a leave to appeal application in terms of 31DD of the Industrial Disputes Act No**.** 43 of 1950 as amended by Act No. 32 of 1990.

Though there is a substantial difference between special leave to appeal and leave to appeal applications when comparing various statutes at times draftsmen had overlooked and ignored this difference

It is pertinent to mention that the Article 128 of the Constitution and section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 the Court of Appeal or High Court as the case may be could grant leave to the Supreme Court only if it involves a 'substantial question of law' The section 31DD of the Industrial Disputes Act No. 43 of 1950 as amended by Act No. 32 of 1990 does not refer to a 'substantial question of law'. Further the Supreme Court in exercising its jurisdiction under Article 128 of the Constitution and section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 in granting special leave to appeal could do so if it is in its opinion the case or matter is fit for review by the Supreme Court. Industrial Disputes Act 43 of 1950 as amended by act No. 32 of 1990 does not refer to the words ' fit for review'. In the Article 128 of the Constitution and section 9 of the High Court of Provinces (Special Provisions) Act No 19 of 1990 when granting leave by the Supreme Court it is referred to as special leave to appeal. Section 31DD of the Industrial Disputes Act No. 43 of 1950 as amended by Act No. 32 of 1990 refers to the application as leave to appeal .

The learned Counsel for the Applicant-Petitioner submitted that Application for special leave to appeal is the proper application and that the Applicant-Petitioner had filed the application under the proper law and followed the proper procedure. It was further submitted that High Court of the Provinces (Special Provisions) Act No. 19 of 1990) is the enabling statute whereas Industrial Disputes Act as amended by Act No. 32 of 1990 merely set out the rights of the parties. Further, the counsel referred to the establish practice in appealing to the Supreme Court in respect of orders from the Labour Tribunal. Before the establishment of High Court of the Provinces under Article 154P of the 13th Amendment to the Constitution appeals from Labour Tribunal was heard in the Court of Appeal. The appeal from the Judgment of the Court of Appeal to the Supreme Court could be filed with leave from the Court of Appeal or where Court of Appeal refuse 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 with special leave from the Supreme Court. High Court of Provinces (Special Provisions) Act No. 19 of 1990 also has similar provisions. Therefore, when leave is sought from the Supreme Court the Application should be a special leave to appeal. However, Industrial Disputes No.43 of 1950as amended by the act No 32 of 1990 refers to a leave to appeal application. Counsel submitted that nothing in the Act indicates the intention of the legislature to depart from the established practice. Counsel submits that this may be due to a draftsman's error or an oversight.

In *Martin v. Wijewardena* (1989) 2 Sri.LR 409 a case decided after the establishment of High Court of the Provinces in 1987 under article 154P of the Thirteenth Amendment to the Constitution and before the enactment of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 stated thus:

> ' A right of appeal is a statutory right and must be expressly created and granted by statute. It cannot be implied. Article 138 is only an enabling Article and it confers the jurisdiction to hear and determine appeals to the Court of Appeal. The right to avail of or take advantage of that jurisdiction is governed by the several statutory provisions in various Legislative Enactments.'

This case was folowed in *Gunarathne vs. Thambinayagam* (1993) Sri.LR at 355 and Malegoda vs. Joachim (1997) 1 Sri.LR at 88.

It should be observed that both the High Court of the Provinces (Special Provisions) Act No19 of 1990 and Industrial Disputes (Amendment) Act No 32of 1990 provide for a right of appeal and confer jurisdiction and power on the Supreme Court to hear and determine cases.

The learned Counsel for the Respondent Bank strenuously argued that Industrial Disputes Act falls into the category of a special legislation and its amending Act No. 32 of 1990 was enacted subsequent to the High Court of Provinces (Special Provisions) Act 19 of 1990 and it should prevail over the High Court of Provinces (Special Provisions) Act No. 19 of 1990. Therefore, the proper application is the Leave to Appeal application in terms of section 31DD of the Industrial disputes Act as amended by Act No. 32 of 1990.

For the reasons stated above I hold that the proper Application to the Supreme Court is under section 9 of the High Court of the Provinces (Special Provisions) Act No 32 of 1990.However we are mindful of the fact that Industrial Disputes (Amendment) Act No 32 of 1990 also provides for a right of Appeal and power and jurisdiction conferred on the Supreme Court to hear and determine cases. Therefore leave to appeal application could also be filed/entertained under section 31DD of the Industrial Disputes Act.

The learned Counsel for the Applicant Petitioner in his written submissions submitted that 'in any case the difference between "leave to appeal" and "special leave to appeal" being one of terminology only and there being no inconsistency/difference in the procedure by which they may be granted and the end result is the same'. He invites the Supreme Court as the apex court of the land not to be hamstrung and/or hindered by such technicalities.

However it should be observed that there is a subtle difference between a leave to appeal and special leave to appeal applications. High Court could grant leave to appeal if it involves a substantial question of law. On the other hand though granting of special leave to appeal by the Supreme Court is discretionary it has a wide discretion. The criteria is that the matter or case in the opinion of the Supreme Court is fit for review by the Supreme Court. Further the Supreme Court shall grant leave in every matter of proceeding in which it is satisfied that the question to be decided is of public or general importance.

Industrial Disputes act fall into the category of social legislation. Section 31C(1) of the Industrial Disputes Act requires the Labour Tribunal after inquiry to 'make such order as may appear to the tribunal to be just an equitable. Therefore when granting equitable relief the court should not be hamstrung by mere technicalities and terminology.

Therefore, I am of the view that the litigant should not suffer due the choice of different words in different statutes by the draftsman in similar context.

The next objection raised by the learned Counsel for the Respondent Bank is that the Applicant Petitioner had failed to comply with the Supreme Court Rules. He had failed to mention in the caption the relevant law which provides for Special Leave to appeal and for that reason the application is defective. The caption should refer to the law under which the application is filed. Question that arise is whether this defect or omission is a mere technical defect or not.

The learned counsel for the Respondent Bank cited the case of *The Ceylon Electricity Board & 9 others V. Ranjith Fonseka* 2008 (BALR) Part 11 page 155 as a case relevant to this application. The petitioner in that case filed a Special Leave to Appeal Application in the Supreme Court regarding an Order made by the Court of Appeal. But included an incorrect title and caption where the jurisdiction was pleaded incorrectly.

The Petition and affidavit for special leave to appeal was titled 'In the Court of Appeal of the Democratic Socialist Republic of Sri Lanka instead of Supreme Court. In the Caption it was stated that the application was made in terms of Article 154P(3)B of the Constitution. This article refers Appellate jurisdiction of the High Court. Article 128 is the correct article as the special leave was sought from the order of the Court of Appeal. Further the Petitioner in that case failed to annex the order of the Court of Appeal. In addition to that there were several other defects too.

The Respondents raised a preliminary objections in respect of the same and moved for dismissal. Petitioner filed amended papers. Although several hearing dates had lapsed Petitioner did not support the application to seek the permission of the Court to amend the Caption.

The Supreme Court dismissed the entire case of the Petitioner and refused the amendment on the following premise:

> " As correctly submitted by the learned President's Counsel, for the respondent the application for Special leave to Appeal filed by the Petitioners before the apex Court of the Republic, should have been drafted with 'care and due diligence' in order to maintain the stature and dignity of this Court. An application such as the present application, which is teeming with irregularities and mistakes cannot, not only be tolerated , but also would be difficult to maintain as each irregularity stated above is fatal to the acceptability and maintainability of the application. Even if the objections may be technical in nature, such irregularities clearly demonstrate the fact that the application made by the petitioners has not complied with the Supreme Court Rules of 1990."

In the present case the facts are different. The title of the Petition is correct. The caption reads thus: 'In the matter of an Application for Special Leave to Appeal from the order

of the High Court of the North Western Province'. The only omission in the caption of the Petition is that there is no reference to section 9 of the High Court of the Provinces (Special Provisions) Act No 19 of 1990 which is the relevant law.

I am of the view that this omission could be considered as a technical defect or irregularity which could be cured by allowing the Applicant-Petitioner to amend the Caption.

The other question that arises is whether Applicant-Petitioner had failed to comply with the Supreme Court rules. Supreme Court Rules 1990 Part 1 (3) reads thus:

" Every such application shall be typewritten, printed or lithographed on suitable paper, with a margin on the left side, and shall contain the Court of Appeal number, and shall be signed by the Petitioner himself, if he appears in person, or by his instructing attorney-at-law. It 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."

The Respondent Bank submitted that the Applicant –Petitioner failed to refer to the questions of law fit to be reviewed by the Supreme Court. The learned counsel for the Respondent Bank submitted that the non compliance of these rules are fatal and due to that reason application should be dismissed in limine. The Counsel had referred to several cases where Supreme Court had dismissed applications for non-compliance of this rule.

In the case of *Attanayake v. Commissioner General of Elections & Others* 2011(2) BLR page 349 the jurisdiction of the Supreme Court was properly invoked but there was non compliance with the Rules by failing to tender the required number of notices along with the petition, Her ladyship Shirani Bandaranayake CJ held:

> "Through a long line of cases decided by this Court, a clear principle has been enumerated that 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 a serious erosion of well established court procedure followed by our courts throughout several decades."

The Counsel for the Applicant-Petitioner had submitted that he had referred to the question of laws in the Petition and thereby complied with the Supreme Court Rules. Paragraph 8 of the Petition referred to the questions of law. In paragraph 10 Petitioner has stated that the said questions are fit and proper and or substantial questions of law for consideration by the Supreme Court. This paragraph does not refer to the exact words "fit for review". However, I find that Petitioner had pleaded questions of law and also averred that the questions are fit and proper questions for consideration. Therefore, I am of the view that the Petitioner had substantially complied with the Supreme Court Rules of 1990.

The Applicant-Petitioner relied on cases of *Priyani Soyza V. Rienzie Arsacularatne* 1999 2 SLR 179 and *Kiriwantha and another Vs Nawaratne* and another 1990 2SLR

393. In Kiriwantha's case Fernando J said that " the weight of authority does favours the view that while all these rules must be complied with, the law does not require or permit an automatic dismissal of the application or appeal of the party in default".

Having considered the submissions of both parties, I am of the view that the above mentioned omissions and errors are technical in nature and do not warrant the dismissal of the Application. The preliminary objections are over ruled and the Application will be listed for support for granting of leave.

No costs.

Judge of the Supreme Court

Saleem Marsoof, P.C., J
I agree.

Judge of the Supreme Court

K Sripavan, J.
I agree.

Judge of the Supreme Court

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

S.C. Spl. L.A. No. 258/2013
C.A. [Writ] No. 510/2011

In the matter of an Application for Special Leave to Appeal to the Supreme Court from a Judgment of the Court of Appeal

1. M. Kanagaratnam,
   Sri Bhadra Kali Amman Kovil,
   Munneswaram, Chilaw
   7th Respondent-Petitioner

2. Kalimuttu Sivapathasunderam,
   Sri Bhadra Kali Amman Kovil,
   Munneswaram, Chilaw
   8th Respondent-Petitioner

3. Mahendrasamy,
   Sri Bhadra Kali Amman Kovil,
   Munneswaram, Chilaw
   9th Respondent-Petitioner

Vs.

1. Sri Bodhiraja Foundation,
   Sri Bodhiraja Dhamayathanaya,
   Embilipitiya

2. Jathika Sangha Sammelanaya,
   Jathyanthara Thorathuru Saha Dharma Paryeshayathanaya,
   Gothami Mawatha,
   Rajagiriya.

3. Olcott Gunasekara, President,
   Dharmavijaya Foundation, No. 380/7,
   Sarana Road, Colombo 7

4. Ven. Bandirippuwe Vineetha Thero,
Thuparamaya, Bandirippuwa, Lunuwila

5. Iragani de Silva, Chairperson- Animal
Welfare Trust, No. 93/20, Elvitigala
Mawatha, Colombo 8

6. Vishaka Tillekarathne, Trustee,
Animal Welfare Trust,
No. 73/2, Kirulapone Avenue,
Colombo 5

7. Lorraine Margueritte Bartholomeusz,
Vice President
Sri Lanka Animal Protection Association,
No. 5/3, Sulaiman Terrace,
Colombo 5

8. Sharmini Desiree Ratnayake,
Secretary,
Sri Lanka Animal Protection Association,
No. 6/2, De Silva Road, Kalubowila

9. Sagarica Rajakarunanayake,
President, “Sathwa Mithra”,
No. 73/28, Sri Saranankara Place,
Dehiwala

10. Lalani Serasinghe Perera,
No. 14, Nuwarawatte,
Nawala

11. Dr. Chamith Nanayakkara,
No. 5, New Station Road,
Sarasavi Uyana

12. Somasiri Alokolange,
No. 15/3, Peiris Mawatha,
Kalubowila, Dehiwala

13. Nikita Ravin Tissera,
No. 29/8, Pangiriwatte Road,
Mirihana, Nugegoda

14. Gamini Wanigaratne,
No. 733/62, Gurugewatte,
Koraleima, Gonapola
Petitioners-Respondents

15. Inspector General of Police,
Police Headquarters,
Colombo

16. Deputy Inspector General of Police, Deputy Inspector General's Office, Puttalam

17. Senior Superintendent of Police Chilaw,
Senior Superintendent's Office,
Chilaw

18. Officer-in-Charge,
Police Station, Chilaw

19. Urban Council of Chilaw,
Puttalam Road, Chilaw

20. Chairman,
Urban Council of Chilaw,
Puttalam Road, Chilaw

21. President,
All Ceylon Hindu Congress,
No. 91/5, Chittampalam A. Gardiner Mawatha,
Colombo 12

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

Respondent-Respondents

BEFORE : **MOHAN PIERIS. P.C. C.J.**
PRIYASATH DEP. P.C. J &
ROHINI MARASINGHE. J

COUNSEL : S. Sivarasa, P.C., with K.V.S. Ganesharajan for the 7th and 8th Respondent-Petitioners

A.R. Surendran, P.C., with N. Kandeepan and M. Jude Dinesh for the 8th Respondent-Petitioner

Raja Dep with K.A. Upul Anuradha Wickramaratne for the 2nd Petitioner-Respondent

Manohara de Silva, P.C., with Arienda Wijesurendra for the 1st, 3rd to 14th Petitioners-Respondents

P. Ranasinghe, D.S.G., for the A.G.

ARGUED ON : 21.07.2014

WRITTEN SUBMISSIONS OF THE 7TH, 8TH AND 9TH RESPONDENTS-PETITIONERS
TENDERED ON : 09.06.2014 & 28.07.2014

WRITTEN SUBMISSIONS OF THE 5TH AND 6TH RESPONDENTS
TENDERED ON : 16.06.2014

WRITTEN SUBMISSIONS OF THE 1ST, 3RD – 10TH, 12TH AND 13TH PETITIONERS-RESPONDENTS
TENDERED ON : 28.07.2014

WRITTEN SUBMISSIONS OF THE 8TH RESPONDENT
TENDERED ON : 13.06.2014

DECIDED ON : 03.09.2014

In the instant case before us the 7th, 8th and 9th Respondents-Petitioners (hereinafter referred to as Petitioners) have appealed to this Court from the judgment of the Court of Appeal dated 29.08.2013 which resulted from the application originally filed by the Petitioners-Respondents (hereinafter referred to as Respondents) in judicial review proceedings.

The Court of Appeal in its judgment dated 29.08.2013 issued a writ of mandamus directing the 1st, 2nd and 4th Respondents (Respondents-Respondents) to take all necessary action as permitted and empowered by law to prevent :

1) the slaughter of animals defined in the definition of the Butchers Ordinance at the Sri Badra Kali Amman Kovil, Munneswaram Chilaw if the 7th, 8th and 9th Respondents do not possess a license issued under the Butchers Ordinance and/or if they violate the provisions of the Butchers Ordinance; and

2) the slaughter of animals defined in the definition of Cruelty to the Animals Act at Sri Badra Kali Amman Kovil, Munneswaram Chilaw if they violate the provisions of the Cruelty to the Animals Act.

Being aggrieved by the judgment dated 29.08.2013 the Petitioners have preferred this appeal to the Supreme Court contending inter alia that the Court of Appeal was in error in issuing the writ of mandamus directing the 1st to 4th Respondents-Respondents to act against the petitioners in the event they did not possess a Butcher's License and if they violated the Prevention of Cruelty to the Animals Ordinance.

The judgment of the Court of Appeal which is sought to be impugned in these proceedings contains the following salient holding-

(a) the word "trade" in section 4(1) of the Butchers Ordinance cannot be interpreted to say that includes only the person who sells or exposes for sale the meat. In the view of the Court of Appeal, the word "trade" in the aforesaid section also includes a person who does the work of a butcher and the person who turns carcass of an animal into meat.

(b) For the aforesaid reasons, the Petitioners have carried on the trade of a butcher.

(c) For the reasons adumbrated above, the priest of the Kovil or the persons in charge of the Kovil must obtain a license under section 4 of Butchers Ordinance to kill animals defined in section 2 of the Butchers Ordinance.

(d) The 8th and 9th Respondents (the 2nd and 3rd Petitioners before the Supreme Court) admit in their statement of objections before the Court of Appeal that animal sacrifice takes place in the Kovil. They do not have a license issued under the Butchers Ordinance. As a result there is a violation of section 4 of the Butchers Ordinance.

(e) If the Petitioners or their agents or servants or employees kill animals without a license issued under the provisions of the Butchers Ordinance, they will commit an offence and the police will then be entitled to prevent the killing of animals in the Kovil premises. Then the police should take actions to prevent violations of the Butchers Ordinance.

The Court of Appeal came to the finding that the Petitioners carried on the trade of a butcher; that they have killed animals without a butcher's license; that they have violated section 4 of the Butchers Ordinance. The Court of Appeal further held that Police will be entitled to prevent the killing of animals if the petitioners do not possess a license under the Butchers Ordinance and if they violate the provisions of the Cruelty to the Animals Act.

In both the oral and written submissions, the Petitioners raised several contentions to assail the judgment of the Court of Appeal. It has been contended that the killing of animals that takes place annually is a ritual sacrifice and it cannot be classified as carrying on trade. In fact it is undeniable that the antiquity of this event has been commented upon in ***Balasunderam v Kalimuththu*** **79 (1) NLR 361 at 379.** One cannot detract from the religious significance of the events taking place at Munneswaram and I do not even call in question the pertinent comments of Parinda Ranasinghe J (as he then was) in ***Premalal Perera v Weerasuriya and Others*** **1985 2 Sri.LR 177 –**" Beliefs rooted in religion are protected. The religious beliefs need not be logical, acceptable, consistent or comprehensible in order to be protected. **Unless the claim is bizarre and clearly non-religious in motivation, it is not within the judicial function and the judicial competence to enquire whether the persons seeking protection has correctly perceived the commands of his particular faith**. The Courts are not the arbiters of scriptural interpretation and should not undertake to dissect the religious beliefs."

As the learned judge pointed out in the above passage, we would not be trespassing into the domain of theological interpretation or questioning the foundation of a religious practice rooted in antiquity. Both the Court of Appeal and this Court are confronted with a claim the pith and substance of which, to my mind, is non-religious in motivation namely the religious

practice albeit of ancient provenance from time immemorial must be validated by law if it were to or were likely to fall foul of the law of the land. In fact one is taken to the pleadings in the Court of Appeal and the Supreme Court to ascertain the nature of claims that initiated judicial review in the Court of Appeal.

It is pertinent to observe that the Respondents sought writs of prohibition and mandamus in their petition and they had prayed for the following reliefs.

a) a mandate in the nature of a writ of prohibition restraining the 5th and /or 6th Respondents or any person authorised by them from issuing an annual or a temporary license or any other approval or authorization whatsoever under section 4 of the Butchers Ordnance to the 7th, 8th and/or the 9th Respondents or their representatives to carry on the slaughter of animals at the Sri Bhadra Kali Amman Kovil;

b) a mandate in the nature of a writ of mandamus directing the 1st, 2nd, 3rd and 4th Respondents to forthwith take all necessary action as permitted and empowered by law to prevent the cruelty and slaughter of animals taking place at the said purported ritual conducted at the Sri Badra Kali Amman Kovil, in Chilaw.

c) A mandate in the nature of a writ of mandamus directing the 1st, 2nd, 3rd and 4th Respondents to forthwith direct officers functioning under the purview to prevent the cruelty and the slaughter of animals taking place at the said ritual conducted at the Sri Bhadra Kali Amman Kovil.

In opposition to the matters raised in the petition, the Petitioners (the 2th, 8th and 9th Respondents in the Court of Appeal) had stated the following in their statement of objections -

a) The said Kovil is an ancient kovil which has a history of more than 350 years.

b) The worship and poojas at the said Kovil are conducted according to traditional religious rites in which very renowned and revered Sivachariyars participate during the annual festival. A large number of devotees from all parts of the country participate at the annual temple festival which is held in August/September each year and the Kovil Utsavam consists of many poojas, oblations and offerings performed to invoke the blessings of Mother Kali.

c) During the annual festival a large number of devotees observe a fast everyday at the said Kovil as a common spiritual discipline observed in the Hindu religion, which is followed by Thanam (Dhanna) where a large number of people and devotees are fed during this period.

d) The annual festival ends with the velvi day which is an integral part of the ritual worship of the deity Sri Badra Kali Amman.

e) The offering of animal sacrifices which takes place during the annual festival is a long-standing religious practice observed at the said Kali Kovil and that any attempt on the part of the Petitioners to seek the assistance of the Police to stop the conduct of the said religious festival would be untenable and tantamount to an unreasonable and unwarranted interference

with the 8th Respondent's fundamental rights guaranteed under Articles 10 and 14 (i) (e) of the Constitution.

f) The offering of animal sacrifice to Goddess Kali that takes place at the Kovil is not carried out in a cruel manner as alleged by the petitioners and that the photographs annexed to the Petition in the Court of Appeal are not authentic and portrays a distorted picture of an act of religious fervor, which amounts to belittling and trivializing the genuine religious belief of pious devotees.

g) The offering of animal sacrifice which takes place during the annual festival is a long standing religious practice observed at the said Kali Kovil.

h) That the provisions of the Butchers Ordinance, the Prevention of Cruelty to Animal Ordinance and the Local Authorities (Standard by Laws) do not discountenance sacrifice of animals as part of a religious festival.

It has to be observed that though the Petitioners denied in their affidavits in the Court of Appeal an affidavit filed by one Augustine Fernando, the contents of the affidavit for the purposes of the record are to the effect that cruelty to animal does take place when the religious ritual is in progress and the Court of Appeal makes reference to the affidavit tendered by the said Augustine Fernando.

Be that as it may, the question before this Court is whether the Court of Appeal correctly interpreted the legislation and law that regulate animal welfare in this country and applied that correct interpretation to the facts and circumstances in this case. This Court, though sitting in appeal over a decision of the Court of

Appeal made in its supervisory jurisdiction, has to be guided by that gladsome jurisprudence gleaned from **the GCHQ case (R v Minister for the Civil Service ex p Council of Civil Service Unions (1985).** Lord Diplock divided the grounds of review under three heads -

> "Judicial review has I think developed to a large state today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads-the grounds upon which administrative action is subject to control by judicial review. The first ground I would call illegality, the second irrationality and the third procedural impropriety."

Lord Diplock gave a very brief definition of illegality -

> "By illegality as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates the decision-making and must give effect to it."

Has the Court of Appeal by giving its interpretation to the word "trade" in section 4 (1) of the Butchers Ordinance erred in law? The Court of Appeal has arrived at a finding that the carcasses of the animals slaughtered on the day of the festival are turned into meat and given by way of alms to devotees who flock to the Kovil.

The Court of Appeal has concluded that the term "trade" in section 4(1) of the Butchers Ordinance cannot be interpreted to mean that it includes only the person who sells or exposes for sale meat. It could embrace a person who does the work of a butcher and a person who turns carcass into meat. This Court is in agreement with this view of the Court of Appeal on the interpretation of the word "trade" and conflated with the meaning given to the word "Butcher" in section 2 of the Butchers Ordinance which is an inclusive definition namely- "Butcher shall include every person that slaughters animals or exposes for sale

the meat of animals slaughtered in Sri Lanka", this Court concludes that the person that slaughters animals on the festival day and turns carcass to meat cannot fall outside the definition of butcher as stipulated in the Butchers Ordinance. In fact the slaughter of animals begins with acquisition by sale or otherwise and the constituent elements of the whole process include transportation which may involve passing of consideration and one cannot divorce the preparation, attempt and the final act of slaughter into separate and distinct compartments. All these activities entail trade at some stage and one cannot view only the slaughter per se and contend that the offering of animals falls outside trade. Neither is the slaughter of a large number of the voiceless majority as these vertebrates are called a back garden operation as some devotees indulge in at their homes. As such the ritualistic sacrifice partakes of the features of the extended meaning of trade.

That is what impels us to incline to the view of the Court of Appeal that inherent in the ritual there is trade and in any event we cannot superimpose the plain meaning of trade as adumbrated by overseas jurisdictions or dictionaries on to the word "trade" that appears in our domestic legislation regulating animal welfare. The plain meaning of trade as connoting only the acts of selling and buying is restrictive in a Sri Lankan domestic law context and it is inherent in the culmination of slaughter and the attendant alms giving and oblations on the festival day that trade takes place and thus the term "trade" has an expansive intent in the Sri Lankan context. Thus there is no illegality in the interpretation of this term and thus this reasoning would in the end necessitate a Butcher's License to be obtained in terms of the procedure established by law. This Court is of the view that when the Court of Appeal concluded that the slaughter of animals on the festival day in Munneswaram has to be sanctioned by the imprimatur of a license, this Court finds no error of law in that reasoning and I am fortified by another factor that leans in favor of affirming the judgment of the Court of Appeal.

One has to bear in mind that the legislation in question namely Butchers Ordinance and Cruelty to Animals Ordinance that regulate the subject matter of animals are neutral and non religion specific enactments which afford uniform treatment regardless of whoever slaughters animals or inflicts cruelty to animals and such intendment of the legislature cannot be advanced on the grounds of derogable exemptions afforded on the basis of religion. The only section –section 17 (1) of the Butchers Ordinance and the proviso thereto as pointed out by the Court of Appeal may facilitate the cause of the Petitioners and it would appear that this Court cannot comment on the availability or otherwise of the benefit afforded by the proviso to section 17(1) in the absence of any such orders made thereunder having been placed before us.

Let me point out that Article 14 (1) (e) –the freedom, either by oneself or in association with others, and either in public or in private to manifest one's religion or belief in worship, observance, practice and teaching is not absolute and in terms of Article 15 (7) of the Constitution such fundamental right can be derogated from on the grounds of such restrictions as may be prescribed by law in the interest of national security, public order and the protection of public health or morality, or for the purpose of securing due recognition and respect for the rights and freedoms of others or meeting the just requirements of the general welfare of a democratic society. There is no gainsaying that limitations placed by domestic legislation would pose derogations within the meaning of the restrictions contemplated by Article 15 (7) and this would further fortify the view I have taken of the necessity to obtain sanction of the law in respect of the festival offerings in Munneswaram.

In the circumstances I affirm the judgment of the Court of Appeal dated 29.08.2013 and dismiss the appeal of the Petitioners accordingly.

MOHAN PIERIS. P.C. C.J.

CHIEF JUSTICE

PRIYASATH DEP. P.C.J

I agree.

JUDGE OF THE SUPREME COURT

ROHINI 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 in terms of Section 451(3) of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No.21 of 1988.

SC.TAB 01A/2014-01F/2014
HC.SPL Case No.7193/2014

1. Andrawas Patabendi Ganendra de Vaas Gunawardena

2. Bamunusinghe Arachchige Lakmina Indika Bamunusinghe

3. Athapaththuge Gamini Sanathchandra

4. Anantha Pathiranage Priyantha Sanjeewa

5. Dissanayake Mudiyanselage Kelum Rangana Dissanayake

6. Andrawas Patabendi Ravindu Sameera de Vass Gunawardena

Presently at Remand Prison, Welikada.

1st -6th Accused-Appellants

-Vs-

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

Complainant-Respondent

BEFORE : **MOHAN PIERIS, PC, CJ.**
S.E. WANASUNDERA, PC, J.
B.P. ALUWIHARE, PC, J.
SISIRA J. DE ABREW, J &
SARATH DE ABREW, J.

COUNSEL : Anil Silva PC with Chandika Pieris and Sumithra Waidyasekera for the 1st -3rd Accused-Appellants.

D.P. Kumarasinghe PC with Neville Abeyratne, Mahendra Kumarasinghe and Asitha Vipulanayake for the 4th & 5th Accused-Appellants.

Anuja Premaratne with Chamath Wickramasinghe, Nayana Dissanayake and Iromie Jayarathne for the 6th Accused-Appellant.

Ayesha Jinasena DSG with Varunika Hettige SSC and Nayomi Wickramasekera SC for the Attorney-General.

WRITTEN SUBMISSIONS TENDERED BY THE 1ST ACCUSED APPELLANT : 24.10.2014

WRITTEN SUBMISSIONS TENDERED BY THE ATTORNEY GENERAL : **23.10.2014**

ARGUED & DECIDED ON : **29.10.2014**

By way of their petitions of appeal preferred by the 1st to 6th Accused-Appellants in this case in terms of Section 451 of the Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 21 of 1988, the Accused-Appellants seek to impugn the

order made by the Trial at Bar on the 25/08/2014, dismissing the objections to the maintainability of the indictment against them.

In these petitions cumulatively taken together, the Accused-Appellants assailed the order of the Trial at Bar dated 25/08/2014 on the following grounds:

a. The order is contrary to law.

b. The said Trial at Bar has disregarded the effect of *R.P. Wijesiri v. Attorney-General* (1980) 2 Sri.L.R 317, and thus the Trial at Bar has acted contrary to what was stated in the precedent.

c. The interpretation placed by the Trial at Bar on Section 5 of the Code of Criminal Procedure Act No. 15 of 1979 is contrary to law.

d. Section 394 of the Code of Criminal Procedure Act No.15 of 1979 is inapplicable.

e. It will be an abuse of process on the part of the A-G to forward an indictment for an offence under the provisions of the penal code when the investigation has begun under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. In the circumstances the Accused-Appellants contend that the continuity of the trial consequent to these alleged vitiating factors and the consequent detention of the Accused would impact on the liberty of the Accused, and the Accused-Appellants have prayed for a quashing of the order dated 25/08/2014 and an order that the Trial at Bar cannot continue and proceed with the trial on the information/indictment. The Accused-Appellants further pray that they be acquitted on these grounds.

At this stage, the contention of the respective counsel could be summarised in a nutshell. The counsel for the 1st to 3rd Accused-Appellants submitted that the subject matter of the appeal could be bifurcated into two grounds namely -

a. The A-G did not have the power to file an indictment under the penal code when the investigations were carried out under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979

b. In the circumstances the indictment/information is tainted.

The contention of counsel was that the Attorney General had acted ultra vires his powers and there was an abuse of process on the part of the Attorney General.

The counsel for the 4th and 5th Accused appellants D.P Kumarasinghe P.C submitted that investigations and materials elicited under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 cannot be used in a trial under the ordinary law of the country. The counsel for the 6th Accused-appellant contended that the investigation was tainted as a result of adhering to the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 in conducting investigations into the alleged crimes and as such, there is an abuse of process.

The underlying thread of argument running through the contentions of the Accused appellants is premised on one cardinal point, namely, whilst the arrest and detention of the Accused and the investigations into the case had been under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979, they had been on the contrary, charged under the Penal Code. This would constitute an abuse of process. This contention alleging abuse of process can be viewed in the light of some of the pronouncements that have been made in regard to abuse of process in overseas jurisdictions. The phrase 'abuse of process' had come up in the context of delay in the case of *Reg. v. Derby Crown Court, Ex parte Brooks* (1984) 80

Cr.App.R. 164, and the pertinent observation of the divisional court merit a reference as far as the clarification of this phrase is concerned. An abuse of process in the context of a delay was conveniently characterised in the following terms:

> *"The power to stop a prosecution arises only when it is an abuse of the process of the court. It may be an abuse of process if either (a) the prosecution have manipulated or misused the process of the court so as to deprive the defendant of a protection provided by the law or to take unfair advantage of a technicality, or (b) on the balance of probability the defendant has been, or will be, prejudiced in the preparation or conduct of his defence by delay on the part of the prosecution which is unjustifiable: for example, not due to the complexity of the inquiry and preparation of the prosecution case, or to the action of the defendant or his co-Accused, or to genuine difficulty in effecting service. . . . The ultimate objective of this discretionary power is to ensure that there should be a fair trial according to law, which involves fairness both to the defendant and the prosecution, for, as Lord Diplock said in Reg. v. Sang [1980] A.C. 402, 437: 'the fairness of a trial . . . is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.'"*

In order to ascertain whether the process of investigation and the ultimate arraignment of the Accused in this case passed the test of the standards that are articulated in the above passage it is convenient to bear in mind the details of events that took place in the case *vis-a-vis* the dates and the statutes that become applicable to these events. These details have been conveniently summarised by the learned Deputy Solicitor General and they throw light on the investigation into the standards that the English cases insist upon, as requirements for an abuse of process to be made out. From the first information into the alleged abduction and

murder of the deceased had come about with the first information being given by Mohammed Fauzdeen to the Bambalapitiya police consequent to which the Bambalapitiya police and filed a report on the 23 May 2013. This step had been taken pursuant to Section 109 of the Code of Criminal Procedure Act No.15 of 1979 and the subsequent B Report filed by the Bambalapitiya police in MC Colombo under Case No. B3729/5/13 has been filed in terms of Section 115 of the Code of Criminal Procedure Act No.15 of 1979. All the subsequent events have been filed under the Code of Criminal Procedure Act No.15 of 1979 and it is pertinent to observe that detention orders had been obtained in respect of Krishantha and Fauzdeen under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979.

The report by the CID in regard to the detention orders narrate that an aspect of the investigation had given rise to a reasonable suspicion that an offence had been committed under the respective provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It is on that basis that the arrest of the 2nd to 5th Accused-Appellants and their detention had taken place under the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It has to be noted, though, that the progress of the investigation continued to be reported under Section 120(1) of the Code of Criminal Procedure Act No.15 of 1979. In the course of this investigation, a request had been made under section 127 of the Code of Criminal Procedure Act No.15 of 1979 to have the statements recorded of Krishantha and Fauzdeen. It is in this light that the 1st Accused-Appellant had been arrested on the 10th June 2013 and his detention had been effected under Section 6(1) of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979. It has to be noted the progress of the investigation had been reported under Section 120(1) of the Code of Criminal Procedure Act No.15 of 1979. It has to be noted that though the provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979 had been used to effect the arrest of the suspects and to secure their

detention, in view of the grounds that existed for such steps taken in the course of the investigation. The investigative steps have also been taken in accordance with the terms of the Code of Criminal Procedure Act No.15 of 1979. It is quite apparent from the chronology of events that have been tendered to court by way of Volume 3, which contains a compendium of the B reports and the investigatory mechanisms adopted among other things. The investigation in the instant case had been solely conducted in terms of the provisions of the Code of Criminal Procedure Act No.15 of 1979. Volume 3 appended to the materials that are before this court clearly bring out the fact that the investigators had identified the Penal Code offences almost at the beginning of their investigation. The continuous reporting of the facts as regards the process of the investigation had been made in accordance with the provisions of the Code of Criminal Procedure Act No.15 of 1979, and this court observes that the Prevention of Terrorism Act No 48 of 1979 had been applied only in the arrest and detention of the 1st to 5th Accused-Appellants. It is quite apparent that by the time these Accused-Appellants came to be arrested, upon the material collected in the course of the investigation, a reasonable doubt had been created in the mind of the investigators of the probable involvement of the perpetrators relating to offences under Sections 2(1)(h) and 3(a)(b) of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979.

When this court observes the details of the periods of detention of the Accused-Appellants, the accompanying details merit reference in respect of each Accused Appellant. The following table would help the court in its investigation as to whether the investigators abused the process of law by having the 1st to 5th Accused-Appellants on detention orders.

Appellant	Statute	Date of Arrest	Validity of the DO	Produced in MC and Remanded	Total Period on DO
1A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	10/06/13	For 72 hours with effect from 10/06/13	13/06/13	03 days
2A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	05/06/13	72 hours at first [sec 6(1), 7(1)]. DO* from 07/06/13 to 02/09/13	17/07/13	1 month and 12 days
3A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	05/06/13	72 hours at first [sec 6(1), 7(1)]. DO from 07/06/13 to 02/09/13	17/07/13	1 month and 12 days
4A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	05/06/13	72 hours at first [sec 6(1), 7(1)]. DO from 07/06/13 to 02/09/13.	17/07/13	1 month and 12 days
5A	Prevention of Terrorism (Temporary Provisions) Act No. 48 of 1979	06/06/13	72 hours at first [sec 6(1), 7(1)]. DO from 07/06/13 to 03/09/13.	17/07/13	1 month and 11 days
6A	Code of Criminal Procedure Act No.15 of 1979	09/08/13	——————--	09/08/13	none

* DO = Detention Order

The tabular data above has clearly established that proper procedure had been followed as mandated by statutory provisions of the Prevention of Terrorism (Temporary Provisions) Act No. 15 of 1979, and there had been material for setting in motion these provisions in order to aid the investigation. A notable feature of this investigation is that as soon as the investigators formed the opinion that their investigation had reached a state where the 1st to 5th Accused-Appellants could be committed to judicial custody, the investigators had produced the 1st to 5th Accused-Appellants before court and they were placed in fiscal custody. In the likes of the above, this court does not find any illegality or procedural irregularity in the investigations that have been conducted by the investigators with a view to bringing the Accused's crimes to be resolved in a court of law.

The question arises whether the counsel for the Accused-Appellants can continue to mount the argument that the interposition of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 at one stage of the investigations taints the whole procedure leading up to the information/indictment that had been preferred against the Accused-Appellants. Section 5 of the Code of Criminal Procedure Act No.15 of 1979, which applies to trial of offences under the Penal Code and other laws states as follows:

> *Section 5. All offences-*
>
> *(a) under the Penal Code,*
>
> *(b) under any other law unless otherwise specially provided for in that law or any other law.*

This provision applies to offences not only under the Penal Code, but any other law, and the section mandates all these offences, both statutory and under the penal code must be investigated, inquired into, tried and otherwise dealt with according to the provisions of the Code of Criminal Procedure Act No. 15 of 1979. In other words,

even a statutory offence, other than offences under the Penal Code have to be investigated, inquired into, tried and otherwise dealt with unless specifically provides for any other procedure. In fact, the case of *T.N. Fernando, Assistant Commissioner of Excise v. Nelum Gamage, Bribery Commissioner and another* (1994) 3 Sri.L.R 190 specifically adverted to Section 5 of the Code of Criminal Procedure Act and declared that even an offence under the Bribery Act can be investigated in terms of the Code of Criminal Procedure Act No.15 of 1979. In the instant case, much was made of the arrest and detention of the 1st to 5th Accused-Appellants under the provisions of the Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979. It needs to be noted that the investigators have always had recourse to the provisions of the Code of Criminal Procedure Act No.15 of 1979 even in regard to these Accused-Appellants.

The Prevention of Terrorism (Temporary Provisions) Act No.48 of 1979 does not have provisions to cater to the recording of first information, summoning of witnesses, periodical reporting of facts to court and securing the assistance of the Magistrate to aid the investigators in the investigatory process. These lacunae are conveniently supplemented by recourse to the provisions of the Code of Criminal Procedure Act No.15 of 1979, and Section 5 can be said to authorise such a cause of action rather than negate it. If the investigators in this case have properly followed the statutory mechanisms that are in place as fortified by previous precedents, it defies logic and reasoning to concur with the contention advanced by counsel for the Accused-Appellants that such a procedure taints the investigatory mechanism that has been adopted in the case. This court is of the view that no illegality or irregularity taints the investigation and thus, no abuse of process has been occasioned.

This court is of the view that based on the above reason, the inherent weaknesses that were observed by Ranasinghe J (as he then was) in *R.P Wijesiri v. Attorney General* (1980) 2 Sri.L.R 317 do not infect this case in any way, and the facts in the

instant case are clearly distinguishable from those of *R.P. Wijesiri v. Attorney General*, and two incomparables cannot be compared to bolster an argument of an illegality that does not exist in this case for the reasons set out above.

In the course of the aforementioned argument an application was made for bail pending trial, presumably on the basis of the alleged infirmities leading to the indictment. This court cannot ignore that this case has provoked a public outcry which had the impact of attracting the provisions that led to a Trial at Bar. It is therefore the view of this court that an expeditious conclusion of this matter would meet the ends of justice from the point of both the accused and those who have been aggrieved by this alleged crime. This court has already held that the indictment has been validly presented. We therefore think it apposite that the application for bail be rejected.

In the circumstances, the indictment that has been forwarded against the Accused-Appellants stands devoid of any illegality or vices and this court sees no compelling reason to grant the relief sought by the Accused-Appellants. We also bear in mind that all the Accused-Appellants have pleaded to the charges and thereby submitted to the jurisdiction of the court. We are mindful of Section 39 of the Judicature Act No. 2 of 1978, which estops an accused party who pleads in any action from objecting to the jurisdiction of such court. Before this court parts with this judgment, the court wishes to advert to the distilled wisdom we glean from Lord Diplock in the celebrated case of *Reg. v. Sang* [1980] A.C. 402, 437:

> "*the fairness of a trial . . . is not all one-sided; it requires that those who are undoubtedly guilty should be convicted as well as that those about whose guilt there is any reasonable doubt should be acquitted.*"

For the reasons set out above we see no reason to fault the reasoning adopted by the Judges of the Trial at Bar in their order dates 25/08/2014 and we affirm the order accordingly. We also direct the Learned Judges of the High Court at Bar to have the trial taken up without delay, and proceeded with **day to day** until its conclusion. We further direct that the Trial at Bar shall not be adjourned on account of any interlocutory appeals or applications made hereinafter by the Accused in the course of the trial, unless otherwise directed by this Court.

Subject to the aforementioned this appeal is dismissed.

CHIEF JUSTICE

S.E. WANASUNDERA, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

B.P. ALUWIHARE, PC, J.

I agree.

JUDGE OF THE SUPREME COURT

SISIRA J. DE ABREW, J.

I agree.

JUDGE OF THE SUPREME COURT

SARATH DE ABREW, 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 Section 451(3) of the Code of Criminal Procedure Act No.15 of 1979 as amended by Act No.21/1988

S.C. TAB Appeal No. 02/2012

H.C. Colombo [TAB]

No.5247/2010

1. W.M.M. Kumarihami,
   Chief Registrar,
   High Court, Colombo 12.

Complainant

Vs.

1. Galagamage Indrawansa Kumarasiri,
2. Thumbedura Vitty Newton,
3. Jayaratnage Dhammika Nihal Jayaratne,
4. Godapitiyawatte Arachchilage Janapriya Senaratne,

Accused

And now between

1. Galagamage Indrawansa Kumarasiri,
2. Thumbedura Vitty Newton,
3. Jayaratnage Dhammika Nihal Jayaratne,
4. Godapitiyawatte Arachchilage Janapriya Senaratne,

Accused-Appellants

Vs.

1. W.M.M.Kumarihamy,
   Chief Registrar, Colombo.
2. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

Before: Tilakawardane, J.
Ekanayake J.
Sathyaa Hettige, PC, J.
Priyasath Dep, PC, J.
Wanasundera, PC, J.

Counsel: Anil Silva PC, with Lasith Muhandiramge and
Manoj Nanayakkara for the 1st Accused-Appellant.

Saliya Pieris with Upul Kumarapperuma, Suranga
Munasinghe, Thanuka Nandasiri and Silyna Pieris
for the 2nd Accused Appellant.

D.P.Kumarasinghe PC, with M.A. Kumarasinghe, and
Vajira Ranasinghe for the 3rd Accused Appellant.

Amila Palliyage with Eranda Sinharage
for the 4th Accused Appellant.

Jayantha Jayasuriya PC, ASG, with
Chaminda Atukorale SC, for the Attorney General.

Written submissions-

Filed on: 20.09.2013 by 1st Accused-Appellant
20.09.2013 by 2nd Accused-Appellant
18.09.2013 by 3rd Accused-Appellant
11.09.2013 by 4th Accused-Appellant
18.09.2013 by the Respondent

Argued on: 05.08.2013, 06.08.2013, 07.08.2013

Decided on: 02.04.2014

SHIRANEE TILAKAWARDANE, J

This is a direct Appeal from the decision of the Trial-at-Bar dated 25.08.2011 whereby the Learned Judges found the 1st, 2nd, 3rd and 4th Accused-Appellants guilty on the following counts:

Count (1): did conspire to abduct Muthuthanthri Bastiange Dinesh Tharanga Fernando in order that such person maybe murdered or put in danger of being murdered and as a result of the said conspiracy you did commit the offence of abduction punishable under **Section 355** read with **Section 113(a)** and **102** of the *Penal Code*.

Count (2): did conspire to abduct Goniamalimage Dhanushka Udayakantha Aponso in order that such person maybe murdered or put in danger of being murdered and as a result of the said conspiracy you did commit the offence of abduction punishable under **Section 355** read with **Section 113(a)** and **102** of the *Penal Code*.

Count (3): did conspire to murder Muthuthanthri Bastiange Dinesh Tharanga Fernando and as a result of the said conspiracy you did commit the offence of murder punishable under **Section 296** read with Section **113(a)** and **102** of the *Penal Code*.

Count (4): did conspire to murder Goniamalimage Dhanushka Udayakantha Aponso and as a result of the said conspiracy committed the offence of murder punishable under **Section 296** read with Section **113(a)** and **102** of the *Penal Code.*

Count (5): did abduct Muthuthanthri Bastiange Dinesh Tharanga Fernando in order that such person maybe murdered or put in danger of being murdered and thereby committed an offence punishable under **Section 355** read with **Section 32** of the *Penal Code*.

Count (6): did abduct Goniamalimage Dhanushka Udayakantha Aponso in order that such person maybe murdered or put in danger of being murdered and thereby committed an offence punishable under **Section 355** read with **Section 32** of the *Penal Code*.

Count (7): at the given time, place and transaction, behaved in order that Goniamalimage Dhanushka Udayakantha Aponso maybe murdered and thereby committed an offence punishable under **Section 296** read with **Section 32** of the *Penal Code.*

Count (8): at the given time, place and transaction, behaved in order that Muthuthanthri Bastiange Dinesh Tharanga Fernando maybe murdered and thereby committed an offence punishable under **Section 296** read with **Section 32** of the *Penal Code.*

The 4 Accused, namely, G. Indrawanasa Kumarasiri [Police Constable], the 1st Accused-Appellant, T. Vitty Newton [Officer in Charge, Angulana Police Station], the 2nd Accused-Appellant, J. Dhammika Nihal Jayaratne [Police Constable], 3rd Accused-Appellant, G. W. A. Janapriya Senaratne [Home Guard], 4th Accused-Appellant each raised questions of law, both jointly and separately, which are dealt by this Court.

The questions of law raised by the Counsel for the 1st Accused-Appellant (hereinafter referred to as the 1st Accused) are as follows:

I. Were the necessary matters not considered in the conviction of the Accused on the charges based on Conspiracy and Common Intention?;

II. Was 1st Accused was deprived of a fair trial [due to the following]?

a. Matters favourable to the 1st Accused had been glossed over by the Learned Judges of the Trial-at-Bar;

b. The Trial-at-Bar had come to the conclusion that the offences have been proved based on material that was not placed before Court;

c. The Trial Judges failed to appreciate what the defence of the 1st Accused was;

d. The defence of the 1st Accused was rejected on tenuous and unsubstantiated grounds;

e. The Accused had been prejudiced at trial because PC Kulasinghe was not called as a witness by Court.

III. The unsworn dock statement of a co-accused was impermissibly allowed as evidence against another accused.

The Counsel for the 1st Accused also averred the defence available under **Section 69** of the *Penal Code* and the defence of duress on account of the *'overpowering nature'* of the 2nd Accused-Appellant.

The questions of law raised by the Counsel for the 2nd Accused-Appellant [hereinafter referred to as the 2nd Accused] are as follows:

I. Was the entire trial vitiated upon the Accused being tried based on the indictment signed by the Registrar of the High Court?;

II. Was the procedure adopted by the CID in respect of naming the key Prosecution Witnesses unfair, unreliable and contrary to Law?;

III. Was the evidence of the Prosecution Witnesses No. 02, 01 and 03, namely, Dissanayake, Thotawatte and Navaratne, unreliable and contradictory, and thus, should have been regarded with caution and rejected;

IV. Does the evidence led by the Prosecution and the Defence lead to the sole inference of the guilt of the 2nd Accused?;

V. In the light of the Dock Statements of the 1st and the 2nd Accused, does not a reasonable doubt arise in respect of the guilt of the 2nd Accused?;

VI. Were investigations which led to the discovery of the spent cartridge and the weapon marked “P 4” tainted which should accrue to the benefit of the 2nd Accused?;

VII. Did the Learned Judges of the Trial-at-Bar fail to take into consideration the fact that the 2nd Accused did not entertain a common murderous intention in respect of the charges regarding murder?;

The questions of law raised by the Counsel for the 3rd Accused-Appellant [hereinafter referred to as the 3rd Accused] is as follows:

I. Did the Learned Judges of the Trial-at-Bar fail to consider whether the weapon carried by 3rd Accused was used in the commission of the murder?;

II. Did the Learned Judges of the Trial-at-Bar fail to critically consider the discovery of the spent cartridge and the circumstances surrounding the recovery of the weapon?;

III. Was the reliance on Ellenborough dictum fair and lawful with the statutory right to silence available to the Accused?;

IV. Has the 3rd Accused been prejudiced because the Court did not call Kulasinghe as a Witness?;

V. Did the Learned Judges of the Trial-at-Bar fail to comprehensively evaluate the law relating to Conspiracy and Common Intention?;

VI. Did the Learned Judges of the Trial-at-Bar fail to consider the contradiction between the evidence of Witness Susantha Jayalath and other Witnesses as to whether the 3rd Accused accompanied the other Accused?;

VII. Did the Learned Judges of the Trial-at-Bar fail to adequately consider the question of intoxication of the 3rd Accused-Appellant?;

VIII. Did the Learned Judges of the Trial-at-Bar fail to consider whether witnesses are accomplices?

The Counsel for the 3rd Accused also averred the defence available under **Section 69** of the *Penal Code*.

The questions of law raised by the Counsel for the 4th Accused-Appellant [hereinafter referred to as the 4th Accused] are as follows:

I. Were the items of circumstantial evidence sufficient to prove the case of the Prosecution against the 4th Accused beyond reasonable doubt?;

II. Was the conviction for the charge of murder under common murderous intention invalid in law as there was no participatory presence of the 4th Accused to the crime?;

III. Did the Learned Judges of the Trial-at-Bar fail to consider the Plea of Justification in favour of the 4th Appellant?;

IV. Did the Learned Judges of the Trial-at-Bar err in law by failing to consider the evidence in favour of the 4th Accused, and instead considering evidence not borne from the Witnesses to convict the 4th Accused for the charge of Murder;

V. Did the Learned Judges of the Trial-at-Bar fail to apply the principles governing the evaluation of a dock statement correctly and legally and, therefore, erroneously reject the Dock Statement?;

VI. Was the Allocutus part of evidence which would strengthen the Plea of Justification and can the Allocutus of an Accused be compared with that of another Accused?

The narrative as unfolded primarily by the Police Officers attached to the Angulana Police Station, namely, Prosecution Witness 01 Thotawatte Gayan Chaturanga Thotawatte (hereinafter referred to as Thotawatte), Prosecution Witness 02 Dissanayake Mudiyanselage Nishanka Dissanayake (hereinafter referred to as

Dissanayake), Prosecution Witness 03 Navaratne Mudiyanselage Roshan Bandara Navaratne (hereinafter referred to as Navaratne) and Prosecution Witness 05 Walpola Gamage Susantha Jayalath (hereinafter referred to as Susantha Jayalath) is set forth as follows:

At the time of the alleged violations, the 2nd Accused was the Officer in Charge of the Angulana Police Station, the 1st Accused and 3rd Accused were Police Constables attached to the said Station and the 4th Accused was a Home Guard serving at the Station.

On the night of 12.08.2009, a party took place at the house of the brother-in-law of Police Constable Kulasinghe, in the vicinity of the Angulana Police Station. This gathering was attended by the 1st, 2nd, 3rd and 4th Accused as well as the aforementioned Police Constable Kulasinghe. Between 11.00-11.30pm, several individuals - a young lady, an elderly man and a woman - arrived at the Police Station in a state of agitation with the view of lodging a complaint regarding two persons alleging to be army officers. These two individuals had entered their house which was located at a nearby tsunami camp, while the lady was asleep with her small child, and allegedly pulled the lady's hand, asked for a box of matches and had wanted to search the house. The lady had then immediately rushed to the Angulana Police Station and complained about this purported harassment to Thotawatte, who was the Reserve Police Officer at the Angulana Police Station at the time. Thotawatte, in turn, had instructed Susantha Jayalath (a Home Guard attached to the Angulana Police Station) to inform the 2nd Accused of this complaint and, consequently, this message was conveyed to the 2nd Accused.

A short while later, acting on the directions of the 2nd Accused, the 1st Accused had come to the Police Station and questioned the complainant in order to ascertain what had transpired. He then made his way back to the party and informed the 2nd Accused of his findings subsequent to which the 1st, 3rd and 4th Accused as well as PC Kulasinghe came back to the Police Station and, together with Susantha Jayalath and

one of the complainants, went in search of the suspects. They went to the house of the complainants and as they could not locate the suspects, returned to the Station. Whilst the 1st, 3rd and 4th Accused and the others were away, the aforementioned lady identified two people who were going past the Police Station as those who harassed her. The two individuals were immediately arrested and taken into police custody by Thotawatte.

Whilst being lead into a cell, Susantha Jayalath mentioned that the two youth were known to him and upon hearing this; the 1st Accused had chased him away. The 1st Accused also assaulted the detainees during this time. Having heard this disturbance, Gunamunige Jayawickrama [Prosecution Witness 15], a Police Sergeant, instructed Thotawatte to record the statement of the complainant and take the two youth to the 2nd Accused. He then retired to bed. The 2nd Accused returned and requested that the complainant be brought to him, which interrupted the process of recording the statement, and as she left immediately after meeting the 2nd Accused, Thotawatte was not in a position to complete the recording of the complaint. Subsequently, the 1st Accused escorted the detainees to the office of the 2nd Accused where they were assaulted by the 2nd Accused with a belt and a rubber tube. During this time, a villager who came to the gate of the Station, through whom Susantha Jayalath wished to convey a message to the father of one of the detainees, was chased away by the 1st Accused as well.

Later, the 2nd Accused requested Thotawatte to inform Navaratne to be ready with the vehicle. The 2nd Accused had further asked the witness to hand over two T56 weapons to the 3rd and 4th Accused and subsequently asked the 1st Accused to relieve the 4th Accused of his weapon and for him to take it instead. None of the three Accused', namely, the 1st, 3rd and the 4th, made entries when they took charge of two T56 guns, thereby contravening the normal established procedure.

The detainees were then handcuffed, their heads were covered in 'shopping bags'

and taken away in the vehicle driven by Navaratne. All four Accused together with PC 35437 Kulasinghe (hereinafter referred to as Kulasinghe), Dissanayake and the two youth travelled in the rear compartment of the vehicle. The 2nd Accused got into the front passenger seat and asked Navaratne to proceed towards Lunawa.

The 2nd Accused had ordered Navaratne to stop the vehicle just after passing the Lunawa Bridge. There, the 1st, 3rd and 4th Accused got off from the vehicle along with the 2nd Accused and at this time, the 1st and 3rd Accused' were armed. One of the two youth, later identified as Danushka Udayakantha Aponso, was also taken out of the vehicle at this stage. The party headed towards the Lunawa Bridge and shortly after, Dissanayake heard a gunshot and he also confirms that after the shooting the 2nd Accused shouted "Kumara [the 1st Accused] remove those handcuffs". Subsequently, all four Accused returned to the vehicle without the youth.

The 2nd Accused got into the front seat of the vehicle and thereafter ordered Navaratne to drive towards Ratmalana. Navaratne stopped the vehicle at a barrier that blocked the road and the 2nd Accused tapped on the glass separating the front compartment with the rear compartment. Then the 3rd and 4th Accused went towards the barrier and it is alleged that at this point the 3rd Accused was armed. The 3rd and 4th Accused removed the barrier and thereafter the witness drove the vehicle towards Ratmalana.

The vehicle was driven past Angulana Police station and parked, on the instructions of the 2nd Accused, near a co-operative store close to a streetlight. At this point, the 2nd Accused alighted from the vehicle and asked the 1st Accused to follow suit.

At this stage, Navaratne had seen the 1st, 2nd, 3rd and 4th Accused proceeding towards the beach with an unknown person who was handcuffed and whose face was covered with a "shopping bag". This unknown person was later identified as Dinesh Tharanga Fernando. The 3rd Accused was carrying a firearm. Navaratne alighted from the

vehicle and proceeded towards the rear of the vehicle where he found Dissanayake and Kulasinghe from whom he inquired what the others were doing. Two gunshots were heard from the direction of the beach. 10 to 12 minutes later the 1st, 2nd, 3rd and 4th Accused returned without the unknown person who was taken towards the beach. The 2nd Accused then asked Navaratne to proceed towards Mt. Lavinia and stopped at the house of one 'Bathala Chaminda'. Acting on the instructions of the 2nd Accused, the 1st, 3rd and 4th Accused, as well as Kulasinghe and Dissanayake, went in search of this individual and returned without him, stating that he was not at home, though he actually was there, a fact they deliberately concealed as they feared that he too would be harmed. The party then returned to the Station. At the Station, the 3rd and 4th Accused returned the two T56 weapons to the Reserve and, contrary to normal due procedure, no entries were made by either at even this stage.

Furthermore, according to the testimony of Navaratne, the 2nd Accused had specifically instructed that no entries were to be made regarding the events that had transpired that night.

It is the submissions of the Prosecution that, when the crowds attacked the Police Station the following morning and relatives of the two deceased detainees were making inquiries about them, the 2nd Accused denied knowledge of any arrests. Further, the 2nd Accused, having noticed that a part of the complaint of the previous night had been recorded by Thotawatte, asked the witness why he had done so when he had instructed him not to record it and asked him to alter the Information Book [hereinafter referred to as the IB]. Prosecution Witness 17 Kariyawasam Hewamanaghe Kasun Buddhika (hereinafter referred to as Kasun Buddhika) was then threatened by the 2nd Accused and asked to alter the IB which he did so, under coercion, by making entries on a fresh page which had been introduced to the book after removing the original page. The particular IB which was altered was produced as P12 and the IB from which the blank sheet was taken to replace the torn page was produced as P19.

After the attack on the Police Station on 13.08.2009, the Senior Superintendent of Police and Senior Superintendent of the Mt. Lavinia Police Station made arrangements to replace all officers attached to the Angulana Police Station. They were taken to Mt. Lavinia Police Station and IP Dias, who was attached to the Mt. Lavinia Police, was detailed to conduct an investigation. At the Mt. Lavinia Police Station, steps had been taken to record statements of several officers including that of Thotawatte, Dissanayake and Navaratne. Furthermore, the Mt Lavinia Police had taken over some of the IBs that were maintained at Angulana Police Station and on 14.08.2009 arrangements were made to take over the weapons from Station.

On 16.08.2009, the Criminal Investigations Department [hereinafter referred to as the CID] was ordered by the Inspector General to take over this investigation. Accordingly, a team of officers met with the Superintendent of Police at the Mt. Lavinia and arrived at the Angulana Police Station in the evening of 16.08.2009 and commenced investigations. The CID took charge of all the IBs and weapons taken over by the Mt. Lavinia Police by that time and proceeded to take charge of an IB that was at the Angulana Police Station as well. They continued with the investigation till the early morning of 17.09 2009 and during this period, steps were taken to record statements from several persons including the Home Guard Susantha Jayalath, who was on duty at the gate of Angulana Police Station on the night of 12.08.2009. The CID also examined all the material that was taken over including the Weapons Issuing Register, through which a discrepancy between the number of guns that was issued to the Angulana Police Station and the number of guns taken into the custody of the Mt. Lavinia Police was noted. On 17.08.2009, the CID recovered the 'missing gun' bearing serial number 1555658 from the strong box of the Angulana Police Station which was produced as P14. This gun, along with the other productions, was handed over to the Government Analyst, Mr. Sarath Gunatilake, on 28.09.2009.

It is the submission of the Prosecution that the investigators attached to the Mt.

Lavinia Division, who were conducting the investigation until the CID took over on 16.08.2009, failed to realise the discrepancy between the actual number of guns that had been in the custody of the Angulana Police Station on 12.08 2009 and the number of guns that were taken over from the Angulana Police Station on 14.08.2009 by PS 26792 Wijesinghe Appuhamy thereby ignoring one of the most important items of evidence.

On 18.08.2009, a statement from Thotawatte was recorded. On 19.08.2009, the statements of the 3rd and 4th Accused and Dissanayake were recorded. The tampering of the IB was discovered on 20.08.2009 while a spent cartridge was recovered at the crime scene in Ratmalana in a 'finger tip search' on 21.08.2009 which, as later confirmed by Government Analyst Mr. Sarath Gunatilake, was fired from the T56 rifle and which was produced as P36B. On 22.08.2009, the IB from which a page was removed [and later entered into the IB that was tampered with], was recovered from the barracks of the Angulana Police Station.

The first issue that merits the consideration of this Court is the argument that the Indictment was signed by the Registrar of the High Court and not the Attorney General. The Counsel argued that this procedural irregularity should vitiate the trial.

In this regard, the Court notes that the Attorney General, by his letter dated 24.05.2009 addressed to the Registrar of the High Court of Colombo, exhibited information against all four Accused under **Section 450(4)** of the *Code of Criminal Procedure Act No. 15 of 1979 as amended by Act No. 21 of 1988* (hereinafter referred to as the *Code of Criminal Procedure*) and His Lordship Justice Asoka De Silva, the Chief Justice at the time, by Order dated 15.06.2010 appointed three Judges of the High Court to try the Accused for offences set out in the Information previously exhibited. The trial was set for 19.08.2010.

Section 450(3) of the *Code of Criminal Procedure* indicates the procedure whereby a

trial before the High Court is to proceed:

> *"A trial before the High Court under this section maybe held either upon indictment or upon information exhibited by the Attorney General."*

It was submitted by the Counsel for the 2nd Accused on 19.08.2010, that the Indictment was signed by the Registrar of the High Court when it should have been signed by the Attorney General, and that this procedural irregularity is a ground for vitiating the entire trial. The Preliminary Objection raised by the Counsel before the High Court was dismissed by the Learned Judges of the Trial-at-Bar on the basis that the Registrar signed the Indictment upon the direction given by the Court in terms of **Section 450(5)(a)** of the *Code of Criminal Procedure*:

> *"A trial before the High Court at Bar under this section shall be held as speedily as possible and shall proceed as nearly as possible in the manner provided for trials before the High Court without a jury* ***subject to such modifications as maybe ordered by the Court*** *or as maybe prescribed by rules made under this section."* (Emphasis added).

In his submissions to this Court, the Defence Counsel relied upon the decision in **Abdul Sammen v. The Bribery Commissioner (1991)** *(1 SLR 76)* to support this argument, where it was stated that

> *"The failure to frame a charge under Section 182 (1) is a violation of a fundamental principle and is not a defect curable under Section 436 of the Code of Criminal Procedure Act No. 15 of 1979".*

It has been observed by this Court that this case refers explicitly to **Section 182(1)** which is a direction to the Magistrate's Court and thus, inapplicable to the judges of the High Court specifically.

This Court makes further reference to **Section 450 (4)** of the *Criminal Procedure Code* which states as follows:

> *"Notwithstanding anything to the contrary in this Code or any other law, the Attorney General may exhibit to the High Court information in respect of any offence to be tried before the High Court at Bar by three Judges without a jury."*

In accordance with this special provision, the Attorney General by a letter dated 24.05.2010 addressed to the Registrar of the High Court, exhibited information marked 'R2' in evidence against all four Accused' under **Section 450(4)** of the *Code of Criminal Procedure*. This Court notes that the Counsel have not disputed the information so exhibited by the Attorney General and that the Counsel have been served copies of the Information so exhibited prior to the commencement of the trial on 13.08.2010. The submissions of the Counsel in this regard, is limited to the fact that proceedings upon an exhibit before the Court are extremely rare, but the Court feels that this is insufficient to vitiate the conviction. Given that the **Section 450 (4)** has been adhered to, this Court affirms that the procedure adopted as lawful and that the Section recognises an alternative procedure to that of tendering the Indictment to a single Judge of the High Court. Therefore, it is not a ground upon which the conviction should be vitiated and the Learned Judges of the Trial-at-Bar were correct to overrule the objection.

Prior to considering the issues raised by the Counsel for the Accused' with regards to the Judgment of the Learned Judges of the Trial-at-Bar, it is important to establish and verify the credibility of the witnesses as well as the investigation process which was conducted by the Mt. Lavinia Police and the Criminal Investigations Department.

It has been brought to the attention of this Court by the Defence that the events that took place on the night of 12.08.2009 and the early hours of 13.08.2009, are in

dispute. From a review of the documentation before us, the version of events that took place on the days in question, as told by each of the Accused' as well as several witnesses, need to be considered to ascertain whether the evidence given by the witnesses are contrary to one another, in order to evaluate the credibility of the Witnesses.

Thus, the Court feels it imperative to recount and reconsider the evidence and material facts that have been established during the trial and then consider whether the facts are in dispute.

In considering the facts that have been established, it has been accepted that Navaratne drove the vehicle; the 2nd Accused occupied the front passenger seat whilst the 1st, 3rd and 4th Accused along with Kulasinghe, Dissanayake and the two deceased were seated in the rear compartment of the vehicle. It has been established by the evidence before us that there was a partition separating the driver and the 2nd Accused from the rest of the passengers. Therefore, communication between the two compartments occurred by way of tapping on the partition. It has been further noted that the passengers seated at the rear compartment of the vehicle were consistently unaware of their exact geographic location.

It has also been established and accepted in the evidence that the two deceased were taken to the vehicle from the Police Station while being handcuffed and with plastic bags placed on their heads in a manner covering their faces. It has been observed that at the first crime scene, the 1st, 2nd, 3rd and 4th Accused alighted from the vehicle and the shooting of the 1st detainee took place close to the Lunawa Bridge. Subsequently, they returned to the vehicle and went to the Ratmalana beach where the 1st, 2nd, 3rd and 4th Accused took the second detainee to the beach and shot him.

Several of these facts have been called into question by the Accused on the basis that

the Prosecution Witness statements do contain number of discrepancies.

The first of such inconsistencies is alleged by the Counsel for the 2nd and 3rd Accused who adverts to the fact that the Witnesses failed to implicate the 4 Accused' when they first made statements to the Mt. Lavinia Police on 13.08.2009.

In this regard, Thotawatte maintains that, out of fear and, being a subordinate officer, he had falsely stated that neither the jeep nor the weapons left the Station on 12.08.2009 when Assistant Superintendent of Police (A.S.P) Gunawardana questioned him. Dissanayake asserts that he gave his statement at the Mt. Lavinia Police to IP Dias denying knowledge of the incident while Navaratne too had similarly maintained that he did not know of the incident.

However, all three Prosecution Witnesses assert that their initial statements to the Mt. Lavinia Police were false and that the statements subsequently made to the CID, implicating the Accused', were accurate. The Defence asserted that the statements made by the Prosecution Witnesses were inconsistent and hence inadmissible and that the subsequent statements made were incompatible with their original statements. In this regard, the Prosecution has pointed out that the ground reality at the time of taking the initial statement was such that the Witnesses were compelled by the 2nd Accused to make statements denying knowledge of the incident. The 2nd Accused, who in the chain of command was their superior officer, had ordered them specifically to deny knowledge of the incident and the Witnesses were simply afraid to say otherwise. For instance, Navaratne states that just before they were being taken in to obtain their statements, he had observed the 2nd Accused and Inspector of Police (I.P) Dias in conversation, and was afraid that divulging the truth at this point would bring them harm. They also stated that as the 2nd Accused was on good terms with the senior officers in the Division, they feared that they might be framed for the offences. Furthermore, Navaratne asserts that he disclosed the truth to Officer Shani Abeysekara who was conducting the investigations for the CID as he felt that the CID

Officers had visibly acted independently and they were genuinely seeking the truth.

Considering the evidence that has been presented before us, I feel that the explanation given by the Witnesses is plausible especially as it has been established that the Mt. Lavinia Police was given complete control of the Angulana Police, and that they had commenced the recording of statements the following morning itself. As such, there was insufficient time in the interim to provide the witnesses with the opportunity to present their evidence in a *secure* atmosphere. It seems that, either deliberately or ineptly, they had not, especially knowing the seriousness of the charges against the officers, handled the investigation independently, impartially nor competently.

The second allegation with regard to inconsistent evidence is made by the Counsel for the 2nd Accused. It was argued that there was a contradiction between the evidence given by Dissanayake and Navaratne in terms of the exact time of the shooting at the 1st crime scene. It was submitted that Navaratne, during Examination-In-Chief, admitted that he heard a gunshot from behind the vehicle shortly after the 2nd Accused alighted from the vehicle, whereas Dissanayake states that a gunshot was heard, roughly five minutes after those at the rear end of the vehicle got down. In this regard, it is noteworthy that, according to the evidence of IP Methias Silva, the body was found only 7-8 feet away from the road which indicates that the 2nd Accused could've reached the place where the victim was shot within in a very short period of time whereas the 1st, 3rd and 4th Accused and the victim could've alighted from the vehicle prior to the 2nd Accused getting down. This would comprehensively explain the difference in evidence and corroborate each other's testimonies. Thus, this Court does not find a serious contradiction in the Witness testimonies which assails the testimonial creditworthiness of the witnesses.

The third submission regarding the contradictions in the evidence pertains to the Affidavit attached to the answer for the Fundamental Rights Application bearing

number S.C.F.R. 687/09 instituted by the parents of the deceased. It was submitted that there were discrepancies between this Affidavit and the statements of the Witnesses. The Prosecution urged that that the Affidavits were signed on 06.02.2010 and were both in English. They maintain that the witnesses lacked sufficient knowledge of the language and were therefore, unable to comprehend the statement that they signed. The Witnesses also in their testimony stated that they had merely signed the Affidavits upon instructions by their lawyers and had not been given the opportunity to read it through thoroughly and understand it.

In order to support their argument, the Defence called upon the Commissioner of Oaths, Mr. Kamal Colambage, before whom the Affidavits were signed. He affirmed that the Affidavits were prepared by the Attorney-at-Law, namely Mr. Sudath Karavita, who was retained by the witnesses' families. He also maintained that he read over the Affidavits and explained the contents of it to the Witnesses. However, this Court is inclined to agree with the Prosecution, which raised the question as to why Dissanayake, who clearly was not the driver of the vehicle, would sign the Affidavit agreeing that he was the driver. It should also be noted that the Attorney- at- Law abovementioned should have been called as a Witness in order to establish the lack of credibility of the Prosecution Witnesses. The Defence opted not to do so.

Three final points were argued by the Defence with regard to the Witnesses. Firstly, the Counsel for the 2nd Accused alleged that the CID engaged in what he referred to as "*witness shopping*" by isolating the witnesses with the most consistent stories to enable a definite conviction of the Accused. The Counsel for the 1st Accused also echoed similar sentiments as he opined that the Prosecution made a concerted effort to bolster up the case against the 1st Accused. The Counsel for the 3rd Accused also asserted that the witnesses procured by the Prosecution could potentially be accomplices to the offences committed and that the CID, in its dire need for witnesses, may have overlooked this fact. This allegation was made with regards to Thotawatte who was the officer responsible for the arrest of the two deceased youth

as well as for the issuance of the firearms that were utilized in the murder. The Counsel for the 2nd Accused further noted that the most appropriate action would have been to obtain evidence from these witnesses subsequent to pardons granted by the Attorney General in accordance with the judgment of the Supreme Court in **Ajith Fernando alia Konda Ajith and Others v. The Attorney General (2004)** *(1 SLR 288)*.

However, this Court notes that this very same judgment states that such a pardon should be given if the Attorney General is:-

> *'satisfied that the accused has in fact committed the crime charged in conjunction with others, or that he has some active part towards its commission; in other words he should be satisfied that the accused is really an accomplice. A mere suspicion that he may have committed the offence is insufficient.'*

The Prosecution has indicated that Thotawatte was interviewed by the CID on 18.08.2009 and made a statement to the Magistrate on 11.10.2009 while Navaratne was interviewed by the CID on 18.08.2009 and Dissanayake on 19.08.2009 and thereafter, both witnesses made statements to the Magistrate on 18.02.2010. The Prosecution asserts that upon perusal of these documents, it was clear that there was insufficient cause to establish that the witnesses acted in complicity in order to garner a pardon. The Prosecution is well within their rights to analyse the evidence available and arrive at this conclusion, provided the evidence does not indicate that the witness (es) played an active role in the commission of the offence. As indicated above, a mere suspicion that he did so is insufficient to garner a pardon. Thus, having carefully examined the material before this Court, we are of the opinion that the allegation of *'witness shopping'* is unfounded and that the Prosecution has adhered to the established legal procedure.

Secondly, the Defence asserted that the trial is unfair due to procedural failures as well as the failure of the trial judges to fulfill their investigatory role. Three of the four Accused alleged that the trial judges were negligent by not calling PC Kulasinghe, the only passenger in the vehicle who was not involved in the trial either in the capacity of a witness or as an Accused. The Defence purported that the Trial Judges had an investigatory role to fulfill and therefore had a duty upon them to call Kulasinghe to give evidence. The Defence further invited the Court to draw an adverse inference due to the failure of the Prosecution to call PC Kulasinghe.

In this regard, the decision given by G. P. A. Silva, S. P. J in **Walimunige John and Another v. The State [1973]** *[76 NLR 488]* is important as it clearly outlines when the Prosecution must call a witness:

> *"The question of a presumption arises only where a witness whose evidence is necessary to unfold the narrative is withheld by the Prosecution and the failure to call such witness constitutes a vital missing link in the Prosecution case and where the reasonable inference to be drawn from the omission to call the witness is that he would, if called, not have supported the Prosecution. But where one witness's evidence is cumulative of the other and would be a mere repetition of the narrative, it would be wrong to direct a jury that the failure to call such witness gives rise to a presumption under section 114 (f) of the Evidence Ordinance."*

Keeping this in mind, it must be noted that both Dissanayake and Kulasinghe were sitting in the rear compartment of the vehicle when it stopped at the first and second crime scenes. Dissanayake, as the second Prosecution Witness, presented the narrative to Court. Thus, this Court cannot observe that a '*vital missing link in the Prosecution case'* has been occasioned by failing to call Kulasinghe. In fact, it appears that had Kulasinghe been called as a witness, his evidence would have been a simple repetition of the facts that had already been established by Dissanayake's

evidence.

Furthermore, the Counsel for the 1st Accused, in particular, argued that the reason the Defence did not call Kulasinghe as a witness was because of the fear that the CID would 'coach' the witness to retract his statement. In light of this argument, as **Section 114** of the *Evidence Ordinance* presumes regularity of all official acts, including that of the police during an investigation, the Court cannot therefore infer or speculate that the witness may have been coached, in the absence of specific evidence to indicate the same. An examination reveals that the Criminal Investigation Department has conducted a thorough and careful investigation and there appears to be no potent or valid reason why the Court should have interfered in the proceedings before the Trial-at-Bar to call Kulasinghe as a witness. In any event had this witness been of such importance to the Defence, it is certainly strange that *none* of the Accused chose to call Kulasinghe to give evidence, although they strongly felt that it was essential in order to prevent 'a miscarriage of justice', but chose to hide behind a purported and unsupported fear of 'witness coaching' by the CID.

Thirdly, the Counsel for the 3rd Accused raised the issue that the Witnesses have to be treated as *Accomplices* whose evidence required independent corroboration. The Court wishes to deal with this question of law on two levels: firstly, in considering whether the Witnesses can indeed be categorised as 'Accomplices' and secondly, if they can be considered 'Accomplices', whether their evidence requires independent corroboration.

According to ***E.R.S.R. Coomarasamy***, the definition given by Wharton is the appropriate definition for Sri Lanka. Wharton in his textbook on Evidence defines accomplice thus:

> *'An accomplice is a person who knowingly, voluntarily and with common intent with the principal offender unites in the commission of a crime. The term cannot be used in a loose or popular sense so as to embrace one who has guilty knowledge or is morally delinquent or who was an admitted participant in*

> *a related but distinct offence. To constitute one an accomplice, he must perform some act or take some part in the commission of the crime, or owe some duty to the person in danger that makes it incumbent on him to prevent its commission."*

The definition given in the Indian case of **Chetumal Rekumal v. Emperor (1934)** *(AIR 183)* has also found support in Sri Lankan case law and was adopted in **King v. Pieris Appuhamy (1942)** (*43 NLR 412*):

> *'An accomplice is one who is a guilty associate in crime or who sustains such relation to the criminal act that he could be charged jointly with the accused. It is admittedly,* ***not every participation in a crime which makes a party an accomplice*** *in it so as to require his testimony to be confirmed'* (Emphasis added).

Thus, the idea that all acts pertaining to a crime can make a party an accomplice is ill-founded. This idea was encompassed in the decision in **King v. Pieris Appuhamy (1942)** (*43 NLR 412)* where the Court held

> *'A witness who merely assisted in the disposal of the dead body but who did not take part in the perpetration of the crime is not an accomplice'.*

This decision was followed in **The Queen v. Ariyawantha (1957)** (*59 NLR 241*). While other cases sought to extend the definition of an accomplice further, a definitive determination on the matter was given by the Supreme Court in **Prabath de Saram v. Republic of Sri Lanka (2002)** where it was submitted, similar to the present case, that the two principal witnesses are accomplices and thus, there should be independent corroboration of their evidence. It was further argued by the Counsel that in the absence of corroboration, their evidence should be rejected and that the Accused was entitled to an acquittal. However, the Supreme Court held that the principal witnesses were not accomplices and thus kept the definition of an

accomplice within the parameters set by **King v. Pieris Appuhamy (1942)** (*43 NLR 412*) and **The Queen v. Ariyawantha (1957)** (*59 NLR 241*).

Thus, the evaluation of whether a witness is an accomplice or not is a manifestly difficult decision to make and this task would admittedly be made easier if the witness had pleaded guilty or admitted or confessed to the police wherein he could be treated as an accomplice. However, one must admit the difficulty that arises when there is no evidence or proof of the involvement or especially the extent of the involvement and it must be strongly asserted that it is improper to treat a person as an accomplice on mere suspicion. Relevant here is the case of **Emperor v. Burns** (*11 BLR 1153*) it where it was held that:

> *'No man ought to be treated as an accomplice on mere suspicion unless he confesses that he had a conscious hand in the crime or he makes admission of the facts showing that he had such hand. If the evidence of a witness falls short of these tests, he is not an accomplice, and his testimony must be judged on principles applicable to ordinary witnesses'.*

In the present case, it must be noted that the Attorney General did not grant conditional pardons to the witnesses as there was insufficient evidence to indicate that they were involved in the crime in the capacity of accomplices. Given this reality, as well as subsequent to an independent evaluation of the evidence presented, this Court cannot be satisfied that the Prosecution Witnesses, in particular Thotawatte, Dissanayake and Navaratne have engaged in a conduct or behaviour that would substantiate the claim that they were indeed accomplices. The definition of an accomplice in Sri Lankan law, as accepted by the Courts, clearly indicates that an accomplice must demonstrate common intent and knowingly unite with the principal offender to commit the crime but excludes the mere presence of witnesses in the vicinity of the scene from coming within this definition.

However, for the purpose of answering this question of law fully, let us assume that

the Witnesses come within the definition of an 'Accomplice'. The question posed to us is whether evidence proceeding from an accomplice must be corroborated and verified by an independent source.

In this regard, reference is made to **Section 133** of the *Evidence Ordinance* which states that

> *"An accomplice shall be a competent witness against an accused person, and a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice".*

While **Section 133** makes it clear that the uncorroborated evidence of an accomplice is acceptable, this section must be read in conjunction with **Section 114(b)** of the *Evidence Ordinance* which states as follows:

> *"An accomplice is unworthy of credit, unless he is corroborated in material particulars".*

These statutory provisions, read together, create a conundrum of sorts leading to the conclusion that the creditworthiness of an accomplice is dependent upon whether his evidence, in material particulars, is corroborated by another source, whereas a conviction based solely on the uncorroborated evidence of an accomplice is not illegal. Yet, such a conviction would undoubtedly be a dangerous and unsafe one. Thus, it is within the purview of the Courts to consider the creditworthiness of each accomplice, apply their mind and search for cogent and conclusive factors that satisfy them that the accomplice is in fact, reliable, if they are to convict solely on his evidence. This sentiment was encapsulated succinctly in **The Queen v. Liyanage and Others (1962)** (*67 NLR 193*) which stated the following with regard to corroborative evidence:

> *'In the case of fellow conspirators or accomplices the established practice, virtually equivalent to a rule of law, requires independent corroboration of their evidence, in material particulars. What is required is some additional evidence, direct or circumstantial, rendering it probable that the accomplice's story is true and reasonably safe to act upon, and connecting or tending to connect the particular defendant with the offence. The degree of suspicion attaching to an accomplice's evidence varies according to the extent and nature of his complicity."*

However, such independent corroboration need not confirm each detail of the account presented by the accomplice, for if such a standard were required, as stated in **Rex v Noakes** *(5 C&P 326) 'his evidence would not be essential to the case; it would be merely confirmatory of the other and independent testimony'.*

Therefore, this submission of the Defence has no legal basis and is not tenable in law. On the facts of this case, the Court does not find evidence to reasonably conclude that the witnesses were accomplices. Therefore, it is held that their testimonial creditworthiness has not been assailed and that the evidence of the witnesses taken individually and cumulatively corroborates each other on material facts and all the evidence in the case, when considered together, proves the charges beyond a reasonable doubt.

The next issue which was raised by the Counsel for 2nd and 3rd Accused, and which is considered by this Court, is whether the investigations which led to the discovery of the cartridge and weapon were tainted and concocted and ought to be rejected.

The Counsel for the 3rd Accused alleged that the discovery of the empty cartridge at the crime scene by ASP Abeysekara shed serious doubts on the reliability of the matter. It was alleged that the scene was visited by a 'veteran investigator', IP Samudrajeeva and officers of the SOCO (Scene of the Crime expert unit) and neither party discovered the empty cartridge whereas it was ASP Abeysekara, who visited the

crime scene much later, who discovered it. Similar concerns have been raised by the Counsel for the 2nd Accused as well in that it was ASP Abeysekera who also made the discovery of the T56 weapon bearing no 1555658 from the strong box on 17.08.2009. In response to these allegations, the Prosecution asserted that the recovery of the spent cartridge was in fact done methodically, using a specialised 'Finger tip Search' which was previously used subsequent to the bombing of the Temple of the Tooth Relic, and is recognised in forensic science. The main witness who was present at the crime scene when the cartridge was discovered was PS 2761 Upali Bandara who narrated the events. Furthermore, Prosecution Witness 34 M.A.S Ajith [hereinafter referred to as M.A.S Ajith] explained the manner in which the search was conducted as one where a selected number of Officers stayed in one line and checked the ground using their finger tips in a slow and patient manner which ultimately led to the discovery of the empty cartridge on the beach. In light of such strong evidence, this Court does not see merit in the argument that this investigation was, in any way, erroneous or suspicious. In fact, it is to be noted that this method of investigation was quite contrary to the search made by the Investigating Officers of the Mt. Lavinia Police who made a cursory visual search. Of course, this may have been due to the agitation by the villagers who made demonstrations against the Police during the initial stages of the investigation. The Court finds no evidence to assail the independence and impartiality of the investigation conducted by the officers of the CID and no reasonable ground for these allegations have been disclosed from the evidence or the lengthy cross-examination in this case to offer a basis for the unfounded allegation by the Defence.

Having established the credibility of the Prosecution Witnesses and resolved the alleged inconsistencies in their testimonies and having established that the investigations were not tainted, this Court now examines the issues put forward by the Defence with regard to the Judgment delivered by the Learned Judges of the Trial-at-Bar.

The Counsel for the 1st Accused alleged that the Learned Judges of the Trial-at-Bar convicted the Accused on evidence and material that was not placed before Court and made references to the judgment of the High Court wherein it was stated that the behaviour of the 1st, 2nd, 3rd and 4th Accused after the commission of the murders, i.e. through the alteration of the Information Book, it is proven that they did in fact commit the murders. In light of this allegation, the Court feels it imperative to analyse the evidence with regard to the tampering of the IB.

The evidence of Thotawatte establishes the following narrative: when the 2nd Accused noticed that the complaint of the lady had been partly recorded in the Information Book [hereinafter referred to as the IB] he questioned Thotawatte as to why he made the entry when he had explicit orders not to do so. The 2nd Accused then instructed Thotawatte to alter the IB and when he protested, the task fell upon the shoulders of Prosecution Witness 17 Kariyawasam Hewamanaghe Kasun Buddhika [hereinafter referred to as Kasun Buddhika], who altered the IB upon compulsion. Given this narrative, this Court accepts the argument of the 1st Accused that it was only the 2nd Accused who was involved in the tampering of the evidence. However, it is equally important to note that none of these Accused had, even after the incident, taken any steps to disclose the truth of the incident. The fact that despite having the knowledge that two youth had been murdered on that fateful night, they omitted to take the ordinary, expected steps of disclosure expected of any innocent person, but instead actively assisted the 1st Accused.

The next issue that requires the consideration of this Court pertains to the allegations made regarding the unsworn statements made from the dock [hereinafter referred to as Dock Statements] by the 1st, 2nd and 4th Accused. It is in agreement that the 1st, 2nd and 4th Accused provided Dock Statements whilst the 3rd Accused exercised his right to remain silent and therefore, refrained from making such a statement.

The arguments put forth by the Defence in terms of the Dock Statements of the

Accused can be summarized as follows:

The Counsel for the 2nd Accused stated in his oral and written submissions that the contents of the Dock Statement of the 1st Accused correspond and corroborates the Dock Statement of the 2nd Accused and this has not been taken into consideration by the Learned Judges at Trial- at Bar. It is also the submissions of the Counsel that the Trial-at Bar erred in law by failing to take in to consideration the declaration of the 1st Accused in his Dock Statement; where he mentions that when the second murder was committed the 2nd Accused remained in the vehicle; and that, due to this, the Learned Judges of the Trial-at-Bar had failed to give the benefit of doubt to the 2nd Accused.

The Counsel for the 4th Accused, in his submissions to this Court suggests that the Learned Judges of the Trial-at bar had erred in law by rejecting the Dock Statement of the 4th Accused on the basis that the position taken up by the 4th Accused in his Dock Statement was not suggested to the Prosecution witnesses.

The Counsel for the 1st Accused also argued that the unsworn Dock Statement of the 4th Accused cannot be used as evidence against the 1st Accused.

Thus, given that the Defence has alleged that the Dock Statements of the Accused were not given sufficient consideration by the Learned Judges of the Trial-at-Bar, this Court feels it imperative to consider the allegations levelled by the Defence as well as consider the Dock Statements and assess its evidential value and relevance.

It must be noted that a Dock Statement is considered evidence, however, subject to the infirmity that it was not given under oath and therefore, not subject to cross-examination. In **The Queen v. Buddhrakkita Thera and 2 Others [1962]** [63 NLR 433],

"The right of an accused person to make an unsworn statement from the dock

*is recognised by our law [**King v. Vellayan [1918]** [20 NLR 251]. That right would be of no value unless such a statement is treated as evidence on behalf of the accused subject however to the infirmity which attaches to statements that are unsworn and have not been tested by cross-examination".*

The manner in which such a statement should be evaluated was analysed in The **Queen v. Kularatne [1968]** [*71 NLR 529*] as follows:

"We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed that,

(a) If they believe the unsworn statement it must be acted upon,
(b) If it raised a reasonable doubt in their minds about the case for the prosecution, the defence must succeed, and
(c) That it should not be used against another accused".

The above direction was expressly followed in **Somasiri V. The Attorney General [1983]** *[2 SLR 225*] and **Gunapala and Others v. The Republic of Sri Lanka [1994]** *[3 SLR 180]* while the principle it embodies was followed in **D. K. Lionel v. The Republic of Sri Lanka [1976]** [*79 NLR 553*].

In assessing whether the Dock Statement of the 1st Accused should be taken into account, its reliability must be verified by this Court. In order to do so, the Court finds it necessary to list out the summarised Dock Statement of the 1st Accused, which is unfolded as follows:

- He assaulted the two youth who were in custody before placing them in the cell;

- The 2nd Accused asked him to bring the two youth to him but claims that he does not know who took them to the 2nd Accused.
- The 2nd Accused asked *'someone'* to take the two youth and put them into the vehicle;
- After the vehicle stopped at the first point, the *'others'* went away with a gun;
- He claims that during this time, he remained in the vehicle along with Dissanayake and PC Kulasinghe;
- He heard a gunshot;
- Someone shouted " Kumara *get down* and remove handcuffs";
- Thereafter, the vehicle proceeded, and after it stopped at the second point, the '*others'* got off and went away.
- Then the 2nd Accused asked him to go and look for the others;
- Upon hearing a gunshot he came back to the vehicle;
- The CID officers recorded only a part of the statement;
- No opportunity was given to make a statement to any judicial officer of any court;
- He did not commit any offence relating to either of the two youth;
- He did not go armed at any stage;
- The only person who was available to prove the innocence was Kulasinghe who remained in the vehicle with him;
- Dissanayake lied against him.

The Prosecution in their submissions holds that the 1st Accused has deliberately failed

to disclose the identity of the officers who took the deceased to the crime scenes, by referring them as '*others'* or '*someone'*. These evasive statements indicate the need of the 1st Accused to not commit to anything for if the events he recounts in the Dock Statement were true, there was no reason for him to be so elusive and non-committing.

Furthermore, the Prosecution avers in their submissions that the 1st Accused makes an attempt to favour the 2nd Accused by refraining from disclosing the person who asked him to remove the handcuffs by referring to him as "*someone*", and shielding himself with the legal right to make any statement without being subjected to cross-examination. It was further submitted that the 1st Accused was making an attempt to assist the 2nd Accused and, in the process, exonerate himself from criminal responsibility as well.

His statement lacked clarity, was superficial and lacked basic details. Further, he was evasive and the lack of full disclosure affects the truthfulness and credibility of this witness.

In assessing the reliability of this Dock Statement, the Court notes the assertion of the 1st Accused that Dissanayake had lied against him, and the only person who could have proven his innocence was PC Kulasinghe [who was not examined as a witness]. Thus, the Court feels it vital to ascertain whether the validity and truthfulness of the Dock Statement, in the absence of the testimony of Dissanayake, can be established. The Counsel for the 1st Accused asserted that he remained in the vehicle at the first crime scene and that "*someone"* shouted "Kumara *get down* and remove the handcuffs". However, Navaratne clearly indicates that he heard the words "Kumara remove those handcuffs" and nothing to specify that the 1st Accused was actually in the vehicle at the time. This affirms the reasoning that the 1st Accused was in fact outside the vehicle, at the crime scene with the other Accused.

Moreover, and even more convincing is the manner in which his declaration in the Dock Statement that he remained inside the vehicle at the second crime scene, is disproven by the testimony of Navaratne where he indicated that he saw the 1st, 2nd, 3rd and 4th Accused, walk towards the beach by the light shed by a street light. Thus, even if the testimony of Dissanayake were untrue as alleged by the 1st Accused, evidence given by Navaratne negates the accuracy and veracity of the Dock Statement.

The Prosecution in their submissions states that the Dock Statement of the 2nd Accused is unacceptable and therefore should be rejected due to his conduct. The Dock Statement of the 2nd Accused statement is summarised as follows where he stated that he:

- He observed the two youth being assaulted at the Police Station;
- Instructed Thotawatte to record the complaint and to detain the two youth until morning;
- PC Kulasinghe and the 3rd Accused sought his permission to question the two youth;
- PC Kulasinghe and 3rd Accused informed him that the two youth had underworld connections and said that it is necessary to proceed to Lunawa to recover an offensive weapon hidden there;
- PC Dhammika said that the time now is passed 4.00 am;
- Claims that he got into the vehicle with the idea of having a cup of tea;
- When questioned by him, Navaratne said that PC Kulasinghe wanted him to proceed to Lunawa;
- The vehicle was stopped at Lunawa in response to a signal that came from the rear compartment of the vehicle;

- He heard a gunshot and opened the door of the jeep.
- He further claims that thereafter he asked “Why were the people in handcuffs shot at” and asked the 1st Accused “Why did you allow shooting people in handcuffs”. Thereafter, the Accused instructed the 1st Accused to remove handcuffs;
- Claims that the 1st Accused removed handcuffs after the shooting;
- Claims that he blamed the officers when they returned to the vehicle;
- Admits that he, thereafter, decided to take the necessary steps to introduce hand grenades to the crime scene with a view of justifying the shooting;
- Claims that thereafter the vehicle proceeded and stopped at Ratmalana following a signal that came from the rear compartment;
- Claims that he remained in the vehicle allowing the others to go with the second youth;
- Admits that he heard gunshots and thereafter officers returned without the youth;
- He claims that he questioned the officers upon their return. Thereafter he asked Navaratne to proceed towards a boutique to have a cup of tea and then went looking for Bathala Chaminda;

In ascertaining the accuracy and reliability of this Dock Statement, several Prosecution arguments appear to be pertinent. The Prosecution notes that the 2nd Accused, admittedly, viewed a number of events, which are against the law, taking place, yet, he did not take any action, being the Officer in Charge of the Angulana Police Station, to either prevent them from taking place, or admonishing or punishing the officers involved, other than merely blaming them. For instance, 2nd Accused admittedly observed the two youth being assaulted, but did not take any steps to reprimand the officers involved, and admittedly, deliberately did not take any

meaningful steps to stop it despite having the authority to do so.

Furthermore, the Prosecution has validly noted the inconsistency of the witness testimonies and the stance of the 2nd Accused where he states that it was PC Kulasinghe and Dissanayake who stated that it was necessary to take the victims to recover an offensive weapon, and that the signal to stop the vehicle at the two crime scenes came from the back of the vehicle when, the testimony of Navaratne clearly indicates that it was the 2nd Accused who was giving directions that night. These directions included ordering two persons to take weapons, asking the 1st Accused to remove the 1st victim's handcuffs, asking Navaratne to drive to Lunawa and Ratmalana and so on. It is also pertinent to note that if the assertion of the 2nd Accused that it was Kulasinghe who wished to take the victims to recover a weapon [and thus, the true culprit of the murder is Kulasinghe], is true, it makes little or no sense as to why Kulasinghe remained in the vehicle during the shootings.

The Prosecution also submits that the 2nd Accused was present at the crime scene and was involved in the murders as he demonstrated intimate knowledge of the crime. He knew that the youth were shot whilst being handcuffed and this Court further notes that if the 2nd Accused was not actually involved in the shooting, it is highly unlikely that he would ask another officer to remove the handcuffs. This Court is inclined to agree with the submissions made by the Prosecution in relation to the reliability and accuracy of the Dock Statement of the 2nd Accused, particularly given the improbability of the 2nd Accused, the Officer in Charge, allowing the 2nd victim to be taken away in the same manner the 1st victim was taken, when he knew that the 1st victim was shot.

Further, it is improbable that the 2nd Accused, if innocent, would have allowed the vehicle to drive *past* the Angulana Police Station to reach Ratmalana without, having witnessed a murder, hurrying back to the Station in order to make sense of events and take the necessary measures against the perpetrators. Instead, the 2nd Accused states that he proceeded to a nearby boutique to have a cup of tea. Given the

alarming events that have just unfolded, it is extremely unlikely, in the eyes of this Court, that an Officer in Charge would treat the matter in a manner so candid and disinterested unless, as testified and proved by the Prosecution Witnesses, he himself was involved in the shooting as well.

Furthermore, this Court notes that *even* if the Dock Statement is to be accepted as valid, the 2nd Accused demonstrated an intention to conceal the illegal events that took place by admitting that he had a view of placing hand grenades at the crime scene to justify the shooting, by not making the relevant entries regarding the arrest of the youth or the journey to Lunawa and Ratmalana, and finally, coercing several Officers to refrain from making truthful statements to the Mt. Lavinia Police.

The Counsel for the 4th Accused submitted that the Learned Judges of the Trial-at-Bar had failed to consider the Dock Statement of the 4th Accused separately and thereby denied a fair trial to the Accused. The Counsel further submitted that the grounds upon which the Learned ASG President's Counsel submitted that the Dock Statement be rejected were untenable. Given these allegations, this Court feels it imperative to analyse the statement to verify its authenticity. Thus, the Dock Statement of the 4th Accused is summarised as follows:

- The 1st and the 3rd Accused took two weapons;
- One of the two youth and 1st, 2nd and 3rd Accused were seen near the vehicle at Lunawa;
- Admits that he also got down from the vehicle;
- Claims that *he remained near the vehicle*;
- Confirms that he heard a gunshot;
- The youth did not return and the vehicle proceeded;

- At the second crime scene, confirms that he saw the three Accused near the vehicle and admits getting down from the vehicle;
- He heard a noise;
- The youth did not return;
- Claims that he did not carry a weapon and that he did not kill them.

With regard to the sincerity of the statement of the 4th Accused that he stayed near the vehicle when the shots were fired, the Learned Judges applied the rules laid out in **Rex v. Lucas (1981)** *(2 All ER 1008)* which was applied by Atukorale J. of the Supreme Court in **Karunanayake v. Karunasiri Perera [1986]** [*2 SLR 27].*. These principles must be satisfied in order to reject a Dock Statement and can be summarized as follows:

1. *"It must be deliberate;*
2. *It must relate to a material issue;*
3. *The motive for the lie must be realization of guilt and a fear of truth;*
4. *The statement must be clearly shown to be a lie other than that of the accomplice who is to be corroborated".*

In assessing the authenticity of the statement, the Prosecution notes the improbability of the 2nd Accused actually allowing him to remain near the vehicle, after having instructed him to get down from the vehicle. This contention is supported by the testimony of Dissanayake who was seated in the rear compartment of the vehicle at the time. Dissanayake was also able to verify from his position in the vehicle that the 4 Accused' and the detainee walked towards the Bridge. He did not, however, indicate that the 4th Accused did in fact stay close to the jeep. The testimony of Navaratne who alighted from the vehicle at the second crime scene and came to the back of the vehicle too did not state that he saw the 4th Accused near the vehicle is also relevant

which casts a reasonable doubt upon the veracity of the statement. This reasonable doubt is compounded by the fact that neither witness was cross-examined regarding this statement which prompted the Learned Judges of the Trial-at-Bar to accurately apply the decision delivered by Sisira de Abrew J in **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** where it was stated that

> *"Whenever the evidence given by a witness on a material point is not challenged in cross examination it has to be concluded that such evidence is not disputed and is accepted by the opponent".*

This principle is echoed in **Pilippu Mandige Nalaka Krishantha Kumara Tissera v. AG (2007)** and is line with the approach adopted by Indian Courts as well as evidenced by the decisions in **Sarwan Singh v State of Punjab (2002)** *(AIR SC 111)* where it was held that

> '*It is a rule of essential justice that whenever the opponent has declined to avail himself of the opportunity to put his case in cross examination, it must follow that the evidence tendered on that issue ought to be accepted',*

and in **Motilal v. State of Madhya Pradesh (1990)** *(CLJ NOC 125 MP*) which held that the

> *'Absence of cross examination of Prosecution Witnesses of certain facts leads to inference of admission of that fact'.*

Furthermore, in consideration of the assertion that he did not carry a weapon, this Court notes the testimony of Thotawatte who claimed that the 3rd and 4th Accused took charge of the guns taken from the strong box, and proceeded to return the weapons as well, and observes that the 4th Accused *did not* challenge this evidence either.

Thus, the inability to accurately verify whether the 4th Accused did in fact stay close to the vehicle due to these questions not being suggested to the Prosecution Witnesses, the fact that this statement remains as mere conjecture without supporting evidence and also the fact that the 4th Accused did not challenge the evidence of Thotawatte, provides this Court with sufficient cause to disbelieve and reject the Dock Statement of the 4th Accused.

Therefore, taking into account all the material before us and the in-depth reasoning above that effectively militates against the Dock Statements of the 1st, 2nd and 4th Accused being accurate, we are in a position to agree with the reasoning of the Learned Judges of the Trial-at-Bar in holding that the Statements were unacceptable and thereby rejecting them.

The next issue was raised by the Counsel for the 3rd Accused who, in his oral and written submissions, averred that the Trial- at Bar has made an error in law by holding that that silence of the 3rd Accused is satisfactory evidence denoting his acceptance of the case of the Prosecution while it is the argument of the Prosecution that the silence of the 3rd Accused establishes his guilt.

In considering the position of the 3rd Accused and, in particular, his silence in this instance, the stance of the Prosecution that his failure to explain incriminatory material is an item which establishes his guilt was on the basis of the 'Ellenborough Dictum'. The Counsel for the 3rd Accused averred that this particular reference cannot be found in any modern text on Evidence and implied that this Dictum cannot, therefore, bear any legal merit.

In considering this contention, this Court makes reference to the Ellenborough Dictum which was encompassed in the judgment delivered by Lord Ellenborough in **Rex v. Cochrane (1814)** *(Gurneys Reports 479)*. The most relevant section is extracted below:

> *"No person accused of crime is bound to offer any explanation of his conduct of circumstances of suspicion which attach to him, but nevertheless, if he refused to do so where a strong prima facie cases has been made out and when it is in his power to offer evidence, if such exist in explanation of such suspicious appearances, which would show them to be fallacious and inexplicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest."*

In analysing the evidence before this Court, it is noted that the 3rd Accused was present when the youth were assaulted, took possession of a weapon without making entries as required, alighted from the vehicle at the first crime scene and proceeded with the other Accused and the victim, alighted from the vehicle at the second crime scene while bearing the firearm and lied about these events upon return to the Station. In the eyes of this Court, these facts create a strong prima facie case against the 3rd Accused and his omission to provide a reasonable explanation, when he had the opportunity to do so, would only amount to this evidence operating adversely to his interest.

It was averred by the Counsel that the Ellenborough Dictum bears no legal merit whatsoever, but this Court notes that the essence of this Dictum has been encompassed in a series of decisions in Sri Lanka. The Ellenborough Dictum was cited by Howard CJ in **The King v. L. Seeder de Silva (1940)** *(41 NLR 337)* and the Learned Judge went on to hold that:

> *"A strong prima facie case was made against the appellant on evidence which was sufficient to exclude the reasonable possibility of someone else having committed the crime. Without an explanation from the appellant the jury were justified in coming to the conclusion that he was guilty".*

Furthermore, in **Inspector Arendstz v. Wilfred Pieris (1938)** *(10 Ceylon Law Weekly 121),* the Supreme Court of Ceylon held that,

> *"A strong prima facie case, — and when it is within his own power to offer evidence, if such exist, in explanation of such suspicious appearances which would show them to be fallacious and explicable consistently with his innocence, it is a reasonable and justifiable conclusion that he refrains from doing so only from the conviction that the evidence so suppressed or not adduced would operate adversely to his interest".*

This principle was analysed in depth by Fernando J in **Queen v. Seetin [1965]** [*68 NLR 316]* from p. 321-324 and further upheld in **Ilangatilaka and Others v. The Republic of Sri Lanka [1984]** [2 SLR 38] and in **J. M. Chandradasa v. The Queen [1969]** [*72 NLR 160].* This principle was more recently approved and accepted by the Supreme Court in **Mohamed Niyas Naufar v. The Attorney General** (*TAB-01/2006*) as well and this Court notes the continuous relevance of this principle in evaluating suspicious circumstances where a strong prima facie case has been constructed against the Accused but he fails, even though it is within his power, to provide an explanation. Thus, in light of a strong prima facie case against the 3rd Accused, his silence cannot be justified.

The final question of law regarding Dock Statements pertains to whether the unsworn statement of one Accused can be held as evidence against another. The Counsel for the 1st Accused argued this point in defence of the Prosecution's invitation to the Court to compare the unsworn statement of the 4th Accused in which incriminatory statements were made regarding the 1st Accused. Reference was made to **Section 30** of the *Evidence Ordinance* which states that

> "*When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of*

such persons is proved, the Court shall not take into consideration such confession as against such other person"

and the decision in **Monis Appu v. Heen Hamy (1924)** (*26 NLR 303*) where Bertram C. J stated that

"If one prisoner standing on the dock makes an unsworn statement implicating the other, this is not evidence. It has no more effect than an ejaculation uttered by an auditor in Court".

While Dock Statements amount to evidence, a statement of one Accused should not be used to implicate another Accused. This principle of evaluating dock states was laid out in **The Queen v. Kularatne [1968]** [*71 NLR 529*] as follows:

"We are in respectful agreement, and are of the view that such a statement must be looked upon as evidence subject to the infirmity that the accused had deliberately refrained from giving sworn testimony, and the jury must be so informed. But the jury must also be directed..,

(c) That it ***should not be used against another accused****". [*Emphasis Added*].*

This is especially important as Dock Statements are not strengthened by an Oath and cannot be subjected to cross-examination. This Court therefore affirms that the Dock Statements of a Co-Accused [in this case, that of the 4th Accused] cannot be used against another Accused [i.e. the 1st Accused].

However, Court also feels it noteworthy to mention that evidence given by the Prosecution Witnesses, and adverted to in detail as set out above, which is independent of the Dock Statement made by the 4th Accused, is valid evidence in this case and prove the case beyond a reasonable doubt.

The next issue that will be considered by this Court pertains to common intention. On the medical evidence alone, it is clearly proved that whoever committed these murders had entertained a murderous intention. The site of the injuries, the weapons used to inflict the injuries seen at the Post-Mortem examination etc. all prove, beyond a reasonable doubt, that whoever committed this offence had a murderous intention as the victims were clearly shot at close range with the clear intention of causing death. This was not even assailed during arguments. The question then to be considered is whether all the accused shared a *common* murderous intention.

An issue raised by the Counsels for the 1st and 4th Accused, in particular, related to whether the conviction of the Accused under Common Murderous Intention was bad in law with the Counsel for the 4th Accused in particular, alleging that participatory presence of the 4th Accused had not been established. In order to effectively analyse this position, this Court will initially assess the law that has been presented.
Section 32 of the *Penal Code* states the following:

> *"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."*

As laid out by the Privy Council in **Mahbub Shah v. Emperor (1925)** (*A. C. 118*), this Court agrees that

> *"It is no doubt difficult if not impossible to procure direct evidence to prove the intention of the individual; it has to be inferred from his act or conduct or other relevant circumstances of the case".*

In this regard, the Counsel for the 4th Accused in his written submissions averred that the Learned Judges of the Trial-at-Bar did not accurately analyse and consider the present case according to the elements of common intention that must be proven. The case of **The King v. Asappu (1950)** (*50 NLR 324*) was cited by the Counsel for the 4th

Accused where Lordship Dias J. outlined the elements of common intention. However, in order to analyse whether the Accused have committed a criminal act in furtherance of the common intention of all, it is noteworthy that the law pertaining to common intention has developed greatly since the decision in **The King v. Asappu (1950)** (*50 NLR 324*), and thus must be updated prior to consideration. In this regard, the Court endeavours to summarise the law relating to common intention as follows:

a. The case of each Accused must be considered separately;

b. The Accused must have been actuated by a common intention with the doer of the act at the time the offence was committed;

c. Common intention must not be confused with same or similar intention entertained independently each other;

d. There must be evidence either direct or circumstantial, of pre-arrangement or some other evidence of common intention;

e. It must be noted that common intention can be formed on the 'spur of the moment';

f. The mere fact of the presence of the accused at the time of the offence is not necessarily evidence of common intention;

g. The question whether a particular set of circumstances establish that an Accused person acted in furtherance of common intention is always a question of fact;

h. The Prosecution case will not fail if the Prosecution fails to establish the identity of the person who struck the fatal blow provided common murderous intention can be inferred.

i. The inference of common intention should not be reached unless it is a necessary inference deducible from the circumstances of the case;

The two fundamental issues raised in the present case is the non-consideration of elements (d) and (f) by the Learned Judges of the Trial-at-Bar and this Court will consider these allegations together.

The Counsel raised the issue of the absence of a 'pre-arrangement' or 'plan' and the fact that the 4th Accused did not utter a single word that could be construed as evidence of such a plan. The Court notes that this element was required according to the elements listed out in **The King v. Asappu (1950)** *(50 NLR 324)* but this Court notes that this requirement has since then been subjected to change. Reference must be made to the case **of R v. Mahatun (1959)** *(61 NLR 540)* where one offender chased the victim with a bomb in his hand and another offender joined him. It was held that common intention arose at the moment in which the offender joined in the chase and thus, common intention could arise on the '*spur of the moment*.' Therefore, even in the present case, the absence of a proven plan does not undermine the existence of a common intention shared by all 4 Accused' as such an intention can arise on the spur of the moment.

The Counsel also averred that there is no direct evidence that establishes an agreement or plan. In this regard, this Court makes reference to the case of **Ariyasinghe and others v. The Attorney General (2004)** *(2 SLR 357*) where Court observed that it is

> "..*very often it is difficult to prove a conspiracy by direct evidence. The existence of an 'agreement to commit a particular offence' is a matter to be*

inferred from the proved circumstances.'

It has also been stated by the Supreme Court of India in **Rishideo v. State of Uttar Pradesh (1955)** *(AIR 331)* [quoted in **Wasamulani Richard v. The State (1973)** (*76 NLR 534*)] that

> *'The existence of a common intention said to have been shared by the Accused is, on an ultimate analysis, a question of fact',*

Thus, this Court is of the opinion that the behaviour of the 4 Accused persons at the Police Station, at the crime scenes and upon return to the station infers the existence of a conspiracy and a common intention to commit the murders. The absence of protest by the Accused, voluntarily escorting a handcuffed detainee and witnessing his murder all point towards a common intention albeit arising on the spur of the moment. The Counsel for the 4th Accused further sought to draw the distinction between participatory presence and mere presence to establish that the behaviour of the 4th Accused did not amount to participatory presence. In this case, the Court does not see a need to establish a verbal declaration which can be construed as evidencing common intention but notes that the knowledge of the assault at the Station, the decision of the 4th Accused to take weapons from the reserve without making any entries as is the established procedure, climbing into the vehicle with the victims being handcuffed and climbing down from the vehicle at Ratmalana knowing what had taken place near the Lunawa Bridge, indicates, cumulatively, evidence of collusion and common murderous intention. These facts establish participatory presence, and when collectively considered indicate that the 4th Accused was not merely present at the crime scenes but actively engaged in illegal acts and dismounted the vehicle at the 2nd crime scene with full knowledge of what had happened earlier.

It has also been submitted to this Court that the presence of an agreement should be established in order for the charges of conspiracy to stand and that the absence of

such a 'verbal' agreement negates the validity of these charges. This Court notes the comprehensive difficulties that tend to arise with regard to definitive evidence of such an agreement. As held in **The Queen v. Liyanage and Others (1962)** (*67 NLR 193*)**,**

> *'The evidence in support of an indictment charging conspiracy is generally circumstantial'.* Having recognised these inherent difficulties, this case goes on to state that '*It is not necessary to prove any direct concert, or even any meeting of the conspirators, as the actual fact of conspiracy maybe inferred from the collateral circumstances of the case. Conspiracy can ordinarily be proved only by a mere inference from the subsequent conduct of the parties in committing some overt acts which tend so obviously towards the alleged unlawful results as to suggest that they must have arisen from an agreement to bring it all about'*.

Thus, this Court is of the strong opinion that the abovementioned factual evidence lead to the irresistible inference of an implied agreement between the parties.

With regard to the 3rd Accused, this Court sees three issues as being worthy of discussion under the analysis of common intention. Firstly, the Counsel for the 3rd Accused alleged that the Prosecution failed to establish whether the firearm from which the cartridge was fired was in fact the same weapon that the 3rd Accused had in his possession during the incident. Secondly, the issue of whether the 3rd Accused did in fact entertain a common intention must be considered. Thirdly, the argument of the Counsel that the strong 'prima facie' case against the 3rd Accused does not move to the stage of being proven beyond reasonable doubt merits the consideration of this Court.

With regard to the first issue, the Court finds it appropriate to consider the abovementioned **Section 32** of the *Penal Code*, as well as the decisions in, **The Queen v. Vincent Fernando (1963)** (*65 NLR 265*) and **Gunasiri and Two Others v.**

The Republic of Sri Lanka (2009) (*1 SLR 39*).

In **The Queen vs. Vincent Fernando (1964)** (*65 NLR 265*), Basnayake C.J. held that

> "*A person who does a criminal act by himself is liable for that act if it offends any provision of the penal law. The above section does not deal with the liability of a person for the criminal act he himself does but with his liability for the criminal acts of others. What are the pre-requisites of such liability? Several persons must have a common intention to do a criminal act, they must all do that act in furtherance of the common intention of all. In such a case each person becomes liable for that act in the same manner as if it were done by him alone*."

Furthermore, in **Gunasiri and Two Others v. The Republic of Sri Lanka (2009)** (*1 SLR 39*), it was held that

> *"In the case of a murder when two or more accused persons are charged on the basis of common intention, the prosecution case will not fail if the prosecution fails to establish the identity of the person who struck the fatal blow".*

Thus, it is noteworthy in this case that there is no burden upon the Prosecution to conclusively establish that each and every Accused was armed or that each Accused committed the deed. What is necessary for a conviction under **Section 32** is proof beyond reasonable doubt that the Accused participated in the act and that *collectively*, the act was carried out by the four Accused. Thus, claiming that the Prosecution was unable to establish whether the cartridge came from the weapon the 3rd Accused was carrying does not help his case for, the Prosecution being able to establish through the evidence submitted by Government Analyst Mr. Sarath Gunatilake who confirmed that the spent cartridge was fired from the relevant T56 rifle recovered from the strong

box, is sufficient to establish that the deed was in fact committed and according to **Section 32**, all persons involved in the commission of the crime individually responsible as if it were done by them alone.

The second issue that merits discussion pertaining to the position of the 3rd Accused is that, in the absence of a defence or an explanation by the 3rd Accused, whether common intention can indeed be inferred. In analysing this position, Court makes reference to The **King v. Endoris et al. (1945)** (*46 NLR 498*) where it was held that where an Accused was proved to have been present when the crime was committed, if he wished his presence to be construed as innocent, he should have provided an explanation of his presence. This case should be read together with the decision in **Wasalamuni D. Richard v. The State** (*76 NLR 534)* where Alles J. and Thamotheram J. held that

> *"The circumstantial evidence against the 3rd Appellant was sufficient, in the absence of evidence given by him to explain his presence at the scene, to establish that he acted in furtherance of a common murderous intention with the other Accused to kill the deceased".*

Thus, in the present case, absence of direct evidence that places the 3rd Accused directly at the crime scenes does not disallow the application of the dictum in **The King v. Endoris et al. (1945)** (*46 NLR 498*). The Court notes the difficulties inherent in establishing an accurate chain of events in the absence of direct evidence but is sufficiently satisfied that the circumstantial evidence coupled with the Witness testimonies and the subsequent findings of the Mt. Lavinia Police and the C. I. D establish a continuous chain of events that establishes the participatory presence of the 3rd Accused, along with the other 3 Accused, at the crime scenes.

This Court further notes that in **The King v. Endoris et al. (1945)** (*46 NLR 498*), Soertsz A.C. J. noted that even if the Accused did not play an active role in the actual attack on the deceased, his armed presence at the scene should have been

explained. Thus, circumstantial evidence provided by the Navaratne and Dissanayake, indicates that the 3rd Accused was armed and that he alighted from the vehicle and walked away with the victims and the other Accused, and returned without the victims, on both occasions which should have been supplemented with an explanation by the 3rd Accused.

The Counsel for the 3rd Accused also indicated that a 'prima facie' case remains 'prima facie' and does not become a case proven 'beyond reasonable doubt' without evidence i.e. that the absence of explanation does not in itself transform a 'prima facie' case into one which has been proven beyond reasonable doubt. In this regard, the Court notes the 3rd Appellant's behaviour that night including quietly taking possession of a gun without making entries, going along with the 2nd Accused and the others when ordered to get down from the vehicle at the Lunawa bridge with the aforementioned gun, returning to the vehicle with a gun in his possession and disembarking from the vehicle, with the gun, where the 2nd murder took place in Ratmalana. The Court further notes that there is no evidence to indicate any remorse, regret or concern in his actions that night and this positive evidence, particularly of the possession of the gun, and the discovery of the T56 gun bearing serial number 1555658 from which the spent cartridge marked P36B had been fired as attested by the Government Analyst Mr. Sarath Gunatilake, is not a mere absence of explanation, but positive evidence that proves the charge beyond reasonable doubt.

In assessing the veracity of the information placed before this Court, it is imperative to note that none of the Prosecution Witnesses were present at the actual crime scenes. Thus, the evidence placed before the Court is largely circumstantial in nature and the Counsel for the 2nd and 4th Accused, in particular, raised the issue of such evidence failing to establish the guilt of the Accused beyond reasonable doubt.

While direct evidence is always more desirable, the proven of circumstantial evidence alone should never negate a conviction. However, it must be noted that items of such

evidence must be treated with extreme care and diligence by the Courts and certain guidelines must be followed in the evaluation and assessment of such evidence.

In **The Queen v Kularatne [1968]** [*71 NLR 529*], the Court of Criminal Appeal quoted the dictum of Watermeyer J in **Rex v. Blom (1939)** as follows:

> *"Two cardinal rules of logic which governs the use of circumstantial evidence in the criminal trial (1) the inference sought to be drawn must be consistent with all the approved facts. If it does not, then the inference cannot be drawn. (2) the proof of facts should be such that they exclude every reasonable inference from them, save the one to be drawn. If they had not excluded the other reasonable inferences, then there must be a doubt whether the inference sought to be drawn is correct'.*

Furthermore, in terms of basing a conviction solely on circumstantial evidence several safeguards are in place in order to avoid a miscarriage of justice as held in **Don Sunny v Attorney General (Amarapala Murder Case) (1998)** *(2 SLR 1)*, where it was stated that when the charges are sought to be proved by circumstantial evidence, the items of circumstantial evidence when taken together must irresistibly point towards the only inference that the Accused committed the offence. These sentiments were further expressed soundly in **King v Abeywickrema et al. (1943)** (*44 NLR 254*) where it was held that

> *"In order to base a conviction on circumstantial evidence, the Jury must be satisfied that the evidence was consistent with the guilt of the Accused and inconsistent with any reasonable hypothesis of his innocence".*

Furthermore, in **King v Appuhamy (1945)** (*46 NLR 128*), it was held that

> *"In order to justify the inference of guilt from purely circumstantial evidence, the*

inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable-hypothesis the that of his guilt".

What is important then to keep in mind during the evaluation of circumstantial evidence is to assess whether the evidence is compatible with the guilt of the Accused. Any reasonable inference that it is not so, must be always held in favour of the Accused.

Thus, for the purpose of assessing the circumstantial evidence placed before this Court, the narratives unfolded by the Prosecution Witnesses are as follows.

"The 2nd Accused asked the two deceased to be brought to his office room where he hit the deceased and requested for a baton/ stick "pollak" and once again hit the deceased. The 3rd Accused, went to the 3-wheeler that was parked in the Police Station and brought a rubber belt and gave it to the 2nd Accused. The 2nd Accused hit the deceased with the rubber belt. Thereafter, the 2nd Accused handed the rubber belt to the 1st, 3rd and 4th Accused' who were also present in the room and asked them to hit the two deceased. Then the 1st Accused took the deceased to the jeep: they were hand cuffed and had plastic bags over their heads".

Evidence by Thotawatte, unfolds as follows:

"The 3rd and 4th Accused had two weapons. The 2nd Accused told the 4th Accused to hand over the weapon he had in his hand to the 1st Accused. Then the 1st Accused took the weapon. Thereafter, he went in to the 2nd Accused' office and brought the deceased in to the jeep. 1st, 3rd and 4th Accused, Kulasinghe and also Dissanayake got in to the rear part of the jeep whilst the 2nd Accused and Navaratne got in to the front part of the jeep. The 4th Accused did not have a weapon in his hand when he was getting in to the jeep".

Whilst Navaratne in his evidence relates the following:

"When I was driving towards Moratuwa we came towards Lunawa Bridge. The 2nd Accused asked me to stop on the bridge. I stopped the vehicle near a light post after the bridge. After I stopped, I remained in the vehicle. The 2nd Accused got out of the vehicle and went towards the back of the jeep. When the 2nd Accused got down from the vehicle I heard a loud noise. It came from the back of the jeep. I knew it was a gunshot. Then I heard the 2nd Accused shouting at the 1st Accused asking him to take off the handcuffs. After about five minutes the 2nd Accused got into the jeep. I heard people getting in to the back of the jeep. I started to drive forward and then the 2nd Accused asked me to drive down the river road which leads to the Angulana Railway Station and once again falls to the Angulana junction. On that road there was a barrier. So I stopped the jeep and kept the lights on. The 2nd Accused knocked at the back window. Then the 3rd and the 4th Accused got down and came to the front. They removed the barrier, then they got back in to the jeep: I did not see them getting in to the jeep I just heard them getting in. The 3rd Accused had a T-56 gun with him.

The 2nd Accused then told me to drive past the Angulana Station towards to Ratmalana. I drove towards Ratmalana; there is a ground in front of the co-operative store. I stopped in front of it. There was a light post near the shop. After I stopped the jeep, the 2nd Accused got out of the jeep and asked the 1st Accused to get down. Then 4 people including the 1st, 3rd, 4th Accused and a man with his hands cuffed got down from the back of the jeep and came in front of the vehicle. In front of the jeep there was a road that led to the beach; they all went down that road towards the beach. I saw the 3rd Accused had a gun in his hand.

Then I heard a sound from the back of the jeep. So I came out and went to the back of the jeep. I saw Kulasinghe and Dissanayaka seated at the back. I asked Kulasinghe what the others were doing. Then I went back to the driving seat and was seated. Once again I heard gun shots firing twice. I remained in the vehicle.

They returned after ten to twelve minutes and the 2nd Accused asked me to drive to Mt. Lavinia to buy cigarettes. The 1st, 3rd and 4th Accused got in to the back of the jeep. But the boy who was handcuffed did not return".

The essence encompassed in the dictum of Fernando, J. in **Chuin Pong Shiek v The AG (1999)** *(2 SLR 277)* (The Tony Martin Case) is relevant in the assessment of the circumstantial evidence placed before the Court in the present case. In the Tony Martin Case, the Court placed emphasis on evidence that was consistent with the presence and participation of the Petitioner [as he was referred to in that case] in the murder, his conduct immediately before and after the crime and the deliberate false statements he had made in material aspects.

With regard to the 1st Accused, Witnesses testified that he assaulted the victims at the Police Station, chased away a villager who had inquired about the deceased, took over a gun from the 4th Appellant and, at the crime scene and removed the handcuffs of one of the deceased subsequent to him being shot. He further failed to disclose a full account of the events that had transpired and deliberately refrained from disclosing the identity of the officers by referring to them as 'the others'. The 2nd Accused also assaulted both victims, ordered two officers to take weapons, ordered the 1st Accused to remove the handcuffs of the deceased, ordered the alteration of the Information Book and coerced all officers concerned to refrain from disclosing the truth at the Mt. Lavinia Police Station. The 3rd and 4th Accused took over weapons without making any entries and returned them without making the relevant entries as well. Further, neither Accused endeavoured to disclose the truth upon return to the Station while the 3rd Accused lied and stated that the 2nd Accused was drunk and the two persons were dropped off. All 4 Accused' where seen climbing into the Police jeep with the two victims being handcuffed and their heads covered with shopping bags and returned to the Station without the deceased. Further, all 4 Accused' were seen accompanying the deceased at the two crime scenes by the Witnesses and returning without the deceased to the vehicle. The evidence of Thotawatte also indicates that

the vehicle first went towards Lunawa and was then seen passing the Police Station and heading towards Ratmalana, where the 2nd crime scene was located. Such circumstantial evidence is consistent only with their presence and participation in the murder and is confirmed by the conduct of the Accused prior to the crimes being committed and their subsequent conduct as well as the deliberate false statements made by them, presumably to conceal true facts.

It must also be mentioned that the Sri Lankan Courts have also recognised that each component of circumstantial evidence, assessed individually, may only amount to a circumstance of suspicion but have emphasised the importance of assessing such components accumulatively. This sentiment was summarised succinctly in **Regina v. Exall (1866)** (*176 ER 853*) where it was held as follows:

> *"It has been said that circumstantial evidence is to be considered as a chain, and each piece of evidence as a link in the chain, but that is not so, for then, if any one link broke, the chain would fall. It is more like the case of a rope composed of several cords. One strand of the cord might be insufficient to sustain the weight, but three stranded together maybe quite of sufficient strength.*
>
> *Thus…in circumstantial evidence – there may be a combination of circumstances, no one of which would raise a reasonable conviction, or more than a mere suspicion; but the whole, taken together, may create a strong conclusion of guilt, that is with as much certainty as human affairs can require or admit of."*

Thus, it must be noted that in the present case, while each piece of evidence, individually considered, may not direct the Court to the conclusion that the Accused were in fact responsible for the murders, the evidence presented by the Prosecution Witnesses, when considered together, irresistibly leads this Court to the conclusion

that the Accused were guilty beyond any reasonable doubt. The evidence further excludes any reasonable inference that is compatible with the innocence of the Accused, thereby leaving the irresistible and only conclusion that the 4 Accused' did conspire to abduct and subsequently murder the two deceased.

The next issue that needs to be considered by the Court is the assertion by the 1st, 2nd and 4th Accused, that their defences were not appreciated by the Learned Judges of the Trial-at-Bar in which judgement the case of **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** was applied. In this case, it was held that in the event important questions are not put to the witnesses during cross-examination, it is believed that the Defence has accepted the witnesses' answers during examination-in-chief. Accordingly, the Learned Judges did not accept the defences admitted to Court on this basis.

This Court thus feels it prudent to assess whether the reasoning of the High Court is sound. The Counsel for the 1st Accused in his written submissions outlined his defence which was that at the time of the first shooting, the 1st Accused was allegedly inside the vehicle with Dissanayake and PC Kulasinghe and during the second shooting, he admits that he got down from the vehicle but once the shots were fired, he allegedly ran back to the vehicle in fright. However, this Court notes that only the discrepancy which arose between the Witness testimonies and the Dock Statement of the 1st Accused was raised in terms of suggesting to Dissanayake the fact that during the 1st shooting, the 1st Accused was inside the vehicle. This position was not suggested to Navaratne during cross-examination. Even then, it is noteworthy that while this position was posed to Dissanayake, he categorically denied this claim and asserted that the 1st Accused, along with the rest, alighted from the vehicle at the first crime scene. Furthermore, the 1st Accused maintains that he was not armed at any point, but this position was not suggested to the Witnesses either. Thus, this Court upholds the application of the judgment in **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)** as the above issues are material points upon which no

cross-examination has taken place and the absence of which amounts to an acceptance of the Prosecution's version.

The Counsel for the 1st Accused also asserts that these questions were posed to the witnesses and alleges that the Learned Judges of the Trial at Bar did not appreciate or care to find out what the defence of the 1st Accused was. In this regard, the Court wishes to highlight several inconsistencies in the argument of the 1st Accused which clearly undermine the truthfulness of his defence. While the 1st Accused categorically maintained that he was in the vehicle during the first shooting, Dissanayake clearly states that he, along with the 2nd and 4th Accused and the first victim, alighted from the vehicle near the Lunawa Bridge. With regard to the second incident, the 1st Accused maintains that he got down from the vehicle but immediately returned when he heard shots being fired. However, Dissanayake does not corroborate this version but states that the 1st Accused alighted from the vehicle with the rest, and returned about ten minutes after the shots were heard, along with the other Accused. The testimony of Dissanayake is corroborated by that of Navaratne as well who did not see the 1st Accused milling near or close to the vehicle when he got down to speak to the two officers at the back whereas he saw the 1st Accused return together with the 2nd, 3rd and 4th Accused by streetlight.

Another inconsistency this Court wishes to highlight is with regard to the assertion of the 1st Accused that he was not armed at any point. However, evidence given by the Witnesses suggest otherwise. Dissanayake stated that the 2nd Accused asked the 3rd and 4th Accused to take the weapons while Thotawatte asserted that a little while later, the 2nd Accused asked the 1st Accused to take the weapon over from the 4th Accused, which the 1st Accused did. In addition, Dissanayake also stated that when the vehicle stopped near the Lunawa Bridge, he saw that both the 1st and 3rd Accused had weapons in their hands when they got down.

Thus, it cannot be said that the High Court, as the Counsel for the 1st Accused

vehemently asserted, did not appreciate or care to find out what the defence of the 1st Accused was, for given that the truthfulness of the account of the 1st Accused is entirely undermined by the testimonies given by the two Witness, namely, Dissanayake and Navaratne, it is apparent that the account of the 1st Accused of his own defence cannot be relied upon.

With regard to the defence tendered by the 2nd Accused, the submissions made by the Counsel for the 2nd Accused complemented by the evidence presented in the Dock Statement state that he was in the vehicle the entire time and did not have control over the situation when his subordinates murdered the two boys. If this position is to be accepted, the Court has to seriously consider the fact that the 2nd Accused is the Officer in Charge of the Angulana Police Station and by law, he is responsible for the actions of his subordinates.

This Court further notes that it is in his power to prevent imminent illegal acts, suppress crimes in progress, punish completed offences, restrain or impose sanctions on his subordinates, as appropriate. In the judgments of the International Criminal Tribunal for the former Yugoslavia the case of **Delalic et al (I.T-96-21) "Celebici"** *16th November 1998, para 395*, **Prosecutor v Tihomir Blaskic** *(IT-95-14), para 333* and in the case of **United States v Karl Brandt et al "doctors trial",** *2 TWC 212*; it was held that an officer in a position of command holds a duty to take steps to control those under him, and failure to do so will render him responsible for his actions. It seems necessary to apply this principle in the present case, although no evidence has been produced before us confirming that the 2nd Accused was in fact incapable of controlling the actions of his subordinates and was helpless in the matter.

Therefore, we do not accept that the 1st, 3rd and 4th Accused abducted and murdered the two boys without the knowledge and/or orders of the 2nd Accused and it is our view that the 2nd Accused was part and parcel of the criminal offences committed.

The next issue with regard to defences is the allegation that the Learned Judges of the Trial-at-Bar have failed to consider the Plea of Justification in favour of the 4th Appellant. The Counsel for the 4th Appellant submits that he was simply carrying out the orders made by his superior officer and that this does not amount to demonstrating a common intention and that he did not carry out illegal orders. Additionally, the Counsel for the 1st and 3rd Accused too argued this point and averred that the defence of superior orders should be applicable to them as well while the Counsel for the 1st Accused, in particular, averred that he had been denied a right to a fair trial due to the dismissal of his defence by the Learned Judges of the Trial-at-Bar in which they relied on the judgement given in **Dadimuni Indrasena & Dadimuni Wimalasena v AG (2008)**.

In this regard, this Court makes reference to **Section 69** of the *Penal Code* which states as follows:

> "*Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of mistake of law in* ***good faith*** *believes himself to be, bound by law to do it."* (Emphasis added).

Section 72 of the *Penal Code* further goes on to state that:

> "*Nothing is an offence which is done by any person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in* ***good faith*** *believes himself to be justified by law in doing it."* (Emphasis added).

With regard to the applicability of **Section 69** of the *Penal Code*, Alles, J. clearly stated in **Wijesuriya v. The State (1973)** *(77 NLR 25)* that

> *"To entitle a person to plead Section 69 as a defence, it is essential that the*

order given by the superior, even if it be not strictly lawful, prompted the person obeying the order to consider himself bound by law, in good faith, to act on the basis that it was a lawful order".

Sri Lankan Courts have recognised the applicability of the defence of superior orders in certain circumstances as enunciated by Gratien, J. in **Corea D. H. R. A v. The Queen (1954)** *(55 NLR 457)* who stated as follows:

"It is not improbably that, when the senior police officer present eventually ordered the complainant's arrest at a later stage, (the subordinate officers) reasonably and in good faith entertained the belief that the order was one which they ought to obey. In these circumstances they were entitled to claim the benefit of the exception to criminal liability set out in ***Section 69*** *of the Penal Code",*

However, the onus is on the Accused to prove that he was, on a balance of probability, acting in *good faith* in order to establish that his actions do not amount to an offence.

In recounting the events that took place that night and firstly, the actions of the 1st Accused i.e. assaulting the youth at the Police Station, chasing away Susantha Jayalath when he informed the 1st Accused that the two youth were personally known to him, and another villager who was near the gate of Police Station, getting the two youth, handcuffed and with shopping bags over their heads into the vehicle, the removal of the handcuffs of the 1st deceased upon instruction and failure to make an entry once he returned to the Police Station, the Court believes that the Accused was not acting in good faith.

The 2nd Accused assaulted the two victims with a baton/stick and a rubber belt [as noted by Thotawatte and corroborated by Dissanayake], ordered the 3rd and 4th Accused to take possession of weapons without making an entry as legally required,

was fully aware that the two youth were handcuffed and had shopping bags over their heads, pretended that he was entirely unaware of the arrests made the previous night, instructed Thotawatte to alter the Information Book and coerced all the relevant officers to prevent them from divulging the truth to the Mt. Lavinia Police. These actions clearly indicate, to a reasonable person, that the 2nd Accused was not acting in good faith whatsoever, but was clearly seeking to further his own means and conceal true events.

With regard to the 4th Accused, the Accused knowingly took possession of a gun from the reserve along with the 3rd Accused and returned said weapon without making entries as legally required. The 4th Accused also knowingly concealed his true whereabouts during the shootings as he asserts that he alighted from the vehicle but remained near it. While no one can corroborate this statement, it should also be noted that at the second crime scene, Navaratne got down from the vehicle and spoke to Dissanayake and Kulasinghe at the back but did not notice the 4th Accused nearby, as he alleged, indicating that he concealed his true whereabouts, possibly to prevent prosecution. Thus, this Court cannot agree that the 4th Accused was acting in good faith either.

The Court feels that it is imperative to note that in **Wijesuriya v. The State** *(77 NLR 25)* it was held that

> "*Section 69 of the Penal Code which states that "Nothing is an offence which is done by a person who is, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith believes himself to be, bound by law to do it" can have* ***no application when a person obeys an order which is manifestly and; obviously illegal****."* (Emphasis added).

The Counsel for the 4th Accused argued, in this regard, that the 4th Accused did not carry out a single illegal order other than obeyed the order to disembark from the

vehicle and walk towards the beach with the other Accused. This Court is inclined to strongly disagree as, at the very least, the 4th Accused obeyed an order to take possession of a weapon and later returned that weapon without making a single entry as required by law. He also admitted to having alighted from the vehicle at the second crime scene, with full knowledge of the extra judicial killing that had taken place earlier at the first crime scene.

Furthermore, this Court feels that it is appropriate to refer to International Criminal Law, which has much persuasive value, where the defence of superior orders has been comprehensively discussed as well.

Article 33 of the *Rome Statute of the International Criminal Court* recognizes the defence of superior orders on the basis of three qualifications. **Article 33** reads as follows:

> *"The fact that a crime within the jurisdiction of the court has been committed by a person pursuant to an order of a government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:*
>
> *I. The person was under a legal obligation to obey orders of the government or the superior in question;*
> *II. The person did not know that the order was unlawful; and*
> *III. The order was not manifestly unlawful.*

The first requirement is an existence of loyalty or legal obligation, whilst the other two requirements refer to requisite standards of knowledge. The latter requirements require the Accused to have personal knowledge of the illegal nature of the order. In this case, the 1st, 3rd and 4th Accused' were Police Officers and given the nature of their profession, it is apparent to us that they had personal knowledge of the nature of

the acts committed.

In ascertaining the trend of international opinion with regard to the applicability of this defence, it is also noteworthy that the English Courts adopt a somewhat strict line in the case of illegal orders, when police officers are involved. Similarly, in the Indian Case of **Gharan Das Narain Singh v. The State** *(AIR 1950 37)*, a constable, acting on the orders of a sergeant, fired into a tent and caused the death of a woman. Though he pleaded the defence of superior orders, Khosla J stated that

> *"The order was unlawful. Obedience to an unlawful order does not exonerate or excuse the person who commits an offence as a consequence of such an order.*

Furthermore, in the South African case of **R v. Smith (1900)** *(17 S.C. 561)*, Solomon J noted that

> *"It is monstrous to suppose that a soldier would be protected where the order is grossly illegal. If a soldier honestly believes that he is doing his duty in obeying the commands of his superior, and if the orders are not so manifestly illegal that he must or ought to have known that they were unlawful, the private soldier would be protected by the orders of his superior officer."*

Thus, it is this Court's opinion that they had a moral choice to avoid committing such offences. The concept of moral choice, recognised at the ***Leipzig trials***, established a principle where a subordinate would be punished, if in the execution of an order, he went beyond its scope or executed an unlawful act which the subordinate could have avoided. This principle was upheld by the German Supreme Court in the case of **USA v. Ohlendorf and Others (Einsatzgruppen Case) (1949)** *(15 ILR 656)*, on the basis of **Article 47** of the *1872 German Military Penal Code* and it is thus clear that superior orders will not avail a subordinate where it is apparent that the order is illegal.

Article 47 states as follows:

> *"If through the execution of an order pertaining to the service, a penal law is violated, then the superior giving the order is alone responsible. However, the obeying sub- [...ordinate] [sub...] ordinate shall be punished as accomplice (1) if he went beyond the order given to him, or (2) if he knew that the order of the superior concerned an act which aimed at a civil or military crime or offense."*

In the case before this Court, it is abundantly clear that the Accused were aware that the order given by the 2nd Accused concerned an act which aimed at a crime i.e. the ill-treatment of prisoners and their subsequent execution whilst in Police custody and thus, the defence of following superior orders cannot be relied upon.

This stance of the Court is in line with similar decisions such as that given in the case of **Llandovery Castle** *(16 AJIL*), where the German Supreme Court did not accept the defence of superior orders. In this case, it was held by the Learned Judges of the Supreme Court that although subordinates are under no obligation to question the order of their superior officer, when an order is universally known to be unlawful, following such an order would be against the law. Even at a very basic level, obeying an order to shoot and kill an individual who was handcuffed is clearly an order universally known to be against the law. Therefore, on the facts pertinent to the case at hand, and on evidence proven beyond a reasonable doubt, this Court dismisses the defence of "Superior orders" as averred by the 1st, 3rd and 4th Accused.

Another question to address is whether the 1st, 3rd and 4th Accused could plead duress. The Counsel for the 4th Accused in particular averred that the said Accused, being the most junior Officer, had carried out the orders given by his superior out of an implied fear of being reprimanded or punished, if he refused to do so. In addition, the Counsel for the 1st Accused asserted that due to the 'overpowering nature of the 2nd Accused' he carried out his orders out of fear.

The defence of duress by threat was defined in **A.G v. Whelan [1993]** (*IEHC*) as being a defence available to an Accused who has committed an offence subject to

> *'Threats of immediate death or serious personal violence so great as to overbear the ordinary powers of human resistance.'*

It is up to the Court to determine whether the threat was sufficiently serious to warrant the defence of duress to stand.

This Court faces insurmountable, philosophical, moral and legal difficulties in putting one life in the balance against that of others. Thus, this Court makes reference to the decisions of the House of Lords in the English cases of **Abbott v. The Queen [1977]** *(AC 755) and* **R v. Howe & Bannister [1987]** (*2 WLR 568)* which have persuasive value and reflect the international opinions on the matter. In the latter case, the House of Lords held that the defence of duress will not be available for murder or attempted murder:

> i. "*We face a rising tide of violence and terrorism against which the law must stand firm recognising that its highest duty is to protect the freedom and lives of those that live under it. The sanctity of human life lies at the root of this ideal and I would do nothing to undermine it, be it ever so slight.*
>
> ii. *Attempted murder requires proof of an intent to kill, whereas in murder it is sufficient to prove an intent to cause really serious injury. It cannot be right to allow the defence to one who may be more intent upon taking a life than the murderer."*

This Court also makes reference to **Section 87** of the *Penal Code* which states the following:

> *"Except murder and offences against the State punishable with death, nothing is an offence which is done by a person who is compelled to do it by threats, which at the time of doing it, reasonably cause the apprehension that instant death to that person will otherwise be the consequent; provided the person doing the act did not of his own accord, or from a reasonable apprehension of harm to himself short of instant death, place himself in the situation by which he became subject to such restraint".*

In light of the evidence presented to this Court, I am of the opinion that the 1st, 3rd and 4th Accused had a choice. In analysing the evidence presented to this Court, it cannot be stated that the Accused were subjected to any threats of immediate death or serious personal violence by the 2nd Accused that is so great as to overpower the ordinary powers of human resistance. What is crucially important to note is that the Accused are Police Officers who are professionally and lawfully entrusted with the duty to serve, to maintain law and order, to protect members of the public and their property, prevent crime, reduce the fear of crime and improve the quality of life of all citizens. Having such great responsibility in their hands and moreover, having wilfully taken on this responsibility, it is atrocious for them to seek duress as an excuse for the abduction and killing of two innocent people. In any case, **Section 87** of the *Penal Code* negates any claim of the defence of duress against a charge of murder. Thus, in the circumstances of this case, the Court notes that the defence of duress in fact and in law, as the Accused have acted with impunity in blatant abuse of their power, the defence of duress cannot be relied upon to provide perpetrators with a pretext for avoiding the responsibilities that have been entrusted to them, especially when the proven facts speak otherwise.

The next issue that is discussed by this Court is one that arises from the submissions

made by the Counsel for the 3rd Accused where intoxication was purported as a defence. From the evidence brought before us it has been noted that the 1st, 2nd, 3rd and 4th Accused was at a party prior to the murder. Although the 2nd Accused in his statement averred that due to medical reasons he did not consume alcohol, 1st, 3rd and 4th Accused accepted that they had consumed alcohol at the party. Subsequent to such consumption, they returned to the Police Station to resume duty in an inebriate state.

The difficulty presented before us is the task of identifying whether the mind of the 1st, 3rd and 4th Accused were so affected by the consumption of alcohol that they were entirely incapable of knowing what they were doing was dangerous i.e. likely to inflict serious injury. With regard to the documentation and other evidence presented before this Court, we are unable to effectively ascertain whether their inebriated state rendered them incapable of knowing what they were doing. However, even if it could be determined that they were unaware of their actions, Court makes reference to **Section 78** of the *Penal Code* which states the following:

> *"Nothing is an offence which is done by a person who, at the time of doing it, is, by reason of intoxication incapable of knowing the nature of the act, or that he is doing what is either wrong or contrary to law:*
>
> *Provided that the thing which intoxicated him was administered to him* ***without his knowledge or against his will***." [Emphasis added].

What is noteworthy is that the Accused cannot, under any circumstances, plead that they did not commit an offence on the ground of intoxication because the consumption of alcohol at the party was entirely voluntary. There is no evidence whatsoever presented to this Court to indicate that the Accused were coerced into consuming alcohol prior to returning to the Station to resume police duties.

This Court notes the Gambian case ***Banday (1948) 15 E.A.C.A. 145***, where it was held that

> "*The common result of the consumption of liquor is that it makes a person reckless as to the consequences of his actions. That, however, is not a defence in law".*

Similarly, we do not accept that 1st, 3rd and 4th Accused could escape from the consequences of their actions by alleging intoxication as a defence, especially in the given circumstances. As Police Officers, allowing the defence of intoxication to stand would be entirely unjust as they are expected to safeguard the rights of the people and prevent situations such as what has transpired in this case.

What is thoroughly alarming is the callous manner in which these officers have treated their respective duties. It is established that they, subsequent to consuming alcohol, returned to the Station to resume their public duties and a rather worrying question arises in our minds as to how the protectors of the public could voluntarily intoxicate themselves and deliberately put themselves in a position where they are unable to control their actions when discharging their duties.

A final question of law pertaining to defences and the Plea of Justification was raised by the Counsel for the 4th Accused. The Counsel, in his written submissions, argued that the Allocutus under **Section 280** of the *Code of Criminal Procedure* is part of evidence and will strengthen the Plea of Justification. **Section 280** of the *Code of Criminal Procedure* states as follows:

> *"In the High Court before judgment of death is pronounced, the Accused shall be asked whether he has anything to say why judgment of death should not be pronounced against him".*

The Counsel has relied on the case of **Priyambalamet. Al. v The Queen (1970)** (*74 NLR 515*), where it was held that

"An admission made by an accused person in answer to the Allocutus under Section 305 of the Criminal Procedure Code is evidence in the case and the Court of Criminal Appeal cannot ignore the effect of such admission".

However, Court makes the distinction that in the abovementioned case, an admission, rather than a defence was made and is thus inapplicable to the present case as in the present case, the 4th Accused in his Allocutus averred the defence of superior orders. However this is untenable in Law and is rejected.

On a concluding note, this Court further deem it utterly horrific for members of the forces in a country to unlawfully detain, physically and mentally assault and thereafter abduct and murder persons who were in their custody. One should not forget that being a member of the forces is an honourable position, where the lives of the citizens have been entrusted to them. This power should not be used to abuse, intimidate and generate fear in the minds of the public. When a person is detained, he is merely a suspect; he has not been found guilty according to the laws of the country and therefore, allowing the forces to behave in such a manner and punish the detainee, cannot, on any count, be condoned as is the basis of the arguments of this defence.
Therefore, for the aforesaid reasons, the Appeal to set aside the Judgment dated 25.08.2011 is dismissed and the Judgment of the Trial-at-Bar is affirmed.

Sgd.

JUDGE OF THE SUPREME COURT.

EKANAYAKE. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

HETTIGE.P.C. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

DEP. P.C. J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

WANASUNDERA.P.C. J

I agree.

Sgd.

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 Democratic Socialist Republic of Sri Lanka

SC. FR. Application No. 24/2013

Kalidasage Roshan Chaminda Wijewardhana,
No. 179/9, Udupila,
Delgoda.

Petitioner

Vs.

1. Kurunegala Plantations Limited,
   No. 80, Dambulla Road,
   Kurunegala.

2. S.K. Nillegoda,
   Chief Executive Officer,
   Kurunegala Plantations Limited,
   No. 80, Dambulla Road,
   Kurunegala

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

Respondents.

* * * * *

SC. (FR) 24/2013

Before : **Mohan Pieris,PC, C.J.**
Priyasath Dep, PC. J. &
Eva Wanasundera, PC,J.

Counsel : Manohara de Silva PC. with Pubudini Wickremaratne for the Petitioner.

Mrs. Shahieda Barrie, SSC. for the Respondents.

Argued On
Preliminary Objections : **18-03-2014** & **16-07-2014**

Written
Submissions filed : By the Petitioner on 26-05-2014
By the Respondents on 19-05-2014

Decided On : **03-09-2014**

* * * * *

Eva Wanasundera, PC.J.

At the commencement of the hearing of this case after granting Leave to Proceed on 05.04.2013, Court suggested a settlement which was not arrived at, by the parties. This Court heard Counsel for the parties on 18.03.2014 when a preliminary objection was raised by the Senior State Counsel appearing for the Respondents. The hearing on the preliminary objection was resumed on 16.07.2014 and Court directed parties to file written submissions on the preliminary objection.

The Respondents submitted that the complaint against the Respondents does not fall under the category of 'executive and administrative action' to bring it within the fundamental rights jurisdiction contemplated in Article 12(1) of the Constitution but is essentially a matter of contract. The thresh-hold issue to be decided is whether the matter before Court is within the category of "contract" or "executive and administrative action".

The facts before Court would lead the way to a certain extent. The 1st Respondent, Kurunegala Plantations Ltd. (hereinafter sometimes referred to as 'KPL') called for tenders for the lease of a rocky site to operate a quarry and the Petitioner was awarded the tender. He entered into a lease agreement on 02.12.2009 with KPL for 3 years and paid the full amount of lease for 3 years. KPL agreed to grant a period of one more month to obtain the necessary permits/approvals to operate the quarry and for the construction of the road to the site. The Petitioner obtained the approval of the Geological Survey and Mines Bureau which issued an Industrial License on 11.01.2011; the approval of the Central Environmental Authority which issued an Environmental Protection License on 07.04.2011 and the approval of the Department of Archaeology on 01.12.2010. As the approvals to quarry had not been obtained, the Petitioner could not have legally started quarrying within one month from 02.12.2009. The Petitioner complains that the Superintendant of the Estate who is an employer of the KPL did not allow him to quarry. He could not have legally started work due to the delay in obtaining the aforementioned licences. Could the delay be attributed only to the KPL or to the Petitioner himself or to both parties? Admittedly quarrying was delayed by 1 year and 8 months. The Petitioner entered the site de-facto on 08.08.2011.

At the end of the 3 years and 1 month commencing from 02.12.2009 the Petitioner demanded from the 1st Respondent KPL to extend the term of the contract which the 1st Respondent refused to do for reasons set out in his statement of objections. It is at this point that the Petitioner invoked the jurisdiction of this Court and complained of the infringement of the Petitioner's fundamental rights guaranteed under Act 12(1) of the Constitution by the Respondents, on the basis that the 1st Respondent has refused to extend the lease agreement for a period of 3 years commencing from 08.08.2011.

The reliefs prayed for by the Petitioners in his petition are, to make order directing the 1st Respondent to act under Clause 22 of the lease agreement and take steps to extend the lease agreement for a period of 3 years from 08.08.2011 or to make order to pay the Petitioner the amount corresponding to the lease rental for 1 year and 8 months and to grant interim order restraining the Respondents from ejecting him from the land and/or to restrain the Respondents from calling for fresh tenders. The agreement is a contract. The reliefs prayed for are based on the clauses in the contract. In summary, the Petitioner is praying that this Court orders the Respondents to perform their obligations laid down on the agreement which is the contract between both parties.

The Petitioner's submissions with regard to the delay in obtaining the licenses prior to the commencement of quarrying operations seems to be referable to the actions of the Superintendent of the Attanagalle Estate at that particular time, who did not allow the Petitioner access to the land. It appears that Superintendent had entertained personal ill-will towards the Petitioner. The 1st Respondent has thereafter dismissed that particular Superintendent from service and appointed another Superintendent who obeyed the instructions given by the Respondents and allowed the Petitioner to carry out the survey of the rock on 08.08.2011. The Petitioner states that the Respondents have acted arbitrarily and delayed the survey and entry to the site of the quarry.

It is important to see that Clause 22 of the Agreement is with regard to extensions by mutual discussions and agreement of the parties and not only at the instance of one party. The 1st Respondent was exercising its contractual right under the provisions and/or conditions of the lease agreement entered into by both parties when it did not extend the lease period included in the agreement. Yet, it is to be noted that the Petitioner could not proceed to actually commence quarrying due to different problems created by the Superintendent of the Estate within which the rock was situated. It is to be noted that the Superintendent at that time was not complying with even the orders of the 1st Respondent even though he was a servant/agent of the 1st Respondent. Needless to say several steps could have been taken by the 1st Respondent to avoid

trouble to the Petitioner prior to the commencement of quarrying which was not strictly included in the contract.

The Counsel for both parties have made submissions to decide on the preliminary objection. The law pertinent to this area in particular, i.e. whether the actions of the State entity, having entered into a contract and/or when entering into a contract, comes under the wing of 'executive or administrative action' or whether the actions of the state should be regarded as only confined to the conditions embodied in the realms of contract between two private parties.

In this context I leave aside the relevant Indian judgments submitted by both parties and consider the following series of Sri Lankan judgments on which the law has developed to date regarding similar cases.

1. Roberts Vs. Ratnayake 1986, 2 SLR 36
2. Wijenaike Vs. Air Lanka 1990, 1 SLR 293
3. Gunaratne Vs. Ceylon Petroleum Corporation 1996, 1 SLR 315
4. Wickrematunga Vs. Anuruddha Ratwatte and others 1998, 1 SLR 201
5. Wickremasinghe Vs. Ceylon Petroleum Corporation 2001, 2 SLR 409

It is common ground that the actions of the Respondents per se fall within the definition of 'executive and administrative action' as they come under the purview of a Ministry. The Respondent's point of contention is that "what is challenged in this application is eventually a matter of contract and does not fall within executive and administrative action falling within the fundamental rights jurisdiction of the Supreme Court".

In ***Roberts Vs. Ratnayake***, it was held that by a majority decision that, "an act done in pursuance of a term or condition contained in a contract could found a complaint of an infringement of the right embodied in Article 12(1) only where such term or condition has a statutory origin or has at least a statutory flavor. The state has to be treated in the same way as any other ordinary party to a legally binding contract and where the rights and obligations of the parties to such a contract fall to be determined by the ordinary law

of contract, then the provisions of Article 12(1) of the Constitution has no application and cannot be invoked."

Wijenaike Vs. Air Lanka, followed ***Roberts Vs. Ratnayake*** decision. It was held that *"Acts of State at the threshold stage or stage of granting a contract would be governed by Constitutional provisions but subsequent acts in the field of contract would not be so governed unless the power or obligation was statutory".*

Thereafter, the decisions in the Supreme Court abstained from following the aforementioned reasoning. In ***Gunaratne Vs. Ceylon Petroleum Corporation 1996, 1 SLR 315,*** the Petitioner complained of an infringement of Article 12(1) of the Constitution owing to a summary termination of a dealership agreement, in terms of a termination clause in the relevant contract. An objection was raised that the termination of the agreement was not 'executive and administrative action' as it was an act done in the exercise of a contractual right to terminate the contract, ***which was signed and concluded*** *d*rawing a contrast to the Roberts Vs. Ratnayake case where it was observed that it was only ***at the threshold stage*** that it could be regarded as executive and administrative action. Justice Mark Fernando did not accept this contention but held as follows:-

> *"The principle of equality embodied in Article 12 does not make any exception, in regard to contracts in general, or particular types of contracts, or the stage at which a contract is. Indeed, the proviso to Article 12(2), as well as Article 12(3), militate against the contention that contracts are excluded. As for the submission that action taken after a contract has been entered into ceases to be executive or administrative action, that would give rise to a host of anomalies. That submission, while acknowledging that discrimination (e.g. on the ground of race, religion, or political opinion) at the stage of awarding or granting a contract, dealership or licence, can be remedied under Article 126, leaves it open, soon thereafter, to cancel that same contract, dealership or licence on the very same grounds doing indirectly that which could not have been done directly."*

In ***Wickrematunga Vs. Anuruddha Ratwatte and Others 1998 -1 SLR 201***, again, it was held, after considering many Sri Lankan cases and Indian cases by Justice A.R.B. Amarasinghe, that *"Law in Article 12 of the Constitution includes regulations, rules, directions, principles, guidelines and schemes that are designed to regulate public authorities in their conduct. In the context, whilst Article 12 erects no shield against merely private conduct, public authorities must conform to constitutional requirements , in particular to those set out in Article 12* ***even in the sphere of contract****; and where there is a breach of contract and a violation of the provisions of Article 12 brought about by the same set of facts and circumstances,* ***the aggrieved party cannot be confined to his remedy under the law of contract****."*

Amarasinghe, J. rejected the dichotomous approach of *pre and post contract* and further stated that in the sphere of contracts, public authorities and functionaries have to conform to the constitutional requirements and in particular those set out in Article 12. He said *"They cannot in my view avoid their constitutional duties by attempting to disguise their activities as those of private parties".*

In ***Wickremasinghe Vs. Ceylon Petroleum Corporation 2001, 2 SLR 409*** case, the Ceylon Petroleum Corporation unilaterally terminated a dealership agreement, as per a clause in the contract that provided for a unilateral right to terminate the contract. It was held in the case that , *"since the termination of the agreement is challenged on the basis of an infringement of the right to equality guaranteed by Article 12(1) of the Constitution,* ***the legality of the termination has to be reviewed not in the light of the law of contract but in the domain of the Constitutional in Article 12****".* Sarath N Silva CJ. observed in that case that *"Therefore the impugned termination of the Dealership agreement by P4 should be reviewed in these proceedings* ***not from the narrow perspective of only the terms of the agreement but from the broader perspective of the exercise of executive and administrative action by the agency of the Government*** *and the constitutional guarantee of equality which should guide the exercise of power under the agreement."*

In the instant case, the 1st and 2nd Respondents had been continuously made aware by the Petitioner of the fact that the Superintendent of the Estate at the commencement of the Petitioner's effort to organize matters to commence quarrying, was obstructing the Petitioner without any reason. The Respondents had turned a blind eye to the Petitioner's complaints until he made a complaint to the Police of the area when the Superintendent of the Estate threatened him with death when he entered the site with the Surveyor. It is only after this incident that the Superintendent had been summoned by the Respondents. It is surprising to observe that it had taken 8 months from 09.01.2011, the date of the Police complaint till 08.08.2011, for the Respondents to issue a letter in writing, directing the new Superintendent to allow the Petitioner to enter the Estate and commence the preliminaries prior to quarrying. It is observed that the Respondents could have acted on the complaints much earlier than they finally did. The survey plan 7787A marked P10 had been done after the date of the lease agreement. Lease agreement is dated 02.12.2009. Survey specifying the area was done on 13.03.2010 after 3 months, according to P10. It would appear that the Respondents have acted in a very irresponsible and arbitrary manner taking advantage of the fact that the 1st Respondent had already collected the lease rental and according to the contract the 1st Respondent was at an advantage. They had not addressed the issue as public officers of the State coming under the purview of the Ministry of State Resources and Enterprise Development. It would appear they had acted arbitrarily right along and with no care towards the counter party of the agreement. When the Petitioner requested that he be given an extension of the lease period beyond the 37 months for which the lease was agreed upon, the 1st Respondent had refused to extend the same seemingly acting in an arbitrary manner.

I am of the opinion that the 1st Respondent's refusal to extend the lease period should be reviewed not from the narrow perspective of only the terms of the agreement but from the broader perspective of the exercise of executive and administrative action. The refusal to extend the lease period by the 1st Respondent is an act of agency of the Government and the Constitutional guarantee of equality should guide the exercise of power under the agreement. Every instance of unfairness to an individual will not give rise to a justiciable grievance under the ideology of the rule of law and equality under

the law but the party which is seemingly more powerful in this instant case, after the conclusion of signing the contract, being a state entity should not have abused the power in its hands. The conduct of the Respondents seem to be arbitrary even though mala fides has not been pleaded in the petition.

In the circumstances, I over-rule the preliminary objection and hold that the main matter be argued on merits.

Judge of the Supreme Court

Mohan Pieris,PC, C.J.

I agree.

Chief Justice

Priyasath 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 under Article 126 of the Constitution of Sri Lanka

S.C.F.R. 64/2009

1. S.A.W. de Silva
"Kusum", Etholuwa
Meetiyagoda, Ambalangoda

2. A.I.L. Sugathadasa
"Isuru", Weligampitiya
Pokunuwita

3. G. Nishantha Morawakage
265/2, Weera Mawatha
Depanama, Pannipitiya

4. W.K.M.S.T. Bandara
75, Ihala Kanogama, Katupotha

5. M.U. Gayani
"Aruna", Udakanatta Watta
Mudugamuwa, Weligama

6. S.S. Vithanage
No.22, 4th Lane, Ratmalana

7. W.U.S. Alwis
No.103, Galkanuwa Road
Gorakana, Moratuwa

8. Chaminda Kottawatta
Ranna North Ranna, Tangalle

9. B.G.C. Nilushika
No.33/12, Angulana Railway

Satation Road, Lakshapathiya,
Moratuwa

10. P.M. Kanattawatta
No. 218, 6th Lane
Dikhenpura, Horana

11. M.K.D. Thushari
D.S. Abeygunawardena Mawatha
Morawaka

12. A.T. Piyasiri
No. 46, Kapuhena Road
Maha Uduwa

13. U.I. Mathugamage
Horaketiya Junction
AgalOya, Bulathsinghala

14. H.M.N. Munasingha
"Singhavilla", Pahalaharwella
Weegabugedara, Kurunegala

15. L.P. De Silva
Galle Road, Middaramulla
Ahungalla

16. B.M. Niroshan Wimaladasa
No. 49 1/1, Moratumulla North
Moratuwa

17. W.R.N. Deepagoda
11 km Post, Ambalanwatta
Atakalampanna

18. H.A.V.L.S. Nawaratna
8B, Public Servants Village
Diurumpitiya, Gatahatta

19. K.P.U. Pushpakumara
No. 441/2, Old Road

Moraketiya, Pannipitiya

20. M.M. Kappagoda
Kandegedara, Devalegama

21. K.L.A. Ariyakeerthi
Temple Road
Magulagama

22. K.M.J.M. Warnasuriya
Galgamuwa South
Mahaarachchimulla, Kurunegala

23. M.G.S. Priyadarshani
No. 54/B, Ihagama
Madawala, Harispattuwa

24. E.M.M.K. Ekanayake
"Sahana", Gammadugolla
Malkaduwawa Road, Kurunegala

25. W.S.D. Gunaratne
No. 43/1 A, Kottapola
Hakahinne, Kegalle

26. L.J.C. Gunathilake
No. 275/14, Bandaranayake
Mawatha, Kegalle

27. S.P.R. Disanayake
"Shanthi", Pitawala
Hewadiwela, Rambukkana

28. D.R.I. Udeshini, No. 103, Alawwa
Road, Warakapola

29. S.V. Ranathungage
No. 48, Danovita Road
Meerigama

30. H.P. Keerthirathne
497, Bandaranayake Road
Weyangoda

31. G.J.R.N.N.D. Ramanayake
No. 20/74, "Green Terance"
Parakandeniya, Imbulgoda

32. R.C. Warusavithana
A-130, Perth Paradise
Ratnapura Road, Gurugoda, Horana

33. A.K.M. Kularatna
Wagawathugoda, KudaUduwa
Horana

34. D.M.C.K. Dissanayake
"Disawasa"
Amunukola Road, Eppawala

35. R.R.P. Malalasekera
No. 58, Konwewa, Upuldeniya
Anuradhapura

36. W.A.J. Bandara
Pahalagama, Dunumala
Warakapola

37. A.M.P.G. Seneviratne
1/301, Wedagewatta Road
Kotuwegoda, Rajagiriya

38. M.K.A.P. Gunathilake
No. 352, Awissawella Road
Kelanimulla, Mulleriyawa New
Town

39. S. Rajinikanth, No. 32
Mariya Basar, Lindula

40. R.M.W.L. Ratnayake
No. 214/E, “Sanasuma”
Midahinna, Kinigama, Bandarawela

41. S.E. Pussawalage
No. 38/1, Beraliyadola Watta
Hapugala, Wakwella, Galle

42. K.L. Priyantha
“Yamuna”, Meeruppa
Denipitiya

43. K.G.A. Gunasekara
Mohottiwatta
Watagedaramulla
Denipitiya

44. K.G.K. Dhasmasiri
“Thilaka”, Hittatiya Mada
Matara

45. N.M. Ranaweera
“Ranasewana”
Malimbada North, Matara

46. H.M.K.P.A.B. Wijeratne
No. 66, Yatawatta, Matale

47. M.M.S.B. Wijethilake
No. 74/1, Kurundeniya, Akurana

48. K. Jayantha, Ambagahawatta
MahaEla Kandiya, Koggala
Ambalantota

49. H.K. Samarasinghe
“Darshana”, Gangasiri Mawatha
Malimbada Palatuwa

50. H.L.K. Thushari

No. 803/4, Gurugewatta
KoralaIma, Gonapola Junction

51. J.A.K.K. Jayasuriya
"Sikuruwana", Kalatuwawa
Pasyala

52. L.M.S.P. Kumara, No. 18/2
Meewella Road, Pethiyagoda
Kelaniya

53. S.W.S.G. Dissanayake, No. 375,
Potategama, Pahala Giribawa
Galagamuwa

54. B.K.P.B. Rodrigo, 223-D,
Henewatte Road, Welivita,
Kaduwela

55. N. Abeythunga, No. 124A,
Maragoda, Thelijjawila

56. W.P.G. Pushpakumara
No. 261, Bandagiriya Welihatta
Hambantota

57. C. Widanapathirana
Wellandagoda, Kirama

58. H.M.Y.B.L. Heenkenda
422/1, Dippitiya, Alawathugoda

59. B.K.M. Dharmasiri, No. 286/2,
Payingamuwa, Hidagala,
Peradeniya

60. K. Sasikaran, Manchavanapathy
Veethy, Kokuvil-West, Kokuvil

PETITIONERS

V.

1. Saliya W. Mathew, Chairman
2. K.L.L. Wijeratne, Member
3. S.C. Mannapperuma, Member
4. Deshabandu M. Mackie Hashim, Member
5. Dr. Jerry Jayawardena, Member
6. Ariyapala de Silva, Member
7. Dr. Loyd Fernando, Member
8. V.Kanaksabhapathy, Member
9. Gunapala Wickramaratne, Member
10. Soma Kotakadeniya, Member
11. Leslie Devendra, Member
12. D.W. Subasinghe, Member
13. Prof. Carlo Fonseka, Member

1st to 13th respondents all of the National Salaries and Cadres Commission, No. 2G-10, Bandaranayake Memorial International Conference Hall (BMICH), Bauddaloka Mawatha, Colombo 7

14. Industrial Development Board**,** 615, Galle Road, Katubedda, Moratuwa
15. K.G. Gamini Gunadasa**,** Chiarman
16. A.P. Kurumbalapitiya**,** Member
17. K.G.T.P. Dissanayake, Member
18. S.H. Harischandra, Member
19. N.W. Hettiarachchi, Member
20. Aruna Gunawardene, Member
21. A.M.D. Bandara, Member

14th to 21st respondents all of the Members of the Industrial Development

Board, 615, Galle Road, Katubedda, Moratuwa

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

RESPONDENTS

Before: Saleem Marsoof, PC, J.
Chandra Ekanayake, J.
Dep, PC, J.

Counsel: J.C. Weliamuna with Pulasthi Hewamanne for the Petitioner
Ms.Viveka Siriwardene SSC, for the respondents

Written submissions tendered on: 4.1.2010 for petitioners
4.1.2010 for 1st to 13th and 22nd respondents

Argued on: 26.11.2013

Decided on: 27.03.2014

CHANDRA EKANAYAKE J.

The 1st to 60th petitioners by their petition dated 20.01.2009 (filed together with an affidavit of the 1st petitioner) had sought reliefs by way of declarations to the effect that the 1st to 13th respondents have violated the fundamental rights of the petitioners' guaranteed under Article 12(1) of the Constitution and that the decision of the 1st to 13th respondents and/or 14th to 21st respondents to categorise the petitioners as Management Assistants (MA) is null and void and that the petitioners are entitled to be categorised either as Middle Management (MM) or Junior Management (JM) or as executives or managers thereof and to be so appointed to such grade forthwith, an order to quash that part of P6 strictly in so far as it is applicable to the petitioners, a direction to the 1st to 13th respondents and/or 14th to 21st respondents to take steps forthwith to categorise the petitioners either as Middle Management (MM) or Junior Management (JM) or as executives or managers thereof. Further, the petitioners had sought compensation in a sum determined by this Court.

When this application was supported on 19.2.2009 this Court had proceeded to grant leave to proceed in respect of the alleged violation of fundamental rights guaranteed under Article 12(1) of the Constitution.

The petitioners are employees of the 14th Respondent Board – namely Industrial Development Board (hereinafter sometimes referred to as the "IDB") holding the posts of 'Enterprise Promotion Managers - (EPM) -Executive Grade -V' as evidenced by the letter of appointment of the 1st petitioner marked P2 and the other petitioners too were issued with similar letters of appointment. Further they had been recruited as Enterprise Promotion Managers – Executive Grade – V, by an open competitive examination followed by an interview. The educational qualifications of all the petitioners are borne out by the document annexed to the petition marked P1. It is further averred that in terms of the previously applicable Scheme of Promotion, those who had 7 years in EPM – Executive Grade – V were entitled to be promoted to EPM – Executive Grade – IV as per P9 [entitling to a higher salary, emoluments and being eligible to apply for the post of Assistant Director – (AD) thereof - see P8(f).]

As averred in paragraph 2 of the petition the petitioners have challenged the purported decision

of the respondents to categorize them as Management Assistants which being a non-executive/ non -managerial grade in the Public Service and it is further alleged that by this their promotional prospects also have been abolished.

Petitioners have further contended that prior to the impugned decisions of the respondents as per the structure of Grades of Employees that prevailed in the IDB, Enterprise Promotion Manager – Grade IV or V were Executive Grades (Vide paragraph 4 of the present petition). Consequent to the Public Administration Circular No.06/2006 by which salaries in the Public Service inclusive of statutory boards were revised, salaries of employees of corporations, statutory boards and fully owned government companies were effected by Management Services Circular No.30 (P3). The schedule to the said P3 which is annexed to the Petition marked P4 has categorized the employees of Corporations, Statutory Boards, fully owned government companies as follows :-

Higher Management	-	**HM**
Academic and Research	-	**AR**
Middle Management	-	**MM**
Junior Management	-	**JM**
Management Assistant	-	**MA**
Primary Level	-	**PL**

Petitioners complain that by the Schedule of Grades (based on P3 and P4) issued by the Salaries and Cardres Commission in respect of the employees of the IDB which is annexed to the petition marked P6(being an annexure to the covering letter of 21/02//2006 – (P5)], they were aggrieved in the following manner:-

(a) that petitioners have been placed under Management Assistant - MA category which being a non-executive position and

(b) EPM Executive Grade - IV was abolished which being a promotional step until then.

It is noteworthy that in terms of P6 they have been placed on the salary scale MA5.2. In the aforesaid circumstances it is contended that purported decisions of the respondents to categorize the petitioners as Management Assistants (non executive/non-managerial grade) and

abolition of promotional prospects thereof constituted an infringement of their rights guaranteed under Article 12 (1) of the Constitution.

The 1st Respondent by his affidavit dated 29.5.2009 has mainly relied on the following among others:-

(a) the Management Circular No. 30 stated that restructuring of salaries will not in any way affect the status of employees and,

(b) that petitioners have been correctly categorized as Enforcement/ Operational/ Extension Officers, for the purpose of revision of salary without changing the status enjoyed by them.

The petitioners have taken up the position that they were employees of the Industrial Development Board (IDB) and were holding the post of Enterprise Promotion Manager (EPM) Executive Grade V, which is an Executive Grade. According to the documents marked P8(a) to P8(i) they were entitled to be promoted to EPM Executive Grade IV on completion of 7 years of service in that position. Furthermore, the petitioners have produced documents to establish that they had discussions and exchanged correspondence [P7(a) to P7(d)] to resolve this anomaly. The document marked P9 was also produced to substantiate the position that their employer namely- the Industrial Development Board (IDB) recommended that EPM Executive Grade - V to be categorized as Junior Management (JM) under the new scheme. This has to be considered in the context of non

filing of objections by the IDB - (14th respondent) and 15th to 21st respondents who being its members. They have consented to abide by any decision that would be given by this Court in this regard.

An examination of the letters of appointment issued to the petitioners (P2) and other material, in conjunction with the averments contained in paragraph 13 of the petition establishes that the duties that were performed by the petitioners immediately prior to the impugned categorization by the new circular belong to an Executive Grade. The petitioners contend that the impugned categorization has positively brought them down from the management level (Enterprise Promotion Managers – Executive Grade – V) to a non-managerial - level viz: a grade called

Non-Managerial level (Enforcement /Operational/Extension Officers) under the salary scale MA5.2. However the respondents laid stress heavily on the fact that the petitioners were never classified as Management Assistants and in fact they were classified as Enforcement /Implementation/Extension Officers solely for the purpose of revision of salary.

The petitioners' position is that in accordance with the Public Administration Circular No. 06/2006 the salaries of employees of corporations, statutory bodies and fully owned government companies were brought under the Management Circular N0. 30 (P3 and P4). Under P3 employees of the said institutions have been classified into several categories and the petitioners in their petition state that they should have been categorized either as JM meaning Junior Management or MM meaning Middle Management.

Petitioners' complaint is that based on the Circular P3 the Salaries and Cadres Commission (S&CC) issued a schedule of grades applicable to employees of the Industrial Development Board (IDB) which abolished the EPM Executive Grade IV which the petitioners belonged to and placed them in a new category called MA(Management Assistant (MA) (Kalamanakara Sahayaka) which falls into a non-executive grade. And as per P6 they have been placed on the salary scale MA. 5:2.

The petitioners have produced documents to establish that they had discussions and exchanged correspondence [P7(a) to [P7(d)] to resolve this anomaly. They have also produced the document (P9) to prove that their direct employer the Industrial Development Board (IDB) has recommended that EPM Executive Grade -V be categorized as Junior Management(JM) under the new salary scheme. This has also been borne out by the fact that the IDB the 14th respondent and the 15th to 21st respondents being its members have not filed objections and have consented to abide by any decision that would be given by this Court.

An examination of the letters of appointment of the petitioners (P2) together with the averments contained in para 13 of the Petition establishes that duties performed by the petitioners immediately prior to the impugned categorization by the new Circular belonged to an executive grade. What has to be ascertained is whether the new categorization of the petitioners according to the relevant Circular amounts to a demotion and/ or placing them in an inferior

position to the position or grade that existed before the promulgation of the same as claimed by the petitioners.

The petitioners claim that the impugned categorization has positively brought them down from the management level (Enterprise Promotion Managers – Executive - grade - (V) to a grade in a non-managerial level to wit: Enforcement /Implementation/Extension Officers under the salary scale MA 5:2. However the respondents laid stress heavily on the fact that they were never classified as Management Assistants and in fact they were classified as Enforcement/Implementation/ Extension Officers, solely for the purpose of re-structuring the salary structure.

It is also submitted on behalf of the respondents that the petitioners were Executive Officers holding the designation of Enterprise Promotion Manager (EPM) Grade-V and that they continued to be Executive Officers designated as EPM Grade-V. The learned counsel for the respondents submitted that the abbreviations 'MA' is merely an acronym which only denotes salary code. To buttress this argument the learned counsel drew the attention of Court to the contents of paragraph 2 of annexure 11 of P3 which is to the following effect:

> "The proposed new salary structure arises out of a re-structuring process covering all the prevailing salary scales and it is not an exercise of granting percentage increases on the existing salary scales. Accordingly various categories of employees, who have hitherto been drawing different salary scales, have been broadly regrouped as follows founded on factors such as entry qualifications, nature of duties assigned to the post, level of responsibilities and the position held in the organizational structure etc. It shall be noted that this re-categorization is purely for the purpose of restructuring the salary structure and shall not in anyway affect or vary the current status of the employee."

In view of the above submission of the learned counsel for the respondents this Court is unable to accept that the abbreviation 'MA' is used to identify the new position under the new circular,

is merely an ‘acronym’ which only denotes a salary code. It is the considered view of this court that the regrouping of the grades under the new circular has been made having taken into consideration inter alia the standing of each employee, their qualifications, nature of duties assigned to the particular post, level of responsibilities and the position held by each employee in the organizational structure before the introduction of the new circular.

Thus I am hesitant to accept the position that the abbreviation ‘MA’ by which the new post was identified was merely an acronym devoid of a meaning. As such this Court holds the view that the two letters are **abbreviations** but not **acronyms**. According to the Oxford Advanced Learner's Dictionary - 4th Edition by A.P.Cowie:

Abbreviations- ‘shortened form of a word or phrase’.

Examples given therein are as follows:

‘**Sept.’** for September and, **‘GB’** for Great Britain.

Furthermore following are given under the word 'abbreviation' in – “The New Shorter Oxford English Dictionary Edited by Leslye Brown – Vol.1-A-M, 1993” :-

> 'The result of abbreviating; a reduced form; an abridgment. A shortened from of a word, phrase, or symbol.

Wherefore ‘MA’ as used in P6 has to be none other than an abbreviation of the phrase **'Management Assistant’.**

According to the same dictionary:

Acronym - a word formed from the initial letters of a group of words, eg. UNESCO for United Nations Educational, Scientific and Cultural Organization. Thus I am hesitant to accept the two letters as an acronym as submitted by the respondents' Counsel. On the contrary the Court is of the view that the two letters ‘MA’ as used in the relevant circular is an abbreviation of the phrase ‘Management Assistant’ and not an acronym. Further this Court holds the view that the contention of the respondents that this classification only denotes a salary code cannot be accepted.

Further it is manifestly clear from P6 that the abbreviations of the other positions therein clearly denotes:-

(a) HM- to mean Higher Senior Managers,

(b) MM- to mean Middle Managers,

(c) JM- to mean Junior Managers,

(d) PL- to mean Primary Level.

Thus, this Court concludes that the letters 'MA' is not an acronym but an abbreviation denoting the phrase and that **MA - 5:2** denotes the category of Management Assistants.

Now I shall advert to the contents of Management Circular No.30.

According to clause 3.2 of the Annexure II of P.3 Management Assistants' Service has been defined as follows;

> 'The services that supplement, facilitate, and support functions performed by executive and managerial personnel of institutions are classified as Management Assistant Services'.

In view of the above, I am persuaded to accept the position of the petitioners that they have been categorized into a group which actually rendered supportive services to them (the petitioners) prior to the implementation of P6 and the impugned categorization, demonstrably brought them down from their previous status as officers of Executive Grade - V. The Court also holds that this manifest lowering of their grade definitely affects their future promotional prospects wherein they have been categorized(or classified) as 'Management Assistants' which is a non-executive and/or non-managerial grade.

It appears to Court that the petitioners had a legitimate expectation of being promoted to senior positions in their career gradually by seniority and experience as provided by the conditions of recruitment that prevailed at the time of recruitment. It was alleged that abolition of EPM Executive Grade – IV by P6 (which being the next promotional step) that existed prior to P6, affected their promotions in the service and is discriminatory. In my view, this constitutes a substantial ground to seek relief in respect of an imminent infringement of the rights guaranteed under Article 12(1). In this regard, observation of His Lordship Kulatunga, J in, Gunaratne v. Sri Lanka Telecom {(1993) 1 SLR 109} at 115 would lend assistance to wit - if a scheme affects the promotions in an existing service it is inherently discriminatory and prospective

candidates for promotions under such scheme may apply for a declaration that such scheme is invalid on the ground that it constitutes an imminent infringement of their rights under Article 12(1). The learned Senior State Counsel for the respondents took up the position that the petitioners' application is time barred and should be dismissed in *limine.* On a perusal of all the material before Court, the grievances of the petitioners amount to a continuing violation of their rights.

According to their petition the petitioners had been Enterprise Promotion Managers Executive Grade -V prior to the impugned categorization and that they performed numerous administrative functions in the IDB. According to para 4(b) of the counter affidavit of the 1st respondent and P10 which were identical to the contents of Clauses 3-6 in P3 which establishes that they had been in the Junior/Middle management level in the IDB. As evidenced by R2A, 'MM 1-2' is the salary code corresponding to the Enterprise Promotion Managers (EPM) Executive grade - 1V which being the next promotional step of the petitioners prior to the impugned circular. Contention of the petitioners' was that as per R2A under the new scheme the next step in their promotional rung should have been the Middle Level Management Grade (MM1-2).

It is observed that by categorizing the petitioners into a group which rendered supportive services to them, prior to the implementation of P6 have brought them down from their original executive status to a non-executive and/or a non-managerial category namely: 'Management Assistants' jeopardizing their future promotional prospects.

Viewed in the above context, I conclude that by failure to place the petitioners either in the Middle Management(MM) or in Junior Management (JM) under the new classification, 1st to 21st respondents have violated their fundamental rights guaranteed to them under Article 12(1) of the Constitution.

Thus, this Court proceeds to grant the reliefs sought by sub-prayers (c)-(g) of the prayer to the petition dated 20/01/2009 to wit,

(1) a declaration that the 1st to 21st respondents have violated the fundamental rights guaranteed under Article 12(1) of the Constitution of Sri Lanka,

(2) a declaration that the decision of the 1st to 21st respondents to categorise the petitioners as Management Assistants (MA) is null and void,

(3) a declaration that the petitioners are entitled to be categorised either as Middle Management (MM) or Junior Management (JM),

(4) an order quashing that part of P6 strictly in so far as it is applicable to the petitioners as above,

(5) a direction to the 1st to 21st respondents forthwith to take steps to categorise the petitioners either as Middle Management (MM) or Junior Management (JM).

In all the circumstances of the case, no order is made with regard to costs.

Judge of the Supreme Court

SALEEM 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 under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Muthuwa Sarukkalige Ranjith de Silva
Petitioner

SC/FR 79/2014

Vs

1. Sumith Parakramawansa
   Principal, Dharmashoka College, Ambalangoda
2. Ravindra Pushpakumara
3. A.W.Sriyani Chandrika
4. N.H. Eranga Indralal
5. K. Indunil de Silva

   All members of the Interview Board for Admission to Year 1- 2014
   Dharmashoka Vidyalaya, Ambalangoda

6. K.P. Wijerathne
7. Nuwan dayantha de Silva
8. Dev Rohan
9. K.D. Lalith Ravindra

   All members of the Appeal Board for Admission to Year 1- 2014
   Dharmashoka Vidyalaya, Ambalangoda

10. Hon. Bandula Gunawardene
    Minister of Education.
11. Anura Dissanayake. Secretary,
    Ministry of Education.
12. Hon. Attorney General

Respondents

Before : K Sripavan J
Rohini Marasinghe J
Sisira J de Abrew J

Counsel : Radeep Ginige for the Petitioner
Mahen Gopallowa SSC for the Respondens

Argued on : 30.5.2014
Decided on : 1.9.2014

Sisira J de Abrew J.

The petitioner, in his petition, inter alia, seeks a declaration from this court that his fundamental rights guaranteed under Article 12 (1) of the Constitution have been violated by the respondents and a direction on the respondents to admit his child for the academic year 2014 (to year one) to Dharmashoka College Ambalangoda. Leave to proceed was granted on 21.3.2014 for the alleged violation of Article 12(1) of the Constitution.

The petitioner who is a teacher attached to Devananda College Ambalangoda made an application to Dharmashoka College Ambalangoda to get his child admitted to year one for the academic year 2014. The Principal Dharmashoka College Ambalangoda, the 1st respondent, by letter marked P3 requested the petitioner to attend an interview scheduled to be held on 12.9.2013. At the interview the petitioner was granted 33 marks which was admittedly less than the cut off marks. Although the petitioner preferred an appeal against the decision of the interview board, the marks given to him by the interview board were not changed by the Appeals Board. The petitioner has produced a circular issued by the Ministry of Education marked as P2 which sets out the instructions relating to admission of children to year one in Government schools for the year 2014. The petitioner states that under clause 6.4.iii of P2, he is entitled to twelve more marks as he has worked in a difficult school for a period of four years. If in fact he was entitled to twelve more marks, he would have got 45 marks and would

thus be entitled to get his child admitted to Dharmashoka College as the cut off mark was forty three. The petitioner contends that the 1st respondent and members of the Appeals Board have not considered the above matters in deciding the matter and that their decision not to admit his child to Dharmashoka College was arbitrary, illegal and capricious. The petitioner further contends that the respondents, by the said decision, have violated his fundamental rights enshrined and guaranteed under Article 12(1) of the Constitution of the Republic.

The petitioner claims that he has, from 1.2.1991 to 8.2.1995, worked in a difficult school. To prove this point, the petitioner has produced his letter of appointment dated 25.1.1991 marked P4 appointing him as an Assistant Teacher to Madakumbura Maha Vidyalaya. According to clause 22 of the said letter of appointment, the petitioner must, during the first three years, work in a difficult area. The petitioner, on the strength of P8, a letter issued by the Principal Madakumbura Maha Vidyalaya, tried to contend that he had worked in a difficult school. The Principal Madakumbura Maha Vidyalaya, in the said letter, did not state that Madakumbura Maha Vidyalaya had been categorized as a difficult school. What he stated in the said letter was that the area in which the Madakumbura Maha Vidyalaya was located had been named as a difficult area. Further the Zonal Director of Education Elpitiya, by his letter dated 26.3.2014 addressed to the Principal Dharmashoka College Ambalangoda marked 1R10, confirmed that Madakumbura Maha Vidyalaya had not been categorized as a difficult school during the period commencing from 1991 to 1995. When I consider all the above matters, I am unable to agree with the contention of learned counsel for the petitioner that the petitioner had worked in a difficult school during the period commencing from 1.2.1991 to 8.2.1995. I therefore reject the above contention.

According to clause 6:4 iii of P2 (circular issued by the Ministry of Education), for the petitioner to get three marks for each year of service in difficult schools, the Zonal Director of Education must certify that the school in which the petitioner served is a difficult school. Has the Zonal Director of Education certified that Madakumbura Maha Vidyalaya as a difficult school? In order to establish this point, the petitioner relied on letter dated 12.6.2013 issued by the principal of Madakumbura Maha Vidyalaya which was also signed by the Zonal Director of Education Elpitiya with an endorsement 'forwarded'. Learned Counsel for the petitioner contended that the said endorsement by the Zonal Director of Education could be considered as a certification issued by the Zonal Director. This contention is nullified by letter marked 1R10 issued by the same Zonal Director stating that Madakumbura Maha Vidyalaya had not been categorized as a difficult school. Then, the above contention of learned counsel for the petitioner fails.

When I consider all the above matters I am unable to conclude that the fundamental right of the petitioner and his child guaranteed by Article 12(1) of the Constitution of the Republic has been infringed by the respondents.

For the above reasons, I dismiss the petition of the petitioner. I do not order costs.

Judge of the Supreme Court.

K Sripavan J

I agree.

Judge of the Supreme Court.

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

1. Janaka I. De A. Goonetileke,
Assistant Superintendent of Police,
Sri Lanka Police College,
Elpitiya.

2. C.E. Wedisinghe,
Assistant Superintendent of Police,
No. 440, Union Place,
Ministerial Security Division,
Colombo 02.

3. S.P. Ranagalage,
Assistant Superintendent of Police,
D.I.G. Colombo Office,
Olcott Mawatha,
Colombo 11.

4. P. Chularatne de Silva,
Assistant Superintendent of Police, No. 440, Union Place,
Ministerial Security Division,
Colombo 02. **and 18 Others**

Petitioners

Case No. S.C.(F.R) Application 308/2009

Vs.

1. Neville Piyadigama,
Chairman, National Police Commission

2. Ven. Elle Gunawansa Thero,
Member,National Police Commission

3. Justice Chandradasa Nanayakkara,
Member,National Police Commission

4. Nihal Jayamanne,
Member,National Police Commission
and 67 Others.

Respondents.

1. Quintus Raymond,
S.P. Vavuniya,
Senior DIG's Office, Police
Complex, Vavuniya

2. H.A. Prematilleke – S.P. (1)
S.P.'s Office,
Kalidasa Road,
Matara.

3. Neil D. Hettiarachchi,
S.P. - Crimes Division,
Police Headquarters,
Colombo 01.

4 Leslie Sarath Edirisuriya,
S.P. (1), S.P.'s Ofice, Gampaha.

5. P.A.L.K. Jayawardena,
S.P. Mannar, (Sectors 5,6,9,17),
Mannar Road,
`Murunkan.

6. Karavitage Ravindra,
S.P. - Colombo Crimes Division,
214, Kollonnawa Road, Dematagoda,
Colombo 02.

7. S.D.R.D. Chandrasinghe – S.P.
Teldeniya District, S.P.'s Office,
Teldeniya.

8. A.P. Sirikumara,
S.P. - Kelaniya (I)
S.P.'s Office, Peliyagoda.

9. M.D.U.S. Gunathillake – S.P.
Buildings Division, Police
Headquarters, Colombo 01.

10. S.C. Vidana Pathirana – S.P. (1),
S.P.'s Office, Galle.

11. J.A.P. Gaminie Perera - S.P. (1),
S.P.'s Office,
Mahara, Gampola.

12. H.M. Dharmasena – S.P. Horana,
S.P.'s Office,
Horana.

13. S. Anura Abeywickrema,
S.P. (III) Kelaniya,
S.P.'s Office,
Peliyagoda.

14. K.D.A. Weerasinghe – S.P. (II)
S.P.'s Office,
Kalutara.

15. D.W.M.R.N. Dassanaiake – S.P. (IV)
S.P.'s Office, Kegalle.

16. S.A.R.P. Jayatillake, - S.P.
Presidential Security Division,
President's House, Fort,
Colombo 01.

17. R.P. Harischandra Bandara,
S.P. Wennapuwa,
S.P.'s Office, Wennapuwa.

18. G.D. Stanislaus – S.P. -Director,
Police Academy in Service Training
Attidiya, Dehiwala.

19. H.M.A. Manage – S.P.,
Prime Minister's Security Division,
150, R.A. De Mel Mawatha,
Colombo 03.

Intervenient -Petitioners
seeking intervention by
Petition dated 02.02.2010

AND

1. W.L.A.S. Priyantha,
Senior Superintendent of Police,
(Director-Supplies),
Police Headquarters,
Colombo 01.

2. W.K.N.D. Silva,
Senior Superintendent of Police,
No. 360/1, Hospital Road,
Kalubowila.

3. R. Kodituwakku,
Senior Superintendent of Police,
No. 26/1, Templers Road,
Mt-Lavinia.

4. P.P.S.M. Dharmarathna,
Senior Superintendent of Police,
Panadura Road, Rambukkana,
Bandaragama.

5. W.K. Jayalath,
Senior Superintendent of Police,
No. 03, Udawalpola,
Kurunegala.

6. M. Don Rajitha Sri Daminda,
Senior Superintendent of Police,
No. 84/08, Kongahahena, Gothatuwa
New Town, Gothatuwa.

7. G.S.Walgama,
Senior Superintendent of Police,
Director, Buildings,
Police Headquarters, Colombo 01.

8. T. Ganeshanatha,
Senior Superintendent of Police,
Director, Organized Crimes and Vice
Division, Police Headquarters,
Colombo 01.

9. D. Gajasinghe,
Superintendent of Police,No. 125/6,
Kandewatte Road, Nugegoda.

10. W.N.S.W. Wickramasinghe,
Superintendent of Police,, No. 16,
Dalada Watte Road, Wadduwa.

11. A.K. Samarasekera,
Superintendent of Police,
Director, Information Technology
Division, Personal Assistance to
Senior D.I.G. (Administration and
Elections), Police Headquarters,
Colombo 01.

12. V.P.C.A. Siriwardane,
Superintendent of Police,
No. 101/01, Senior Police Officers'
Quarters, Kew Road, Colombo 02.

13. D.R. Lalan Ranaweera,
Superintendent of Police,
No. 111/2, Molpe Road, Katubedda,
Moratuwa.

14. L.P.S.P. Sandungahawatta,
Superintendent of Police,
Superintendent Division,
Parliament.

15. K. Ajith Rohana,
Superintendent of Police,
Police Headquarters,
Colombo 01.

16. K.P.P. Fernando,
Superintendent of Police,
No. 132/A/3, Fantasy Garden,
Kahathota Road, Malabe.

17. W.M.M. Wickremasinghe,
Superintendent of Police,
Presidential Security Division,
Janadhipathi Mawatha, Colombo 01.

18. K.P. Mahinda Gunarathna,
Superintendent of Police,
Presidential Security Division,
Janadhipathi Mawatha, Colombo 01.

19. L.K.W.K. Silva,
Superintendent of Police,
No. 73/A, St. Maris Road,
Uswetakeyawa.

20. A.H.M.C.K. Alahakoon,
Superintendent of Police,
No. 24/4, Club Road,
Kegalla.

21. L.H.G. Cooray,
Superintendent of Police,
Sri Lanka Police College,
Kalutara.

22. P.S.R. Dayananda,
Superintendent of Police,
Central III, Colombo D.I.G. Office,
Colombo 01.

Intervenient-Petitioners
Seeking Intervention by
Petition dated 08.06.12.

BEFORE : K. Sripavan, J.
S. Hettige, P.C., J.,
P. Dep, P.C.,J.

COUNSEL **:** Manohara de Silva, P.C. with Pubudini Wickremaratne for the Petitioners
Upali de Almeida for the parties seeking to intervene by Petition dated 02.02.10.
Roshan Hettiarachchi for the parties seeking to intervene by Petition dated 08.06.12
Uditha Egalahewa, P.C. for the 9th Respondent.
Viveka Siriwardena, S.S.C. for the Attorney-General

ARGUED ON : 27.11.2013

WRITTEN SUBMISSIONS
FILED : By the Petitioners on 13.01.2014
By the parties seeking to intervene on 10.12.2013 & 17.12.2013
By the 9th Respondent on 08.01.2014

DECIDED ON : 30.01.2014

K. SRIPAVAN, J.

On 27.11.2013 Mr. Upali de Almeida and Mr. Roshan Hettiarachchi supported two applications to intervene in this matter. Mr. Manohara de Silva, President's Counsel for the Petitioners, Mr. Uditha Egalahewa President's Counsel for the 9th Respondent and Ms. Viveka Siriwardene, Senior State Counsel for the Attorney-General objected to the intervention sought by the parties by their petitions dated 02.02.2010 and 08.06.2012.

Mr. Upali de Almeida submitted to Court that the 9th Respondent unknown to the parties seeking to intervene in this application **was** appointed to the rank of Superintendent of Police Grade I as apparent from T.M. 831 dated 20.03.2009 marked **P10** with effect from 22.05.2005. It is to be noted that having filed the intervention papers on 02.02.2010, no steps were taken to support the application for intervention until 16.03.2012. The delay of more than two years to

support the application for intervention cannot be condoned, even if this Court has a discretion to grant relief.

Learned President's Counsel for the Petitioners, learned President's Counsel for the 9th Respondent and the learned Senior State Counsel for the Attorney-General strongly objected to the intervention on the basis that papers seeking to intervene have not been filed within the period of one month set out in Article 126(2) of the Constitution.

The original petition was filed by the Petitioners on 20.04.2009 seeking a declaration, inter alia, that the backdating of the promotion of the 9th Respondent to the rank of Assistant Superintendent of Police with effect from 05.11.1993 was null and void. The petition was subsequently amended after obtaining permission from Court and without any objection from the Respondents. The amended petition filed on 19.07.2011, amongst others, contained the following two reliefs in paragraphs (h) and (m) of the prayer to the said petition:

(h). make order backdating the promotion of the Petitioners to the rank of Assistant Superintendent of Police with effect from 05.11.93.

(m). make order directing the 62nd to 70th Respondents to promote the Petitioners to the rank of Superintendent of Police – Grade I with effect from 22.05.05.

Mr. Upali de Almeida contended that intervention would not be sought

if the Petitioners did not pursue the relief of having themselves promoted as per prayer contained in (h) and (m) of the amended petition. In fact, in paragraph 19 of the written submissions filed by the parties seeking to intervene, it is stated as follows:-

> *"19. If Your Lordships' Court grants the Petitioners' promotions as claimed by them, then the Petitioners would be promoted over and above all the Intervenient Petitioners causing a further anomaly to the said Intervenient Petitioners. As these promotions are then caused consequent to the judgment in this Application, in the circumstances, the Intervenient Petitioners would be afforded no remedy in respect of the malady suffered by them. Once Your Lordships' Court makes an order on this Application promoting the Petitioners, then it would be too late in the day for the Intervenient Petitioners to seek any relief from Your Lordships' Court."*

After the final hearing and determination, in the event, the Court decides to grant the reliefs sought by the Petitioners in paragraphs (h) and (m) of the prayer to the petition, then it would become a judicial order made by Court in the exercise of its fundamental rights jurisdiction. It will never be an "executive or administrative act" which is said to constitute the infringement or the imminent infringement as the case may be of the fundamental rights of those who are now seeking to intervene. This Court cannot give relief under Article 126 of the Constitution in respect of a judicial act performed by it.

On the other hand, if the Court decides that the appointment sought by the Petitioners is in violation of the Establishments Code or any other applicable provisions of the law, it will not grant the relief sought by the Petitioners and will make order accordingly.

Learned Counsel relied on the case for *Abayadeera and 162 Others* Vs. *Dr. Stanley Wijesundera, Vice Chancellor, University of Colombo (1983) 2 S.L.R. 267* and argued that parties be permitted to intervene in this application. It must be noted that *Abayadeera's* case was a writ application where the Petitioners sought a writ of mandamus on the Respondents to compel them to hold the 2nd MBBS Examination. It may be appropriate to reproduce the observation made by Fernando J. in the case of *Gamaethige* Vs. *Siriwardena* (1988) 1 S.L.R. 384 at 399.

> *"It is useful to appreciate that the remedy under Article 126(2) cannot be equated to the prerogative writs. Whether an applicant for the latter remedy has a right or a duty to exhaust administrative remedies, or whether the Court has a discretion to withhold relief where an applicant has failed to seek a possibly more convenient or expeditious remedy, or whether the pursuit of an administrative remedy is an adequate excuse for delay, may all be questions relevant to the grant of the prerogative writs; but they have no bearing on Article 126. The conferment of exclusive jurisdiction on this Court and the imposition of a time-*

limit is consistent with the need for the prompt invocation of the jurisdiction of this Court."

Thus, it would be seen that one cannot equate a writ application to that of a fundamental right application and that the time limit of one month prescribed by Article 126(2) has always been treated as mandatory. The remedy under Article 126 must be availed of at the earliest possible opportunity, within the prescribed time and if not so availed of, the remedy ceases to be available. However, if a petitioner establishes that he became aware of an infringement not on the very day the act complained of was committed but only on a later date, then, in such an event, the said period of one month will be reckoned only from the date on which the Petitioner did in fact became aware of such infringement. [Vide *Edirisuriya Vs. Navaratnam and Others* 1985 1. S.L.R. 100]. Time begins to run when the infringement takes place and not from the date on which the Petitioners sought relief from this Court.

The second case relied on by the learned Counsel was the case of *Abayadeera Jayanetti* Vs. *The Land Reform Commission and Others* 1984 (2) S.L.R. 172. I must emphasize that Jayanetti's case did not involve the question of intervention sought by various parties. The Petitioner himself filed a list of persons whose evidence would be required by him and prayed for notice on them. After hearing submissions of Counsel, the Court directed that the persons named in the list be added as parties and time was given to these added parties to file whatever papers they wished. In the present application, however,

the petitioners did not seek permission of Court to add anyone as Respondents; instead they objected to the applications filed by all those who are seeking to intervene in this application. Both cases cited by the Learned Counsel are of no relevance.

Mr. Roshan Hettiarachchi too supported for intervention in respect of the petition filed on 08.06.2012. The parties referred in the said petition sought intervention on becoming aware of the relief prayed for by the Petitioners. (Vide paragraph 6 of the Written Submissions filed on 17.12.2013). Counsel submitted that the promotions of the 9th Respondent is in direct contravention of the scheme of promotion applicable to Police Officers and such an appointment affects both the rank and seniority of the Petitioners now seeking to intervene in this application. One does not know the date on which the parties seeking to intervene became aware of the reliefs prayed for by the Petitioners. In any event, fundamental rights are guaranteed against the State and have nothing to do with rights of individuals inter se. Thus, the relief prayed for by the Petitioners cannot form the basis or the source of discrimination.

The power of this Court to allow intervention and to make any such direction stems from the proof of infringement of a fundamental right. In order to sustain the plea of discrimination based upon Article 12(1) the parties seeking to intervene have to satisfy Court the violation of the fundamental right by executive and/ or administrative action and must come to Court within a period of one month from such

infringement. If the parties seeking to intervene fail to bring this case within Article 126(2), they could not be allowed to intervene. It may be relevant to reproduce the observation made by Fernando, J. in Gamaethige's case (supra) at page 397.

> *In Hewakuruppu v. de Silva (3) the Tea Commissioner had refused the petitioners application for a subsidy on 18.10.83; he did not apply to this Court under Article 126(2) within one month, and on 13.7.84 appealed to the Tea Board. In that appeal reference was made to instances where other persons, similarly situated, had allegedly been granted subsidies; thus the petitioner had knowledge. before 13.7.84, of the acts by comparison to which he had been subjected to unequal treatment. The decision of the Tea Board refusing relief was received by the petitioner on 4.9.84, and application to this Court was made on 4.10.84. It was urged in that case that the petitioner was entitled to exhaust administrative remedies before invoking the jurisdiction of this Court, and that Article 126 should be liberally interpreted.* ***Although a strong case was established of unequal treatment, the Court nevertheless did not grant any relief as the petition was not filed in time.****"*
> (emphasis added)

While the time limit is mandatory, in exceptional circumstances, this Court has a discretion to entertain an application, if there is no lapse, fault or delay on the part of the parties seeking to intervene. The

Constitution provides for a definite and expeditious remedy, in the highest Court of the land to be granted according to law and not subject to any uncertain discretion. One cannot sleep over one's rights and thereafter seek to intervene in this application in order to bypass the mandatory time limit imposed by the Constitution. In *Seneviratne* Vs. *Tissa Dias Bandaranayake and another* (1999) 2 S.L.R. 341 at 351, Amerasinghe, J. commented that -

"*If a person were negligent for a long and unreasonable time, the law refused afterwards to lend him any assistance to enforce his rights; the law both to punish his neglect,* ***nam leges vigilantibus, non dormientibus, subveniunt,*** *and for other reasons refuses to assist those who sleep over their rights and are not vigilant."*

The parties seeking to intervene in this application by Petition dated 08.06.2012 have failed to establish to the satisfaction of Court that intervention papers were filed within time. The following dates are relevant to consider, the application for intervention:-

(a) The 9th Respondent was promoted to the rank of Superintendent of Police, by notice dated 20.03.2009;
(b) The Petitioners filed this application on 20.04.2009; and
(c) The petition seeking to intervene was filed on 08.06.2012.

Considering the dates, I am not inclined to exercise any discretion in favour of the parties seeking to intervene especially when such

intervention is sought almost three years after the petitioners invoked the jurisdiction of this Court.

The intervention sought in terms of the petitions dated 02.02.2010 and 08.06.2012 is accordingly refused. There will be no 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 TH E 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.

Dr. Vickrambahu Karunarathne,
17, Barrack Lane,
Colombo 02.

Petitioner

S.C.(F.R.) Application *308*/2013

Vs.

1. Prof. A. Senaratne
   Vice-Chancellor
2. Prof. Shantha K. Hennayake,
   Deputy Vice-Chancellor (Acting)
3. Prof. K. Samarasinghe
   Dean/Agriculture
4. Prof. (Ms) A. Abhayaratne
   Dean/Arts
5. Prof. U.B. Dissanayake Dean/Dental Science
6. Prof. L Rajapaksha, Dean/Englineering
7. Prof. M.D. Lamawansa
   Dean/Medicine
8. Prof. S.H.P.P. Karunaratne Dean/Science
9. Prof. H.B.S. Ariyaratne Dean/Vet. Medicine
10. Dr. D.B.M.Wickramaratne
    Dean/AHS

Ex-Officio Members – Council of the University of Peradeniya

11. Prof. P.W.M.B.B. Marambe
    Faculty of Agriculture
12. Prof. A. Wickramasinghe
    Faculty of Science

Members Elected by the Senate-Council of the University of Peradeniya

13. Ms. M. Abeygunasekera
14 Mr. U.W. Attanayake
15. Mr. B.M.N. Balasooriya
16. Prof. M.L.A. Cader
17 Mr. R. Chandrasekera
18 Dr. A.U. Gamage
19 Mr. A. Hewage
20 Mr. G. Jayaratne
21 Ms. P. Jayasekera
22 Mr. M.S. Premawansa
23 Mr. S. Ratwatte
24 Mr. M. Samaranayake
25 Dr. L. Weerasinghe

Members appointed by the University Grants Commission- Council of the University of Peradeniya

Collectively – The Council of the University of Peradeniya

26 The University of Peradeniya
Peradeniya
27 Honouable Attorney General,
Attorney General's Department,
Colombo 12

Respondents.

BEFORE : K. SRIPAVAN, J.
E. WANASUNDERA, P.C.,J.

COUNSEL **:** M.A.Sumanthiran for Petitioner.
Shavindra Fernando, P.C., Addl. Solicitor General for Attorney General

ARGUED ON : 21.03.2014

WRITTEN SUBMISSIONS : Not filed.

DECIDED ON : 09.05.2014

K. SRIPAVAN, J.

When this application was taken up for support, the learned Additional Solicitor General appearing for the Attorney-General objected to leave to proceed being granted and in addition, raised a preliminary objection to the maintainability of the application on the basis that it has been filed outside the time limit prescribed by Article 126(2) of the Constitution.

In the instant application, the Petitioner impugns, inter alia, the failure and/or neglect and / or refusal on the part of all or any one or more of the 1st to 25th respondents to grant the Petitioner's retirement benefits. In paragraph 21 of the petition, the Petitioner alleges that 5 years and 5 months have lapsed from the time of retirement. The Petitioner in paragraph 17 of the petition states that the Respondents refused and/or failed or / neglected to honour the said findings or/recommendations of the Human Rights Commission as well and reasserted its purported position that since the Petitioner had tendered his resignation, the need to reinstate the Petitioner does not arise.

It is necessary to analyze the Petitioner's grievances in order to ascertain whether leave should be granted. It would appear that by letter dated 10th August 1967 the Petitioner was confirmed in the post of Assistant Lecturer with effect from 1st September 1967 in the University of Ceylon. On 9th June 1971, the Petitioner was promoted to the post of Lecturer in Engineering Mathematics with effect from 19th March 1971. In July 1977, the Petitioner was once again promoted to the post of Senior Lecturer in the Department of Engineering Mathematics with effect from

30th March 1977. In paragraph 6 of the petition, the Petitioner states that when Act No. 16 of 1978 came into operation, he lost the opportunity of retiring under the said Act. However, he submitted a letter to the 1st Respondent on 27th August 1982 marked **(P6)** requesting permission to retire with benefits due to him under Section 142 of Act No. 16 of 1978. However, the Vice Chancellor of the University of Peradeniya, by his letter dated 21st October 1982 marked **(P7)** sent the following reply to the Petitioner -

> "*Reference your letter dated August 27th 1982, I regret to inform you that you will not be able to retire under Section 142 of the Universities Act, No. 16 of 1978 at this stage. However, I am accepting your resignation from the post of Senior Lecturer in the Department of Engineering Mathematics with effect from 1st November, 1982 subject to Council approval. Approval of the Council is also being sought to pay you gratuity in terms of the UGC Circular 139 of August 24, 1981.*
>
> *As regards your request for contribution to the Universities Provident Fund from October 1967 to October 1970, I regret that this could not be done as you had not made arrangements to get Council approval and continue your contribution during the period of your leave.*"

Thus, it could be seen that the Petitioner was never allowed to retire in terms of Act No. 16 of 1978. The reply of the Vice Chancellor demonstrates that the University accepted the Petitioner's resignation from the post of Senior Lecturer with effect from 1st November 1982 subject to the approval of the Council. In the absence of any challenge to the document marked **(P7)** where the Vice Chancellor has accepted the resignation of the Petitioner from the post of Senior Lecturer, with effect from 1st November 1982, this Court is at a loss to understand the basis on which the Petitioner could claim the retirement benefits. No evidence was placed to show that the Petitioner was retired from the University.

The alternate argument of the Petitioner is that the Political Victimization Committee of the Ministry of Education recommended that the Petitioner should be re-instated and the said recommendation of the Political Victimization Committee was approved by the Cabinet, as evidenced by the letter dated 25th October 2001 marked **(P8).** It is to be noted that the Political Victimization Committee was not a body appointed in terms of Act No. 16 of 1978. If the Petitioner's contention is that he should be reinstated based on the recommendation of the Political Victimization Committee, he should have come to Court within one month of the receipt of the letter dated 25th October 2001 marked **(P8).** In *Gamaethige* Vs. *Siriwardene* (1988) 1 S.L.R. 384 at 398, Fernando, J. expressed the nature of the jurisdiction of this Court in the following terms :

> "*However, the effect of the conferment on this Court of sole and exclusive jurisdiction to hear and determine questions relating to the infringement of fundamental rights by executive or administrative action is two-fold, firstly, this Court cannot give relief under Article 126 in respect of an executive act though clearly or flagrantly wrongful unless it is also an infringement of a fundamental right, and secondly, no other court or tribunal can hear or determine any question relating to the infringement of a fundamental right by executive or administrative action, although it may give relief against other wrongful acts.*"

Accordingly, no other Court or Tribunal other than this Court can grant relief to the Petitioner for the violation of his fundamental rights.

The allegation that the Respondents' refusal/ or failure and/or neglect to honour the views/recommendations of the Human Rights Commission cannot form the basis of the Petitioner's discrimination. In terms of Section 14(3) (C) of the Human Rights Commission of Sri Lanka Act No. 21 of 1996, the Human Rights Commission could only make recommendations as it may think fit to the

appropriate authority or persons with a view to prevent any infringement or the continuation of such infringement. The findings, views, recommendations of the Human Rights Commission will not bind either of the parties or this Court. Where the appropriate authority or persons to whom a recommendation is addressed fails to report to the Commission within the period specified in such a recommendation, all what the Commission could do is to make a full report of the facts to the President who shall, cause a copy of such a report to be placed before Parliament. Hence, the remedy available to the Petitioner under Act No. 21 of 1996 is different from the remedy that could be granted to the Petitioner in terms of Article 126 of the Constitution. The Petitioner cannot seek to enforce the recommendations of the Human Rights Commission in an application of this nature.

The Petitioner in paragraph 19 of the petition avers that the 1st Respondent has failed to take necessary steps to facilitate the payment of his retirement benefits to fall in line with the settlement reached in F.R. Application No. 260/2002. It is observed that the proceedings in F.R. Application No. 260/2002 were terminated on 28.01.2003 upon a settlement reached between the Petitioners and the Respondents in the said application.

The Petitioner was not a party to the proceedings in F.R. Application No. 260/2002. In these circumstances, I am of the view that the Petitioner cannot rely on the settlement entered in the said application. In any event, the Petitioner was aware of the judgment delivered in F.R. Application No. 260 /2002 as far back as 28th January 2003. It is to be noted that time begins to run when the infringement takes place. The pursuit of other remedies whether judicial or administrative do not prevent or interrupt the operation of the time limit. The settlement in F.R. Application No. 260/2002, even if it is applicable to the Petitioner, the alleged violation would arise from a judicial order given and not

from an executive or administrative action. Thus, the Petitioner is not entitled to invoke the fundamental rights jurisdiction of this Court on the basis of a settlement reached in F.R. 260 /2002.

If the Petitioner claims that the 1st to the 25th Respondents have failed to comply with the Cabinet decision to re-instate the Petitioner with effect from 21.10.1982 as communicated by letter dated 25.10.2001 marked **(P8)** the Petitioner should have invoked the jurisdiction of this Court in terms of Article 126(2) of the Constitution. The preliminary objection raised by the learned Additional Solicitor General is entitled to succeed as the Petitioner has filed this application almost 12 years after the receipt of **(P8).**

For the above reasons, I do not see any legal basis to grant leave to proceed. Leave to proceed is thus refused.

JUDGE OF THE SUPREME COURT.

E. 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 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.

IN THE SUPREME COURT OF DEMOCRATIC REPUBLIC SOCIALIST OF SRI LANKA

In the matter of an application under Articles 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC APPLICATION (FR) 524/2008

Dr. P.W.S.M. Samarasinghe,
No. 6, Sarasavi Mawatha,
Department of Agriculture Quarters,
Peradeniya.

PETITIONER

-Vs-

Justice Priyantha Perera,
Former Chairman,
Public Service Commission,
No. 1777, Nawala Road, Narahenpita,
Colombo 5.
And Others

RESPONDENTS

BEFORE : Hon. Saleem Marsoof, PC., J,

Hon. Sathyaa Hettige, PC., J, and

Hon. Priyasath Dep, PC., J.

COUNSEL : Dr. Jayampathi Wickremeratne, PC., with Pubuduni Wickremaratne for the Petitioner.

Rajiv Goonathilake, SSC., for the 1st to 12th and 16th Respondents.

Faisz Musthapha, PC., with Faisza Marker, for the 13th Respondent.

Manohara de Silva, PC., with A. Wijesundera for the 15th Respondent.

Argued On : 11.2.2014

Written Submission On : 25.2.2014

Decide On : 26.3.2014

SALEEM MARSOOF, PC., J,

The Petitioner was an officer of the Sri Lanka Agriculture Service and is attached to the Department of Agriculture, Peradeniya, and on the date of her application to this Court filed in terms of Articles 17 and 126 of the Constitution, served as the Deputy Director (Potato Development) at the Seed and Planting Material Development Centre (SPMDC) of that Department. The Petitioner sought to challenge by his application the appointment of the 15th Respondent, who had been promoted from the post of Deputy Director (Agricultural Enterprise Development and Information Service) to the post of Director of the Seed and Planting Material Development Centre (SPMDC) on 3rd November 2008 in the Agriculture Department. Both the Petitioner and the 15th Respondent have since retired, and are no more in service.

The Petitioner has stated in her petition filed in this Court that the decision of the 1st to 14th Respondents or anyone or more of them to appoint the 15th Respondent to the said post violated her fundamental rights to equality enshrined in Article 12(1) of the Constitution, and prayed for a declaration that the said appointment of the Petitioner is null and void, and by way of further relief, prayed that she be appointed to the post of Director of Seed and Planting Material Development Centre (SPMDC) of the Department of Agriculture (Director SPMDC) with effect from 3rd November 2008, which was the date of the impugned appointment of the 15th Respondent, or to appoint the Petitioner to the said post with effect from the 1st of November 2006, from which time she had been appointed to cover the duties of the said post until the permanent vacancy was filled.

Learned President's Counsel for the Petitioner has submitted at the hearing of this application that since the Petitioner has already retired when she was at the maximum of her salary scale, even if she is successful in her application in this Court and is notionally appointed to the post of Director SPMDC, her quantum of pension benefits would not be enhanced, as the salary last drawn by the Petitioner was the same as what was last drawn by the 15th Respondent in the post of Director SPMDC. Since the learned President's Counsel for the Petitioner himself has stated that the Petitioner would not get any monetary advantage, the only matter that keeps her hopes alive would be the possibility of her being allowed to take away her official vehicle that she used at the time of her retirement. Thus it would be seen that the Petitioner's application is more or less academic, except for the question as to whether she could retain her official vehicle.

However, since the learned President's Counsel for the Petitioner wished to pursue his application, and the case was fully argued before us, I would endeavour to decide the matter on its merits, albeit briefly. The only question argued before us was whether the 15th Respondent had been unduly favoured as against and to the detriment of the Petitioner at the interview held to select a suitable person for appointment as Director SPMDC on 17th April 2008.

The 12th Respondent has made available to Court a certified copy of the marks awarded to each candidate at the interview, and it would appear that the Petitioner had obtained a total of 193.4 marks and was ranked third, and these marks were 60.85 marks less than what was awarded to the 15th Respondent who obtained 254.25 marks and was ranked first. It is also relevant to note that one W.M. Jayasena obtained 234.5 marks and was ranked second, with another candidate who faced the interview, being ranked fourth with 188.1 marks.

Hence, even if the Petitioner succeed in showing that the Petitioner has been favoured, as against her, she cannot still succeed in this application unless it is shown that W.M. Jayasena, who has been ranked second has also been similarly discriminated, but the petition filed by the Petitioner in this case, or the counter affidavit of the Petitioner does not contain any such allegation. In this context, it is also significant that the 15th Respondent was senior to the Petitioner in class I of the Sri Lanka Agriculture Service, to which class the Petitioner was appointed with effect from 1st October 1997 while the 15th Respondent was appointed to the same class only with effect from 1st October 1996.

The only material submission made by the President's Counsel for the Petitioner at the hearing which was contested by the learned President's Counsel for the 13th Respondent as well as learned President's Counsel for the 15th Respondent and the learned Senior State Counsel who appeared for the 1st to 12th and 16th Respondents, is that the interview panel had misdirected itself in awarding marks for direct relevant experience to the relevant post. Learned President's Counsel for the Petitioner has submitted that the Petitioner had more direct relevant experience in the field relevant to the post of Director SPMDC than the 15th Respondent. In particular, he contended that the Petitioner was not awarded any marks for the following posts she held in the Department as noted below:

(1) Research Officer at the Agriculture Research Institute MahaIlluppallama from 16th March 1976 to 31st December 1985, for which the Petitioner has claimed 59.5 marks,

(2) Research Office in charge of the Agronomy Division from 29th September 1989 to 20the October 1998 for which the Petitioner has claimed 54 marks, and

(3) Research Officer at the SPMDC from 29the October 1998 to 27the September 1999, for which the Petitioner has claimed 6 marks.

These marks would, if awarded to the Petitioner as claimed, would add up to 119.5 additional marks, which would be more than enough for the Petitioner to be ranked first at the interview.

However, learned Counsel for the various Respondents have all relied on the marking scheme annexed to the Petitioner's own petition marked P6, which explains how marks should be awarded at an interview. The criteria in contention in this case is that of direct relevant experience *applicable to the post in question*, *that is the post of Director of the Seed and Planting Material Development Centre* (SPMDC), which is found in the marking scheme P6 annexed to the Petition. I quote below the relevant criteria:-

> "*Posts in SPMDC* – Farm Planning and Management, Seed & Planting Material Production in Government Farms and Contract Seed Production Experience."

The emphasis in the aforesaid criteria is to production, as opposed to mere research, and in my considered opinion, the process of "farm planning and management", "seed and planting material production" and "contract seed production experience", altogether exclude research related work. Of course, research experience may be counted as direct relevant experience if the post in contention was a research job, but the post to which the 15th Respondent was in the field of production.

The posts with respect to which the Petitioner claims she would be entitled to marks under the category of direct relevant experience are all research positions, and they would not count even as indirect relevant experience. Even if these positions were entitled for marks under the latter category, since only 3 marks are awarded for each year of service as opposed to 6 marks that may be awarded for direct relevant experience, the Petitioner would only get 59.75 marks for the years of service claimed in Agriculture Research Institute, the Agronomy Division and at the SPMDC, which would be insufficient to bridge the gap between the 15th Respondent and the Petitioner, which according to the marks awarded at the interview was 60.85 marks.

Conclusion

In all these circumstances, and for the foregoing reasons, I hold that the Petitioner has failed to discharge the burden placed on her by law to succeed in this application, and accordingly the application of the Petitioner is dismissed, but in all the circumstances without costs.

JUDGE OF THE SUPREME COURT

Sathyaa Hettige, PC. J,

I agree.

JUDGE OF THE SUPREME COURT

Priyasath Dep, PC. J

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. [F/R] No. 555/2009

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

Herath Mudiyanselage Yohan Indika Herath, "Ambasevana",

Dummalasuriya.

Petitioner

Vs.

1. Ajith, Police Constable, Police Station, Dummalasuriya.
2. Ariyasena, Police Constable, Police Station, Dummalasuriya.
3. Jayamaha, Police Constable, Police Station, Dummalasuriya.
4. Officer- in-Charge, Police Station, Dummalasuriya.
5. Assistant Superintendent of Police, Office of the Assistant Superintendent of Police, Kuliyapitiya.
6. Inspector General of Police, Sri Lanka Police Headquarters, Colombo 1.
7. Hon. the Attorney General,

Department of Attorney General,

Colombo 12.

Respondents

BEFORE : **TILAKAWARDANE. J.**

SATHYAA HETTIGE.P.C. J &

MARASINGHE.J

COUNSEL : Upul Kumarapperuma with Ms. Udumbara Dasanayake for the Petitioner.

J.C. Weliamuna with Pulasthi Hewamanna for the 1st to 4th Respondents.

Ms. Lakmali Karunanayake, S.S.C., for the 5th, 6th and 7th Respondents.

ARGUED ON : 29.10.2013.

DECIDED ON : 18.02.2014

TILAKAWARDANE, J

A Fundamental Rights application was instituted by the Petitioner before this Court on the 24th of July 2009, against the 1st to the 7th Respondents. The action was initiated for the breach

of the Fundamental Rights guaranteed by the Constitution in **Articles 11, 12(1)** and **13(1),** however, during arguments, Counsel agreed to limit their arguments, on the 29th of October 2013, to the breach of **Article 11** of the Constitution. Accordingly, this Court heard arguments with regards to the alleged breach of **Article 11** of the Petitioner.

The events that preceded this application as alleged by the Petitioner are that, on the 20th of June 2009 the Petitioner's brother, one Herath Mudiyanselage Dilan Mahesh Herath organized a musical show in the Dummalasuriya Public Playground from 8:00pm to 10:00pm. The Petitioner was a member of the organizing committee of the event and alleges that upon the conclusion of the event he, along with two other friends, namely; Sooriya Mudiyanselage Niroshana Mahesh Kumar and Herasinghe Hettiarachchige Anil Indika, left and walked towards his vehicle. It is at this juncture that he asserts that the 1st, 2nd and 3rd Respondents were attacking a group of people he did not recognize. The 1st Respondent, who according to the Petitioner was under the influence of alcohol, purportedly assaulted the Petitioner. The Petitioner had clarified to the 1st Respondent that he was a member of the organizing committee however, the 1st Respondent was joined by the 2nd Respondent as well as another unidentified police officer and continued to assault the Petitioner with clubs and caused injury to his face, abdomen and head. The said officers were also allegedly under the influence of alcohol. The 1st, 2nd and 3rd Respondents has subsequently dragged him to a police jeep in the vicinity and locked him inside it, at which time the Petitioner called his brother who had arrived at the scene and requested the 1st Respondent to release the Petitioner. The 1st Respondent supposedly admitted to the Petitioner's brother that he inadvertently assaulted and detained the Petitioner. The Petitioner was requested to escort the 1st, 2nd and 3rd Respondents to the Police Station in order to discuss the events and the Petitioner agreed to accompany the Respondents to the station. At 12:00am the following morning the Petitioner was presented to the Galmuruwa Government Hospital for examination by the medical officer who was informed by the Petitioner that he was assaulted by the Respondents. The Petitioner was further detained until 10:00am and granted bail at that time. The Petitioner subsequently alleges that he spent two days at the Kuliyapitiya Base Hospital and was "observed for a head injury" by Dr. A. Kailai Nathan. The observations sheet of the said medical report has been included in

evidence and marked as "P3". The Petitioner also includes that he was threatened by a police officer attached to the Dummalasuriya Police Station on the 24th of June 2009. The Petitioner was charged with the offence of affray by fighting and was produced before the Kuliyapitiya Magistrates Court on the 26th of June 2009.

At the outset, this Court wishes to clarify that the alleged incident has undisputedly taken place on the 20th of June 2009 and the petition to the Supreme Court has only been made on the 24th of July 2009. **Article 126(2)** of the **Constitution** clearly states as follows:

> *"Where any person alleges that any such fundamental right or language right relating to such person has been infringed or is about to be infringed by executive or administrative action, he may himself or by an attorney-at-law on his behalf, within **one month(***emphasis added) *thereof, in accordance with such rules of court as may be in force, apply to the Supreme Court by way of petition in writing addressed to such Court praying for relief or redress in respect of such infringement. Such application may be proceeded with only with leave to proceed first had and obtained from the Supreme Court, which leave may be granted or refused, as the case may be, by not less than two Judges."*

The Petitioner has filed the application upon the lapse of the time bar that has been put in place by the Constitution and hence this application should, prima facie, be dismissed. The exception to this rule exists in the **Human Rights Commission of Sri Lanka Act No.21 Of 1996. Section 13(1)** of the act states as follows:

> *"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 complaints is pending before the Commission, shall not be taken into account in computing the period of one month within an application may be made to the Supreme Court by such person in terms of Article 126 (2) of the Constitution."*

The Petitioner could avoid the lapse of the time bar if the application that was made to the Human Rights Commission was made within one month of the alleged incident. The documents marked as "P6" and "P6a" in evidence, are the proof of the complaint made to the Human

Rights Commissioner by the mother of the Petitioner. The said document is dated 23rd of June 2009 and as such the application made by the Petitioner is within the time bar for such an application.

This Court sees several issues that require the clarification and discourse of this Court. The document that portrays a somewhat polar opposite of the allegations put forth by the Petitioner is the report by the Assistant Superintendent of the Kuliyapitiya Police. This report is included in evidence and is marked as "5R6". This Court will, in due course, address the said contradictions and inconsistencies and arrive at its conclusion, however, it is crucial to put in perspective the rights guaranteed by the constitution under **Article 11** in order to determine whether a violation of the right has in fact occurred.

Article 11 of the Constitution states that:

> *"No person shall be subjected to torture cruel, inhuman or degrading treatment or punishment."*

The Fundamental Rights provision is also supplemented by the **Torture Act No. 22 of 1994** which provides criminal sanctions for torture. This Court wishes to draw from the said act, the definition of torture in order to establish whether the alleged conduct of the Respondents and the injuries reported by the Petitioner amounts to torture. **Section 12** of the said act defines torture in accordance with **Article 1** of the **Torture Convention** as follows:

"Torture, with its grammatical variations and cognate expressions, means any act which causes severe pain, whether physical or mental, to any other person, being an act which is-

(a) Done for any of the following purposes:

I. Obtaining from such person or a third person any information or confession;

II. Punishing such other person for any act which he or a third person has committed, or is suspected of having committed; or

III. Intimidating or coercing such other person or a third person; or

(b) Done for any reason based on discrimination, and being in every case, an act, which is, done by, or at the instigation of, or with the consent or acquiescence of, public officer or other person acting in an official capacity"

This definition of torture is supplemented by the definition adopted by this Court in the case of **Mrs. W. M. K. De Silva v Chairman of Ceylon Fertilizer Corporation** *(1989) 2 SLR 393* where **Amarasinghe J** defined Torture as:

> "*In my view Article 11 of the constitution prohibits any act by which* ***severe pain or suffering****(emphasis added), whether physical or mental is, without lawful sanction in accordance with a procedure established by law, intentionally inflicted on a person (whom I shall refer to as the 'victim') by a public official acting in the discharge of his executive or administrative duties or under colour of office, for such purposes as obtaining from the victim or a third person a confession or information, such information being actually or supposedly required for official purposes, imposing a penalty upon the victim for an offence or breach of a rule he or a third person has committed or is suspected of having committed, or intimidating or coercing the victim or a third person to do or refrain from doing something which the official concerned believes the victim or the third person ought to do or refrain from doing, as the case may be."*

He further elaborated in the said case that:

> *"Torture implies that the suffering occasioned must be of a particular intensity or cruelty. In order that ill treatment may be regarded as inhuman or degrading it must be 'severe'. There must be the attainment of a 'minimum level of severity'. There must be the crossing of the 'threshold' set by the prohibition. There must be an attainment of 'the seriousness of treatment envisaged by the prohibition' in order to sustain a case based on torture or inhuman or degrading treatment or punishment".*

The culmination of these two definitions presents to Court a framework within which acts of a public officials qualify as torture or degrading and inhuman behaviour.

There is a wealth of case law, both local and foreign, that sets out guidelines for the adjudication of what amounts to torture under this Article. The primary issue that arises with regards to the establishment of torture under **Article 11** is that if evidence or proof of the torture or inhumane and degrading treatment.

The standard of proof expected of a Petitioner seeking redress for breach of this right is high. The Court has, in the case of **G. Jeganathan v The Attorney General** *(1982) 1 SLR 294*

clarified the intent of the Court in establishing such a high standard. Here the Court stated that the alleged acts must be 'strictly proved' due to the fact that, if the allegations are proven to be true and honest they will carry 'serious consequences' for the officers concerned.

The case of **Channa Peris and Others v The Attorney General and Others** *(1994) 1 SLR 01* has established three principles that require the consideration of the Court if it is to establish torture:

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 mechanism through which the Court expects the Petitioner to establish the breach is through medical reports and evidence from the medical officers who examined the victims. The Court implements a strict standard in this regard, as was clarified in the case of **Nadasena v 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."*

This Court emphasizes the need for cogent and strong evidence in order to establish the alleged torture that constitutes a breach of fundamental rights. The Petitioner has argued, as part and parcel of this case, the document marked as "P3" which is a copy of the observation notes of the Kuliyapitiya Base Hospital. The Respondents have also submitted medical evidence to support their assertion in the form of the Medico-Legal Examination Form, which is marked

"1R3" in evidence. Both reports indicate that the injury was not of a serious nature. The report, 1R3, which was filed by the Dummalasuriya Medical Officer (Report Number 101/09) indicates that the injury was of a "non-grievous" nature and is a "contusion" which is a result of a "blunt weapon". **The "Webster's Medical Dictionary**" defines a 'contusion' as follows:

> *"Contusion - Another name for a bruise. A bruise, or contusion, is caused when blood vessels are damaged or broken as the result of a blow to the skin (be it bumping against something or hitting yourself with a hammer). The raised area of a bump or bruise results from blood leaking from these injured blood vessels into the tissues as well as from the body's response to the injury. A purplish, flat bruise that occurs when blood leaks out into the top layers of skin is referred to as an ecchymosis."*

This definition puts in perspective for this Court the nature of the harm caused and clarifies that the injury reported is not of a serious nature and is similar to an injury that could arise out of a household accident.

The report that requires some discussion by this Court is "P3", which expressly states that the Petitioner was: "assaulted by police with blunt weapons to head, face, abdomen…"the Court clarifies that whilst this may, under normal circumstances, qualify as evidence of the assault, by the Petitioner's own admission, it was he who reported to the doctor that he was assaulted by the police. The doctor has accordingly merely entered it on the report and had no further knowledge with regards to the said incident. It is also noteworthy that though the Petitioner complained of head, abdomen and face injuries he was only 'observed' for head injuries according to the medical report. No other injuries have been recorded in the report and this is inconsistent with the statement of the Petitioner.

Accordingly, this Court feels that the evidence adduced by the Petitioner in order to establish "torture" falls short of the standard that is expected by this Court. In the case of **Kapugeekiyana v Hettiarachchi (1984)** *(2 SLR 153)* the Courts upheld that the lack of evidence to the satisfaction of the Court in order to establish torture would disable a claim of the Petitioner for the breach of fundamental rights. This view is consistent with international case law such as **Grant v Jamaica (1994)** *(Communication No. 353/1988)*, **Fillastre (On Behalf of**

Fillastre and Bizouarn) v Bolivia (1991) *(Communication No. 336/1988)* and **Soogrim v Trinidad and Tobago (1993)** *(Communication No. 362/1989).*

In the case of **Velmurugu v A.G. (1981)** *(1 SLR 406)* **Sharvananda J** highlighted the difficulties that arise out of this high standard of proof that has been repeatedly ordered by our Courts. His Lordship quoted the landmark "**Greek Case"** *Vide Journal of Universal Human Rights, Vol. 1, No: 4, Oct-Dec. 1979 at p.42* where the **European Commission on Human Rights** noted the said difficulties, as follows:

> *"There are certain inherent difficulties in the proof of allegations of torture or ill-treatment. First, a victim or witness able to corroborate his story might hesitate to describe-or reveal all that has happened to him for fear of reprisal upon himself or his family. Secondly, acts of torture or ill-treatment by agents of the Police or Armed Services would be carried out as far as possible without witnesses and perhaps without the knowledge of higher authority. Thirdly, where allegations of torture or ill-treatment are made, the authority; whether the Police or Armed Services or the Ministers concerned, must inevitably feel that they have a collective reputation to defend, a feeling which would be all the stronger in those authorities that had no knowledge of the activities of the agents against whom the allegations are made. In consequence there may be reluctance of higher authority to admit or allow inquiries to be made into facts which might show that the allegations are true. Lastly, traces of torture or ill-treatment may with lapse of time become unrecognizable, even by medical experts, particularly where the form of torture itself leaves few external marks."*

This Court is mindful of these issues in this regard and as such will discuss the discrepancies in evidence prior to arriving at a conclusive decision. The greatest such discrepancy is perhaps the stark difference in statements of the two friends who accompanied the Petitioner on the 20th of June 2009. The statements of the said individuals were submitted as "P2a" and "P2b" in evidence by the Petitioner. In these statements, the said witnesses, namely, Sooriya Mudiyanselage Niroshana Mahesh Kumar and Herasinghe Hettiarachchige Anil Indika corroborate the Petitioner's version of events, however, a completely different version is

presented in the Police Report marked "5R6". Herasinghe Hettiarachchige Anil Indika asserted in the police report that he witnessed a physical altercation between two parties and that he saw the Petitioner being within the proximity of the police jeep. He also stated that he only heard of the assault by the police from the Petitioner's mother and that he witnessed no such incident. Sooriya Mudiyanselage Niroshana Mahesh Kumar alleged that he saw none of the incidents described and that he was about 30 meters away from the scene and as such got no clear visual of the events that were described by the Petitioner. He too stated that he only heard of the alleged assault from one 'Sithara'. Court is mindful of the fact that it is these two witnesses whose testimony constitutes the only available evidence that can affirm the allegation that the police officers were intoxicated at the time of the said incident. Accordingly, this Court sees no evidence that has been adduced in order to affirm the said allegation and is thus left with no choice but to disregard the claim. Furthermore, the 2nd Respondent was not on duty on the night of the said incident and the Police Report confirms the fact that he was at home at the time these events unfolded. It is also noteworthy to mention that the Petitioner stated that his father lodged a complaint to the Kuliyapitiya Police with regards to the incident that occurred on the 24th of June 2009. However, there appears to be no such record of the said complaint being lodged or any other evidence tendered in support of this claim. In fact the Assistant Superintendent of Police in his report denies hearing any such complaint.

This Court, taking into account the fact that the only two witnesses who are able to corroborate the story of the Petitioner have in fact provided two contradictory stories and taking into account all of the above inconsistencies, feels that the Petitioner's **Article 11** rights have not been infringed upon by the 1st, 2nd, 3rd, 4th or 5th Respondents. The case is accordingly dismissed. No costs.

Sgd.

JUDGE OF THE SUPREME COURT

SATHYAA HETTIGE.P.C.J

I agree.

Sgd.

JUDGE OF THE SUPREME COURT

MARASINGHE.J

I agree.

Sgd.

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. Kariyawasam Widanarachilage Gathidu Ugeeshwara Perera,
. No. 80/1, 12176,(T20)
Kassapa Road,
Colombo 05.
2. Kariyawasam Widanarachilage Dimuthu Sanjeewa Perera,
. No. 80/1, 12176,(T20)
Kassapa Road,
Colombo 05.

Petitioners

S.C.F.R. Application 27/11

Vs.

1. Upali Gunasekera,
Principal,
Royal College,
Colombo 07.

2 Director National Schools
Isurupaya, Battaramulla.

3. Secretary,
Ministry of Education,
Isurupaya, Battaramulla.

4. Honourable Attorney-General,
Department of Attorney General,
Colombo 12.

Respondents

BEFORE : K. Sripavan, J.
E.Wanasundera P.C., J.
B. Aluwihare, P.C., J.

COUNSEL **:** Saliya Pieris with Thanuka Madawa for the Petitioners.

Viraj Dayaratna Deputy Solicitor General for the Respondents.

ARGUED ON : 06.05.2014

WRITTEN SUBMISSIONS
FILED : By the Defendants-Petitioners- Petitioners on 24th July 20124
By the Plaintiff-Respondent-Respondents on 20th June 2014

DECIDED ON : 18.09.2014

K. SRIPAVAN, J.

The Petitioners filed this Application on 24th January 2011 seeking inter alia, a direction from this Court to admit the First Petitioner Kariyawasam Widanarachilage Gathidu Ugeeshwara Perera, to Grade 1 at the Royal College, Colombo in the year 2011. The basis of the Petitioners' claim was that as enumerated in the Petition, the 1st to 3rd Respondents in refusing to admit the 1st Petitioner allegedly violated the Fundamental Rights guaranteed under Article 12(1) of the Constitution.

Leave to proceed was granted on 1st February 2011 for an alleged violation of Article 12(1) of the Constitution. When the application was taken up for hearing on 31st January 2014, Learned Deputy Solicitor General appearing for Respondents raised a preliminary objection to the maintainability of the application on the ground that necessary parties have not been named as Respondents and that itself was a fatal irregularity leading to the dismissal of the application “in limine.”

Learned Deputy Solicitor General relied on Rule 44(1)(b) of the Supreme Court Rules 1990 which reads as follows :

> *" Where any person applies to the Supreme Court by a petition in writing, under and in terms of Article 126(2) of the Constitution, for relief or redress in respect of an infringement or an imminent infringement, or any fundamental right or language right, by executive or administrative action, he shall name as respondents the Attorney General and the person or persons who have infringed or are about to infringe such right."*(emphasis added)

Thus, Counsel submitted that as per the Rules of the Supreme Court, it is a must to name the persons who have infringed the Fundamental Rights of the Petitioners as Respondents. The word "shall" as referred to in the Rule must normally be construed to mean "shall" and not "may" for the distinction between the two are fundamental. Granting the application of mind, there is little or no chance that one who intends to leave a lee-way will use the language of command in the performance of an act. But, since, even lesser directions are occasionally clothed in words of authority, it becomes necessary to delve deeper and ascertain the true intent and meaning of this Rule. The obligatory nature of the requirement that the particular step/act should be taken is indicated by the word "shall". This expression is generally used to impose a duty to do what is prescribed, and not a discretion to comply with it according to whether it is reasonable or practicable to do. As observed in *L.A. Sudath Rohana* Vs. *Mohamed Zeena and Others* (S.C. H.C. C.A.L.A. No.

11/2010- S.C. Minute of 17.3.2011), Rules of the Supreme Court are made in terms of Article 136 of the Constitution, for the purpose of regulating the practice and procedure of the Court. Similar to the Civil Procedure Code, which is the principal source of procedure, which guides the Courts of civil jurisdiction, the Supreme Court Rules regulates the practice and procedure of the Supreme Court.

Accordingly, where there has been non-compliance with the Rule, serious consideration must be given for such non-compliance as it would lead to an erosion of well established court procedures maintained throughout several decades. It may be relevant to reproduce below the observation made by Dr. Shirani A, Bandaranayake, C.J. (as she then was) in the case of *Batugahage Don Udaya Shantha* Vs. *Jeevan Kumaratunga and Others* (S.C. Spl. L.A. 49/2010 – S.C. Minute of 29.03.12).

> *"It should be borne in mind that the procedure that should be followed. when filing applications before the Supreme Court cannot be easily dis-regarded as that is administered on the basis of the Rules that are made under the provisions stipulated in the Constitution. The said Rules, which have been made for the purpose of assisting the administration of court procedures should be followed and when they are not complied with, it cannot be said that objections raised on the basis of non-compliance are mere technical objections."*

The Petitioners allege that admission to Government schools for the year 2011 was regulated by a Circular issued by the Secretary, Ministry of

Education, marked **P12.** In terms of the said Circular, the Second Petitioner was interviewed by an "Interview Panel" of four members whose names and addresses were not known to the Petitioner. When the provisional list was published, the First Petitioner's name was not amongst the students who were selected to Royal College. The Second Petitioner thereafter, preferred an appeal to the "Appeal Board" comprising of five members, the names of those members too were not known to the Petitioners. Thus, if there was any prejudice that had been caused to the Petitioners, it was due to the decisions taken by the "Interview Board" and the "Appeal Board". When the authority who passed the impugned order is not impleaded no relief could be granted to the Petitioners for the Court cannot adjudicate on the validity of an act of an authority in its absence.

Having prayed for an order from the Court to direct the First Respondent in terms of paragraph "C" of the prayer to the petition to submit a list of names of the Members of the relevant "Interview Panel" and the "Appeal Board", the Petitioners failed to support the application for such direction. While I agree with the learned Counsel for the Petitioners that this Court is empowered to grant such relief or make such direction as it may deem just and equitable and to add parties without whose presence questions in issue cannot be completely and effectually decided, once pleadings are complete and the application is taken up for argument, no latitude could be shown to the Petitioners for failure to show due diligence. In my view, the Petitioners should have supported the application and obtained an order in terms of paragraph "C" of the prayer to the petition either prior to or the least, the date on which leave

to proceed was granted. There can be no doubt that the Fundamental Rights guaranteed by the Constitution must be safeguarded and protected by the Supreme Court. However, lapse of time and delay are most material factors to be considered. Almost, three years have lapsed since the grant of leave to proceed. If the Petitioners are not vigilant and there is no diligence on their part in pursuing a remedy, the Court may decline to intervene and grant relief in the exercise of its equitable jurisdiction.

For the reasons stated, I hold that the failure to implead the "Interview Board" and the "Appeal Board" justify the rejection of the petition without going into the merits of the case. The preliminary objection is thus upheld.

The application is dismissed without costs.

JUDGE OF THE SUPREME COURT.

E.WANASUNDERA, P.C.J.,

I agree.

JUDGE OF THE SUPREME COURT.

B.ALUWIHARE, 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 and in terms of Article 126 of the Constitution of Sri Lanka.

1. B.V.M.W.Kumarasiri,
No. 105/1, Egodawatta,
Bellana.

2. H.M.T.S. Herath,
No. 69, Nallamudawa Road,
Andagala, Eppawala.

3. R.D.H. Mendis,
No. 219, Mellawagedara,
Mellawagedara,

4. C.G.A.S.N. Wijerathne,
No. 31/A, Rotarigama,
Inamaluwa.

5. M.A.U.N. Kumara,
Temple Road, Mahimpitiya,
Thalahitimulla, Kuliapitiya.

6. N.K. Godage,
E-92, Nikapitiya,
Ussapitiya.

7. V.M.U.K.K. Gunarathne,
No. 86/1, “Darshana”,
Wewala, Bokkawala,
Kandy.

8. D.M. Ariyarathne,
Yaya 2/68,
Uwathissapura,Mapakadathuwa,
Mahiyanganaya.

9. A.A.J.S. Aathawuda,
No. 48, Miriheliya, Alawwa.

10. R.D.R.S. Chandrakumara, No. 3/22,
Dewala Road, Katuwana, Homagama.

11. M.V.P. Swaranareka,
No. 362/A/3, Udupila North,
Delgoda.

12. B.A.Indika,
No. 479, Sisil Mawatha,
Katunayake.

13. K.K. Fernando,
No. 121, Galamulla,
Sinhapura, Horombawa.

14. N.W.J.N. Damayanthi,
2nd Lane,
Chaminda Kumara Mawatha,
Wehera, Kurunegala.

15. H.A.C.J. Hettiarachchi,
"Janaka Sevana", Makuddala,
Helamada, Kegalle.

16. S.M.S. Priyangani,
No. 2B, Alugolla Lane,
Welagedara, Badulla.

Petitioners

S.C.(F.R.) Application 277/09

Vs.

1. M.M.N.D. Bandara,
Secretary, Ministry of Education,
Isurupaya, Battaramulla.

2. Dayasiri Fernando,
Chairman,

3. Palitha M. Kumarasinghe,
Member,

4. S.C. Mannapperuma,
Member.

5. Ananda Senevirathne,
Member.

6. N.H. Pathirana,
Member.

7. S. Thillai Nadaraja,
Member.

8. M.D.W. Ariyawansha,
Member

9. A. Mohammed Nahiya,
Member

10. Sirimavo A. Wijerathne,
Member
the 2nd to 10th Respondents,
all of Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

11. G.D.L. Gunawardene,
Secretary,
Public Service Commission,
No. 356/B, Carville Place,
Galle Road.
Colombo 03.

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

Respondents.

13 H.M. Gunasekeara,
Secretary,
Ministry of Education,
Isurupaya,
Battaramulla.

14. N. Ariyadasa Cooray,
Secretary,

Public Service Commission,
No. 177, Nawala Road,
Narahenpita,
Colombo 05.

Added Respondents.

BEFORE : **S. Marsoof, P.C., J.,**
K. Sripavan, J.
B.Aluwihare, P.C.,J.

COUNSEL **:** J.C. Weliamuna for Petitioners.
Ms. Viveka Siriwardene, S.S.C.for the 2nd to 10th and 12th to 14th Respondents.

ARGUED ON : 17.01.2014

DECIDED ON : 28.03.2014

K. SRIPAVAN, J.

The Secretary, Ministry of Education by notice dated 27.01.2006 published in Gazette Notification bearing No. 1430 marked **P1** called for applications for the Open Competitive Examination (hereinafter referred to as "the examination") for recruitment to Class III of the Sri Lanka Educational Administrative Service. The cadre of Class III of the said Service is composed of "General Cadre" and "Special Cadre". In terms of the Gazette Notification **P1**, a candidate should satisfy the following basic qualifications to apply for the said Open Competitive Examination.

(I) Should be a citizen of Sri Lanka,

(II) Should have obtained a degree from a recognized University or should have passed any professional or other examination deemed by the Public Service Commission to be of equivalent standard,

(iii) Should not be less than 22 years and not more than 32 years of age as on 27.02.2006.

In the instant application, the Petitioners seek to challenge, inter alia, the purported actions taken by the Respondents to arbitrarily change the criteria and /or the non-selection/non-appointment of the Petitioners to the Special Cadre of Class III of the Sri Lanka Educational Administrative Service (hereinafter referred to as the "SLEAS".)

The Petitioners allege that the examination was held in two Parts, namely, Part I and Part II. The Part I examination was held on 09.07.2006. Clause 3 of P1 stipulates that only those candidates who scored a minimum of 60% marks in each question paper in Part I would become eligible to sit for Part II. The Petitioners state that upon securing the requisite marks at the Part I examination they were called upon to sit for the Part II examination held on 22.07.2007. The aggregate marks revealed to the Petitioners after the said examination were as follows :-

1st Petitioner	-	254 marks
2nd Petitioner	-	243 marks
3rd Petitioner	-	243 marks
4th Petitioner	-	243 marks
5th Petitioner	-	241 marks
6th Petitioner	-	241 marks
7th Petitioner	-	235 marks
8th Petitioner	-	233 marks
9th Petitioner	-	233 marks
10th Petitioner	-	231 marks
11th Petitioner	-	231 marks
12th Petitioner	-	228 marks
13th Petitioner	-	224 marks
14th Petitioner	-	236 marks
15th Petitioner	-	233 marks
16th Petitioner	-	249 marks

It is the contention of the Petitioners that by letter dated 11.08.2008 marked **P4** they were called for an interview to be held on 05.09.2008. It was at the interview, the Petitioners were surprisingly told that there were certain additions made to the original Gazette Notification **P1** setting out explicitly the degrees/diplomas that would be considered for the "Special Cadre" *vis-a-vis* the fields of "Special Education" and "Planning". The Petitioners specifically allege at Paragraph 16 of the Petition that the following matters transpired at the interview :

"(a) The 1st to 9th Petitioners who had been selected and called for interviews for the Special Cadre in the field of "Information Technology" were told that although they had studied subjects which relate to Information Technology, those cannot be considered as major subjects of their respective degrees.

(b) The 10st to 13th Petitioners who had been selected and called for interviews for the Special Cadre in the field of "Special Education" were told that they had certain problems regarding the qualifications in terms of the amended criteria. The 10th to 13th Petitioners were not aware of the said amended criteria. Further, the respective interview panels pointed out that these Petitioners could have changed the Special Cadre field that they had applied for. Then, the Petitioners opted to change the Special Cadre field to "Planning". The respective interview panels however, did not make any decision thereof and therefore these Petitioners believed that they would be considered for the Special Cadre positions in the field of "Special Education".

(c) The 14th Petitioner who had been selected and called for an interview for the Special Cadre in the field of "Art" was told that the subjects that she had studied for her Bachelor of Arts degree obtained from the Faculty of Arts of the University of Peradeniya were not relevant to the field she had applied for.

(d) The 15th Petitioner who had been selected and called for an interview for the Special Cadre in the field of "English" was told that although he had studied English for his degree that cannot be considered as a major subject of the degree.

(e) The 16th Petitioner who had been selected and called for interview for the Special Cadre in the field of "Science" was told that she can be given a Special Cadre appointment in the field of "Agriculture".

Learned Senior State Counsel appearing for the Respondents took up inter alia, the following objections/defences to the maintainability of this application by the Petitioners :

(a) that the application of the Petitioners challenging the addendum marked **P6** is time barred in that it had been filed more than one month after the infringement, complained of, in contravention of Article 126(2)

(b) that the addendum made to Gazette Notification marked **P1** by a subsequent Gazette Notification marked **P6** caused no prejudice to any of the Petitioners.

(c) that the Petitioners did not either possess a degree or the requisite qualifications in the field they had applied for or do not have sufficient marks to be selected to the field they had applied for.

Time Bar

It is common ground that the Petitioners were called for interviews on 05.09.2008.It was at the interview, the Petitioners were told that certain additions were made to the Gazette Notification **P1** by incorporating the degrees and/or

Post Graduate diplomas required for the applicants in the "Special Cadre" in the fields of "Special Education" and "Planning". Thus, the Petitioners became aware of the "addendum" to **P1** as far back as in September 2008. However, no steps were taken by the Petitioners to challenge the said "addendum" on the basis that it violated the fundamental rights of the Petitioners.

It is necessary to state at the outset that I am not inclined to favour the conduct of the Petitioners who participated at the interview without any protest, fully availed themselves to the interview process and then when they observed that selection had gone against them, came forward to challenge the addendum **P6** on the ground of unknown disability on their part. The participation, without challenging the addendum **P6** with full knowledge of all the circumstances, preclude the Petitioners from objecting to the selection process embodied in **P1** and **P6** by an application filed seven months thereafter, namely, on 07.04.2009. The conferment of exclusive jurisdiction in terms of Article 126(1) and the imposition of a time-limit in Article 126(2) demonstrate with certainty the need for the prompt invocation of the jurisdiction of this Court. The addendum embodied in **P6** therefore cannot be challenged in the proceedings.

Petitioners do not possess the required qualifications or adequate marks

Learned Senior State Counsel drew the attention of Court to Clause 5(ii) and 5(iii) of Part II in **P1** which reads as follows :

> "*5 (ii)* *In addition to the General Cadre, applications can be forwarded for vacancies in fields mentioned in para (III) in Special Cadre given below. A candidate can apply for the General Cadre and for two fields relevant to the Special Cadre. In the case of applications made under the Special Cadre, the candidate should have studied and*

passed the subjects for the degree relevant to the field applied for

(iii) Special subject areas and the relevant Code Numbers are indicated below:

The subject area applied for and the relevant Code Number should be stated in the place specified in the application:

(a) General Cadre II

(b) Special Cadre

Subject area	
English	*21*
Mathematics	*22*
Science	*23*
Art	*24*
Music (Oriental)	*25*
Music (Western)	*26*
Dancing	*27*
Agriculture	*29*
Commerce	*30*
Special Education	*33*
Planning	*34*
Arabic	*35*
Information Technology	*36 "*

Thus, it is abundantly clear that when applications were called under the "Special Cadre", the candidates should have studied and passed the subjects relevant to the field applied for, at degree level. It is true that by **P6** an addendum was introduced indicating the degrees and/or Post Graduate diplomas necessary in order to consider the candidates in the "Special Cadre" in the fields of "Special Education" and "Planning". Except the 10th to the 13th Petitioners, who preferred

their applications in the "Special Cadre" in the field of "Special Education" the others applied for different subject areas not caught up by the addendum **P6.** Thus, there is nothing on the face of the applications of the Petitioners (other than the 10th to the 13th Petitioners) brought to the notice of Court that there is some undisclosed or unknown criteria by which they were subjected to discrimination. While good faith and knowledge on the part of the First Respondent who published the Gazette Notifications **P1** and **P6**, on the orders of the Public Service Commission is to be presumed, in order to give the maximum benefit to the Petitioners, I proceed to consider their grievance based on the Gazette Notification **P1** only.

Learned Senior State Counsel at the hearing before us informed that the Public Service Commission had no objection to appoint the 3rd Petitioner namely, R.D.H. Mendis to the SLEAS- Class III with effect from a date as determined by the Supreme Court. Senior State Counsel stated that the Public Service Commission was of the view that the 3rd Petitioner's B.A. degree with "Computer Studies" as one of the main subjects was relevant to the field of "Information Technology" and therefore he could deemed to have studied and passed the subjects for his degree relevant to the field applied for as required by **P1**.

The 1st Petitioner selected the fields of "Information Technology" and "Mathematics" in the "Special Cadre". She further claims that she has studied, amongst others, Management Information System, Computer Science and Statistical Methods for her Bachelor of Arts degree. The Public Service Commission is in doubt whether the subjects offered for her degree are relevant to the field applied for. It is also noted that the 1st Petitioner had offered Mathematics for Social Science, Basic Mathematics and Advanced Mathematics for the degree examination and had obtained a Second Class (Upper Division) pass. In these circumstances, good conscience and a fair and reasonable approach,

demand that she be appointed to the SLEAS Class III as she had obtained 254 marks when the cut-off marks for "Mathematics" is 242. Furthermore, the 1st Petitioner is entitled to be appointed, on the basis of the same yardstick used by the Public Service Commission to appoint the 3rd Petitioner to the SLEAS-Class III. If the 1st Petitioner is not treated in accordance with the essential requirements of justice and fair play she would be denied the equal protection of the law. It must be remembered that when Parliament confers upon a body, functions which involve making decisions, there is a presumption that Parliament intended that the said body should act fairly towards those persons who would be affected by its decision.

The 2nd Petitioner selected the fields of "Information Technology" and "Science". According to the degree Certificate available, her major subjects were Physics and Chemistry. However, she could not be selected for the "Science" field as the cut off marks for Science is 247 whereas she had obtained only 243 marks. She could not have been considered for "Information Technology" as she had only offered "Basic Computing" as one of the minor subjects.

The 4th Petitioner selected the fields of "Information Technology" and "Mathematics". She has obtained an ordinary pass in the Bachelor of Science (Business Administration) degree and has not offered any subjects relevant to the field applied for.

The 5th Petitioner selected the fields of "Information Technology" and "Commerce". He has obtained an ordinary pass in the Bachelor of Commerce (Special) degree and has not offered any subjects relating to "Information Technology". He could not be considered for the field of "Commerce" as the cut off marks for "Commerce" is 255 whereas he had obtained only 241.

The 6th Petitioner selected the fields of "Information Technology" and "Agriculture". She obtained a Second Class (Lower Division) in Bachelor of Science degree in Agriculture. However, she did not offer any subjects relevant to the field of "Information Technology" for her degree. In so far as the field of "Agriculture" is concerned, she had obtained 241 marks whereas the cut off marks for "Agriculture" is 251.

The 7th Petitioner chose the field of "Information Technology" only. She got a Second Class (Lower Division) pass in the Bachelor of Science (Business Management) Special degree. The major subjects she offered were in the fields of "Business Management" and "Financial Marketing and Production Management". However, "Information Technology" is one of the minor subjects she had passed for her degree out of 25 course units. Though she had obtained 235 marks at the written examination when in fact the cut off marks for "Information Technology" is 217, the Public Service Commission was correct, in arriving at a decision that the only course unit in "Information Technology" may not be sufficient to achieve the required proficiency in the field of "Information Technology". There is no material before Court to show the grading obtained by her in "Information Technology". Thus, I am unable to hold that the Public Service Commission acted unreasonably or unjustly ignoring the concepts of justice and equality which are the corner-stones of the Constitution.

The 8th Petitioner too chose the field of "Information Technology" only. He got a Second Class Honours (Upper Division) Pass in the Arts degree Examination in Political Science. One of the course units he offered for his degree were "Writing Skills and Computer Literacy". I have no hesitation in concluding that the subject of "Writing Skills and Computer Literacy" cannot be equated to the field of "Information Technology". Though the cut off marks for "Information Technology"

is 217, the subject offered for his degree is quite conceivably irrelevant to be considered for the field of “Information Technology”.

The 9th Petitioner selected the fields of “Information Technology” and “Mathematics”. He obtained a General degree in Science with a Second Class (Lower Division). However, two of the subjects offered by him were “Computer Applications in Business and Industry” and “Computing I and II”. These two minor subjects out of 29 subjects may not be sufficient to fall within the definition of “subjects relevant to the field of “Information Technology” even though, he has scored 233 marks at the written examination. He disqualifies to be considered for “Mathematics” as the cut off marks for the field of “Mathematics” is 242.

The 10th Petitioner selected the fields of “Information Technology” and “Commerce”. He was admitted to the Special degree of Bachelor of Business Management (Human Resources) and earned the required standard for a pass. None of the subjects he offered relate to “Special Education”. He could not be considered for the field of “Commerce” as he had got 231 marks only, which is very much less than the cut off marks for “Commerce”, namely, 255.

The 11th Petitioner opted the field of “Special Education” only. She possess a Bachelor of Arts degree with a Second Class (Upper Division). Unfortunately, the subjects she offered relate to Economics, Sociology, Mass Communication etc. with no relevance to the field of “Special Education”.

The 12th Petitioner chose the fields of “Special Education” and “Mathematics”. She reached the standard required for a pass offering Pure Mathematics, Social Statistics and Philosophy for the Bachelor of Arts degree Examination. Hence, she did not possess any subjects relating to the field of “Special Education”. The marks

she obtained, namely, 228 is not sufficient for her to be considered to the field of “Mathematics”.

The 13th Petitioner applied to the fields of “Special Education” and “Commerce”. He was conferred with a Bachelor's degree in Business Management (Human Resources) with Second Class (Lower Division). The subjects offered for his degree are not relevant to the field of “Special Education”. The marks he obtained namely, 224 at the examination is not sufficient to consider to the field of “Commerce”.

The 14th Petitioner opted the field of “Art” only. She possesses a degree in Bachelor of Arts with one course unit titled “Art and Architecture of Sri Lanka” out of 32 course units. She is disqualified on the basis of not possessing subjects for her degree relevant to the field applied for.

The 15th Petitioner chose the field of “English”. He has a Bachelor of Special Arts degree in Geography. He has offered English “Lower Intermediate Level”, “Intermediate Level” and for “Academic purposes”. It would appear that with the above-mentioned subjects he had not acquired the required standard in English to be considered to the field of “English” as he has obtained 'C” grading only. There may be impelling reasons for the Public Service Commission to arrive at such a finding. In the absence of any allegation of “mala fides” against a clear transgression of the accepted guiding principles and gross violation of constitutional norms, it is unsafe for the Court to interfere with the findings of the Public Service Commission, though there is room to hold differing opinions. The Court would be reluctant to substitute its view unless it is proved that the decision of the Public Service Commission is grossly unreasonable, in the sense that no reasonable body can come to such a finding.

The 16th Petitioner selected the fields of "Science" and "Agriculture". She has a degree in Bachelor of the Science in Agriculture with a Second Class (Lower Division). The subjects she offered relate to "Agriculture" and "Agricultural Extension" and did not relate to the field of "Science". Hence, she was not considered to the field of "Science" . However, the marks she obtained, namely, 249 is not sufficient for her to to be considered to the field of "Agriculture", which had a cut off marks of 251.

Conclusion

On the basis of the foregoing analysis, I declare that non-appointment of the 1st and the 3rd Petitioners to the "Special Cadre" of Class III of the SLEAS violated their fundamental right guaranteed in terms of Article 12(1) of the Constitution. I therefore direct the Public Service Commission to appoint the 1st and the 3rd Petitioners to Class III of the SLEAS to the fields of "Mathematics" and "Information Technology" respectively, with effect from the date on which the appointments of other candidates were made based on the Gazette Notification marked **P1.**

The seniority of the 1st and the 3rd Petitioners are to be reckoned from the date on which they would be appointed to Class III of the SLEAS, with all the benefits accruing to them. So long as the Constitution stands as it is, it is the duty of this Court to uphold the fundamental rights and thereby honour its sacred obligation to the persons affected. The reliefs sought by the 2nd and 4th to 16th Petitioners are refused. I make no order as to costs.

I must emphasize that selection of candidates to the SLEAS is definitely a matter of public importance, urgently calling for proper safeguards in the selection criteria. If adequate safeguards are provided in a precise manner, it would really facilitate the "Appointing Authority" to adopt the contemplated procedures necessary to

gather sufficient data/material to enable the said Authority to arrive at a proper conclusion in regard to the matters submitted for its determination. A criteria indicating the prescribed subjects relevant to the field applied for with clear and specific guidelines degenerates into arbitrariness, erases uncertainty as to the procedure and grants one of the common law protections which Article 12(1) guarantees. The rule of law demands that everything the "Appointing Authority" does falls within a framework of recognized rules and principles which restrict the exercise of any discretionary power. The object of having such a criteria further guarantees confidence in the minds of those who seek to enter the SLEAS and whose ambition is to serve the nation in shaping the future "Educational Administration" more efficient and effective.

JUDGE OF THE SUPREME COURT

S. MARSOOF, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

B. ALUWIHARE, 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 Article 126 read with Article 17 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Sujeewa Arjune Senasinghe,
No. 03, Chelsea Gardens,
Colombo 03.

Petitioner

S.C. F.R. 457/2012

Vs.

1. Ajith Nivard Cabraal,
Governor, Member,
Monetary Board, Central Bank
of Sri Lanka, No. 30, Janadhipathy Mawatha,
Colombo 1.

2 Monetary Board of the Central Bank
No. 30, Janadhipathy Mawatha,
Colombo 1.

3. P.B. Jayasundera,
Secretary, Ministry of Finance,
No. 30, Janadhipathy Mawatha,
Colombo 1.

4. Nimal Welgama,
Member, Monetary Board,
No. 30, Janadhipathy Mawatha,
Colombo

5. Mrs. Mano Ramanathan,
Member, Monetary Board,
No. 30, Janadhipathy Mawatha,
Colombo 1.

6. N.A. Umagiliya,
Member, Monetary Board,
No. 30, Janadhipathy Mawatha,
Colombo 1.

7. Hon. Sarath Amunugama,
Minister of International Monetary Cooperation, No. 50/1, Siripa Road, Colombo 05.

8. H.A.S. Samaraweera,
Auditor General,
Auditor General's Department,
306/72, Polduwa Road, Battaramulla.

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

Respondents.

BEFORE : K.Sripavan, J.

R. Marasinghe, J.

Sarath de Abrew, J.

COUNSEL Upul Jayasuriya with S.H.A. Mohamed for Petitioner instructed by Paul Ratnayake Associates.

Sanjay Rajaratnam, Deputy Solicitor General with Mrs. S. Barrie, Senior State Counsel for Respondents.

ARGUED ON : 22/07/2014 and
04/09/2014

DECIDED ON : 18/09/ 2014

K. SRIPAVAN, J.

The Petitioner's complaint to this Court is that the 1st and 3rd to 6th Respondents in purchasing Greece Govt. Bonds and / or investment transaction acted in an unlawful, irresponsible and an arbitrary manner. Petitioner further alleged that when making investments Clause 5.2.9 of the Foreign Exchange Reserves Management Guidelines has not been complied with. On a direction issued by Court the learned Deputy Solicitor General on 26.09.12 filed a copy of the Foreign Exchange Reserves Management Guidelines (FRMG) issued by the International Operations

Department of the Central Bank. It is observed that the said guidelines does not contain Clause 5.2.9 relied on by the Petitioner. In any event, it is noted that Section 66 of the Monetary Law Act empowers the Monetary Board to maintain "an international reserve" adequate to meet any foreseeable deficits in the international balance of payments. In terms of Section 67 of the said Act "Securities of Foreign Governments" is considered as one of the assets which includes "International Reserves" . The Governor of the Central Bank is the Chief Executive Officer and charged with the execution of policies and measures approved by the Monetary Board and the direction, supervision and control of the internal management and administration of the Central Bank. In terms of Clause 2.2.1 of the FRMG, the Governor has the delegated authority from the Monetary Board with regard to taking decisions in foreign exchange reserves management.

The document marked "A" filed by the learned Deputy Solicitor General indicates that on 16th March 2011 a discussion was held with the Governor with regard to the possibility of investing in Greece and Ireland Bonds. The said document "A" further shows that the proposed investment in Greece and Ireland were not material as they were less than 1.0 per cent. of the reserves of the Central Bank and would not expose to any undue risk.

The Auditor General in his letter dated 11th October 2012 addressed to Hon. D.E.W. Gunasekera, Chairman on Public Enterprises (with a copy to the Governor, Central Bank) had stated though the Central Bank had incurred a loss from the investment in Greece Government Bonds, it has earned a total net profit of U.S. $ 430.2 Million on International Reserve Management during the year 2011.

The investment in Greece Bonds and its trade forms part of the risk management strategy. If all investments are maintained as risk free investments the return would be negligible. The Central Bank therefore has to select a mix of low risk and risk bearing investments expecting a reasonably high return.

We must not forget that in complex economic policy matters every decision is necessarily empiric and therefore its validity cannot be tested on any rigid formula or strict consideration. The Court while adjudicating the constitutional validity of the decision of the Governor or Members of the

Monetary Board must grant a certain measure of freedom considering the complexity of the economic activities. The Court cannot strike down a decision merely because it feels another policy decision would have been fairer or wiser or more scientific or logical. The Court is not expected to express its opinion as to whether at a particular point of time or in a particular situation any such decision should have been adopted or not. It is best left to the discretion of the authority concerned. We have to focus on the applicable law and ascertain whether the impugned decision to invest in Greece Bonds was an arbitrary exercise of power serving a collateral purpose.

At the hearing before us, learned Counsel for the Petitioner sought to argue that Clauses 5.2.1 and 3.3.2 of FRMG have not been complied with. It is noted that in his Petition, the Petitioner has failed to take up the said objection; neither sought to amend the Petition after a copy of the FRMG was made available in September 2012. Hence, the new matters now raised are outside the time

limit prescribed in Article 126(2) of the Constitution and cannot be gone into. In any event, it is apparent that from the document marked **X6** filed by the Petitioner which contains answers given by the Hon. Minister to queries raised by the Leader of the Opposition that all Bonds were issued by "The Hellenic Republic Ministry of Economy and Finance Public Debt Management Agency" on behalf of the Government of Greece which is the official authority in issuing Government Bonds in Greece. The decision to invest in such Bonds was based on the trade-off between different risks faced and the Central Bank's tolerance for higher risk on a very small part of its portfolio (Only 0.6% of its portfolio was invested in Greece Bonds). Investing in high yielding sovereign paper is an integral part of fund management of many funds in the world and the Central Bank too had followed a similar practice in investing a tolerable proportion of its resources (0.6%) in Greece Government Bonds. When the Euro Zone took a turn for the worse several weeks after the investments were made, in mid July 2011, the Central Bank sold a part of Greece Bonds at a loss of US$ 6.6 Million. This measure was taken to mitigate the risk of the Greece investment losing further value due to subsequent development in the Euro Zone. Such loss has been taken into consideration in computing the profit/gains for the year 2011 amounting to US$ 430.2 Million.

Considering the totality of the circumstances, it is neither possible nor desirable to hold that the Members of the Monetary Board in taking a decision to invest in Greece Bonds, have acted arbitrarily, unreasonably and in a fraudulent manner. In view of the conclusion reached, the Court

is not inclined to express any opinion on the objections raised by the learned Deputy Solicitor General on the maintainability of the application.

Leave to proceed is accordingly refused. No costs.

JUDGE OF THE SUPREME COURT.

R. MARASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT.

SARATH DE ABREW

I agree.

JUDGE OF THE SUPREME COURT.

SC.FR. Application No.82/2014

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

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

Wijialudchumi Ramesh
No.84, Chetty Street,
Nallur,
Jaffna.

Petitioner

SC.FR.Application No.82/2014

Vs.

1. Justice C.V. Wigneswaran
Chief Minister
Northern Provincial Council,
No.125, Temple Road,
Jaffna.

2. Mr. Lalith Weeratunga
   Secretary to the President,
   Presidential Secretariat,
   Colombo 1.

3. G.A.Chandrasiri
   Governor,
   Northern Province,
   Old Park,
   Kandy Road,
   Chundikuli,
   Jaffna.

4. Vidyajyothi Dr. Dayasiri Fernando
   Chairman,
   Public Service Commission,
   No.177,
   Nawala Road,
   Narahenpita,
   Colombo 05.

5. Mr. Palitha M. Kumarasinghe P.C.

6. Mrs. Sirimavo A. Wijeratne

7. Mr. S.C.Manapperuma

8. Mr. Ananda Seneviratne

9. Mr. N.H.Pathirana

10. Mr. S.Thilandarajah

11. Mr. M.D.W.Ariyawansa

12. Mr. A. Mohamed Nahiya

All of who are Members of Public Service Commission,
No.177,
Nawala Road,
Narahenpita,
Colombo 05.

13. Secretary
Ministry of Public Administration
and Home Affairs,
Colombo 7.

14. Hon. Attorney General
Attorney General's Department,
Hulftsdorp,
Colombo 12.
Respondents

BEFORE : **MOHAN PIERIS, PC, CJ.**
ROHINI MARASINGHE, J. &
B.P.ALUWIHARE, PC, J.

COUNSEL : Gomin Dayasiri with Manoli Jinadasa and R.Abeygunawardane for the Petitioner.
K.Kanag-Iswaran PC with Lakshmanan Jeyakumar for the 1st Respondent instructed by M/s.Neelakandan & Neelakandan.
J.P.Gamage for the 3rd Respondent.
Nerin Pulle DSG for the 2nd and 4th -14th Respondents.

WRITTEN SUBMISSIONS OF THE PETITIONER AND 1st RESPONDENT

TENDERED ON : 04.07.2014.

SC.FR. Application No.82/2014

WRITTEN SUBMISSIONS OF THE 3RD RESPONDENT

TENDERED ON : 11.07.2014

ARGUED ON : 14.07.2014, 28.07.2014

DECIDED ON : 04.08.2014

MOHAN PIERIS, PC, CJ.

We have heard learned counsel for the petitioner as well as counsel for the 1st Respondent and Deputy Solicitor General for the 2nd, 4th to 14th Respondents.

When the Petition of the Petitioner was supported on 24th March 2014, this Court granted leave to proceed in respect of the alleged infringements by the 1st Respondent of Articles 12 (1) and 14 (1) (g) of the Constitution upon the view that the impugned document P10 (the Circular) entitled the Administrative Standing Instructions No 1/2014 issued by the 1st Respondent is on the face of it ultra vires the powers of the 1st Respondent. Accordingly this Court issued an interim order suspending the operation of P10 until the final hearing and determination of this application subject to the following terms-

1) the petitioner being an officer appointed by his Excellency the President in terms of Section 31 of the Provincial Council Act No 42 of 1987 continues to be under His Excellency the President and his directions on all matters including her transfer, approval of leave, disciplinary control etc.

2) the appointment, transfer and disciplinary control of officers belonging to the National Public Service is subject to the direction and control of the

National Public Service Commission and the rules, regulations framed by the said the Commission.

3) The appointment, transfer, dismissal and disciplinary control of provincial public officers belonging to the Provincial Public Service Commission in this case of the Northern Province is governed by the provisions contained in part 4 of the Provincial Council Act No 42 of 1987 is amended and the rules and regulations framed thereunder.

Thereafter the 1st Respondent filed his affidavit in Court and in paragraph 55 thereof he informs this Court that the impugned circular P10 which gives rise to these proceedings has been withdrawn. Though the 1st Respondent qualifies such withdrawal on the basis of deference to this Court, he is unequivocal in his assertion that his action to withdraw the circular is consequent to the interim order made by this Court on 24 March 2014. It is therefore clear that it was the interim order that induced/or persuaded the 1st Respondent to appreciate the correct legal position as to the vires of P10. In the teeth of this withdrawal, the statement dated 28th of July 2014 that has been filed in contradistinction by the Attorney at Law on record setting out certain concomitant responses from the petitioner that would, according to this Statement, eventuate in a formal withdrawal of the impugned circular P10, is at variance with the affidavit filed by the Respondent.

The Court has already adverted in this Order to the view it takes of his precatory assertion that withdrawal was also effected out of deference to this Court. In the Statement of Objections dated 21st of June 2014 and the adjunctive affidavit referred to above, the Court observes that apart from good governance that has allegedly generated the issuance of the

Circular P10, nowhere has the 1st Respondent sought to qualify his act of withdrawal of P10. Neither do the Statement of Objections and affidavit of the 1st Respondent lay down any conditions upon which the withdrawal of the Circular P10 has been effected. In the circumstances this Court concludes that when the 1st Respondent withdrew the impugned circular, it was a conscious, deliberate and unconditional withdrawal of his former act of having brought forth P10. No further act is needed on the part of the 1st Respondent as the Court is of the view that all requirements necessary for a formal withdrawal of the Circular have unequivocally been satisfied. Thus the Statement dated 28 July 2014 filed by the Attorney-at-Law on record which has found its ingress into the proceedings goes against the grain of the unconditional withdrawal reflected in the Statement of Objections and Affidavit of the 1st Respondent and the Statement filed by the Attorney-at-Law cannot be acted upon.

It has to be noted that the unconditional withdrawal effected by the 1st Respondent of the Circular P10 brings about far reaching consequences. This would amount to a representation to this Court that the 1st Respondent was mistaken as to the erroneous effect of the Circular and such representation would have the effect of creating an estoppel that neither the 1st Respondent nor his agents/attorneys would deny the truth of this representation at a later point of time as this Court would act upon the supposition that the 1st Respondent stepped outside the four corners of his powers in issuing P10 as he did-See Sharvananda CJ in **Abeywicrema v Pathirana** (1986) 1 Sri.LR 120.

Thus this Court is of the view that any investigation into the vires of P10 has been rendered superfluous and since the gravamen of the Petition under Article 126 of the Constitution calls in question the issuance of the Circular and the consequent infringement or imminent infringement allegedly arising therefrom, the Petitioner can have recourse to the fact that the withdrawal of P10 removes her fear of any imminent infringement of her fundamental rights.

In the circumstances since we are of the view that the withdrawal of P10 is dispositive of the issues raised by the Petition, the Court need not go into the collateral and peripheral question of the appointment and the continued holding of the Petitioner of the office of the Chief Secretary. However we reiterate the position that the tenure of office of the Petitioner and other public officers is governed by the parameters as set out in paragraphs (1), (2) and (3) of the interim order of this Court adumbrated above.

Be that as it may, May this Court observe that the Petitioner must also, in furtherance of constitutional comity, endeavor to conduct the affairs of the Northern Public Service with an overriding objective to render the affairs of the Council effectual in a beneficial manner in keeping with the parameters enjoined by law.

Mr Gomin Dayasiri, the Counsel for the Petitioner was pleased to tender to this Court on 29th July 2014 a bundle of documents some of which emanate from the Chief Secretariate of the Northern Provincial Council and these documents demonstrate without a scintilla that the Chief Minister has been duly informed of the Petitioner's movements outside the Northern Province in connection with a particular duty on specific

dates which could not have caused any misgivings or suspicions of any clandestine movements which might be repugnant to/ or had the potential of undermining the good governance having regard to the fact that the Petitioner had been discharging her duties without any blemish even at a time when the Northern Provincial Council had not been in existence.

The Court would finally remind all stake holders in Provincial Council administration that they should rise from mutually misplaced suspicions in a spirit of comity and reconciliation when the people of this Nation are on an onward march towards nation building, in an objective to ensure that every citizen of this Country lives in peace and dignity in one unitary state to enjoy all that is granted to him or her as decreed by the Constitution.

As we hold the view based on the facts, circumstances and supervening factors in the case that any further proceedings would be infructuous, proceedings in this application filed by the Petitioner are hereby terminated.

CHIEF JUSTICE

ROHINI MARASINGHE, J.
I agree.

JUDGE OF THE SUPREME COURT

B.P.ALUWIHARE, PC, J.
I agree.

JUDGE OF THE SUPREME COURT