SRI LANKA SUPREME COURT **Judgements Delivered (2015)**

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Judgments Delivered in 2015

15/ 12/ 15	SC Appeal No: 15/2013	Jathika Sevaka Sangamaya, No. 416, Kotte Road, Pitakotte. (On behalf of S.S. Samarasinghe, G.V.A.N. Senadheera, S.N. Nanayakkara, P.B.H. Denuwara and Kalyani Samarakoon) Applicant Vs. Sri Lanka Hadabima Authority No. 08, Gannoruwa Road, Peradeniya. Respondent AND Jathika Sevaka Sangamaya No. 416, Kotte Road, Pitakotte (On behalf of S.S. Samarasinghe, G.V.A.N. Senadheera, S.N. Nanayakkara, P.B.H. Denuwara and Kalyani Samarakoon) Applicant-Appellant Vs. Sri Lanka Hadabima Authority No. 08, Gannoruwa Road, Peradeniya. Respondent-Respondent AND NOW BETWEEN Jathika Sevaka Sangamaya No. 416, Kotte Road, Pitakotte (On behalf of S.S. Samarasinghe, G.V.A.N. Senadheera, S.N. Nanayakkara, P.B.H. Denuwara and Kalyani Samarakoon) Applicant-Appellant-Appellant Vs. Sri Lanka Hadabima Authority No. 08, Gannoruwa Road, Peradeniya. Respondent-Respondent-Respondent
14/ 12/ 15	SC/FR 1006/2009	Hapugodage Jagath Perera Petitioner Vs 1. Gothami Ranasinghe Inspector of Police, Officer-in-Charge of the Minor Crime Branch, Police Station, Mirigama. 2. Milla Vitharana alias Millavithanachchi Inspector of Ploice, Officer-in-Charge of the Traffic Branch, Police Station, Mirigama. 3. Milinda Premanath Karunaratne, Sub Inspector of Police, Police Station, Mirigama. 4. Inspector General of Police, Police Head Quarters, Colombo1. 5. Hon. Attorney-General Attorney General’s Department Colombo 12. Respondents
13/ 12/ 15	S.C. Appeal No. 44/2012	Padmal Ariyasiri Mendis, No.29, Moratumulla Road South, Moratuwa. Plaintiff Vs. Vijith Abraham de Silva, No. 13, Peduru Mawatha, Moratumulla, Moratuwa. And Vijith Abraham de Silva, No. 13, Peduru Mawatha, Moratumulla, Moratuwa Defendant-Appellant Vs. Padmal Ariyasiri Mendis, No.29, Moratumulla Road South, Moratuwa. Plaintiff-Respondent And Now Between Vijith Abraham de Silva, No. 13, Peduru Mawatha, Moratumulla, Moratuwa Defendant-Appellant- Petitioner-Appellant Vs. Padmal Ariyasiri Mendis, (Deceased) No.610B, Halgahadeniya Road, Gothatuwa. Plaintiff - Respondent Respondent -Respondent Sarukkali Patabedige Claris de Silva, of No. 610B, Halgahadeniya Road, Gothatuwa. Substituted Plaintiff-Respondent- Respondent-Respondent
09/ 12/ 15	SC Appeal 27/2013	Hangidigedara Thilakaratne (Deceased) Plaintiff RAG Sumanawathi Substituted Plaintiff Vs Galkaduwegedara Sunil Jayathilake Defendant AND BETWEEN RAG Sumanawathi Substituted-Plaintiff-Appellant Vs Galkaduwegedara Sunil Jayathilake Defendant-Respondent AND NOW BETWEEN RAG Sumanawathi Substituted-Plaintiff-Appellant-Appellant Vs Galkaduwegedara Sunil Jayathilake Defendant-Respondent-Respondent

07/ 12/ 15	S.C. Appeal No. 11/2004	Mrs. D. Jayasekera (nee D.H. Hapangama) No. 1242, Welikada, Rajagiriya. Plaintiff Vs. Mrs. Eslin Wimalaratne No. 30/3, Gothami Road, Borella, Colombo 08. And Mrs. D. Jayasekera (nee D.H. Hapangama) No. 1242, Welikada, Rajagiriya. Plaintiff-Appellant Vs. Mrs. Eslin Wimalaratne No. 30/3, Gothami Road, Borella, Colombo 08. Defendant-Respondent (deceased) And Miss I.S. Wimalaratne No. 30/3, Gothami Road, Borella, Colombo 08. Substituted Defendant-Respondent And Mrs. Eslin Wimalaratne No. 30/3, Gothami Road, Borella, Colombo 08. (deceased) Miss I.S. Wimalaratne No. 30/3, Gothami Road, Borella, Colombo 08. Substituted Defendant-Respondent-Appellant Vs. Mrs. D. Jayasekera (nee D.H. Hapangama) No. 1242, Welikada, Rajagiriya. Plaintiff-Appellant-Respondent
07/ 12/ 15	S.C. FR Application No. 170/2015	1. Coral Sands Hotel (private) limited, No. 326, Galle Rd, Hikkaduwa , 2. S.E.Goonewardena, Managing Director, Coral sand hotel limited hikkaduwa Vs. Ravi Karunanayaka MP, The Minister of Finance, The ministry of finance & planning, The secretariate, Colombo 01, ..and Three others.
01/ 12/ 15	S.C Appeal 125/2011	Benthota Arachchige Kanthi Pushpa Ranjini “Karunawasa”, Kiralawelkatuwa, Embilipiriya. PLAINTIFF Vs. Handagalage Dhammika Wajirapriya Sarathchandra Textiles Pallegama Embilipitiya. DEFENDANT AND BETWEEN Handagalage Dhammika Wajirapriya Sarathchandra Textiles Pallegama Embilipitiya. DEFENDANT-PETITONER Benthota Arachchige Kanthi Pushpa Ranjini “Karunawasa”, Kiralawelkatuwa, Embilipiriya. PLAINTIFF-RESPONDENT AND NOW BETWEEN Handagalage Dhammika Wajirapriya Sarathchandra Textiles Pallegama Embilipitiya. DEFENDANT-PETITIONER-APPELLANT Vs Benthota Arachchige Kanthi Pushpa Ranjini “Karunawasa”, Kiralawelkatuwa, Embilipiriya. PLAINTIFF-RESPONDENT-RESPONDENT

23/11/15	SC Appeal No. 56/2008	Anusha Wijewardena 34, Orchard Gate, Bradly Stoke, BS 32 OHW, Bristol, United Kingdom By her Attorney Simila Patuwatha Vithana 75/3-2, Isipathana Mawatha, Colombo 5. PETITIONER Vs. 1. Minister of Lands, Sampathpaya" Battaramulla. 2. Minister of Lands Govijana Mandiraya, Battaramulla. 3. Divisional Secretary, Kaduwela. 4. Director Urban Development Authority, "Sethsiripaya", Battaramulla. 5. Sri Lanka Land Reclamation and Development Corporation, P.O. Box 56, No. 3, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya. 6. Commissioner General of Agrarian Development Department of Agrarian Development 42, Sir Marcus Fernando Mawatha, P.O. Box 537, Colombo 7. 7. Hon. Attorney General Attorney General's Department Colombo 12. RESPONDENTS AND BETWEEN Anusha Wijewardena 34, Orchard Gate, Bradly Stoke, BS 32 OHW, Bristol, United Kingdom By her attorney Simila Patuwatha Vithana 75/3-2, Isipathana Mawahta, Colombo 5. PETITIONER-PETITIONER Vs. 1. Minister of Lands, Sampathpaya" Battaramulla. 2. Minister of Lands Govijana Mandiraya, Battaramulla. 3. Divisional Secretary, Kaduwela. 4. Director Urban Development Authority, "Sethsiripaya", Battaramulla. 5. Sri Lanka Land Reclamation and Development Corporation, P.O. Box 56, No. 3, Sri Jayawardenapura Mawatha, Welikada, Rajagiriya. 6. Commissioner General of Agrarian Development Department of Agrarian Development 42, Sir Marcus Fernando Mawatha, P.O. Box 537, Colombo 7. 7. Hon. Attorney General Attorney General's Department Colombo 12. RESPONDENTS-RESPONDENTS
15/11/15	SC Appeal No. 209/12	Lanka Banku Sevaka Sangamaya, (On behalf of L.D. Dayananda), No. 20, Temple Road, Maradana, Colombo 10. Applicant Vs. People's Bank Head Office, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Respondent AND BETWEEN People's Bank Head Office, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Respondent- Appellant Vs. Lanka Banku Sevaka Sangamaya, (On behalf of L.D. Dayananda), No. 20, Temple Road, Maradana, Colombo 10. Applicant- Respondent AND NOW BETWEEN People's Bank Head Office, Sir Chittampalam A Gardiner Mawatha, Colombo 2. Respondent-Appellant- Petitioner Vs. Lanka Banku Sevaka Sangamaya, (On behalf of L.D. Dayananda), No. 20, Temple Road, Maradana, Colombo 10. Applicant- Respondent- Respondent

12/11/15	S.C. Appeal No. 48/2010	K.G. Somapala alias R.U. Somapala Keselgollegoda Ginihampitiya Hemmathagama. PLAINTIFF Vs. W. A. Sumanasiri Udawatta, Samapura, Hemmathagma. DEFENDANT AND BETWEEN W. A. Sumanasiri Udawatta, Samapura, Hemmathagma. DEFENDANT-APPELLANT Vs. K.G. Somapala alias R.U. Somapala Keselgollegoda Ginihampitiya Hemmathagama. PLAINTIFF-RESPONDENT AND NOW BETWEEN W. A. Sumanasiri Udawatta, Samapura, Hemmathagma. DEFENDANT-APPELLANT-PETITIONER Vs. K.G. Somapala alias R.U. Somapala Keselgollegoda Ginihampitiya Hemmathagama. PLAINTIFF-RESPONDENT-RESPONDENT

11/11/15	SC Appeal No. 40/2013	Asoka Sarath Amarasinghe No. 32, Vidyalaya Road, Gampaha. Petitioner Vs. 1. R. Wijeratne Respondent (Deceased) 1A. Ranjith Flavian Wijeratne No. 27/1 (27B), Sir Ernest de Silva Mawatha, Colombo 07. Substituted Respondent 2. Sirimevan Bibile (Former Chairman) 2A. Dr. M.S. Jaldeen (Chairman) 3. B. Bodinagoda (Former Vice Chairman) 3A. C. Ranawaka (Member) 4. B. Gunasekera (Former Member) 4A. J.M.S. Bandara (Member) 5. S.W. Gunawardene (Former Member) 5A. R.W.M.S.B. Rajapakse (Member) 6. M. Samaraweera (Former Member) All members of the Ceiling on Housing Property Board of Review, Department of National Housing, Sir. Chittampalam A. Gardiner Mawatha, Colombo 02. 7. D. Weerapana Former Commissioner of National Housing 8. Y.B. Pussedeniya Former Commissioner of National Housing 8A. M. Sritharan Commissioner of National Housing, The Department of National Housing, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. 9. Hon. R. Premadasa Former Minister of Housing, Local Government and Construction 9A. Wimal Weerawansa Minister of Construction, Engineering Services, Housing and Common Amenities, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. Respondents AND NOW BETWEEN Ranjith Flavian Wijeratne No. 27/1 (27B), Sir Ernest de Silva Mawatha, Colombo 07. Substituted 1A Respondent Appellant Vs. 1. Asoka Sarath Amarasinghe No. 32, Vidyalaya Road, Gampaha. Petitioner Respondent 2. Sirimevan Bibile (Former Chairman) 2A. Dr. M.S. Jaldeen (Chairman) 3. B. Bodinagoda (Former Vice Chairman) 3A. C. Ranawaka (Member) 4. B. Gunasekera (Former Member) 4A. J.M.S. Bandara (Member) 5. S.W. Gunawardene (Former Member) 5A. R.W.M.S.B. Rajapakse (Member) 6. M. Samaraweera (Former Member) All members of the Ceiling on Housing Property Board of Review, Department of National Housing, Sir. Chittampalam A. Gardiner Mawatha, Colombo 02. 7. D. Weerapana Former Commissioner of National Housing 8. Y.B. Pussedeniya Former Commissioner of National Housing 8A. M. Sritharan Commissioner of National Housing, The Department of National Housing, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. 8B. L.S. Palanasooriya Commissioner of National Housing, The Department of National Housing, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. 8C. Prof. W.N. Karunadasa Commissioner of National Housing, The Department of National Housing, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. 9. Hon. R. Premadasa Minister of Housing, Local Government and Construction, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. 9A. Hon. Wimal Weerawansa Minister of Construction, Engineering Services, Housing and Common Amenities, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. 9B. Hon. Sajith Premadasa Minister of Housing and Samurdhi, „Sethsiripaya", Sri Jayawardenapure Kotte, Battaramulla. . Respondents-Respondents

08/11/15	SC Appeal 100/2008	Property Finance and Investments Kandy (Private) Limited Petitioner Vs 1. Ms.KHA Meegasmulla, Municipal Commissioner, Kandy Municipal Council, Kandy. 2. Kandy Municipal Council Kandy Respondent AND NOW BETWEEN 1. WAR Wimalasiri Municipal Commissioner Kandy Municipal Council, Kandy. 2. Kandy Municipal Council, Kandy Respondent-Petitioner-Appellants Vs Property Finance and Investments Kandy (Private) Limited Petitioner-Respondent-Respondent
04/11/15	SC/FR/ 768/2009	1. Sisira Kumara Wahalathanthri Puhulyay Ambalantota. 2. Dannister Gunasekara No. 153/01/B, Weerakatiya Road, Aluthgoda, Tangalle. PETITIONERS Vs. 1. Jayantha Wickramaratne Inspector General of Police Police Headquarters, Colombo 01. 2. Kalinga Silva Headquarter Inspector Tangalle Police Station, Tangalle. 3. S. J. B. Suwaris Inspector of Police Police Station Tangalle. 4. Hon. Attorney General Attorney General's Department Colombo 12. RESPONDENTS
02/11/15	SC/CHC/ Appeal/ 08/2007	Merchant Bank of Sri Lanka Ltd., No. 28, St. Michael's Road, Colombo 3. (formerly at No. 189, Galle Road, Colombo 3) PLAINTIFF Vs. 1. Deguruge Nihal Perera Caring on business under the name, style and firm of "Desan Enterprises" At No. 19/21, Eksath Mawatha, Mahara, Kadawatha. 2. D.C.A. Ramani Mallika No. 14, Eksath Mawatha, Mahara, Kadawatha. DEFENDANTS AND 1. Deguruge Nihal Perera Caring on business under the name, style and firm of "Desan Enterprises" At No. 19/21, Eksath Mawatha, Mahara, Kadawatha. 2. D.C.A. Ramani Mallika No. 14, Eksath Mawatha, Mahara, Kadawatha. DEFENDANTS-PETITIONERS Vs. Merchant Bank of Sri Lanka Ltd., No. 28, St. Michael's Road, Colombo 3. (formerly at No. 189, Galle Road, Colombo 3) PLAINTIFF-RESPONDENT-RESPONDENT AND BETWEEN 1. Deguruge Nihal Perera Caring on business under the name, style and firm of "Desan Enterprises" At No. 19/21, Eksath Mawatha, Mahara, Kadawatha. 2. D.C.A. Ramani Mallika No. 14, Eksath Mawatha, Mahara, Kadawatha. DEFENDANTS-PETITIONERS-APPELLANTS Vs. Merchant Bank of Sri Lanka Ltd., No. 28, St. Michael's Road, Colombo 3. (formerly at No. 189, Galle Road, Colombo 3) PLAINTIFF-RESPONDENT-RESPONDENT- RESPONDENT
01/11/15	SC Appeal 15/2010	Batuwanage Siripala Plaintiff vs RA Jayatilleke (Deceased) Defendant AND RA Shirley Anura Substituted Defendant-Appellant Vs Batuwanage Siripala Plaintiff- Respondent AND NOW BETWEEN Batuwanage Siripala (Deceased) 1A Suneetha Nipuna Arachchi 1B Batuwanage Adeesha Sahan Substituted Plaintiff-Respondent-Appellants Vs RA Shirly Anura Substituted Defendant-Appellant-Respondent

01/11/15	S.C. Appeal No. 04/2010	1. J.R.Punchiappuhamy 2. J.R. Ratnasiri Senarath Bandara Both of Arama, Aranayake. Plaintiffs Vs. J.R. Dingiribanda of Galaudawatta, Arama, Aranayake. Defendant And then Between J.R. Dingiribanda of Galaudawatta, Arama, Aranayake. Defendant-Appellant Vs. 1. J.R.Punchiappuihamy 2. J.R. Ratnasiri Senarath Bandara Both of Arama, Aranayake. Plaintiff-Respondents And Now Between 1. J.R.Punchiappuihamy 2. J.R. Ratnasiri Senarath Bandara Both of Arama, Aranayake. Plaintiff-Respondent-Appellants Vs. J.R. Dingiribanda of Galaudawatta, Arama, Aranayake. Defendant-Appellant-Respondent
27/10/15	S.C Appeal 88/2005	M. G. P. Rajashilpa, Commissioner of Labour, Colombo East Labour Office, Narahenpita. Complainant Vs Ceylon Heavy Industries and Construction Co. Ltd Oruwela, Athurugiriya. Respondent AND Ceylon Heavy Industries and Construction Co Ltd., Oruwela, Athurugiriya. Respondent-Appellant M. G. P. Rajashilpa Commissioner of Labour, Colombo - East Labour Office, Labour Department, Narahenpita. Complainant-Respondent AND NOW Ceylon Heavy Industries and Construction Co. Ltd., Oruwela, Athurugiriya. Respondent-Appellant-Petitioner Vs M.G.P. Rajashilpa Commissioner of Labour, Colombo East Labour Office, Narahenpita. Complainant-Respondent-Respondent L.D.C Perera No.13/1 Gnanawimala Mawatha Athurugiriya Added Respondent
14/10/15	SC Appeal 63/2013	Hatton National Bank Limited Petitioner-Petitioner-Appellant Vs Sella Hennadige Chandrasiri Respondent-Respondent-Respondent
06/10/15	S.C. Appeal No. 46/2011	
01/10/15	SC / Appeal No / 117/2013	Hilary Howard Dunstan De Silva, No 18/1, Dakshinarama Road, Mount Lavinia. Plaintiff Vs. Rani Lokugalappaththi, C/O Shakila Achini De Silva, No. 26, Fathima Mawatha, Welikadamulla Road, Mabola, Wattala. Defendant AND Rani Lokugalappaththi, C/O Shakila Achini De Silva, No. 26, Fathima Mawatha, Welikadamulla Road, Mabola, Wattala. Defendant Petitioner Vs. Hilary Howard Dunstan De Silva, No 18/1, Dakshinarama Road, Mount Lavinia. Plaintiff Respondent AND NOW BETWEEN Rani Lokugalappaththi, C/O Shakila Achini De Silva, No. 26, Fathima Mawatha, Welikadamulla Road, Mabola, Wattala. Defendant Petitioner Appellant Vs. Hilary Howard Dunstan De Silva, No 18/1, Dakshinarama Road, Mount Lavinia. Plaintiff Respondent-Respondent

01/ 10/ 15	S.C. (CHC) Appeal No.08/2010	Sanicoch Group of Companies, No. 24, Bristol Street, London FCIY 452 England. Appearing by its Attorney Denham Oswald Dawson 157, Dutugemunu Street, Kohuwala. PLAINTIFF Vs. Kala Traders (Pvt.) Limited, No. 151, Dam Street, Colombo 12. DEFENDANT In the matter of an application made under and in terms of Section 86(2) of the Civil Procedure Code. Kala Traders (Pvt.) Limited, No. 151, Dam Street, Colombo 12. DEFENDANT-PETITIONER Vs. Sanicoch Group of Companies No. 24, Bristol Street, London FCIY 452 England. Appearing by its Attorney Denham Oswald Dawson 157, Dutugemunu Street, Kohuwala. PLAINTIFF-RESPONDENT AND NOW Kala Traders (Pvt.) Limited, No. 151, Dam Street, Colombo 12. DEFENDANT-PETITIONER-APPELLANT Vs. Sanicoch Group of Companies No. 24, Bristol Street, London FCIY 452 England. Appearing by its Attorney Denham Oswald Dawson 157, Dutugemunu Street, Kohuwala. PLAINTIFF-RESPONDENT-RESPONDENT
21/ 09/ 15	S.C. Appeal No. 16/2009	Anthony Kanicius Malcolm Perera of No. 36/4, Horana Road, Panadura. Plaintiff Vs. 1. Warushahennedige Nimalasiri Fernando 75, Horana Road, Wekada, Panadura. 1st Defendant 2. Wagoda Pathirage Premaratne 75, Horana Road, Wekada, Panadura. Added 2nd Defendant And Wagoda Pathirage Premaratne 75, Horana Road, Wekada, Panadura. Added 2nd Defendant-Appellant Vs. D.H.K. Yasawathie, 19B No. 75, Eluwila Horana Road, Panadura. Substituted Plaintiff-Respondent 1. Warushahennedige Nimalasiri Fernando 75, Horana Road, Wekada, Panadura. Defendant-Respondent And Between Wagoda Pathirage Premaratne 75, Horana Road, Wekada, Panadura. Added 2nd Defendant-Appellant- Petitioner Vs. D.H.K. Yasawathie, 19B No. 75, Eluwila Horana Road, Panadura. Substituted Plaintiff-Respondent-Respondent 1. Warushahennedige Nimalasiri Fernando 75, Horana Road, Wekada, Panadura. Defendant-Respondent- Respondent And Now Between Wagoda Pathirage Premaratne 75, Horana Road, Wekada, Panadura. Added 2nd Defendant-Appellant-Appellant Vs. D.H.K. Yasawathie, 19B No. 75, Eluwila Horana Road, Panadura. Substituted Plaintiff-Respondent-Respondent 1. Warushahennedige Nimalasiri Fernando 75, Horana Road, Wekada, Panadura. Defendant-Respondent- Respondent

16/ 09/ 15	SC FR Application No. 256/2010	Ginigathgala Mohandiramlage Nimalsiri, 349/1, Horagala Watta, Beraketiya, Kiriwattuduwa. Petitioner Vs. 1. Colonel P.P.J. Fernando, Commanding Officer, 3/Sri Lanka General Corps, Panagoda Army Camp, Homagama. 2. Major General H.L. Weeratunge, Colonel Commander, General Services Corps, Panagoda Army Camp, Homagama. 3. Brigadier W.R. Palihakkara, Director, Pay and Records Office, Panagoda Army Camp, Homagama. 4. Major General H.J.G. Wijeratne, Director General (Legal), Sri Lanka Army, Army Headquarters, Colombo 02. 5. Lt. General Jagath Jayasooriya, Commander of the Sri Lanka Army, Army Headquarters, Colombo 02. 6. Mr. Gotabhaya Rajapakse, Secretary, Ministry of Defence, Public Security, Law and Order, Colombo 03. 7. Honourable Attorney General, Department of the Attorney General, Colombo 12. Respondents
16/ 09/ 15	S.C (FR) 451/2011	Horathalge Thilak Lalitha Kumara “Dharmashri” , No. 2, Korossa, Udugampola. PETITIONER Vs. 1. S.S. Hewapathirana Secretary, Ministry of Youth Affairs and Skills Development, “Nipunatha Piyasa”, No. 354/2”, Elvitigala Mawatha, Colombo 5. 2. H. Chithral Ambawatte Director General, Department of Technical Education and Training, P.O. Box 557, Olcott Mawatha, Colombo 10. 3. P. K. Sarathchandra Administrative Officer, Department of Technical Education and Training, P.O. Box 557, Olcott Mawatha, Colombo 10. 4. T. A. Piyasiri Director General, Tertiary and Vocational Education Commission, “Nipunatha Piyasa”, No. 354/2”, Elvitigala Mawatha, Colombo 5. 5. P. B. Abeykoon, Secretary, Ministry of Public Administration and Home Affairs, Independence Square, Colombo 7. 6. Wasantha Gunaratne Director (Administration) Department of Technical Education and Training, P.O. Box 557, Olcott Mawatha, Colombo 10. 7. T. M. D. Tennakoon Maintenance Engineer Department of Technical Education and Training, P.O. Box 557, Olcott Mawatha, Colombo 10. 8. Hon. Attorney General Attorney General’s Department, Colombo 12. RESPONDENTS

09/09/15	S.C. FR Application No. 611/12	1. Wasantha Disanayake, No. 37/34, Weerapuranappu Place, Wariyapola Road, Matale. 2. Wickramapala Yapa, No. 189, Pallemulla, Haloluwa. 3. Wadugodage Shantha Weerasingha, Pahalawatta, Welihipitiya, Dikwella. 4. Kiribanda Bandara Wijewardane, No. 55, Isuru Uyana, Udaperuwa, Kinigama, Bandarawela. 5. Hapu Archchige Premachandra Jayawardane, No. 214C, Doranagoda West, Udugampola. 6. Wariga Jeyesta Mudiyanselage Bandula, No. 49, Irrigation Office Road, Matale. 7. Wanakku Arachchige Don Udaya PriyanthaJayakodi, No. 61, Bollatha, Ganemulla. 8. Wanigasekara Mudiyanselage Wajirapani Wishaka Wanigasekara, No. 220/A, Sarvodaya Mawatha, Makandana, Madapatha' 9. Desi Malkanthi Samarawickrama, No. 477/2, Makumbura, Pannipitiya. 10. Mathara Lokuge Kamal Priyantha, 8E, Mahabuthgamuwa, Angoda. Petitioners Vs. 1. Secretary, Ministry of Public Administration and Home Affairs, Independent Square, Colombo 7. 2. Secretary, Ministry of Finance, Colombo 1. 3. Director General Department of Census and Statistics, No. 109, 5th Floor, Rotunda Tower, Colombo 03. 4 Director (Administration) Department of Census and Statistics, No. 109, 5th Floor, Rotunda Tower, Colombo 03. 5. Director General of Examinations, Department of Examinations, Isurupaya, Battaramulla 6. Vidyajothi Dr. Dayasiri Fernando, Chairman, Public Service Commission, No. 77, Nawala Road, Narahenpita, Colombo 05. And others. 7. Palitha M. Kumarasinghe, P.C. Members, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 8. Sirimavo A. Wijeratne, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 9. S.C. Mannapperuma, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 10. Ananda Seneviratne, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 11. N.H. Pathirana, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 12. S. Thillanadarajah, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 13. M.D.W. Ariyawansa, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 14. A. Mohomed Nahiya, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. (All Members of the Public Service Commission) 06A. A. Sathya Hettige, Chairman, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 07A. S.C. Mannapperuma, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 08A. Ananda Senevirathne, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 09A. N.H. Pathirana, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 10A. S. Thilandarajah, Member. Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 11A. A. Mohomed Nahiya, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 12A. Kanthi Wijethunga, Member, Public Service Commission, No. 177, Nawala Road, Narahenpita, Colombo 05. 13A. Sunil S. Sirisena, Member, Public

01/09/15	S.C. FR Application No. 171/15	Tiran P.C. Alles No. 345/33, Kuruppu Lane, Colombo 08. Vs. Mr. N.K.Illangakoon, Inspector General of Police, Poloce Head Quarters, Colombo 01 & four Others
01/09/15	S.C. Appeal No. 73/2014	Kosgolle Gedara Greeta Shirani Wanigasinghe, Alupatha, Ussapitiya. Applicant Vs. Hector Kobbekaduwa Agrarian Research and Training Institute, No. 114, Wijerama Road, Colombo 07. Respondent And Between Kosgolle Gedara Greeta Shirani Wanigasinghe, Alupatha, Ussapitiya. Applicant-Appellant Vs. Hector Kobbekaduwa Agrarian Research and Training Institute, No. 114, Wijerama Road, Colombo 07. Respondent-Respondent And Now Between Kosgolle Gedara Greeta Shirani Wanigasinghe, Alupatha, Ussapitiya. Applicant-Appellant-Appellant Vs. Hector Kobbekaduwa Agrarian Research and Training Institute, No. 114, Wijerama Road, Colombo 07. Respondent-Respondent-Respondent
12/08/15	SC. Appeal No. 142/10	W.A.A.M. Dharmasena, Aluketiya, Hongamuwa, Ratnapura. Workman Vs. 1. Superintendent, Kekunagoda Estate, Elapatha, Ratnapura. 2. Lal Wasantha Abeywickrama, Alevihala, No. 252, Main Street, Ratnapura. Respondents AND Lal Wasantha Abeywickrama, Alevihala, No. 252, Main Street, Ratnapura. 2nd Respondent- Petitioner Vs. W.A.A.M. Dharmasena, Hapugastanna Plantation Ltd., Alukeliya, Hongamuwa, Workman-Respondent And Now Between Lal Wasantha Abeywickrama, No. 132/15, Moragahalandha Mawatha, Pannipitiya. 2nd Respondent-Petitioner-Appellant Vs. W.A.A.M. Dharmasena, Hapugastanna Plantation Ltd. Alukeliya, Hongamuwa. Workman-Respondent-Respondent
11/08/15	S.C. Appeal No. 146/2013	1. Dr. Rasiah Jeyarajah, 2. Rassiah Yogarajah, Both of No. 43/A, Yatinuwara Street, Kandy . appearing by their duly appointed Power of Attornney holder Sanmugam Sabhapathi Ganeshan. Plaintiffs Vs. Yogambihai Thambirajah nee- Renganathan Pillei, No. 43, Yatinuwara Street, Kandy . Defendant And Yogambihai Thambirajah nee- Renganathan Pillei, No. 43, Yatinuwara Street, Kandy . Defendant-Appellant Vs. 1. Dr. Rasiah Jeyarajah, 2. Rassiah Yogarajah, Both of No. 43/A, Yatinuwara Street, Kandy . appearing by their duly appointed Power of Attornney holder Sanmugam Sabhapathi Ganeshan. Plaintiffs-Respondents And Now 1. Dr. Rasiah Jeyarajah, 2. Rassiah Yogarajah, Both of No. 43/A, Yatinuwara Street, Kandy . appearing by their duly appointed Power of Attornney holder Sanmugam Sabhapathi Ganeshan. Plaintiffs-Respondents-Appellants Vs. Yogambihai Thambirajah nee- Renganathan Pillei, No. 43, Yatinuwara Street, Kandy . Defendant-Appellant-Respondent
04/08/15	SC. Appeal 192/2012	

03/ 08/ 15	S.C. Appeal No. 111/2014	Lutz Paproth Seenimodara Tangalle. PLAINTIFF Vs. 1. Otto Geissler Seenimodara Nakulugamuwa. 2. Dirk Bryant Flamer – Caldera No. 47/17, Ward place, Colombo 7. DEFENDANTS AND BETWEEN Dirk Bryant Flamer – Caldera No. 47/17, Ward place, Colombo 7. 2ND DEFENDANT-PETITIONER Vs. Lutz Paproth Seenimodara Tangalle. PLAINTIFF-RESPONDENT Vs. 1. Otto Geissler Seenimodara Nakulugamuwa. 1ST DEFENDANT-RESPONDENT AND NOW BETWEEN Dirk Bryant Flamer – Caldera No. 47/17, Ward place, Colombo 7. 2ND DEFENDANT-PETITIONER-APPELLANT Vs. Lutz Paproth Seenimodara Tangalle. PLAINTIFF-RESPONDENT-RESPONDENT Otto Geissler Seenimodara Nakulugamuwa. 1ST DEFENDANT-RESPONDENT- RESPONDENT

29/ 07/ 15	SC (Appeal) No.182/2012	R.L.P. Nihal, No. 303C, Bai Watte, Nivandana North, Ja-Ela. Applicant Vs. 1. Board of Directors, Salacine Television, Institute, SLBC Training Institute, Torrington Square, Colombo-07. 2. Niranga Hettiarachchi, Chairman/Executive Officer, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. 3. Lester S. Rupasinghe, Director, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. 4. Lakshitha Jayawardhana, Director, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. Respondents. AND THEN BETWEEN In the matter of an application In terms of section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154 P of the Constitution of the Democratic Socialist Republic of Sri Lanka. 1. Niranga Hettiarachchi, Chairman/Chief Executive Officer, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo07 2. Lester S. Rupasinghe, Director, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. 3. Lakshitha Jayawardhana, Director, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. Respondent-Petitioners Vs. 1. R.L.P. Nihal, No. 303C, Bai Watte, Nivandana North, Ja-Ela. Applicant-Respondent 2. Board of Directors, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. Respondent-Respondent AND NOW BETWEEN In the matter of an application under and in terms of section 31DD of the Industrial Disputes Act (as amended) read with section 9 of the High Court of the Provinces Special Provisions Act No. 19 of 1990 for Special Leave to Appeal. 1. Niranga Hettiarachchi, Chairman/ Chief Executive Officer, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. 2. Lester S. Rupasinghe, Director, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. 3. Lakshitha Jayawardhana, Director, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. Respondent-Petitioners- Petitioners. Vs. 1. R.L.P. Nihal, No. 303C, Bai Watte, Nivandana North, Ja-Ela. Applicant-Respondent- Respondent. 2. Board of Directors, Salacine Television Institute, SLBC Training Institute, Torrington Square, Colombo-07. Respondent-Respondent- Respondents.
28/ 07/ 15	S.C.Appeal No: 140/2011	

27/ 07/ 15	S.C (FR)Application No. 108/2010	Kelum Dharshana Kumarasinghe Attorney at Law No. 38, Bodhirukarama Lane Galborella, Kelaniya. PETITIONER FOR & ON BEHALF OF 1. L.M.R. Pushpasiri, C/o, Swarna Saloon, Mapitigama, Alawwa. 2. S. D. G. Dharmasiri 201/02, Dissage Watta, Suriyagama, Kadawatha. 3. J. K. Rathnasiri Mahamagahena Karaputugala, Kamburupitiya. 4. D.M.R. Banda 105/01A, Gala Junction Kiribathgoda. 5. G. W. Jayarathna, Sooriyapaluwa, Kadwatha, 6. P. D.A. Rohan, 42/1, Wihara Mawatha, Naligama, Ragama. 7. R. M. Ariyarathna, Yapahuwa Junction Mahawa. 8. H.A.S. Geethadeva, 413, Maligathenna, Weyangoda. 9. P.H. Wasantha Batadoowa, Batapola, Meetiyagoda. 10. G.M.A. Bandara 11, Roswatta, Polgahawela. 11. M.G. Donald, 126A, Giyagala Watta, Garuwalgoda West, Agalugaya, Habaraduwa. 12. H.P.D.S. Pathirana 189/2, Dewahera, Nittambuwa. 13. H. D. Reshan, Randolawatta, Mitiyagoda. DETAINEES Detained at the Criminal Investigations Department Vs. 1. S. Hettiarachchi Additional Secretary Ministry of Defence, Public Security, Law and Peace, Colombo 3. 2. Mahinda Balasooriya Sri Lanka Police Department Police Headquarters, Colombo 1. 3. Nandana Munasinghe Deputy Inspector General of Police Criminal Investigations Department Secretariat Building, Colombo 1. 4. Vass Gunawardena, Senior Superintendent of Police S.S.P Office, Kurunegala Police Station Kurunegala. 5. Withana, Inspector of Police, Police Station, Gokarella, Kurunegala. 6. I.P., C.D.I. Paranagama, Inspector of Police O.I.C., Special Investigations 1, Criminal Investigations Department, Colombo 1. 7. Prasanna Wickramasooriya, Chairman, Airport Aviation, Sri Lanka Airport, Katunayake. 8. S.I. Jayawardena Police Station, Kurunegala. 9. Hon. Attorney General Attorney General’s Department, Colombo 1. RESPONDENTS
22/ 07/ 15	S.C.FR.Application No. 230/2015	
07/ 07/ 15	SC / Appeal / 142/14	Ace Containers (Pvt) Ltd. 315, Vauxhall Street, Colombo 2. Plaintiff Vs. Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razeek Fareed Mawatha, Colombo 1. Defendant AND NOW BETWEEN Commercial Bank of Ceylon PLC, Commercial House, No. 21, Sir Razeek Fareed Mawatha, Colombo 1. Defendant Appellant Vs. Ace Containers (Pvt) Ltd. 315, Vauxhall Street, Colombo 2. Plaintiff Respondent
25/ 06/ 15	S.C. Appeal No. 122/2011	Mangalika De Silva (nee Hemachandra) No. 378, Nawala Road, Rajagiriya. PLAINTIFF-RESPONDENT-PETITIONER Vs. Prabhath Joseph De Silva Jambo Restaurant No. 86/A-2, Negombo Road, Thudella, Ja-ela. DEFENDANT-APPELLAN-RESPONDENT Pushpa Kumari Jayawardena No. 72A, Kaleliya Road, Kapuwatta, Ja-ela. CO-DEFENDANT-RESPONDENT-RESPONDENT

23/ 06/ 15	S.C. (F.R.) Application No. 64/2015, 71/2015, 72/2015, 84/2015	
18/ 06/ 15	S.C . Application No. 48/2012	Samarakoon Mudiyanselage Jayathilake of Palle Baddewela, Makehelwala DEFENDANT-APPELLANT-PETITIONER Vs. Balahinna Arachchige Sarath Abeyweera of No. 110, Aththalapitya, Hingula. PLAINTIFF-DEFENDANT-RESPONDENT
16/ 06/ 15	SC Appeal 54/2011	LVC Kuruppu Administrator of the estate of DBH Kuruppu Plaintiff Vs B Carolis Perera Defendant HA Charlot Nonna Substituted Defendant AND BETWEEN HA Charlot Nonna Substituted Defendant-Petitioner Vs Obrey Orvil Carrol Kuruppu Substituted-Plaintiff-Respondent AND NOW BETWEEN HA Charlot Nonna Substituted Defendant-Petitioner-Appellant Vs Obrey Orvil Carrol Kuruppu Substituted-Plaintiff-Respondent-Respondent
10/ 06/ 15	SC (CHC) 47/2008	Alli Company (Pvt) Ltd. Plaintiff-Appellant Vs Mohamad Noohu Abdul Salam Defendant-Respondent
08/ 06/ 15	SC Appeal 106/2012	Lanka Banku Sevaka Sangamaya (On behalf of EAA Dayananda) Applicant Vs Peoples' Bank Respondent AND BETWEEN Peoples' Bank Respondent-Appellant Vs Lanka Banku Sevaka Sangamaya (On behalf of EAA Dayananda) Applicant-Respondent AND NOW BETWEEN Peoples' Bank Respondent-Appellant-Appellant Vs Lanka Banku Sevaka Sangamaya (On behalf of EAA Dayananda) Applicant-Respondent-Respondent
03/ 06/ 15	S.C. F.R Application No. 273/2014	D.M. Anura Mangala Unit 4A/66 Badulu Oya, Kandekatiya. PETITIONER Vs. 1. The Inspector General of Police N.K. Illangakoon Police Headquarters, Colombo 1. 2. Deputy Inspector General of Police Uva Province Roshan Fernando Deputy Inspector General 's Office Badulla. 3. M. Kumara Balasuriya Inquiring Officer Assistant Superintendent of Police Police Office Badulla. 4. Hon. Attorney General Department of Attorney General Colombo 12. RESPONDENTS

19/ 05/ 15	S.C/FR Application No. 204/2011	J. A. Lionel Chandraratne (Library Assistant , Galgammulla Public Library) Ranasgalla, Nakkawatta. PETITIONER Vs. 1. Mr. Tissa R. Balalla The Governor of the North Western Province Governor's Office, Kurunegala. 2. Mr. Gamini Wattegedera The Chairman The Provincial Public Service Commission in the North Western Province, Provincial Council Complex Kurunegala. 3. Mr. H. M. Mettananda Nilame Member The Provincial Public Service Commission in the North Western Province, Provincial Council Complex Kurunegala. 4. Mr. Sarath Stanley Member The Provincial Public Service Commission in the North Western Province, Provincial Council Complex Kurunegala. 5. Mr. M. Iqbal Member The Provincial Public Service Commission in the North Western Province, Provincial Council Complex Kurunegala. 6. Ms. Kanthi Vehalla The Secretary The Provincial Public Service Commission in the North Western Province, Provincial Council Complex Kurunegala. 7. Mr. T. G. U. B. Tambugala The Chief Secretary of the North Western Province, Office of the Chief Secretary Kurunegala. 8. W. M. M. B.Weerasekera The Commissioner of Local Government Department of Local Government of the North Western Province Kurunegala. 9. Mr. Vijitha Bandara Ekanayake The Secretary Kuliyapitiya Pradeshiya Sabha, Kuliyapitiya. 10. Hon. The Attorney General Attorney General's Department Colombo 12. RESPONDENTS BEFORE: Priyasath Dep P.C., J., Upaly Abeyratne J. & Anil Gooneratne J. COUNSEL: Jeffry Alagaratnam P.C. with Lasantha Gurusinghe
27/ 04/ 15	S.C. H.C. CALA 331/2010	
27/ 04/ 15	S.C. H.C. CALA 331/2010	

01/ 04/ 15	S.C. Appeal No. 155/2011	Ranasinghe Arachchilage Samadara Malini Ranasinghe (Deceased) PLAINTIFF 1A. Senarath Arachchilage William Singho 1B. Senarath Arachchilage Thushara Senarath 1C. Senarath Arachchilage Samindra Senarath 1D. Senarath Arachchilage Lasantha Senarath All of Weralugama Kuliyapitiya (Post) SUBSTITUTED-PLAINTIFFS Vs. Adhikari Appuhamilage Appuhamy (Deceased) DEFENDANT 1A. Wijesinghe Arachchilage Rosalin Nona (C/o. Balagolla Kade, Kobeygane (Post) 1B. Kalubowila Appuhamilage Rosalin Nona 1C. Adhikari Appuhamilage Ariyawansha 1D. Adhikari Appuhamilage Gunawansha 1E. Adhikari Appuhamilage Gunasinghe 1F. Adhikari Appuhamilage Wijesinhge 1G. Adhikari Appuhamilage Weerawansha 1H. Adhikari Appuhamilage Ariyakusum 1I. Adhikari Appuhamilage Chandra Kusum 1J. Adhikari Appuhamilage Dimuna Sanjeewanie All of No. 13, Jayasirigama, Pannala (Post) 1K. Jayalath Balagallage Solomon Dias 1L. Jayamanna Both of Thalammehera, Pannala (Post) SUBSTITUTED-DEFENDANTS AND BETWEEN 1k. Jayalath Balagallage Solomon Dias Thalammehera, Pannala (Post) 1K SUBSTITUTED-DEFENDANT-APPELLANT Vs. Ranasinghe Arachchilage Samadara Malini Ranasinghe (Deceased) 1A. Senarath Arachchilage William Singho 1B. Senarath Arachchilage Thushara Senarath 1C. Senarath Arachchilage Samindra Senarath 1D. Senarath Arachchilage Lasantha Senarath All of Weralugama Kuliyapitiya (Post) SUBSTITUTED-PLAINTIFFS-RESPONDENTS Adhikari Appuhamilage Appuhamy (Deceased) 1A. Wijesinghe Arachchilage Rosalin Nona Balagolla Kade, Kobeygane (Post) 1B. Kalubowila Appuhamilage Rosalin Nona 1C. Adhikari Appuhamilage Ariyawansha 1D. Adhikari Appuhamilage Gunawansha 1E. Adhikari Appuhamilage Gunasinghe 1F. Adhikari Appuhamilage Wijesinhge 1G. Adhikari Appuhamilage Weerawansha 1H. Adhikari Appuhamilage Ariyakusum 1I. Adhikari Appuhamilage Chandra Kusum 1J. Adhikari Appuhamilage Dimuna Sanjeewanie All of No. 13, Jayasirigama, Pannala (Post) 1L. Jayamanna of Thalammehera, Pannala (Post) SUBSTITUTED-DEFENDANT-RESPONDENTS AND NOW BETWEEN 1k. Jayalath Balagallage Solomon Dias Thalammehera, Pannala (Post) 1K SUBSTITUTED-DEFENDANT-APPELLANT-APPELLANT Vs. Ranasinghe Arachchilage Samadara Malini Ranasinghe (Deceased) 1A. Senarath Arachchilage William Singho 1B. Senarath Arachchilage Thushara Senarath 1C. Senarath Arachchilage Samindra Senarath 1D. Senarath Arachchilage Lasantha Senarath All of Weralugama Kuliyapitiya (Post) SUBSTITUTED-PLAINTIFF-RESPONDENT-RESPONDENTS Adhikari Appuhamilage Appuhamy (Deceased) 1A. Wijesinghe Arachchilage Rosalin Nona Balagolla Kade, Kobeygane (Post) 1B. Kalubowila Appuhamilage Rosalin Nona 1C. Adhikari Appuhamilage Ariyawansha 1D. Adhikari Appuhamilage Gunawansha 1E. Adhikari Appuhamilage Gunasinghe 1F. Adhikari Appuhamilage Wijesinhge 1G. Adhikari Appuhamilage Weerawansha 1H. Adhikari Appuhamilage Ariyakusum 1I. Adhikari Appuhamilage Chandra Kusum 1J.

30/ 03/ 15	S.C.(HCCA) (LA) No. 346/2013	1. Geekiyanage Thanuja Sanjeewani Amarasinghe No. 14. Vijitha Road, Dehiwala. 2. Geekiyanage Sardha Maheshini Amarasinghe Sisira Niwasa, Narammala. 3. Dona Kusuma Sardhalatha Amarasinghe Sisira Niwasa Narammala. Plaintiff-Petitioners-Petitioners Vs. 1. Geekiyanage Nirosha Prasadini Kahandawarachchi No. 2, Esther Place Park Road, Colombo 05. 2. Chanaka Ravindra Kahandawarachchi No. 2, Esther Place Park Road, Colombo 05. Defendant-Respondents-Respondents
26/ 03/ 15	SC. Appeal 49/2012	
25/ 03/ 15	SC(FR) Application No. 31/2014	1. R.P.P.N. Sujeewa Sampath 2. R.P.P.N. Hasali Gayara Both of 114, Thimbirigasyaya Road, Colombo 5. PETITIONERS Vs. 1. Sandamali Aviruppola Principal Vishaka Vidyalaya 133, Vajira Road. Colombo 5. 2. Anura Dissanayake Secretary, Ministry of Education Ministry of Education Isurupaya Battaramulla. 3. Bandula Gunawardhana Minister for Education Ministry of Education Isurupaya Battaramulla. 4. A. S. Rohini 5. K. A. D. M. S. Rathnayake 6. S. Guneratne 7. R. A. I. Randunge All Members of the Interview Board (on admissions to Grade 1, 2014) C/o. Vishaka Vidyalaya 133, Vajira Road. Colombo 5. 8. Members of the Appeal Interview Board (on admissions to Grade 1, 2014) C/o. Vishaka Vidyalaya 133, Vajira Road. Colombo 5. 8A. Gita Abeygunawardene Principal of Holy Family Convent Chairman of the Appeal Interview Board 8B. A. S. Rohini Secretary of the Appeal Interview Board. 8C. N. R. Jinasena Member of the Appeal Interview Board. 8D. H. A. M. C. A. Jayasundara Member of the Appeal Interview Board. 8E. Shrimathi Jayasoorioya Member of the Appeal Interview Board. 9A. N. N. Kottage (Minor) 9B. R. Kottage Both of 110/1, Thimbirigasyaya Road, Colombo 5. 10A. S. I. S. H. Amaratunga (Minor) 10B. N. I. W. A. Karunaratne Both of 43, Siripa Road Colombo 5. 11A. D. S. Atapattu (Minor) 11B. K. A. D. K. Samaraweera. Both of 119, Havelock Road, Colombo 5. 12A. H. M. T. Wijewardene (Minor) 12B. R. H. K. Erandhika Both of 76/3, Thimbirigasyaya Road, Colombo 5. 13A. I. T. Lanka Geeganage (Minor) 13B. A. Udayangani Dahanayake Both of 57/8, D.S. Fonseka Road, Colombo 5. 14A. E. Y. M. Leelaratne (Minor) 14B. E. T. D. Leelaratne Both of 20/2, Fife Road, Thimbirigasyaya, Colombo 5. 15. Ranjith Chandrasekera Director of Education National Schools Isurupaya, Battaramulla. 16. Hon. Attorney General Attorney General's Department Hultsdorp Colombo 12. RESPONDENTS
24/ 03/ 15	Application No. SC/FR/ 498/2011	Christobuge Chrishan Hilary Srikith Fernando. No. 59, Puwakaramba Road, Kadalana, Moratuwa. Petitioners Vs. 1. National Water Supply and Drainage Board (NWS &DB) Head Office. Galle Road, Ratmalana. & 11 others Respondents

24/ 03/ 15	Application No. SC/FR/ 46B/2014	1. B.M.N. Banneheka and (minor) 1a.Master B.M.I.A. Banneheka, Both of “Somi Kelum” Ihala Malkaduwawa Road, Kurunegala. Petitioners Vs. 1. Y.G. Thillakaratne, Principal (Chairman of the Interview Board) Maliyadeva Boys College, Negombo Road, Kurunegala. & 18 Others Respondents
23/ 03/ 15	S.C. Appeal No. 199/2012	Mahawattage Dona ChanikaDiluniAbeyratne, No. 227/2, Stanley ThilakaratneMawatha, Nugegoda. Plaintiff Vs. 1. Janaka R. Gunawardena, No. 17, 1st Lane, Colombo 5. 2. Jaykay Marketing Services (Pvt.) Ltd., Registered Office No. 130, Glennie Street, Colombo 2. Place of business Keels Super Market, No. 225, Stanley ThilakaratneMawatha, Nugegoda. Defendants And Between Jaykay Marketing Services (Pvt.) Ltd., No. 130, Glennie Street, Colombo 2. Carrying on business at: Keels Super Market, No. 225, Stanley ThilakaratneMawatha, Nugegoda. 2ndDefendant-Petitioner Vs. Mahawattage Dona ChanikaDiluniAbeyratne, No. 227/2, Stanley ThilakaratneMawatha, Nugegoda. Plaintiff-Respondent Janaka R. Gunawardena, No. 17, 1st Lane, Colombo 5. 1st Defendant-Respondent And Now Between Mahawattage Dona ChanikaDiluniAbeyratne, No. 227/2, Stanley ThilakaratneMawatha, Nugegoda. Plaintiff-Respondent- Appellant Vs. Jaykay Marketing Services (Pvt.) Ltd., No. 130, Glennie Street, Colombo 2. Carrying on business at: Keels Super Market, No. 225, Stanley ThilakaratneMawatha, Nugegoda. 2ndDefendant-Petitioner-Respondent Janaka R. Gunawardena, No. 17, 1st Lane, Colombo 5. 1st Defendant-Respondent-Respondent
22/ 03/ 15	S.C. Appeal No. 141 / 11	Prins Gunasekera, No. 26, Flodden Road, London, SE5 9LH. Plaintiff Vs. Associated Newspapers of Ceylon Limited, No. 35, D.R. WijewardenaMawatha, Colombo 10. Defendant And Between Prins Gunasekera, No. 26, Flodden Road, London, SE5 9LH. Plaintiff-Appellant Vs. Associated Newspapers of Ceylon Limited, No. 35, D.R. WijewardenaMawatha, Colombo 10. Defendant - Respondent And Now Between Associated Newspapers of Ceylon Limited, No. 35, D.R. WijewardenaMawatha, Colombo 10. Defendant-Respondent- Appellant Vs. PrinsGunasekera, No. 26, Flodden Road, London, SE5 9LH. Plaintiff-Appellant- Respondent
22/ 03/ 15	SC Appeal 141/2011	Prins Gunasekera Plaintiff Vs Associated News Papers of Ceylon Limited Defendant And Between Prins Gunasekera Plaintiff-Appellant Vs Associated News Papers of Ceylon Limited Defendant-Respondent And Now Between Associated News Papers of Ceylon Limited Defendant-Respondent-Appellant Vs Prins Gunasekera Plaintiff-Appellant-Respondent

22/ 03/ 15	S.C/F.R. No. 39/2013	Abdul Jabar Mohamed Sakir No. 61, Dambulla Road, Kurunegala (On behalf of minor M.S.F. Shameeha) PETITIONER Vs. 1. The Principal Holy Family Convent Kurunegala. Abdul Jabar Mohamed Sakir No. 61, Dambulla Road, Kurunegala (On behalf of minor M.S.F. Shameeha) PETITIONER Vs. 1. The Principal Holy Family Convent Kurunegala. 5. Hon. Attorney General Attorney General's Department Colombo 12. 11. P.M. Nazir Deputy Director of Education Provincial Education Office, Kurunegala And 05 others. RESPONDENTS
11/0 3/1 5	S.C. Appeal No. 17/2013	Hon. Attorney General Attorney General‟s Department, Colombo 12. Complainant Vs. Ambagala Mudiyanselage Samantha Sampath, No. 03, Urupitiya. Accused And Between Hon. Attorney General Attorney General‟s Department, Colombo 12. Complainant-Appellant Vs. Ambagala Mudiyanselage Samantha Sampath, No. 03, Urupitiya. Accused-Respondent And Now Between Ambagala Mudiyanselage Samantha Sampath, No. 03, Urupitiya. Accused-Respondent- Appellant Vs. Hon. Attorney General Attorney General‟s Department, Colombo 12. Complainant-Appellant- Respondent
08/ 03/ 15	S.C. Appeal No. 47/2011	
05/ 03/ 15	S.C. Appeal No. 91/2012	Union Trust and Investments Ltd., No. 347, Union Place, Colombo 02. Plaintiff Vs. 1. Madagodage Thusitha Wijesena. 52, Ward Place, Colombo 7 And now at Nlo. 32/1D, Barnes Place, Colombo 07. 2. Swarna Wijesena 51, Ward Place, Colombo 07 And now at No. 32/10D, Barnes Place, Colombo 07. 3. Wadisinghe Arachchige Kapilaratne 301/3, Gamunu Mawatha, Kiribathgoda. Defendants And 1. Madagodage Thusitha Wijesena. then of M and M Centre, 2nd Floor, No. 431/5, Kotte Road, Welikada, Rajagiriya. 2. Swarna Wijesena then of Ward Place, Colombo 07 and 32/10D, Barnes Place, Colombo 07 Both presently of 10/1, Reid Avenue, Colombo 7. 1st & 2nd Defendant- Petitioners Vs. Union Trust and Investments Ltd., No. 347, Union Place, Colombo 02 And presently of No. 30-2/1, 2nd Floor, Galle Road, Colombo 06. Plaintiff-Respondent Wadisinghe Arachchige Kapilaratne 301/3, Gamunu Mawatha, Kiribathgoda. 3rd Defendant-Respondent And Now Between Union Trust and Investments Ltd., No. 347, Union Place, Colombo 02 And presently of No. 30-2/1, 2nd Floor, Galle Road, Colombo 06. Plaintiff-Respondent-Appellant Vs. 1. Madagodage Thusitha Wijesena. then of M and M Centre, 2nd Floor, No. 431/5, Kotte Road, Welikada, Rajagiriya. 2. Swarna Wijesena then of Ward Place, Colombo 07 and 32/10D, Barnes Place, Colombo 07 Both presently of 10/1, Reid Avenue, Colombo 7. 1st & 2nd Defendant- Petitioners-Respondents Wadisinghe Arachchige Kapilaratne 301/3, Gamunu Mawatha, Kiribathgoda. 3rd Defendant-Respondent- Respondent

15/ 02/ 15	SC Appeal No. 67/2011	Honourable Attorney-General Attorney-General's Department Colombo-12. Complainant Vs. 1. Ayiduroos Abdul Rahim 2. Shavul Hameed Nasir 3. Abdul Baffoor Amanullah 4. Sahibu Mohideen Accused AND BETWEEN 1. Ayiduroos Abdul Rahim No.2, Re-settlement Village Aajarawatta Norochchole. 2. Shavul Hameed Nasir No.A1, Kandakuliya Kalpitiya. 3. Abdul Gaffoor Amanullah Samagipura Puttalam. 4. Sahibu Mohideen, No.87/1, Obanbaduda Road, Puttalam. Accused-Petitioners Vs. Honourable Attorney-General, Attorney General's Department, Colombo-12. Complainant –Respondent AND NOW BETWEEN 1. Ayiduroos Abdul Rahim No.2, Re-settlement Village Aajarawatta Norochchole. 2. Shavul Hameed Nasir No.A1, Kandakuliya Kalpitiya. 3. Abdul Gaffoor Amanullah Samagipura Puttalam. 4. Sahibu Mohideen, No.87/1, Obanbaduda Road, Puttalam. Accused-Petitioners-Petitioners Vs. Honourable Attorney-General Attorney-General's Department Colombo 12. Complainant– Respondent Respondent
10/ 02/ 15	SC Appeal 39A/2010	KA Mary Nona Plaintiff Vs. Vs HAP Wimaladasa Defendant AND BETWEEN HAP Wimaladasa Defendant-Appellant Vs KA Mary Nona Plaintiff-Respondent AND NOW BETWEEN HAP Wimaladasa Defendant-Appellant-Appellant Vs KA Mary Nona Plaintiff-Respondent-Respondent

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

In the matter of an Appeal with Special Leave to Appeal granted by the Supreme Court against the Judgment dated 27.07.2009 of the Provincial High Court of Civil Appeals of the Sabaragamuwa Province.

S.C. Appeal No. 04/2010

S.C.HC.CA.LA. No. 215/09
SP/HCCA/KAG No. 257/2007(F)
D.C. Mawanella No. 282/L.

1. J.R.Punchiappuhamy
2. J.R. Ratnasiri Senarath Bandara
Both of Arama, Aranayake.

Plaintiffs

Vs.

J.R. Dingiribanda of Galaudawatta, Arama, Aranayake.

Defendant

And then Between

J.R. Dingiribanda of Galaudawatta, Arama, Aranayake.

Defendant-Appellant

Vs.

1. J.R.Punchiappuihamy
2. J.R. Ratnasiri Senarath Bandara
Both of Arama, Aranayake.

Plaintiff-Respondents

And Now Between

1. J.R.Punchiappuihamy
2. J.R. Ratnasiri Senarath Bandara
Both of Arama, Aranayake.

Plaintiff-Respondent-Appellants

Vs.

J.R. Dingiribanda of Galaudawatta,
Arama, Aranayake.

Defendant-Appellant-Respondent

* * * * *

BEFORE : **Priyasath Dep, PC.,J.**
S. Eva Wanasundera, PC.J .&
Sisira J.de Abrew, J

COUNSEL : Dr. S.F.A. Cooray for Plaintiff-Respondent-Appellants.

S.N. Vijithsingh with Laknath Seneviratne for Defendant–Appellant - Respondent.

ARGUED ON : **21.07.2015**

WRITTEN SUBMISSION FILED : By the Respondent on 01.09.2015

DECIDED ON : **02.11.2015**

* * * * * *

Eva Wanasundera, PC.J.

This appeal is from the judgment dated 27.7.2009 of the Provincial High Court of Civil Appeal of the Sabaragamuwa Province holden at Kegalle. By that judgment the Civil Appellate High Court reversed the judgment dated 11.02.2005 of the Additional District Judge of Mawanella and dismissed the Plaintiff's action without costs.

This Court granted Leave to Appeal on the question of law set out in paragraph 6(a) and 6(b) of the Petition dated 07.09.2009 and added another question as raised by the Counsel for the Respondent as 6(c). They are as follows:-

6(a) Have the Honourable Judges of the Provincial High Court erred by coming to the finding that the principle of law that, "the fact that the Plaintiff has prayed for a greater relief than what he is entitled to, should not prevent him from getting a lesser relief which he is entitled to" has no application to this case?

6(b) Have the Honourable Judges of the Provincial High Court erred in holding that the principle of law enunciated in the decision of Your Lordships' Court in *Attanayake v. Ramyawathie* has no application to this case?

6(c) Is the Appellant entitled to eject the Respondent in view of Deed bearing No. 5151 dated 25.11.1997?

The facts observed by this Court and elicited in evidence in the present case can be summarised as follows:- Two Plaintiffs, father and son, filed action in the District Court of Mawanella on 22.10.1997 regarding a land described in the schedule to the plaint named 'Bilinchagahamula Hena'. The extent of the land is not mentioned in the schedule but boundaries are described. In evidence, it was disclosed that the extent of the land is about 1 acre. In the plaint they claimed title together for 11/24th share of the said land on title **gained by deeds and the rest of the land by prescription**. They alleged that the Defendant, the brother of the 1st Plaintiff is a trespasser who came into the land illegally on 03.10.1993 and was continuing to occupy one part of the land.

The prayer was for **a declaration of title to the whole land** and ejectment of the defendant and damages. The Defendant filed answer on 30.03.1998 and claimed that if the Defendant entered the land as a trespasser legal action should have been taken against him by the Plaintiffs in 1993 which they had failed to do and that he had been on the land except the 11/24th share belonging to the Plaintiffs **on title received from deeds as well as prescription**. The Defendant further pleaded that the troubles started with some quarrels between the parties and that the possession of land as co-owners is difficult and therefore the solution would be a partition action. **Defendant**

prayed that the parties should be ordered to partition the land. He further stated that the Defendant's son, Senaratne by deed No. 5151 dated 25.11.1997 has now obtained title by deed as well to the part of the land occupied by them, which is 13/24th share of the whole land. Thus, **the Defendant also claimed paper title along with his son and prescriptive title to 13/24th share of the whole land**. The 1st Plaintiff and the Defendant are brothers. The Plaintiffs **claim** that they being the father and son are occupying the whole land. The Defendant claims that he and his son are occupying 13/24th share of the same land.

The District Court heard the trial. The 1st Plaintiff and 2nd Plaintiff, father and son both gave evidence. The Defendant also gave evidence. Other witnesses were not allowed for the defence because the names of the witnesses were not by name listed, in the list of witnesses. Judgment was given on 11.2.2005 to the effect that the Plaintiff was entitled to the ownership of the whole land and that he can get possession of the whole land meaning that the Defendant can be ejected from the land.

The Defendant appealed to the Civil Appellate High Court of Kegalle and the Civil Appellate Judges allowed the appeal setting aside the judgment of the District Court and dismissed the Plaintiff's action without costs by their judgment dated 27.7.2009.

Counsel for the Appellant had quoted the decision **in *Attanayake v. Ramyawathie* 2003, 1 SLR 401 at page 409** and argued in the Civil Appellate High Court that the principle of law namely "the fact that the Plaintiff has prayed for a greater relief than what he is entitled to, should not prevent him from getting a lesser relief which he is entitled to" should apply to the Plaintiff-Respondent AND therefore the Plaintiff is entitled to have got relief to eject the Defendant-Appellant in the Civil Appellate High Court. The High Court Judges had dismissed this argument by stating that the said case has no application to the facts of the present case. The Counsel for the Appellant in this forum also argued on the same lines.

I observe that in the present case, it was an accepted fact by both parties and also proven by the Plaintiffs with deeds that 11/24th share of 'Bilinchagahamula Hena' of an extent of about 1 acre belongs to the Plaintiffs. The ownership of 11/24th share of the land remains as such for ever. They claimed prescriptive title to this share of the land

together with the rest of the land, claiming that they possessed it without interference till 1993. They filed action to eject the Defendant and get a declaration that they are the owners of the rest of the land by prescription.

The following questions arise in my mind, when I try to understand the Appellants' argument. (1) What relief did the Plaintiffs pray for in the District Court? (2) What relief did they get in the District Court? (3) When the Defendant appealed to the Civil Appellate High Court, what was the relief granted to him? (4) What is the lesser relief that the Plaintiffs claim to be entitled to which they did not get at the end of the Appeal to the High Court?

The answers as I see, are (1) They prayed for a declaration of title to the whole land (2) They got a declaration of title to the whole land plus a right to eject the Defendant (3) The Civil Appellate High Court dismissed the Plaintiffs' action in the District Court thus reversing the judgment of the District Court. (4) As claimed by the Plaintiff-Appellants, the lesser relief can be identified as "a declaration of title to 11/24th share of the land".

The Provincial High Court has stated that ***Attanayake v. Ramyawathie*** **2003, 1 SLR 401** has no application to this case. Let me analyse the said case. It was a Vindicatory Action. The original Plaintiff sued the Defendant for a declaration of title to the land in suit and ejectment. The Plaintiff did not refer to himself being a co-owner of the land in dispute. The Defendant too claimed title to the same land. The evidence in suit was to the effect that the land should be divided among seven persons. The Plaintiff failed to prove exclusive (prescriptive) title to the larger land he claimed; nor was any issue suggested at the trial or in appeal in respect of the larger land.

It was held that, although the Plaintiff might have been entitled to a declaration of title to a portion of the land as co-owner of the entire land, she failed to adduce evidence of ownership for a portion or the larger land claimed by prescription or ouster. In the circumstances of the case, the Plaintiff was not entitled to the relief of a declaration of title. The appeal was dismissed in this case.

I fail to see any relevance of the present case to the stare decisis of the case in ***Attanayake v. Ramyawathie*** except that the Plaintiffs in the present case might have

been granted a declaration of title to a portion of the land as 'co-owner of the land', if the Plaintiff prayed for the same. The Plaintiff prayed for a declaration of title regarding the whole land in the District Court. The Civil Appellate High Court did not grant any declaration of title to the whole land or a part of the land which was the accepted "11/24th share as a co-owner" but dismissed the action. On this account, I agree that the Civil Appellate High Court should have granted 'a declaration of title to 11/24th share as a co-owner' to the Plaintiffs. Yet I observe that the ejectment of the alleged trespasser was what the High Court had prevented by dismissing the action of the Plaintiffs.

At pg. 407 of ***Attanayake v. Ramyawathie*** (supra) as obiter in this case, it is quoted by the Appellants (Plaintiffs) that "the fact that an Appellant has asked for a greater relief than he is entitled to should not prevent him from getting the lesser relief which he is entitled to". I take it as **only t**hat the Plaintiffs prayed for a declaration of title to a larger land but they should have been given a declaration of title to the lesser amount, ie. 11/24th share as co-owner.

The case ***Attanayake v. Ramyawathie*** (supra) cannot be interpreted to say that 'ejectment of an alleged trespasser' is a lesser relief than "a declaration of title to the whole land". These reliefs are different in nature and cannot be even compared to each other as "bigger" relief and "lesser" relief. The comparison of reliefs should be of the same sort on one band, like 'stone' with 'stone' and 'wood' with 'wood' and not otherwise.

On this argument, I hold that the Civil Appellate High Court should have declared that "the Plaintiffs are entitled to 11/24th share of the whole land". Other than that ***Attanayake v. Ramyawathie*** (supra) has no application to the facts of the present case.

The Civil Appellate High Court had analysed the evidence of the Plaintiffs and Defendant and held that the 2nd Plaintiff became the owner of a part of the whole land in 1988 which is a fact proven by his title deed and by 1997 when action was filed, he had been the co-owner only for 9 years. The 1st Plaintiff, father might have been there for longer but both of them together as Plaintiffs cannot claim prescription together to

the same land for a longer period. The father might have prescribed to the portion of land he occupied definitely for a longer period than the son because he is very much younger than the father. Them being joint Plaintiffs have stood against them regarding prescription.

Moreover, I observe that the evidence of the Defendant on record shows that he also had been there for very long, ie. over 30 years or so. The 1st Plaintiff and the Defendant being brothers had inherited from their mother and father separately different shares at different times. The evidence of the Plaintiffs did not prove that the Defendant was a trespasser. It is apparent that they had been enjoying parts of the whole land without demarcating them. The evidence when analysed brings me to that conclusion.

I observe that Deed 5151 dated 25.11.1997 shows that the Defendant's son has bought ½ of the whole land of 'Bilinchagahamula Hena'. The Defendant and his son are at present enjoying what was bought by the son. This means that now they have a valid title deed from the other co-owner transferring 12/24th share of the whole land. I cannot see the Defendant as a trespasser as he and his son are together on a part of the land with a title deed granting title to the son.

The Counsel for the Defendant-Respondent argued that he is in agreement with the decisions of this Court ***in Hewavitharana vs. Dungan Rubber Company Ltd.*** (1913) 17 NLR 49 and ***Harriette Vs. Pathmasiri*** (1996) 1 SLR 358. The *Ratio Decidendi* of ***Hewawitharana vs. Dungan Rubber Company*** (supra) is "one out of several co-owners may without joining with any other co-owner in the action sue a trespasser for a **declaration of his undivided share**, ejectment and damages. **There is no doubt that the owner of an undivided share of land is entitled to sue a trespasser. In the process he could claim to have his title to the undivided share declared and could eject the trespasser from the whole land."**

In ***Harriette vs. Pathmasiri*** (supra) Sarath N. Silva,J. (as he then was) cited the aforementioned principal with approval and adopted the same. It was held in that case that " our law recognizes the right of a co-owner to sue a trespasser to have his title to an undivided share declared and for ejectment of the trespasser from the whole land

because the owner of the undivided share has an interest in every part and portion of the entire land".

Accordingly, I observe that the Plaintiffs being admittedly the co-owners of an undivided 11/24th share of the entire land surely have a right as co-owners of the land to sue a trespasser , to have their title to the undivided share declared and for ejectment of the trespasser from the whole land. **The question is whether the Plaintiffs have proved that the Defendant is a trespasser? The evidence shows that they have failed to prove that the Defendant is a trespasser**.

On a balance of probabilities of the evidence before court, I observe that on record the Plaintiffs and the Defendant and his son have been on the land for a length of time as co-owners and in 1993 they have quarreled. It is only then that the Plaintiffs have filed action to eject the Defendant from the entire land. It is a re-vindicatio action. The Plaintiffs have failed to prove title to the whole land but proved title by deeds to only an undivided 11/24 th share. It was their burden to adduce evidence of exclusive possession and acquisition of prescriptive title by ouster which they have failed to do.

Furthermore, the Defendant's son has obtained title to half of the whole land by deed 5151 dated 25th November, 1997. That deed was not challenged at the trial. It was written about one month after this action was filed in the District Court on 22.10.1991. Yet the reality at present is that the Defendant and his son who owns half of the entire land are on the land. They cannot be named as trespassers any more and this Court does not see the Defendant as a trespasser.

The Appellants' counsel at the hearing suggested that this matter should be heard by a Bench of 5 Judges. I see no reason whatsoever as a basis for such a suggestion. The case law referred to by counsel are not in any conflict in their reasoning by the judges who heard the said cases.

I am of the view that the Judges of the Civil Appellate High Court should have granted a declaration of title only to 11/24th share of the co-owned land of Belinchagahamula Hena to the Plaintiffs instead of dismissing the action altogether. I hold that the Appellants are only entitled to that relief and no more. Since it was not proved that the Defendant was a trespasser, he cannot be ejected by the Plaintiffs. Now that the

Plaintiffs are enjoying the same land as co-owners with the Defendant and his son, it is the right time to file a partition action and demarcate the portions of land so that it would be peaceful thereafter. It is only an incidental suggestion of Court.

I vary the judgment of the Civil Appellate High Court dated 27.07.2009 and state that the Plaintiffs are entitled to a declaration of 11/24th share of the Belinchagahamula Hena which is of about one acre in extent. However they are not entitled to ejectment of the Defendant from the land.

I answer the aforementioned questions of law in the negative and thus in favour of the Defendant-Appellant-Respondent. The Appeal is dismissed subject to the aforementioned variation. However, I order no costs.

Judge of the Supreme Court

Priyasath Dep, 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 with Special Leave to Appeal granted by Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 11/2004

S.C. Spl. LA No. 309/2003
C.A. Appeal No. 91/92(F)
DC. Colombo No. 7503/RE

Mrs. D. Jayasekera
(nee D.H. Hapangama)
No. 1242, Welikada,
Rajagiriya.

Plaintiff

Vs.

Mrs. Eslin Wimalaratne
No. 30/3, Gothami Road,
Borella,
Colombo 08.

And

Mrs. D. Jayasekera
(nee D.H. Hapangama)
No. 1242, Welikada,
Rajagiriya.

Plaintiff-Appellant

Vs.

Mrs. Eslin Wimalaratne
No. 30/3, Gothami Road,
Borella,
Colombo 08.

Defendant-Respondent
(deceased)

And

Miss I.S. Wimalaratne
No. 30/3, Gothami Road,
Borella,
Colombo 08.

Substituted Defendant-Respondent

And

Mrs. Eslin Wimalaratne
No. 30/3, Gothami Road,
Borella,
Colombo 08.
(deceased)

Miss I.S. Wimalaratne
No. 30/3, Gothami Road,
Borella,
Colombo 08.

Substituted Defendant-Respondent-Appellant

Vs.

Mrs. D. Jayasekera
(nee D.H. Hapangama)
No. 1242, Welikada,
Rajagiriya.

Plaintiff-Appellant-Respondent

****

BEFORE : **Eva Wanasundera, PC. J**

Buwaneka Aluwihare, PC.J. &

Anil Gooneratne, J.

COUNSEL : Romesh de Silva, PC. with Geethaka Gunawardane for the Defendant-Respondent-Appellant.

Manohara de Silva, PC. for the Plaintiff-Appellant-Respondent.

ARGUED ON : **17.09.2015**

DECIDED ON : **08.12.2015**

EVA WANASUNDERA, PC.J.

Special leave to Appeal was granted on the following questions of law against the judgment of the Court of Appeal dated 14.10.2003. They are as follows:-

1. Is the said judgment contrary to law and against the evidence adduced in the case?
2. Did their Lordships err in fact and in law in concluding that the trial judge has come to a finding that the Defendant Respondent had come into occupation of the premises in suit after the Rent Act came into operation in March, 1972, when in fact, the finding of the trial judge was to the contrary?
3. Did their Lordships fail to appreciate the submission that even though the Defendant has admitted receipt of a notice to quit, but had denied the receipt of the notice to quit marked as P2 specially in view of the fact that the copy of the purported notice to quit had no date, and the lawyer in question was not called to give evidence to establish that such notice to quit was in fact sent on that day as pleaded in the case?
4. Did their Lordships err in law analyzing the provisions contained in Sec.22(7) of the Rent Act and particularly in respect of the occupation contemplated under the said provision? And thus did their Lordships err in law in holding that the occupation referred to under Sec. 22(7) of the Rent Act is the occupation as a tenant when for the purposes of the ' specified date ' the occupation could also mean the occupation under a tenant at the time?
5. Have their Lordships failed to analyse the provisions contained in Sec. 18 of the Rent Restriction Act and also failed to properly analyse the evidence adduced as to the succession to the tenancy by the defendant in spite of many documents been produced to court?
6. Have their Lordships erred in law in holding that as a result of attorning to the Plaintiff by the Defendant in 1988, for the purposes of Sec. 22(7) the 'specified date' is the date of attornment in 1988.

7. Did their Lordships err in fact and in law holding that the evidence of the Plaintiff with regard to the reasonable requirement had not been challenged when there was evidence to the contrary given by the Defendant and upon which written submissions were also tendered by the Defendant to the District Court?
8. Have their Lordships erred in fact and in law in deciding the issues of reasonable requirement when the District Court had not answered the said issues and thus, if at all, on the reasonable requirement this case ought to have been sent to the District Court to try the said issues?

I feel that it is necessary to have a look at the background of the facts. The facts can be narrated this way. The Plaintiff Appellant Respondent (hereinafter referred to as the Plaintiff) instituted action in the District Court of Colombo to eject the Defendant Respondent Appellant (hereinafter referred to as the Defendant) from premises No. 30/3, Gothami Road, Borella **on the ground that the Plaintiff reasonably required the premises for occupation by the Plaintiff.**

The Defendant filed answer stating that her husband came into occupation of the house with her in 1942 under the grandfather of the Plaintiff as the land lord. Her husband was the tenant. The husband of the Defendant died on 02.01.1967. Then she became the legal tenant of the said grandfather of the Plaintiff, namely Pawlis Appuhamy. She paid the rent of Rs. 81. 47; the house is subject to the Rent Act No. 7 of 1972.; she did not get the notice to quit dated 30.11.1988 and that the Plaintiff is unable to have and maintain the action in accordance with Sec.22(7) of the Rent Act.

Section 22(7) reads as follows:

> "No action shall be instituted for the ejectment of the tenant on the ground that the premises **are reasonably required**, where the ownership of such premises was acquired by the land lord, on **a date subsequent to the specified date**, by purchase or by inheritance or gift other than inheritance **or gift from a parent** or spouse **who had acquired ownership of such premises on a date prior to the specified date."**

Specified date has been defined as follows:

> **“ Specified date** means **the date** on which the tenant for the time being of the premises, **or the tenant upon whose death** the tenant for the time being succeeded to the tenancy under Sec. 36 of this Act or Sec. 18 of the Rent Act, **came into occupation** of the premises.”

The dates of the events relevant to this matter can be identified as follows:-

1. The Plaintiff became the present owner of the premises on 25.02.1987 by deed No. 4238 which was a gift from her mother who received it from her husband as a gift on 02.11.1945.
2. The Defendant came into physical occupation of the premises with her husband who was the first tenant in 1942, as per the Defendant.
3. The first tenant who was the present Defendant’s husband died on 02.01.1967.
4. The Defendant had then attorned to the Plaintiff’s mother according to letters V3 dated 7.1.1967 and V4 dated 17.01.1967.

The District Judge who heard the trial dismissed the Plaintiff’s action on the basis that Sec. 22(7) of the Rent Act is a bar for the Plaintiff to file action against the Defendant. The trial judge did not consider and added that he need not consider whether the premises were needed by the Plaintiff on “ reasonable requirement” when he had decided to dismiss the Plaintiff’s action in accordance with Sec. 22(7) of the Rent Act.

The Court of Appeal judges over turned the District Court decision and granted judgment in favour of the Plaintiff as prayed for in the plaint. They considered reasonable requirement which the District Judge specifically refused to consider and did not consider. The District Judge had delivered judgement only on the basis that Sec.22 (7) of the Rent Act was a bar to the filing of the action.

An analysis should be done of Sec.22 (7) relating to the facts of the present case since it has become necessary. According to this section, action cannot be filed to eject a tenant by a land lord if he or his predecessor became the owner of the premises after the ‘specified date’ by way of a gift from a parent who acquired

ownership on a date prior to the 'specified date'. The specified date can be reckoned as the date on which the present tenant or his predecessor who died came into occupation of the premises.

In the present case, the Plaintiff became the owner on 25.02.1987. Her mother became the owner on 02.11.1945. The present tenant became the tenant on 02.01.1967.The present tenant's husband had become the tenant in 1942.

I view the Rent Act as an Act containing provisions to protect the poor tenants who in the year 1972 and before, had been paying a rental of less than Rs.100. Over four decades have passed since then. As of today, the poorest of the poor who live in small houses on rent must be paying much more than Rs. 100 per month. The times have changed but the Rent Act is valid law and the provisions have to be interpreted by courts in a meaningful way.

If I may quote Lord Denning in Magor and St. Nallons R.D.C. Vs Newport Corporation (1950) 2 AER 1226,1236 C.A., he said thus;

> " 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 gaps and making sense of the enactment than by opening it up to destructive analysis "

Sec.22 (7) of the Rent Act contemplated on the poor tenants being ousted from their poorly built small houses, in an unjustifiable manner. The law did not give a chance for the land lord to sell the premises to another over the head of the tenant. The law did not want to give a chance to the land lord to gift it to someone else and let that person evict the tenant. That is why the law provided for a specified date which meant the date on which the tenant came into occupation. If someone became the owner of the premises after the tenant came into occupation, he was not allowed to file action soon after he became the owner and evict the tenant. If the tenant died, the land lord was not allowed to

chase out those who were holding under the former tenant at once. The tenant's children and spouse were protected.

What is the scenario when the tenant attorns to the new owner according to law or even if it is not proper attornment, when the parties agree and act as land lord and tenant? What is the position if the parties agree for a new rental and carry on the relationship of land lord and tenant smoothly? Then, does the land lord have a right to request the premises on reasonable requirement by giving one year's notice under the Rent Act and if it is not given, can the land lord file action to evict him? Or could it be the position in law that some land lords cannot ever file action to evict the tenant according to Sec. 22(7)?

I am of the opinion that the law should not be interpreted to mean that the land lord has to give up on his right and title to own the land. The Rent Act was brought in, only to protect the tenants and for no other reason. The limits have to be decided according to the circumstances but not to reach an absurdity.

In the present case, no notice was sent to the Commissioner of National Housing which was a requirement in law before filing action. It was an admitted fact but the parties did not contest the case on that point. The parties went to trial on other matters quite rightly and quite reasonably.

The Plaintiff gave notice under Sec.22 (1)(b) allegedly on 30.11.1988 terminating the tenancy and requesting the Defendant to hand over vacant possession of the premises on 31.12.1989. The notice did not bear a date on it but the delivery under registered cover was proven with official witnesses in court. The District Judge had disregarded this evidence of delivery and harped on the point that the letter of notice did not have a written date on it. Action was filed on 28.06.1990 which date falls one and a half years later than the date such notice was sent. I am of the opinion that the said notice can be regarded as adequate compliance of the provisions of law contained in Sec. 22(1) (b).

Both parties, the Plaintiff and the Defendant have put forward different arguments with regard to the meaning of 'the specified date' in Sec.22(7). I

would like to analyse it in this way. The land lord Pawlis Appuhamy rented out the house to Mr. Wimalaratne. Pawlis Appuhamy gifted the house to his wife in 1945. He then died and Mr. Wimalaratne attorned to his wife as her tenant. Thereafter Mr. Wimalaratne died in 1967and his wife, Eslin Wimalaratne attorned to Pawlis Appuhamy's wife, Mrs. W.R. Hapangama. In 1987 Mrs. Hapangama gifted the house and property to the Plaintiff, their daughter, Mrs. D. Jayasekera. Then Eslin Wimalaratne attorned to her as the land lord. Since then the Plaintiff was the land lord and the Defendant was the tenant. The monthly rental of Rs. 81.47 was continuously paid by money orders to each of the land lords by the tenants at all times from the year 1942 as alleged by the Defendant up to the year 1990, i.e. for 48 years. The evidence was that the Defendant has a son who is married and away but there were two unmarried daughters living with the Defendant at the time the case was filed. She gave evidence and said that the monthly income was Rs. 5500 but she does not want to leave the place because it was convenient to be there for her needs as well as she could not afford another house with that income of the household. Comparison of an income of Rs 5500 a month and Rs. 81.47 paid as rent seems to be very much profitable to the tenant on the Defendant's own evidence.

The Plaintiff's evidence was that she owns no other houses; she was pregnant; she had a miscarriage because she was living on rent on an upstair of a house and had to climb up and down all the time; doctors have advised her to be on the ground floor if possible and this house which is owned by her and given on rent to the Defendant is a single storeyed house and as such she reasonably requires it for her occupation. These facts were not contested. The balance of probabilities seem to weigh more towards the land lord's side.

I am of the opinion that the clause 'came into occupation' of the premises contained in the interpretation of ' specified date ' in Sec. 22(7) of the Rent Act should mean nothing but the date the tenant became a tenant of the specific land lord. At different times the tenant attorns to the different land lords when the ownership passes from one person to the other. It cannot be interpreted to mean the physical occupation of the tenant in the same premises because it leads to an absurdity. For example, if the first tenant is the father and a child is born to him

who later attorns as a tenant to the owner's child when they are both adults, it cannot be interpreted to say that the tenant came into occupation at the time when he was a child. The judicial interpretations given in the cases of Hameed V Cassim (1996) 2 SLR 30 and W.B.C. Senerath Nandadeva v Z.N. Gulamhussein - Bar Association Law Journal Reports (1994) Vol. V part 11 page 12 should be followed. The judges in those cases said that "the date on which the tenant for the time being came into **occupation qua tenant**. **It is not the physical occupation by the tenant but the date on which he became the tenant of the land lord at that time.**

I would like to state that each time that a tenant attorns to a new land lord there is a new tenancy agreement between that particular land lord and that particular tenant which must be understood for proper interpretation of the provisions of the Rent Act.

Accordingly I answer the questions of law mentioned above, in favour of the Plaintiff Appellant Respondent who filed action to eject the tenant as Plaintiff in the District Court of Colombo. I dismiss the argument that Sec. 22(7) is a bar for the Plaintiff to file action against the Defendant. I am of the view that the Plaintiff had filed action after giving proper notice requiring reasonable occupation for the Plaintiff which was proven by the Plaintiff without a contest.

This Appeal is dismissed. I affirm the judgement of the Court of Appeal. However I order no costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Anil Goonaratne .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 Kegalle

Batuwanage Siripala
Plaintiff

SC Appeal 15/2010
SC/(HC)CALA 106/2009
Civil Appellate High Court Kegalle
SP/HCCA/ KAG/221/2007(F)
DC Kegalle 4232/L

Vs

RA Jayatilleke (Deceased)
Defendant

AND

RA Shirley Anura
Substituted Defendant-Appellant

Vs

Batuwanage Siripala

Plaintiff- Respondent

AND NOW BETWEEN

Batuwanage Siripala (Deceased)

1A Suneetha Nipuna Arachchi
1B Batuwanage Adeesha Sahan

Substituted Plaintiff- Respondent-Appellants

Vs

RA Shirly Anura
Substituted Defendant-Appellant-Respondent

Before : Rohini Marasinghe J
Sisira J De Abrew J
Priyantha Jayawardene PC,J
Counsel : W Dayaratne PC with R Jayawardene
for Substituted Plaintiff- Respondent-Appellants
DMG Dissanayake for Substituted -Defendant-Appellant-Respondents

Argued on : 13.5.2015
Decided on : 2.11.2015

Sisira J De Abrew J.

Batuwanage Siripala, the Plaintiff-Respondent- Appellant (hereinafter referred to as the (Pliantiff-Appellant) instituted this action for a declaration of title and for ejectment of the Defendant-Appellant-Respondent RA Jayatilleke (hereinafter referred to as the Defendant-Respondent) from the land described in the schedule to plaint. After trial the learned District Judge delivered the judgment in favour of the Plaintiff- Appellant. But on appeal, the High Court by its judgment dated 27.4.2009 set aside the judgment the learned District Judge. Being aggrieved by the said judgment of the High Court, the Plaintiff-Appellant has appealed to this court. This court, by its order dated 1.3.2010, granted leave to appeal on questions of law set out in paragraph 20 (a),(c), (d),(e) and (f) of the amended petition of appeal dated 11.11.2009 which are reproduced below.

1. Did their Lordships err in law when they came to the conclusion that the Substituted Defendant-Appellant-Respondent has acquired prescriptive rights to the land in dispute?

2. Did their Lordships err in law when they failed to consider that the Substituted Defendant-Appellant-Respondent has failed to establish a starting point for the acquisition of the prescriptive rights?
3. Did their Lordships err in law when they came to the conclusion that the Substituted Defendant-Appellant-Respondent has started his adverse possession from the date of the final decree in the partition case bearing No. 9740/P?
4. Did their Lordships err in law when they failed to consider that a person who has established the title by valid deeds is not required to prove possession of the corpus?
5. Did their Lordships err in law when they came to the conclusion that the original Defendant's possession has superseded the paper title of the Plaintiff-Respondent-Petitioner?

It is undisputed that the corpus in this case is a part of the subject matter in case No. DC Kegalle 9740/P; that the said land was depicted as Lot No. 2 in final plan No.701/A prepared by D. Liyanage Licensed Surveyor; and that Lot No.2 of the said plan No.701/A was allotted to one TA Liliyan Margret Dayawathi by the partition decree of the said case dated 11.9.1963.

In an action for declaration, who has the burden to establish the title to the land? To answer this question, I would like to consider certain judicial decisions

> In Wanigarathne Vs Juwanis Appuhamy 65 NLR 167 Justice Heart observed: "In an action rei vindicatio the plaintiff must prove and

> establish his title. He cannot ask for a declaration of title in his favour merely on the strength that the defendant's title is poor or not established."
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> In Lokumanika Vs Gunasekara [1997] 2 SLR 281, Justice Ranaraja observed that in an action for declaration of title, the plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant.
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> In Peeris Ve Savunhamy 54 NLR 281 Justice Dias held thus: "Where, in an action for declaration of title to land, if the defendant is in possession of the land in dispute the burden is on the plaintiff to prove that he has dominium."

Having considered the above judicial decisions, I hold that in an action for declaration of title, the burden lies with the plaintiff to prove his title to the land. I will now consider whether the Plaintiff-Appellant has discharged this burden. TA Liliyan Margret Dayawathi who was allotted Lot No.2 of Plan No.701/A by the final partition decree in case No.9740, by deed No.557 dated 16.1.84 (P4), transferred the said Lot No.2 to Pathma Varunalatha. The said Varunalatha , by deed No.5443 dated 25.10.1988 (P5), sold the said Lot No.2 to Batuwanage Siripala, the Plaintiff-Appellant. When I consider the above matters, I hold that the Plaintiff-Appellant has discharged his burden and proved his title to the land which is the subject matter in this case. For the purpose of this case, on a commission issued by court, GAR Perera licensed Surveyor prepared plan No. 838 dated 30.4.1990 and superimposed his plan on

plan No.701A. Lot No.1 of plan No.838 is claimed by the Defendant-Respondent which is also described in the 2nd schedule to the plaint.

The Defendant-Respondent contends that he had been in possession of the land described in the 2nd schedule to the plaint (lot No.1 of plan No.838 prepared by GAR Perera Licensed Surveyor). The Defendant-Respondent claims prescriptive title to the land on the basis that he had been in possession of the said land for over a period of ten years. If a person claims prescriptive title, he must prove that he has been in undisturbed, uninterrupted and adverse possession of the land for a period of ten years (Section 3 of the Prescription Ordinance). This is the law of the land. For the purpose of clarity I would like to state the following judicial decisions.

> In Sirajudeen and Others Vs Abbas [1994] 2 SLR 365 GPS De Silva CJ held thus: "As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court. One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner."

> In Ranasinghe Vs Somawathi [2004] 2SLR 154 Justice Dissanayake observed thus: "A right of way by prescription has to be established by proof of the existence of the following ingredients, inter alia, (a) adverse possession; (b) uninterrupted and independent user for at least 10 years to the exclusion of all others"

I will now consider whether the Defendant-Respondent has proved uninterrupted, undisturbed and adverse possession for a period of ten years. The Defendant-Respondent relies on the Surveyor's report. On the day of the survey the Defendant-Respondent had claimed that he had cultivated the land. Is this evidence sufficient to prove the above ingredients? A person who claims prescription can complain to the surveyor on the day of the survey that he cultivated the land even if he had not cultivated it. This claim is only the version of the complainant. This type of claim cannot be considered as strong evidence to prove undisturbed, uninterrupted and adverse possession. The son of the Defendant-Respondent has stated in his evidence that his father was in possession of the land for a long period. Apart from this evidence there is no any other evidence. Mere statements of witnesses that the Defendant-Respondent was in possession of the land in dispute for over a period of ten years are not evidence of uninterrupted, undisturbed and adverse possession. This was the view expressed by GPS De Silva CJ in Sirajudeen Vs Abbas (supra).

The other question that must be considered is whether the above evidence of the son of the Defendant-Respondent could be accepted. I now consider this question. The Defendant-Respondent was the 3rd defendant in

partition case No.9740P. He made an application to exclude lot No.2 of plan No.701/A, but was not successful. Attorney-at-Law for the plaintiff in the said partition case thereafter moved notice of writ on the 3rd defendant (the Defendant-Respondent in this case) but notice could not be served on him even on 25.11.1965. The fiscal had reported that the 3rd defendant was not in the village. Later notice of writ was served on the 3rd defendant in the partition case but he did not come to court. Attorney-at-Law for the plaintiff in the said partition case moved the District Court to vacate the order for reissue of notice of writ on the 3rd defendant as the plaintiff had taken possession of the land. The 3rd defendant in the partition case (No.9740P) is the Defendant-Respondent in this case. The above facts were established by journal entries of case No.9740P. The above evidence has clearly established that the Defendant-Respondent was not in possession of the land although he claimed so. For the above reasons, I hold that the evidence of the son of the Defendant-Respondent cannot be accepted and he was not in uninterrupted, undisturbed and adverse possession of the land in dispute. Learned High Court Judges were of the opinion that although final partition decree was entered on 11.9.1963, no steps had been taken to recover the possession. The plaintiff in the partition case took over the possession of the land without the writ of execution being executed and the Attorney-at-Law for the plaintiff had informed this matter to the District Court. Therefore it appears that the learned High Court Judges were in error when they made the above observation.

For the above reasons, I hold that the judgment of the High Court is wrong and cannot be permitted to stand. I answer the questions of law raised by the Plaintiff-Appellant in his favour.

For the above reasons, I set aside the judgment of the High Court dated 27.4.2009 and affirm the judgment of the learned District Judge dated 29.7.2004. I allow the appeal. The Substituted Plaintiff-Respondent-Appellants are entitled to recover costs fixed at Rs.50,000/- from the Defendant-Respondent.

Appeal allowed.

Judge of the Supreme Court.

Rohini Marasinghe J

I agree.

Judge of the Supreme Court.

Priyantha Jayawardene PC J

I agree.

Judge of the Supreme Court.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANKA

In the matter of a Special Leave to Appeal in terms of Article 154(P) read with the Constitution read with Section 31DD of the Industrial Disputes Act (as amended) and Section 9 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990.

Jathika Sevaka Sangamaya,
No. 416, Kotte Road,
Pitakotte.

(On behalf of S.S. Samarasinghe, G.V.A.N. Senadheera, S.N. Nanayakkara, P.B.H. Denuwara and Kalyani Samarakoon)

SC Appeal No: 15/2013

CP/HCCA/KAN/61/2011

LT3/104 – 108/2005

Applicant

Vs.

Sri Lanka Hadabima Authority
No. 08, Gannoruwa Road,
Peradeniya.

Respondent

AND

Jathika Sevaka Sangamaya
No. 416, Kotte Road,
Pitakotte

(On behalf of S.S. Samarasinghe, G.V.A.N. Senadheera, S.N. Nanayakkara, P.B.H. Denuwara and Kalyani Samarakoon)

Applicant-Appellant

Vs.

Sri Lanka Hadabima Authority
No. 08, Gannoruwa Road,
Peradeniya.

Respondent-Respondent

AND NOW BETWEEN

Jathika Sevaka Sangamaya
No. 416, Kotte Road,
Pitakotte

(On behalf of S.S. Samarasinghe, G.V.A.N. Senadheera, S.N. Nanayakkara, P.B.H. Denuwara and Kalyani Samarakoon)

Applicant-Appellant-Appellant

Vs.

Sri Lanka Hadabima Authority
No. 08, Gannoruwa Road,
Peradeniya.

Respondent-Respondent-Respondent

Before : S. E. Wanasundera, PC. J.
Sisira J. de Abrew, J.
Priyantha Jayawardena, PC. J

Counsel : Uditha Igalahewa PC with Ranga Dayananda for the Applicant-Appellant-Appellant
Sobhitha Rajakaruna D.S.G. for the Respondent-Respondent - Respondent

Argued on : 26th February, 2015

Decided on : 16th December, 2015

Priyantha Jayawardena, PC. J,

This is an appeal filed by a Trade Union on behalf of some of its members to have the order of the learned High Court Judge of the High Court of the Central Province dated 8th August, 2012 and the order of the learned President of the Labour Tribunal of Kandy dated 22nd August, 2011 set aside. Further, it has prayed for the granting of the relief as prayed for in the applications made to the Labour Tribunal.

The Applicant-Appellant-Appellant (hereinafter sometimes referred to as the Appellant) made applications to the Labour Tribunal of Kandy alleging that the services of five members of Jathika Sevaka Sangamaya (hereinafter referred to as workmen) were wrongfully terminated with effect from 1st June, 2005 by the Respondent-Respondent-Respondent (hereinafter sometimes referred to as the Respondent Authority) and prayed for relief as prayed for in the said applications.

The Respondent Authority filed its answers denying the termination of services of the said workmen and further stated that the aforesaid workmen's contracts of services could not be extended as there were no provisions available for the same. Thereafter, the Appellant filed replications and stated inter-alia that the termination of services of the aforesaid workmen were not effectuated on justifiable grounds but merely effectuated with intention of politically victimizing the said workmen.

Subsequently, the Respondent Authority filed an amended answer stating that the services of the aforesaid workmen were terminated due to changes made to the regulations of the Respondent Authority in accordance with a decision of the Cabinet of Ministers dated 2nd March, 2005 and the Circular No. 27/2001. Consequently, all the appointments made with effect from 1st October, 2001 became invalid and hence such appointments were terminated with effect from 1st June, 2005 and as such it did not amount to unlawful termination.

At the inquiry before the Labour Tribunal the Appellant commenced its case as the Respondent Authority denied the termination of the services. As the subject matter in all the cases was the same all the cases were consolidated and taken up for inquiry by the Labour Tribunal.

One of the workmen namely, P.B.H. Denuwara gave evidence on his own behalf and on behalf of others and the other workmen filed affidavits on their behalf and the Appellant concluded its case marking documents A1 to A44.

Thereafter, one H.M. Wijeratne, Senior Clerk gave evidence on behalf of the Respondent Authority and the Respondent's case was closed marking documents R1 to R12. Thereafter, both parties filed written submissions.

Upon the conclusion of the inquiry the learned President of the Labour Tribunal delivered his order in favour of the Respondent on the 22nd August, 2011. The learned President raised two issues in the said order namely;

a) as to how the workmen's services were terminated, and

b) whether it is possible for the Labour Tribunal to intervene in an instance where services of the workmen were terminated by reason of a Cabinet decision.

The Appellant being aggrieved by the said order preferred an appeal to the High Court of the Central Province. However, the learned High Court Judge affirmed the said order of the Labour Tribunal and the appeal was dismissed by the Judgment dated 8th August, 2012. The learned High Court Judge stated inter-alia that the services of the workmen were terminated pursuant to a decision of the Central Government and not by the Respondent Authority and therefore, the finding of the learned President of the Labour Tribunal that he had no jurisdiction to override the authority of the Cabinet of Ministers is correct.

Being aggrieved by the aforesaid Judgment of the learned High Court Judge, the Appellant made an application seeking Special Leave from this Court and the Court granted Special Leave on the following questions of law, namely;

(a) Did the Hon. Judge of the High Court err in law by holding that the Labour Tribunal had no jurisdiction to override the authority of the Cabinet of Ministers?

(b) Did the Hon. Judge of the High Court err in law by affirming the award made by the learned President of the Labour Tribunal without properly evaluating the evidence led in the Labour Tribunal?

(e) Did the Hon. Judge of the High Court fail to consider that the Respondent was a separate and independent legal entity as distinct from a government department and thus amenable to the just and equitable jurisdiction of the Labour Tribunal?

(f) Did the Hon. Judge of the High Court fail to consider that the Respondent was legally not subject to the control of the Cabinet of Ministers?

When the appeal was taken up for hearing the learned President's Counsel for the Appellant submitted that National Agricultural Diversification and Settlement Authority (NADSA) was established by order published in Gazette under section 2 of the State Agricultural Corporations Act No. 11 of 1972 (as amended). The aforesaid NADSA was later assigned the corporate name "Haritha Danau Bim Sanwardena Madyama Adhikariya" or "Hadabima Authority" by order published in Gazette in place of "National Agricultural Diversification and Settlement Authority". In terms of section 2 of the said Act, Hadabima Authority is a body corporate having perpetual succession. According to section 8 of the said Act, general supervision, control and administration of affairs and business of the Respondent Authority is vested with the Board of Directors. In terms of section 6 of the said Act, the Minister may give general or special directions, however, after consultation with the Board of Directors. Furthermore, there is no provision in the said Act which enables the Cabinet of Ministers to give any direction to the Respondent Authority. The Board of Directors is only bound to give effect to any direction by the Minister, if, and only if, the Minister gives such direction after consultation with the Board in writing.

Appellant further submitted that very purpose of establishing a Corporation instead of a Government Department is to give a degree of independence in decision making and ease rigid control of the Government. Therefore, the Respondent Authority is not required to blindly give effect to any direction even from the Minister who is empowered to make such direction subject however, to provisions of the said Act. Therefore, the Appellant submitted that the Respondent Authority is an independent entity that is not subject to the control of the Cabinet of Ministers.

The learned Deputy Solicitor General for the Respondent Authority drew the attention of the Court to section 6 of the State Agricultural Corporation Act No. 11 of 1972.

Section 6 of the State Agricultural Corporation Act No. 11 of 1972 states as follows;

"

(1) The Minister may, after consultation with the Board of Directors, give such Board general or special directions in writing as to the exercise of the powers of the Corporation, and the Board shall give effect to such directions.

(2) The Minister may, from time to time, direct in writing the Board of Directors to furnish to him, in such form as he may require, returns, accounts and other information with respect

to the property and business of the Corporation, and such Board shall carry out every such direction.

(3) The Minister may, from time to time, order all or any of the activities of the Corporation to be investigated and reported upon by such person or persons as he may specify, and upon such order being made, the Board of Directors, any member, officer, servant or agent of the Corporation shall afford all such facilities, and furnish all such information, to such person or persons as may be necessary to carry out the order. ”

The Respondent Authority further submitted that in terms of the said section the Respondent Authority is bound to abide by the general or special directions issued by the relevant Minister who is a member of the Cabinet. The decision not to extend the services of the workmen had been taken by the Cabinet of Ministers as a policy decision of the Government.

The said decision of the Cabinet of Ministers is re-produced below;

> “ Cabinet Paper 05/0037/039/003, a Memorandum dated 22.12.2004 by the Minister of Agriculture, Livestock, Land and Irrigation on ‘Permanent Status for the Workmen of the Sri Lanka Hadabima Authority”
>
> Cabinet noted that the Cabinet Sub-Committee had considered this matter along with the Report of the Department of Management Services of the Ministry of Finance and Planning dated 14.02.2005 on “Permanent Status for the Workmen of the Sri Lanka Hadabima Authority” and approval was granted for the recommendations of the above Report ”.

The said recommendations considered by the Cabinet of Ministers contained in the Report of the Department of Management Services of the Ministry of Finance and Planning dated 14.02.2005 which was marked as “R3a” stated that creation of 70 posts and recruitment of permanent staff there for is recommended in accordance with the requirements made by the Ministry of Agriculture, Livestock, Land and Irrigation. Recruitments to respective posts on permanent basis should be made in accordance with approved schemes of recruitment. Accordingly, no further relief should be considered for those workmen who have received compensation on retrenchment.

The said decision to terminate the services of the workmen had emanated from the said decision of the Cabinet of Ministers to restructure the Respondent authority. However, neither the Labour Tribunal nor the High Court has considered the said decision of the Cabinet of Ministers. On the contrary it has been held that the Labour Tribunal has no jurisdiction to consider the same.

Thus, it is necessary to consider the legality of the order made by the Labour Tribunal which was affirmed by the High Court in deciding the question – " whether it is possible for the Labour Tribunal to intervene in an instance where the services of workmen were terminated by a Cabinet decision ". The powers of the Cabinet of Ministers, courts and labour tribunals and safeguards provided to courts and labour tribunals are enshrined in the Constitution. Hence, it is necessary to consider the relevant articles in the Constitution in order to answer the said question of law. Thus, the separation of powers enshrined in the Constitution will be considered first.

Separation of Powers

The doctrine of separation of powers is based on the concept that concentration of the powers of Government in one body will lead to erosion of political freedom and liberty and abuse of power. Therefore, powers of Government are kept separated to prevent the erosion of political freedom and liberty and abuse of power. This will lead to controlling of one another.

There are three distinct functions involved in a Government of a State, namely legislative, the executive and the judicial functions. Those three branches of Government are composed of different powers and function as three separate organs of Government. Those three organs are constitutionally of equal status and also independent from one another. One organ should not control or interfere with the powers and functions of another branch of Government and should not be in a position to dominate the others and each branch operates as a check on the others. This is accomplished through a system of "checks and balances", where each branch is given certain powers so as to check and balance the other branches.

Separation of powers enshrined in the Sri Lankan Constitution

The doctrine of separation of powers is enshrined in Article 4 read with Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka (hereinafter referred to as the Constitution).

Article 4 of the Constitution ***inter-alia*** states;

" The Sovereignty of the People shall be exercised and enjoyed in the following manner :-

(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. "

Article 3 of the Constitution of the Democratic Socialist Republic of Sri Lanka states as follows;

> " 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. "

Like in most of the Constitutions in the world, the concept separation of powers has been enshrined in the Sri Lankan Constitution too. Thus, the aforementioned three organs of the State act independently from one another. This aspect was considered by the courts and affirmed the said position.

In re the nineteenth amendment to the Constitution (2002) 3 SLR 85, Article 3 and 4 of our Constitution were considered by a bench of seven judges in the Supreme Court and then Chief Justice Sarath N. Silva, P.C. unanimously held that Article 4 is linked to Article 3 of the Constitution.

Further, it was held " 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 subparagraphs (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 subparagraph 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 subparagraph 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. "

Moreover, clarifying our constitutional provisions, it was held (at page 98) " this balance of power between the three organs of government, as in the case of other Constitutions based on a separation of power is sustained by certain checks whereby power is attributed to one organ of

government in relation to another. " [The bill was presented to Parliament on the 19th September 2002 and the decision of the Supreme Court was conveyed to Parliament on the 22nd of October, 2002. However, the Bill was not proceeded with.]

Justice Saleem Marsoof, P.C. analyzing our Constitution in the case of *Attorney-General v. Dr. Upathissa Atapattu Bandaranayake Wasala Mudiyanse Ralahamige Shirani Anshumala Bandaranayake* (S.C. Minutes dated 21st February, 2014) held " 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 Montesquieu and William Blackstone, who gave the doctrine of Separation of Powers its initial momentum. "

However, a careful consideration of the Sri Lankan Constitution shows that some members of the legislature are performing executive functions and thus, in respect of certain areas there is no strict demarcation of separation of powers between the executive and the legislature – for instance the members of Parliament are appointed as ministers who perform executive functions. The said position is reflected in Article 42 (1) and (2) of the Constitution.

Labour Tribunal Presidents are Judicial Officers.

The effect of a decision of the Cabinet of Ministers on the jurisdiction of the Labour Tribunal

Labour Tribunal Presidents have been included in the interpretation of Judicial Officer in Article 170 of the Constitution.

Articles 170 of the Constitution states inter-alia ;

" Judicial officer " other than in Article 114, means any person who holds office as –

(a) a Judge of the Supreme Court or a Judge of the Court of Appeal;

(b) any Judge of the High Court or any Judge, presiding officer or member of any other Court of First Instance, tribunal or institution created and established for the administration of justice or for the adjudication of any labour or other dispute but does not include a person who performs arbitral functions or a public officer whose principal duty or duties is or are not the performance of functions of a judicial nature.

(c) ……. "

Further, according to the powers given to the Labour Tribunals by the Industrial Disputes Act as amended, such Tribunals are exercising judicial power in deciding matters before them. The aforementioned positions were considered in the cases of *Upali Newspapers Ltd. v. Eksath Kamkaru Samithiya and others* (1999) 3 SLR 205 and *Walker Sons & Co. Ltd. v. F.C.W. Fry* (1966) 68 NLR 73.

In *Upali Newspapers Ltd. v. Eksath Kamkaru Samithiya and others* (1999) 3 SLR 205 Kulatilake J. held that in terms of Article 170 of the Constitution the term 'judicial officer' is interpreted so as to include the President of a Labour Tribunal as well. In terms of Article 114 of the Constitution the President of a Labour Tribunal is appointed by the Judicial Service Commission. It is enshrined in Article 116 of the Constitution which recognizes the independence of the judiciary, certain safeguards, which enable judicial officers to perform their powers and functions without any interference.

In *Walker Sons & Co. Ltd. v. F.C.W. Fry* (1966) 68 NLR 73 it was held by Sansoni C.J, H.N.G. Fernando S.P.J., and T.S. Fernando J. (Tambiah J. and Sri Skanda Rajah J. dissenting), that " a Labour Tribunal exercises judicial power when it acts under Part IV A, particularly section 31B, of the Industrial Disputes Act (as amended by Act No. 62 of 1957). "

Independence of the Judiciary

Article 111C (1) of the Constitution (Article 116 of the Constitution was renumbered as Article 111C by the Seventeenth (17^{th}) Amendment to the Constitution) provides ***inter-alia*** as follows;

> " Every judge, presiding officer, public officer or other person entrusted by law with judicial powers or functions or with functions under this Chapter or with similar functions under any law enacted by Parliament shall exercise and perform such powers and functions without being subject to any direction or other interference proceeding from any other person except a superior court, tribunal or institution or other person entitled under law to direct or supervise such judge, presiding officer, public officer or such other person in the exercise or performance of such powers or functions. "

Article 111C of the Constitution is a manifest intention to ensure the judiciary is free from interferences whatsoever. Thus, there is a clear demarcation of powers between the judiciary and the other two organs of the government, namely, the executive and the legislature. However, the jurisdiction of courts can be validly ousted by enacting legislation to oust jurisdiction under the Sri Lankan Constitution.

As stated above the Labour Tribunals too exercise the judicial power of the State within the meaning of Article 4 of the Constitution when it exercises its powers under the Industrial Disputes Act No. 43 of 1950 as amended. Any act or decision to interfere with judicial power is outside the competence of the legislature and the executive and are inconsistent with the separation of power between executive, legislator and judiciary enshrined in the Constitution and thus, such acts or decisions are ultra vires and has no force or power in law. Further, such acts or decisions would necessarily infringe and violate the principle of independence of the judiciary enshrined in Article 111C of the Constitution which is the paramount law.

Hence, it is not possible to oust the jurisdiction of the Labour Tribunals or courts by a decision of the Cabinet of Ministers. Though, the Labour Tribunals have no judicial power to review a decision of the Cabinet of Ministers, they have the power to consider the legality and the applicability of such decisions other than the policy of the government contained in such a decision, in an inquiry under the Industrial Disputes Act as amended.

Thus, I hold that both the learned President of the Labour Tribunal and the learned High Court Judge erred in law by not considering the decision of the Cabinet of Ministers as the said decision of the Cabinet of Ministers dated 2nd March, 2005 does not oust the jurisdiction of the Labour Tribunal.

The effect of a cabinet decision on Courts and Tribunals

Now I will consider the effect of the said decision of the Cabinet of Ministers with regard to the inquiry before the Labour Tribunal. As pointed out earlier under Article 42 and 55 of the Constitution, the Cabinet of Ministers are performing executive functions under the Constitution and their decisions can be either policy decisions or administrative decisions or both. Accordingly, the decisions of the Cabinet of Ministers other than the policy decisions are amenable to judicial review. Thus, I am of the opinion that the Labour Tribunal is entitled in law to consider the said decision of the Cabinet of Ministers dated 2nd March, 2005 at the inquiry before it in order to ascertain the applicability of the said decision to the applications filed by the workmen.

I am also of the view that Labour Tribunals are required to give effect to the Government policy contained in a decision of a Cabinet of Ministers, to the extent such policies are applicable to public corporations and statutory bodies subject to applicable Constitutional provisions, laws and rules and regulations in deciding the matters before them.

This view was expressed in the case of *Insurance Corporation of Sri Lanka v. Ceylon Mercantile Union* III Srisk LR 13. It was held that the decisions in the case to terminate the services of the applicants after they reach the age of 55 years upon consideration of their applications for extensions have been lawfully taken in terms of the Public Administration Circular No. 95 of 04.04.75 which is an expression of Government policy and which was applicable to these Corporation workmen. The Policy of the Government to designate the Minister in charge to decide upon such applications for extensions of service cannot be questioned and no further justification of his decision is necessary.

In *Karunaratne v. Uva Regional Transport Board* (1986) 3 CALR 93 Wijetunge J. held "where the State, as a matter of policy lays down a code of conduct for workmen in the Public and Corporation sectors and specifies the penalties for violation of such provisions, it is obligatory in my view for a Court or Tribunal to give effect to such rules and deal with infringements in the manner provided therein."

The questions of law on which special leave was granted are answered as follows:-

(a) Did the Hon. Judge of the High Court err in law by holding that the Labour Tribunal had no jurisdiction to override the authority of the Cabinet of Ministers?

The learned High Court Judge has held that the Labour Tribunal had no jurisdiction to override the authority of the Cabinet of Ministers. Though the said finding is correct, as stated in the Order of the learned President of the Labour Tribunal dated 22nd August, 2011 the proper question of law that needs to be determined in this appeal is whether it is possible for the Labour Tribunal to intervene in an instance where services of the workmen were terminated by reason of a decision of a Cabinet of Ministers. However, the learned High Court Judge has not considered the said proper question of law. Hence, I hold that the learned High Court Judge erred in law by not considering the proper question of law which is involved in this appeal.

(b) Did the Hon. Judge of the High Court err in law by affirming the award made by the learned President of the Labour Tribunal without properly evaluating the evidence led in the Labour Tribunal?

As stated above the learned High Court Judge has failed to consider the proper question of law involved in this appeal and thereby erred in law by affirming the Order of the Labour Tribunal. Further, as the Labour Tribunal did not hold an inquiry in terms of section 31 C of the Industrial Disputes Act as amended, in respect of the preliminary objection with regard to the maintainability of the applications filed on behalf of the workmen. Hence, there was no evidence before the High Court to decide on the said preliminary objection.
In view of the foregoing answers to the aforementioned questions of law, the other two questions of law on which the leave was granted need not be answered.

Hence, for the foregoing reasons, I set aside the decisions of the learned High Court Judge dated 8th August, 2012 and the learned President of the Labour Tribunal dated 22nd August, 2011 and direct the learned President of the Labour Tribunal to proceed with the inquiry under section 31 C of the Industrial Disputes Act as amended and dispose the matter at its earliest taking into consideration of the long delay that has taken place in this appeal.

As stated above "Haritha Danau Bim Sanwardena Madyama Adhikariya" or "Hadabima Authority" which is a body corporate has been established under section 2 of the State Agricultural Corporations Act No. 11 of 1972 (as amended). Therefore, though it is an organ of the State, it is distinct from a government department.

Thus, if the learned President holds that the said decision of the Cabinet of Ministers is applicable to the inquiry before the Labour Tribunal, the learned President of the Labour Tribunal is further directed to consider whether applicable procedure set out in the said Act as amended has been followed by the Respondent Authority in order to give effect to the said decision in making a just and equitable order.

Accordingly, the appeal is allowed without costs.

Judge of the Supreme Court

S.E. Wanasundera, PC, J

I agree

Judge of the Supreme Court

Sisira 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 with Special Leave to Appeal granted by Supreme Court under Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 16/2009

SC.HC.CA. LA. No. 168/08
WP/HCCA/Kalutara No. 120/2001(F)
DC. Panadura No. 19416/L

Anthony Kanicius Malcolm Perera of
No. 36/4, Horana Road,
Panadura.

Plaintiff

Vs.

1. Warushahennedige Nimalasiri Fernando
   75, Horana Road, Wekada,
   Panadura.

1st Defendant

2. Wagoda Pathirage Premaratne
   75, Horana Road, Wekada,
   Panadura.

Added 2nd Defendant

And

Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Panadura.

Added 2nd Defendant-Appellant

Vs.

D.H.K. Yasawathie,
19B No. 75,
Eluwila Horana Road,
Panadura.

Substituted Plaintiff-Respondent

1. Warushahennedige Nimalasiri Fernando
   75, Horana Road, Wekada,
   Panadura.

Defendant-Respondent

And Between

Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Panadura.

Added 2nd Defendant-Appellant- Petitioner

Vs.

D.H.K. Yasawathie,
19B No. 75,
Eluwila Horana Road,
Panadura.

Substituted Plaintiff-Respondent-Respondent

1. Warushahennedige Nimalasiri Fernando
   75, Horana Road, Wekada,
   Panadura.

Defendant-Respondent-Respondent

And Now Between

Wagoda Pathirage Premaratne
75, Horana Road, Wekada,
Panadura.

Added 2nd Defendant-Appellant-Appellant

Vs.

D.H.K. Yasawathie,
19B No. 75,
Eluwila Horana Road,
Panadura.

Substituted Plaintiff-Respondent-Respondent

1. Warushahennedige Nimalasiri Fernando
   75, Horana Road, Wekada,
   Panadura.

Defendant-Respondent-Respondent

* * * * *

BEFORE : **S. Eva Wanasundera, PC. J**
Sisira J. de Abrew, J. &
Anil Gooneratne, J.

COUNSEL : S. Mandaleswaran with P. Peramunugama and Mrs. D. Ganeshanathan for 2nd Defendant-Appellant-Appellant.

H. Pieris for Substituted Plaintiff-Respondent-Respondent.

ARGUED ON : **22.06.2015**

DECIDED ON : **22.09.2015**

* * * * * *

S. EVA WANASUNDERA, PC.J.

Questions of Law to be decided by this Court was laid down on 20.03.2009 when Leave to Appeal was granted. They are as set out in paragraphs 12(a), (b), (c), (f) and (h) of the Petition dated 15.12.2008. At the hearing of this matter on 22.06.2015, the Appellant's Counsel informed Court that he will not pursue the question of law set out in para (h) of paragraph 12 of the Petition. Therefore, the questions to be decided are as follows:-

12(a) Did the Provincial High Court of Kalutara (Civil Appeals) err by holding that the Learned District Judge has dealt with correctly the issue regarding the payment of the advance of Rs.10,000/= at the time P2 was signed without considering admission of the Plaintiff that the Defendant has denied the receipt of the said advance as far back as 10.07.1985 and the

subsequent conduct of the Plaintiff, i.e. without requesting the 1st Defendant, straight away went to the lawyer and sent P4 or 1D1 and filed action 8 days thereafter even without waiting till the last day of the alleged agreement to sell marked P2.

(b) Did the Provincial High Court of Kalutara (Civil Appeals) err by holding that the alleged payment of a sum of Rs.10,000/= to the Notary and depositing a sum of Rs.72,500/= to the credit of the case is a proper tender of money for the performance of the alleged agreement to sell marked P2.

(c) Did the Provincial High Court of Kalutara (Civil Appeals) err by holding that the Learned District Judge has rightly concluded that there was a breach of agreement to sell marked P2 which gave rise to a cause of action in favour of the Plaintiff and that there was no necessity for the Plaintiff to have waited till 31.10.1985 to sue on the said agreement marked P2.

(f) Did the Provincial High Court of Kalutara (Civil Appeals) err in not considering that there was no existing contract affecting the property in question at the time the 2nd Defendant purchased the subject matter of this action on 1.12.1985 by P7 as the alleged agreement to sell marked P2 was only operative upto 31.10.95 notwithstanding the registration of the "lis pendens".

Facts can be narrated in brief. The original Plaintiff A.K.M. Perera filed action against the 1st Defendant W.N. Fernando in the District Court praying for specific performance of a sales agreement entered into between them marked as P2 with regard to a land. P2 dated 01.5.1985 is the sales agreement. It was registered at the Land Registry on 13th of May, 1985. The Plaintiff states that Rs. 10,000/- was paid to the 1st Defendant at the time the sales agreement P2 was signed. The balance to be paid within 6 months was Rs. 72,000/-. Before the six months lapsed, the Plaintiff deposited the balance amount with the lawyer who executed the sales agreement and through the lawyer informed the 1st Defendant by way of a letter sent by registered post which fact was proved in court requesting him to come to the lawyer's office, collect the money and

sign the transfer deed in favour of the Plaintiff as promised by P2. The 1st Defendant did not come on that day as expected.

Thereafter, the 1st Defendant sold the same land to one W.P.Premaratne on 1st of December, 1985, i.e. even after the Plaintiff instituted the action against the 1st Defendant and lispendens was registered in the Land Registry on 17.10.1985 indicating to the public that there is an action filed in court with regard to the said land. Then W.P. Premaratne was added to the action as a party and named as "Added 2nd Defendant". The Plaintiff died and he was substituted by D.H.K. Yasawathie, his wife. She is now the Substituted Plaintiff-Respondent. The 1st Defendant-Respondent is the person who signed the sales agreement with the Plaintiff A.K.M. Perera. The Added 2nd Defendant-Appellant W. P. Premaratne, is the person who bought the land while the sales agreement was registered in the Land Registry.

In this matter, the 1st Defendant Respondent who is the seller of the land did not appeal from the District Court judgment and neither did he participate at the proceedings before the Civil Appellate High Court.

The District Court Judge granted the relief claimed by the Plaintiff by his judgment on 15.10.2001as prayed for in paragraphs I, II, III IV and VI of the prayer to the amended Plaint dated 5th of January, 1987. The 1st Defendant did not appeal. The Added 2nd Defendant appealed. The Civil Appellate High Court by its judgment dated 04.11.2008 dismissed the appeal affirming the District Court judgment.

The narrative of the incident is important. The Plaintiff signed an agreement to sell, namely P2 with the 1st Defendant. The advance paid was Rs.10,000/-. The sale price was stated as Rs.82,500/-. The balance to be paid was Rs.72,500/- on or before 30.10.1985. The 1st Defendant being the owner of the land got the agreement P2 registered in the Land Registry. P2 is Deed No. 516 dated 01.05.1985 by which it was agreed to sell the land in the 2nd Schedule of the said Deed with the right of way over the land in the 3rd Schedule. The land in the 2nd Schedule which is 10 perches in extent is a divided and defined portion from and out of the land in the 1st Schedule. The balance money had to be paid within 6 months from 01.5.1985. **Clause 8 and 9 specifically stated that as soon as the Plaintiff got the money ready the 1st**

Defendant has to come to the Notary Public named by the Plaintiff and sign the deed of transfer. The witnesses were L.J.P.M. Manel Bernedette Fernando (nee Perera) and D.H.K. Yasawathie. The Notary Public was K.V.P. Jayatilaka. P2 (අ) is the protocol of Deed 516 P2(අඅ) is the statement on the 1st page of P2(අ) written by the 1st Defendant himself in his own handwriting as having accepted Rs.10,000/- on the date of the deed. The 1st Defendant admitted this signature and his handwriting when cross examined at the trial. The 1st Defendant is a teacher working in a Government School and cannot be in any way considered as an illiterate person. He admitted the inscription on the protocol which says that he has accepted Rs.10,000/- as an advance but refused that he got the money as stated therein.

The Plaintiff deposited the money Rs.72,500/- with the Lawyer, Notary Public, K.V. P. Jayatillake and the Notary dispatched a letter dated 07.10.1985 to the 1st Defendant to be present in his office on 11.10.1985 to sign the deed of Transfer as promised by agreement P2. The lawyer further states in that letter to the 1st Defendant, that it would be convenient to him as his house is very close to the office of the lawyer. The 1st Defendant did not turn up on that date. Then the Plaintiff instituted action in the District Court on 15.10.1985. He registered the lis pendence on 17.10.1985 to the effect that a case has been filed and deposited the balance money to the credit of the case on 23.10.1985.

Thereafter on 01.12.1985 the **1st Defendant executed another deed, which is a transfer of the same land to the Added 2nd Defendant, namely Deed 2681 for the consideration of Rs.83,000/-.** The Attorney-at-Law and Notary Public was S.D. Rajapaksha and it was registered on 12.12.1985.

The Added 2nd Defendant's position is that his lawyer was someone who knew the 1st Defendant and he was introduced to him by the 1st Defendant. According to the Added 2nd Defendant's evidence on record, the lawyer impressed on him that the title was good and therefore he was entrusted to write the deed. The Added 2nd Defendant seems to be someone who trusted the Attorney at Law Rajapaksha and the seller, the 1st Defendant and bought it for the consideration of Rs. 83000/-. He is in possession of the corpus since then. I believe after having gone through the evidence led at the trial

that the Added 2nd Defendant-Appellant was a person who got caught to the trick to buy the said land having confided in his Attorney-at-Law.

Section 93 of the Trust Ordinance No. 9 of 1917 comes into play in this situation. It reads:-

> "Where **a person acquires property with notice that another person has entered into an existing contract affecting that property** of which specific performance could be enforced, **the former must hold the property for the benefit of the latter** to the extent necessary to give effect to the contract, **provided that in the case of a contract affecting immovable property such contract shall have been duly registered before such acquisition".**
>
> Sec. 3 of the Trust Ordinance explains what is meant by " a person acquires property with notice that another person has entered into an existing contract affecting that property…"

Sec.3 reads:-

> "A person is **said to have notice of a fact** either when he actually knows that fact, or **when, but for willful 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 case in hand, the Added 2nd Defendant would have come to know about the sales agreement that the 1st Defendant had with the Plaintiff, **'but for willful abstention from inquiry or gross negligence '** for which he should get the blame for himself. His version of what happened between himself and the lawyer Rajapaksha who was introduced to him by the seller **cannot be taken as an excuse for having bought the said property without looking into the title at the land registry.**

In the case of **Silva Vs Salo Nona 32 NLR 81**, this situation was very well discussed by Garvin A.C.J and Lyall Grant J. as far back as in the year 1930. It was held that **"Registration of an agreement to sell land is of itself notice**, within the meaning of Section 93 of the Trust Ordinance, to a person who acquires the land subsequent to

such agreement" Garvin A.C.J. went on to say further, " I hold that for the purpose of Sec. 93 of the Trust Ordinance, due registration of a contract affecting land is notice". "The means of search are available; there can be no doubt that a prudent purchaser should and almost invariably does search the register in his own interest; if he searches the existence of registered documents is revealed to him and he has knowledge. It seems to me that if such a person refrains from searching, he must be held to have knowledge of those facts which would have come to his knowledge **but for his willful abstention from inquiry".**

While agreeing with Garvin A.C.J., Lyall Grant J. added, "One object of the land register, if not the main object, is to enable the public to obtain information regarding transactions affecting the land. If it were open to a person acquiring land to say, I had no notice of a previous transaction affecting the land I bought because I failed to see the register, the system of registration would lose much of its value". "I agree that if the agreement to sell was duly registered the **subsequent purchaser must be held to have had notice of it. It follows that under Sec. 93 of the Trust Ordinance he must hold the land for the benefit of the Plaintiff to the extent necessary to give effect to the contract.** The effect of that Section is to alter the law to the extent that proof of actual fraud is no longer required **in order to enable the person who first registered his contract to enforce it in spite of a subsequent transfer."**

In **Thidoris Perera Vs Eliza Nona 50 NLR 177**, by an agreement duly registered, first and second defendants agreed to sell to the plaintiff within three months of the final decree in a partition action then pending, the divided lot that would be allotted to them in the final decree. They however sold this lot to the third defendant. In an action by the plaintiff for specific performance of the agreement, **it was held that the agreement was an existing contract within the meaning of Sec. 93 of the Trust Ordinance and that specific performance could be enforced".**

In **De Silva Vs Senaratne 50 NLR 313**, the case of **Silva Vs Salo Nona** was followed and Jayetileke S.P.J. said that " If a person agrees to sell a land, and afterwards refuses to perform his contract and then sells the land to a purchaser who has **notice of the agreement**, the latter will be compelled to perform the contract of his vendor". The "notice of the agreement" is as per Sec. 93 of the Trust Ordinance.

The Appellant argued that the statement “that the money is ready” is not sufficient for the seller to perform specific performance. **Muhandiram Vs. Salam 49 NLR 80** was cited as having no application to the facts of the instant case. When I read the said judgment, I found that it was quite relevant to the instant case in hand. It was an appeal by the plaintiffs from a judgment dismissing an action for specific performance of a contract of sale. I quote Justice Canekeratne, obiter , “ The letter makes it clear that the sum of money was deposited with the Proctor – Notary; the defendant is requested to accept the money, to call at the Proctor’s office, and to execute a transfer on or before July, 13, 1945. The defendant neither called at the office of the Proctor nor sent a reply. He did not at any time take up the position that the Proctor’s office was not a convenient place for the execution of the deed. The appellants did everything they were bound to do for the purpose of obtaining a transfer of the properties. ….The Appeal is allowed with costs”. This case also supports the fact that when money was made available with the lawyer and the vendor is requested to come and collect the money and sign the deed, the vendor is obliged to adhere to the request as agreed by the contract.

Thus I opine that the letter to the 1st Defendant by the Plaintiff in the instant case, through the Attorney-at-Law to come to his office and sign the transfer is equal to a “proper tendering of the purchase price”, **more so because it is specifically mentioned as such in the agreement to sell marked as P2.** How else can a person tell another to comply with an agreement for specific performance other than inviting him to the lawyer’s office where the agreement was signed first, mentioning specially the fact that the money is already deposited with the Notary and Attorney at Law? It was up to the 1st Defendant to go, accept the money and sign the transfer deed which he failed to do. He purposely did not comply with the clauses in the agreement and thereafter got another buyer who was foolish enough to believe the lawyer of the 1st Defendant, who was the seller. The proper practice is for the buyer to engage his own lawyer of his choice and get him to go through the title recorded in the land registry in which the land is registered and then decide to buy the same. Then he should get his lawyer to prepare the deed of transfer to be signed. The Added 2nd Defendant was introduced to the lawyer Rajapaksha by the seller. It is this lawyer who executed the

transfer deed No. 2681 in favour of the Added 2nd Defendant. It is apparent from the evidence of the Added 2nd Defendant that the 1st Defendant knowingly, for some reason or other, avoided performance of the agreement and fraudulently sold the land to the Added 2nd Defendant.

No sooner than the 1st Defendant did not turn up to sign the transfer deed at the lawyer's office, the Plaintiff had instructed his lawyer, Jayatilleke to file action for specific performance on the agreement to sell, P2. The Appellant's counsel argued that the Plaintiff should have waited till the last date given in the agreement for specific performance is over before filing action. That argument does not hold water because **when there is a breach of the contract by one party, the cause of action arises at that time and not at a later time.**

The Plaintiff filed action for specific performance against only the 1st Defendant and then, later on only, he had come to know that there are some other people in the house on the land which was promised to be sold to him. His lawyer did a search in the land registry and found out that it had been sold to another person. Then that person was added to the action as Added 2nd Defendant.

Those who gave evidence in the case before the District Court are the Plaintiff, his lawyer, Jayatilleke, one witness to the sales agreement, the 1 st Defendant and the Added 2nd Defendant. The 1st Defendant's position was that he did not receive the advance of Rs. 10000/- even though he signed on the protocol. He further said that the Plaintiff promised to pay that money later after obtaining a loan from the Development Finance Corporation. If court has to believe him, he should have run to the lawyer and signed the transfer deed as promised which he did not do. Instead, he waited for another one and a half months and sold the land to the Added 2nd Defendant. Then, his argument that he wanted the money soon is not correct.

I find that the District Judge has analysed the evidence well and come to the correct finding. The Judges of the Civil Appellate High Court Judges also have also considered the arguments placed before them and confirmed the judgment of the District Judge. I myself have gone through the evidence and the arguments placed before this court and thereafter come to a finding. I answer the questions of law enumerated above in favour

of the Plaintiff in the District Court whose rights have now passed onto the Substituted Plaintiff- Respondent- Respondent.

I am of the view that in this case, the action complained of being "the Added 2nd Defendant-Appellant's purchase of the property", comes under the purview of the provisions of Section 93 of the Trust Ordinance. The Added 2nd Defendant has been holding the said property in trust for the benefit of the person who, at the time he bought the property had entered into a contract of which specific performance could be enforced to the extent necessary to give effect to the contract. At that time, it was for the benefit of the Plaintiff in the District Court case. Now it should be for the benefit of his wife, D.H.K. Yasawathie, who was substituted in his place of the case which has continued for so long up to date.

I hold that both the Civil Appellate High Court Judges and the District Court Judges were quite correct in their judgments. I agree with their findings. Accordingly, now, the Substituted - Plaintiff - Respondent is entitled to get the relief prayed for by the original Plaintiff in his amended plaint dated 05.1.1987, namely paragraphs I, II, III, IV and VI of the prayer in the aforementioned amended plaint, according to the judgment of the District Court dated 15.10.2001. In addition to the said reliefs, the Substituted Plaintiff-Respondent is entitled to costs in the Civil Appellate High Court as well as Costs in this Court. The Appeal is hereby dismissed.

Registrar is directed to send this judgment forthwith to the Civil Appellate High Court of Kalutara under case No. WP/HCCA/ Kalutura/120/2001 (F) and to the District Court of Panadura under D.C. Panadura Case No. 19416/L along with the briefs if they were sent to the Supreme Court on any earlier dates.

Judge of the Supreme Court

Sisira J. de Abrew, J.

I agree.

Judge of the Supreme Court

Anil Gooneratne, 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 with Special Leave to Appeal granted by Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 17/2013

S.C.Spl. LA No. 207/2012
C.A.No. . 297/2008
HC. Kurunegala No. 259/2006

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

Complainant

Vs.

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

Accused

And Between

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

Complainant-Appellant

Vs.

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

Accused-Respondent

And Now Between

Ambagala Mudiyanselage Samantha Sampath,
No. 03,
Urupitiya.

Accused-Respondent-Appellant

Vs.

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

Complainant-Appellant-Respondent

* * * * *

BEFORE : **Eva Wanasundera, PC. J**
Sarath de Abrew, J. &
P. Jayawardena,PC. J.

COUNSEL : Nimal Muthukumarana for Accused-Respondent-Appellant.
Yasantha Kodagoda, DSG. for Attorney-General.

ARGUED ON : **05.11.2014**

DECIDED ON : **12.03.2015**

* * * * * *

EVA WANASUNDERA, PC.J.

In this case, Special Leave to Appeal was granted on the questions of law contained in paragraph 21(a) of the Petition dated 01.10.2012. The said question is as follows:-

"Is the judgment of the Court of Appeal contrary to law and bad in law?"

The Attorney General who is the Complainant-Appellant-Respondent in this case (hereinafter referred to as the 'Respondent'), forwarded an indictment on 04.08.2006 against the Accused-Respondent-Appellant(hereinafter referred to as the "Appellant") to the High Court of Kurunegala for having, on a day between 01.08.2003 and 31.3.2004 committed the offence of rape punishable in terms of Section 364(2)(e) of the Penal Code with regard to W.C. Janitha Perera, a girl under 16 years of age. On 28.10.2008 when the case was taken up for trial in the High Court of Kurunegala, the Appellant-pleaded guilty to the charge and the learned High Court Judge committed the Appellant on his own plea of guilt. Thereafter, the High Court imposed a term of 2 years rigorous imprisonment suspended for a period of 10 years and a fine of Rs.5000/- with a default sentence of 1 year rigorous imprisonment and also ordered the payment of Rs.200,000/- as compensation to the victim of the crime W.C. Janitha Perera.

Being aggrieved by the punishment imposed on the Appellant by the High Court, the Respondent Attorney General preferred an appeal to the Court of Appeal. On 24.07.2012, the Court of Appeal pronounced the judgment setting aside the punishment in the nature of the suspended term of imprisonment imposed by the High Court and substituting therefor the minimum term of imprisonment that may be imposed for the offence, ie. 10 years rigorous imprisonment. However the Court of Appeal did not interfere with the fine and the order for compensation imposed by the Learned High Court Judge. The Appellant has appealed from the judgment of the Court of Appeal and Special Leave was granted by this Court as aforementioned on one question of law.

The argument of the Appellant at the hearing of this appeal was that the judgment in the case of SC. Reference No. 03/2008 recognizes the imposing of sentences below the minimum mandatory sentence after considering the circumstances of the particular case and that the present case should be reviewed accordingly. The Appellant prays that this Court should exercise its discretionary power and affirm the High Court judgment which imposed a sentence below the minimum mandatory sentence to the Appellant setting aside the Court of Appeal judgment. The argument of the Respondent was that the judgment in SC. Reference 03/2008 with regard to the constitutionality of the penal provision in Section 364(2)(e) of the Penal Code amended by Act No. 22 of 1995 concerning the minimum mandatory term of imprisonment, is outside the jurisdiction of

the Supreme Court and should therefore not serve as a valid or binding precedent. The Deputy Solicitor General further argued that upon the conviction of any person for having committed an offence in terms of Section 364(2)(e) of the Penal Code, i.e. 'statutory rape', the Court is obliged to impose a term of rigorous imprisonment which is not less than 10 years.

The facts in this case can be narrated as follows. The Appellant, a labourer in occupation had married the victim's sister. They had no children in that marriage. The victim's sister had left the country without the consent of the husband about an year after the marriage. The Appellant was then invited by the victim's parents ie. his mother in law and father in law, to come and live with them in their house. The victim was a 15 year old girl attending school. Only four of them lived in that house. The girl was found to be pregnant when her mother took her to the hospital when she was unwell. Then the pregnancy was 5 months old. The parents stopped her going to school; told the Appellant not to come home again; took her to another village and kept her there, with an older married couple who had no children, having in mind to hand over the baby to them when it is born. The parents did not go to the Police. The victim girl did not make any complaint at that time to the Police.

Most unexpectedly, some outsider had informed the Police of the area that the Appellant and the victim were mysteriously missing from that house. It is only then that the Police had launched an investigation and found that the girl was away in another house whereas the Appellant was living with his parents in his village close by. The statement made to the Police revealed that the girl was only 15 years old, and then the Appellant was taken into custody and was later enlarged on bail.

The victim gave birth to a baby girl on 19.07.2004 in the Kuliyapitiya Base Hospital. It is the Appellant who informed the Registrar of Births of the area that the baby girl was born, according to her birth certificate filed of record. It is mentioned therein that the father of the baby is the Appellant, A.M. Samantha Sampath and that the parents were not legally married. It is accepted that at the time of her birth, the baby girl Sanduni Wasana had a father, the Appellant and a mother, the victim.

The Attorney General forwarded an indictment to the High Court dated 04.08.2006. It was taken up for trial on 28.10.2008 for the first time. The Appellant pleaded guilty to the charge of rape of a girl below 16 years and he was subject to punishment by the High Court under Section 364(2)(e) of the Penal Code as amended by Act No 22 of 1955. The baby Sanduni Wasana is being paid maintenance by the Appellant and moreover he visits the school as the father of the child when called upon to do so; has arranged the transportation to and from the school and sends money to maintain the child. The High Court imposed a punishment of 2 years RI. suspended for 10 years and imposed a fine and compensation.

The Attorney General appealed against this sentence to the Court of Appeal. It was argued on 24. 07.2012 and decided also on 24.07.2012, i.e. on the same day and the Court of Appeal set aside the suspended sentence and imposed a punishment of 10 years rigorous imprisonment. It is from that judgment that the Appellant is before this Court.

In my mind, the sole question to be decided is whether a mandatory minimum sentence imposed by statute i.e. Section 364(2)(e) of the Penal Code stifles the hands of the Court imposing the punishment thus taking away the judicial discretion in sentencing or whether Court is bound to impose the mandatory minimum sentence. Since the said sentence, according to the judgment of the Supreme Court in S.C. Reference 03/2008, is in conflict with Articles 4(c), 11 and 12(1) of the Constitution, the High Court held that it is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

I believe that every Judge who sits in a Court and hears the case in the Court of first instance gets the opportunity not only to hear the case but also to see the case with the physical eye, to smell the case, to feel the case and to fathom the case with the present mind. The Judge could hear the words of evidence and observe the body language of those who give evidence.

In this case, leave aside the victim of rape and the Appellant, there exists a child born into this world as a consequence of the sexual intercourse between the two and that child is a girl child who is now over 10 years of age. She is getting the benefit of the

presence of the father and the mother as at present. The Appellant is willingly working for the support of the child.

The Charter on the Rights on the Child as declared in the Children's Charter 1992 to which Sri Lanka has proclaimed to be a party, Article 03(2) reads thus:- "The best interest of the child shall be the primary consideration in any matter, action or proceeding concerning a child, whether undertaken by any social welfare institution, court of law, administrative authority or any legislative body ". Article 7 of the same reads:- "A child shall be registered immediately after birth and shall have the right from birth to a name, right to acquire a nationality and as far as possible the right to know and be cared for by his parents".

In the case of *Dharma Sri Tissa Kumara Wijenaike Vs. Attorney General (SC. Appeal No. 179/2012- minutes of 18.11.2013*) Justice Tilakawardane commented that "the decision appears to be based on the reality that the Court is the upper guardian of a child".

In the present case, there is an existing 3rd person in the picture, ie. the 10 year - old girl who is born and living in this world as a result of the victim and the Appellant having had sexual intercourse. It is the Appellant who is the father of the child who at all times concerned has truly and sincerely declared to be the father and is parenting and minding the child born to the victim. It is a special case where the Court has to give its mind to a 3rd party who happens to be in existence as a consequence of statutory rape to which the father of the child has pleaded guilty to. Supposing the Appellant is sent to jail for 10 years to come, the girl child of 10 years at present will not get the love and affection, care and support of the father to whom she looks up to at present and would not ever understand the concept of the State punishing him for 'statutory rape' committed on her mother, for which the girl is made to suffer for no wrong committed by her at any time in her life, during her prime childhood which is included in the 10 years of rigorous imprisonment i.e. until she is 20 years of age. This fact is a matter of grave concern of this Court as "the Court is the upper guardian of any child on earth".

I would like to analyse the judgment in the case of S.C. Reference 03/2008. It was a matter of a Reference made to the Supreme Court in terms of Article 125(1) of the

Constitution of the Democratic Socialist Republic of Sri Lanka, made by the High Court Judge of Anuradhapura inquiring "whether Section 364(2) of the Penal Code as amended by Penal Code (Amendment) Act No. 22 of 1995 has removed the judicial discretion when sentencing an accused convicted of an offence in terms of that Section." The Learned High Court Judge had submitted her observations to the effect that the medical report negates the use of force and support the position that sexual intercourse had been consensual. The Supreme Court stated that even though the woman's consent was immaterial for the offence of rape when she is under the age of 16 years, a woman's consent is relevant for a Court, in the exercise of its discretion in deciding the sentence for such an offence. The High Court Judge had also noted that a custodial sentence of 10 yrs. R.I. would not benefit the complainant. The Supreme Court had also observed that there was no mandatory minimum sentence before the Amendment No. 22 of 1995 to the Penal Code, when it made the determination in SC Ref. 03 / 2008.

The Supreme Court considered Article 4(c), Article 11 and Article 12(1) of the Constitution, in S.C. Reference 03/2008. This case discussed many Special Determinations such as SC./SD 6/98, 7/98, 4/2003 and 5/2003 where it was decided that the Bills before Parliament in the respective Determinations which tried to impose 'mandatory minimum sentences' were held to be inconsistent with Articles 4(c), 11 and 12(1) of the Constitution. The reasons attributed to the said decisions were as follows:-

(a) The imposition of mandatory minimum sentences would result in legislative determination of punishment and a corresponding erosion of a judicial discretion and a general determination in advance of the appropriate punishment without a consideration of relevant factors which proper sentencing policy should not ignore; such as the offender and his age, and antecedents, the offence and its circumstances (extenuating or otherwise), the need for deterrence and the likelihood of reform and rehabilitation.

(b) The imposition of mandatory minimum sentences would result in imposing identical sentences in case where court thinks it appropriate and where Court

thinks it most inappropriate which amounts to treating unequals as if they were equals, in violation of Article 12(1).

(c) The effect of imposition of mandatory minimum sentences would amount to an erosion of an essential judicial discretion in regard to sentencing. There would be gross disparities in sentences, which will not only violate the principles of equal treatment but may even amount to cruel punishment.

The Supreme Court held in S.C. Reference 03/2008 that "as far as Section 364(2)(e) of the Penal Code is concerned, the High Court has been prevented from imposing a sentence that it feels is appropriate in the exercise of its judicial discretion due to the minimum mandatory punishment prescribed in Section 364(2)(e). Having regard to the nature of the offence and the severity of the minimum mandatory sentence in Section 364(2)(e) is in conflict with Articles 4(c), 11 and 12(1) of the Constitution."

In the present case in hand, the learned Deputy Solicitor General argued that S.C. Reference 03/2008 judgment is contrary to the limitation on judicial review as contained in Article 80(3) of the Constitution and is therefore unconstitutional and outside the jurisdiction of the Supreme Court.

In that case, the Supreme Court also held that,

> "Article 80(3) only applies where the validity of an act is called into question. However, Article 80(3) does not prevent a Court from exercising its most traditional function of interpreting laws. Interpretation of laws will often require a Court to determine the applicable law in the event of a conflict between two laws. This is a function that has been exercised by this Court from time immemorial".

I find that the issue in the present case is a conflict between the provisions in an ordinary law, ie. the Penal Code and the provisions in the Constitution. The Constitution is accepted as the Supreme Law of the country and the ordinary laws derive their validity from the Constitution. The provisions in the ordinary law should be interpreted in the light of the Constitutional provisions. The Constitution should be used as a flash-light on the provisions of the ordinary law. Any mandatory minimum sentence imposed

by the provisions of any ordinary law, in my view is in conflict with Article 4(c) 11 and 12(1) of the Constitution in that it curtails the judicial discretion of the Judge hearing the case. For example, the State files criminal cases against persons in the society; then these persons face the charges in Court and defend themselves; at the time of conviction, Court hearing the criminal case has no doubt that the accused is guilty or not. If the State proves its case without any doubt, the suspect is found guilty; otherwise he is acquitted. Court has 'no discretion' in that part of the trial which is decided on the evidence before court. It is only in deciding on the punishment that the Court has a discretion. When a minimum mandatory sentence is written in the law, the Court looses its judicial discretion. That part of the law with the minimum mandatory sentence, acts as a bar to judicial powers in sentencing or punishing the wrong doer. The Judge who has seen, felt and smelt the case should be given the discretion in sentencing, considering all the circumstances of the case, the consequences of a sentence, whether it serves as cruelty to the wrong doer, the victim or any other person affected by that sentence etc. Sentencing is the most important part of a criminal case and I find that provision in any law with a minimum mandatory sentence goes against the judicial discretion to be exercised by the Judge.

In the present case, we must look at the big picture with the victim of rape the Appellant, the father of the child born, and the 10 year- old girl child who was born into this world as a result of the victim having been raped. The victim of rape never complained to the Police until after a pregnancy of 5 months when Police on its own came to the victim in search of her when an outsider informed the Police of her missing from home. There was no chance for the victim to give evidence as the Appellant pleaded guilty to the charge of statutory rape of the victim. There is a bar for the victim and the Appellant to enter into a marriage as the Appellant is already legally married to the victim's sister who is living abroad. The child is being looked after by the Appellant father in the eyes of the society, and the child is dependent on the income earned by the Appellant.

In these circumstances I hold that the Learned High Court Judge had correctly imposed a suspended sentence of "2 years RI. suspended for 10 years". I agree with the decision of the Supreme Court in S.C. Reference 03/2008 and uphold the conclusion of that case that the minimum mandatory sentence in Section 364(2)(e) is in conflict with

Articles 4(c), 11 and 12(1) of the Constitution and that the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion notwithstanding the minimum mandatory sentence.

I set aside the judgment of the Court of Appeal dated 24.07.2012 and affirm the judgment of the High Court dated 28.10.2008. However, I order no costs.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court

P. Jayawardena,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 against the judgment 14.6.2012 in Appeal No.CPH/HCCA/KAN/172/2008(F) in terms of Sec.5C(1) of Act.No54of 2006

Hangidigedara Thilakaratne (Deceased)
Plaintiff

RAG Sumanawathi
Substituted Plaintiff

SC Appeal 27/2013
SC/HC(CA)LA 296/2012
CP/HCCA/KAN/172/2008/(F)
DC Kandy Case No.19585/L

Vs

Galkaduwegedara Sunil Jayathilake
Defendant

AND BETWEEN

RAG Sumanawathi
Substituted-Plaintiff-Appellant

Vs

Galkaduwegedara Sunil Jayathilake
Defendant-Respondent

AND NOW BETWEEN

RAG Sumanawathi
Substituted-Plaintiff-Appellant-Appellant

Vs

Galkaduwegedara Sunil Jayathilake
Defendant-Respondent-Respondent

Before : Eva Wanasundera PC, J
B. Aluwihare PC, J
Sisira J De Abrew J

Counsel : H. Withanachchi with Anuradha Weerakkody
for the Substituted Plaintiff-Appellant-Appellant
Chandrasiri de Silva with Nadeera Weerasinghe for the
Defendant-Respondent-Respondent

Argued on : 26.10.2015
Written submissions tendered on : 9.12.2014 by the Plaintiff-Appellant
24.11.2014 by the Defendant-Respondent.
Decided on : 10.12.2015

Sisira J De Abrew J.

The original plaintiff Hangidigedara Thilakaratne who is now dead instituted this action in the District Court of Kandy praying, inter alia, for

1. a declaration that he was the owner of the land described in the schedule B to the plaint.
2. eviction of the Defendant-Respondent-Respondent (hereinafter referred to as Defendant-Respondent) from the said land and damages.

Thilakaratne's wife Sumanawathi has been substituted in the room of Thilakaratne.

The learned District Judge after trial, by his judgment dated 3.3.2008, dismissed the plaintiff's action. Being aggrieved by the said judgment of the learned District Judge, the Substituted Plaintiff-Appellant-Appellant (hereinafter referred to as the Plaintiff-Appellant) appealed to the Civil Appellate High Court (hereinafter referred to as the High Court). The High Court, by its judgment dated 14.6.2012, affirming the judgment of the learned District Judge, dismissed the appeal. Being aggrieved by the said judgment of the High Court, the Plaintiff-

Appellant has appealed to this court. This court, by its order dated 1.2.2013, granted leave to appeal on the questions of law set out in paragraph 19 (i),(ii),(iii) of the petition of appeal which are reproduced below.

1. Did the High Court and the District Court err in law by coming to a finding that the vendors of Deed No. 933 were not allotted any share from the corpus whereas in fact the said vendors had become entitled to the corpus by Deed No.2621?
2. Did the Courts below err in law by coming to a conclusion that the plaintiff had failed to prove his title owing to the failure that there was no reference to Deed No.2621 from which the vendor therein became entitled to the land in suit in Deed No.933 relied upon by the Plaintiff?
3. Did the Courts below err in law by not taking into account the evidence adduced by the vendor in Deed No. 933 to the effect that the vendors therein had transferred the rights to the corpus which may be allotted to their predecessor, to the Plaintiff?

Court has also allowed the following question of law.

"Whether the maxim of *exceptio rei venditae et traditiae* is applicable in the circumstances of this case?"

The son of the Plaintiff-Appellant, in his evidence, relying on the plaint and documents produced at the trial, inter alia, stated the following matters.

1. Hangidigedara Jeevanhamy who was the father of Hangidigedara Thilakaratne instituted partition action No.7445/P in the District Court of Kandy seeking to partition the land described in the schedule A to the plaint.
2. While the partition action was pending Galkaduwegedara Sethuwa (hereinafter referred to as Sethuwa), the 1st defendant in the partition case No.7445/P, by deed No.2621(P1) dated 4.8.1975, transferred his rights, title

and interest that may be allotted to him in the final decree of the partition case to Galkaduwegedara Sirisena (hereinafter referred to as Sirisena).

3. The said Sirisena and Galkaduwegedara Welliya (hereinafter referred to as Welliya), by deed No 933(P2) dated 12.2.1980, transferred their rights, title and interest derived from Sethuwa to Hangidigedara Thilakaratne who was the original plaintiff in the case. (According to deed No.933 this position is not correct. Although the Plaintiff-Appellant says these facts, I have, elsewhere of this judgment, discussed whether this was the true position). Although Welliya's name appears in deed No.933 as one of the owners, he has not got any title to the property by deed No.2621.
4. In terms of the Final Decree entered on 9.5.1988 in partition case No 7445/P, Sethuwa was allotted Lot No.4 in plan No.6447A.

The said Lot No.4 is the corpus in present case. The plaintiff-Appellant relying on the above facts, claims that he is entitled to the rights, title and interest of Sethuwa who was allotted Lot No.4 of Plan No.6477A in the above partition case.

The mother of the Defendant-Respondent in her evidence relying on the answer filed by the defendant and the documents produced at the trial has, inter alia, stated the following facts.

1. Sethuwa, the 1st defendant in the partition case No.7445/P, by deed No.10839[V1] dated 13.12.1985, transferred his rights, title and interest that may be allotted to him in the Final Decree in the said partition case.
2. The Defendant-Respondent who was placed in possession of the land by Sethuwa was in uninterrupted possession.

The Defendant-Respondent only moved for dismissal of action of the plaintiff.

When I consider the documents in this case it is clear that Sethuwa, on two occasions, had transferred his rights, title and interest that may be allotted to him in the partition case No.7445/P. One was by deed No.2621[P1] to Sirisena on 4.8.1975 and the other one was by deed No.10839[V1] to the Defendant-Respondent on 13.12 1985. It is undisputed that in the Final Decree in the partition case no. 7445/P Sethuwa was allotted Lot No.4 depicted in final partition plan No.6477A.

Sethuwa, by deed No.2621[P1] dated 4.8.1975, transferred his rights, title and interest that may be allotted to him in the Final Decree in partition case No.7445/P to Sirisena. Sethuwa was the 1st defendant in the said partition case. The Final Decree of the partition case No.7445/P was entered only on 9.5.1988. Sirisena and Welliya executed the deed No.933 [P2] on 12.2.1980 which was well before the entry of the partition decree. Thus in any event when Sirisena executed the deed No.933 he had not had title to the property. It is interesting, at this stage, to consider Section 66 of the Partition Law No 21 of 1977 which reads as follows.

(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 subsection (1) of this section shall be void ;*

(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 subsections (1) and (2) of this section.*

It is also noteworthy to state Section 67 of the old Partition Act No.16 of 1951 which reads as follows.

(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 or by entry of a certificate of sale.*

(2) *Any voluntary alienation, lease or hypothecation made or effected in contravention of the provisions of subsection (1) of this section shall be void.*

Although there is strict provision in the partition law which prohibits transfer of undivided share of the corpus in a partition case pending the partition action, there appears to be case law which is somewhat contrary to this prohibition. Although I do not strictly intend to follow this case law in the present case, it is necessary to state here the said judicial decisions.

In MWAP Jayathilake Vs PG Somadasa 70 NLR 25 it was held: *"Section 67 of the Partition Act has not altered the position which prevailed under the former Partition Ordinance that the prohibition against the alienation or hypothecation of an undivided share or interest pending a partition action does not prevent a party from disposing, during the pendency of the action, of the interest that will be ultimately allotted to him in the final decree."*

In B. Sillie Fernando Vs W Silman Fernando 64 NLR 404 it was held: *"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 severally 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."*

However it is interesting to find out what Sirisena and Welliya by deed No.933[P2] dated 12.2.1980 sold to Hangidigedara Thilakaratne. The schedule in the said deed No.933 states as follows:

"All our right title and interest in and to all that land called Galkaduwehena and the share that may be allotted **to us** in the District Court of Kandy Partition case No. P 7445 in and to all that land called Galkaduwehena of two pelas in paddy

showing extent situated at Dehigama in Gangapalatha of Yatinuwara in the District of Kandy Central Province and bounded on the East by fence of the garden of Jambukotuwa of Horatale, South by the fence of Gamawalauwehena, West by fence of the garden of Don Haramanis Appuhamy, and on the North by Ella of Koholane Kumbura, together with the house and everything standing thereon." (emphasis added).

It is therefore seen that Sirisena and Welliya, by the said deed No.933, have transferred the share that may be allotted to them by the partition case No.7445/P in the District Court of Kandy. Were they parties in the said partition case? The answer is in the negative. Thus no share has been allotted to them in the partition case. In fact no share could or would be allotted to them in the partition case as they were not parties. In the schedule of the deed No 933(P2), Sirisena and Welliya have not referred to Sethuwa's share that would be allotted to him in the partition case No.7445/P and to the deed No.2621. By deed No.933(P2), they have not transferred to Hangidigedara Thilakaratne what was given to Sirisena by Sethuwa by deed No.2621. By the Final Decree (P3) in the Partition case No.7445/P Sirisena and Welliya have not been allotted any share of the corpus. Therefore by deed No.2621(P1) and deed No.933(P2), the original plaintiff Hangidigedara Thilakaratne had not derived title of Lot No.4 of the final partition plan No.6477/A.

In an action for *rei vindicatio* the burden is on the plaintiff to prove his title. This view is supported by the following judicial decisions. In Luwis Singho and others Vs Ponnamperuma [1996] 2 SLR 320 it was held that *"actions for Declaration of Title and ejectment (as in this case) and Vindicatory actions are brought for the same purpose of recovery of property. In a Rei Vindicatio action the cause of action is based on the sole ground of violation of the Right of Ownership, in such an action proof is required that;*

(i) the Plaintiff is the owner of the land in question i.e. he has the dominium and, (ii) that the land is in the possession of the Defendant".

In Loku Menika and Others Vs Gunasekare [1997] 2 SLR 281 following facts were observed. *"The plaintiff-respondent instituted action seeking a declaration of title to the corpus. The defendant-appellant himself claimed title on a chain of title set out in his answer. The District Court held in favour of the plaintiff. In the appeal, it was urged that the learned District Judge had failed to appreciate that in a declaratory action the plaintiff must strictly prove his title."* Court of Appeal held thus: *"The plaintiff must set out his title on the basis on which he claims a declaration of title to the land and must prove that title against the defendant."*

Plaintiff Hangidigedara Thilakaratne had filed a *rei vindicatio* action. Therefore he must prove the title to the land which is Lot No.4 of the final partition plan No.6477/A, but he has not proved it. Therefore his action should fail. The Defendant-Respondent has only asked for the dismissal of the Plaintiff's action.

Learned counsel for the Plaintiff-Appellant contended that the learned High Court Judges have not applied the doctrine of *exceptio rei venditae et traditiae.* When considering the said doctrine it is important to consider a passage from the book titled 'The Law of Property in Sri Lanka by Prof. GL Peiris' 3rd Reprint-page 140 which states as follows.

"The general rule is that the transferor should be the owner at the time delivery is made.

However an important qualification to this rule is contained in the Roman-Dutch common law doctrine as to the *exceptio rei venditae et traditiae.* The effect of the doctrine is that, where a vendor sells without title but subsequently acquires one, this title accrues to the benefit of the purchaser and those claiming through him, the moment of its acquisition by the vendor."

The above doctrine cannot be applied to the transfer in deed No.933 (P2) because Sirisena and Welliya have, by the said deed, transferred the share that may be allotted to them by partition case No.7445/P. But they are not parties to the said case. Therefore no share could or would be allotted to them in the said partition case. In fact in the Final Decree of the said partition case, no share has been allotted to them.

For the aforementioned reasons, I answer the questions of law raised by the Plaintiff-Appellant in the negative.

For the above reasons, I upholding the judgments of the District Court and the Civil Appellate High Court, dismiss the appeal. However in all the circumstances of the case I do not make an order for costs.

Appeal dismissed.

Judge of the Supreme Court.

Eva Wanasundera 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 appeal against the judgment of the Civil Appellate High Court of Ampara

KA Mary Nona

Plaintiff

SC Appeal 39A/2010
SC/(HC)CALA 34/2010
High Court Ampara
Appeal EP/HCCA/AMP/141/07
DC Ampara 378/L

Vs

HAP Wimaladasa

Defendant

AND BETWEEN

HAP Wimaladasa

Defendant-Appellant

Vs

KA Mary Nona

Plaintiff-Respondent

AND NOW BETWEEN

HAP Wimaladasa

Defendant-Appellant-Appellant

Vs

KA Mary Nona

Plaintiff-Respondent-Respondent

Before : Eva Wanasundera PC, J
Buwaneka Aluvihare PC, J
Sisira J De Abrew J

Counsel : Palitha Kumarasinghe PC with Nuwan Rupasinghe
for Defendant-Appellant-Appellant
Buddika Gamage for Plaintiff-Respondent-Respondent

Argued on : 22.9.2014
Decided on : 11.2.2015

Sisira J De Abrew J.

This is an appeal against the judgment of the Judges of the Civil Appellate High Court of Ampara dated 14.12.2009 wherein they, affirming the judgment of the learned District Judge, held in favour of the Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent).

This Court by its order dated 18.5.2010, granted leave to appeal on the following question of law.

'Whether the judges of the Civil Appellate High Court erred in law in resorting to the provisions of the Land Development Ordinance to uphold the validity of a permit issued under the provisions of the State Land Ordinance."

The Plaintiff Respondent initiated this action in the District Court of Ampara on the following basis.

1. Plaintiff-Respondent's husband KGM Jinadasa was declared to be the owner of the land described in the 1st schedule to the plaint by judgment dated 3.6.1991 in DC Ampara case No.199/L which was between the Plaintiff-Respondent's husband and one T.Lilly Nona. There is no evidence to suggest that there is any relationship between the said T.Lilly Nona and the Defendant-Appellant-Appellant (hereinafter referred to as the Defendant-appellant).

2. Possession of the land described in the 1st schedule to the plaint was handed over to the husband of the Plaintiff-Respondent on 3.9.1991as a result of the judgment in DC Ampara 199/L

3. Thereafter from 1991 till 1994 the Plaintiff-Respondent and her predecessor in title were in possession of the said land.

4. The Defendant-Appellant in 1994 entered a portion of the said land which is described in the 2nd schedule to the plaint.

The Plaintiff-Respondent, in the plaint, inter alia, sought the following relief.

1. A declaration of title in respect of the land described in the 2nd schedule to the plaint.

2. Ejectment of the Defendant-Appellant and his agent from the said land (described in the 2nd schedule to the plaint) and grant vacant possession to the Plaintiff-Respondent.

It is common ground that the land described in the schedule to the plaint is a State land. The entire land which is two acres and two roods in extent, has been given to the husband of the Plaintiff-Respondent by permit No. 8440 which was marked P3(c) at the trial. The learned District Judge, in his judgment 21.7.2006, decided that the said permit had been issued under the provisions of the Land Development Ordinance. The learned High Court Judges too in their judgment dated 14.12.2009 decided the same. Learned President's Counsel for the Defendant-Appellant contended that conclusions of both courts on the said point were wrong and that the said permit had been issued under the State Land Ordinance and not under the Land Development Ordinance. The learned High Court Judges further decided that under Section 48A of the Land Development Ordinance, the spouse of the permit holder became entitled to succeed the land. Therefore the most important question that must be decided in this case is whether the said permit has been issued under the provisions of the Land Development Ordinance or the State Land Ordinance.

Has the permit in respect of the land been issued to the husband of the Plaintiff-Respondent under the provisions of the Land Development Ordinance? If the answer to the above question is in the negative, both judgments of the District Court and the High Court are wrong. I now advert to this question. Permit No.8440 (marked as P3(c) at the trial) very clearly states that it has been issued under the provisions of the Crown Land Ordinance No.8 of 1947. It appears that both the District Judge and High Court Judges have failed to examine the permit. For the above reasons, I hold that conclusions reached by the District Court and the High Court are wrong. Although learned counsel for the Plaintiff-Respondent contended that no issue was raised on this point, as I pointed out earlier, the judgment of the learned District Judge has been based on this point and the High Court affirmed the

judgment of the learned District Judge on the same point. Therefore both the judgments should be set aside.

It is pertinent to consider Section 16 of the State Land Ordinance which reads as follows:

"16(1) Where it is provided in any permit or licence that such permit or licence is personal to the grantee thereof, all rights under such permit or licence shall be finally determined by the death of such grantee.

16(2) Where it is provided in any permit or licence that such permit or licence shall be personal to the grantee thereof, the land in respect of which such permit or licence was issued and all improvements effected thereon shall, on the death of the grantee, be the property of the State ; and no person claiming through, from or under the grantee shall have any interest in such land or be entitled to any compensation for any such improvements."

According to condition No.5 of the permit, the permit is personal to the permit holder. The Plaintiff-Respondent, in her evidence, admits that at the time she filed the case her husband was dead. When I consider Section 16 of the State Land Ordinance and the conditions of the permit, it appears that the rights of the Plaintiff-Respondent under the permit have come to an end with the death of her husband and the Plaintiff-Respondent has no title to the land. Therefore the case of the Plaintiff-Respondent should fail.

Earlier I have held that both judgment of the learned District Court and the High Court should be set aside. For the above reasons, I set aside the judgment of the learned District Judge dated 21.7.2006 and the judgment of the learned High Court Judges dated 14.12.2009.

In view of the above conclusion reached by me, I answer the question of law raised by the appellant in the affirmative.

As the case in the District Court has been filed only in respect of the land described in the 2nd schedule to the plaint, this judgment is applicable only in respect of the said land.

Learned President's Counsel for the Defendant-Appellant submitted that the Defendant-Appellant has been ejected by executing the writ of ejectment issued by the District Court pending the appeal. Learned counsel for the Plaintiff-Respondent too admitted this position. Learned President's Counsel for the Defendant-Appellant made an application to restore the Defendant-Appellant to the possession of the land described in **the 2nd schedule** to the plaint. I note that the Defendant-Appellant has come into occupation of this land without any legal basis. The Government has not issued him any permit to occupy the said land. If this Court now directs to restore the Defendant-Appellant to the possession of the said land, indirectly this Court gives him permission to occupy the State Land for which he did not or does not have a permit. Further if such a direction is given, it can be construed as an encouragement for illegal occupiers of State lands to occupy such lands. It appears that the Defendant-Appellant was in illegal possession of the land. Such persons can be evicted under the provisions of the State Lands (Recovery of Possession) Act. For the above reasons I am of the opinion that this Court should not restore the Defendant-Appellant in possession of the land. I therefore refuse the application of learned President's Counsel to restore the Defendant-Appellant in possession of the land described in the 2nd schedule to the plaint. However as I have set aside the judgments of District Court and the High Court, execution of the writ placing the Plaintiff-Respondent too cannot be permitted. I therefore direct the

learned District Judge to take steps to recall the writ of execution which placed the Plaintiff-Respondent in possession of the land described in **the 2nd schedule to the plaint.** Both parties cannot occupy the land described **in the 2nd schedule** to the plaint and it will continue to be State land. However the Divisional Secretary or the Government Agent of the area is at liberty to decide whether he should issue a permit to the said land and if decides so, the person in whose favour it should be issued

Judgments of the District Court and the High Court are set aside

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

SC Appeal No. 40/2013

SC (Spl) LA Application No. 23/2012

CA Application No. 347/88

In the matter of an Application for Special Leave to Appeal under and in terms of the provisions of Article 128 of the Constitution of the Democratic Socialist Republic of Sri Lanka against the order of their Lordships of the Court of Appeal delivered on 11.01.2012.

Asoka Sarath Amarasinghe
No. 32, Vidyalaya Road,
Gampaha.

Petitioner

Vs.

1. R. Wijeratne

Respondent (Deceased)

1A. Ranjith Flavian Wijeratne
No. 27/1 (27B),
Sir Ernest de Silva Mawatha,
Colombo 07.

Substituted Respondent

2. Sirimevan Bibile
(Former Chairman)

2A. Dr. M.S. Jaldeen
(Chairman)

3. B. Bodinagoda
(Former Vice Chairman)

3A. C. Ranawaka (Member)

4. B. Gunasekera (Former Member)

4A. J.M.S. Bandara (Member)

5. S.W. Gunawardene
(Former Member)

5A. R.W.M.S.B. Rajapakse
(Member)

6. M. Samaraweera
(Former Member)
All members of the Ceiling on Housing Property Board of Review, Department of National Housing, Sir. Chittampalam A. Gardiner Mawatha, Colombo 02.

7. D. Weerapana
Former Commissioner of National Housing

8. Y.B. Pussedeniya
Former Commissioner of National Housing

8A. M. Sritharan
Commissioner of National Housing, The Department of National Housing, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

9. Hon. R. Premadasa
Former Minister of Housing, Local Government and Construction

9A. Wimal Weerawansa
Minister of Construction, Engineering Services, Housing and Common Amenities, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

Respondents

AND NOW BETWEEN

Ranjith Flavian Wijeratne
No. 27/1 (27B),
Sir Ernest de Silva Mawatha,
Colombo 07.

Substituted 1A Respondent Appellant

Vs.

1. Asoka Sarath Amarasinghe
   No. 32, Vidyalaya Road,
   Gampaha.

   Petitioner Respondent

2. Sirimevan Bibile
   (Former Chairman)

2A. Dr. M.S. Jaldeen
(Chairman)

3. B. Bodinagoda
   (Former Vice Chairman)

3A. C. Ranawaka (Member)

4. B. Gunasekera (Former Member)

4A. J.M.S. Bandara (Member)

5. S.W. Gunawardene
   (Former Member)

5A. R.W.M.S.B. Rajapakse
(Member)

6. M. Samaraweera
   (Former Member)

All members of the Ceiling on Housing Property Board of Review, Department of National Housing, Sir. Chittampalam A. Gardiner Mawatha, Colombo 02.

7. D. Weerapana
   Former Commissioner of National Housing

8. Y.B. Pussedeniya
   Former Commissioner of National Housing

8A. M. Sritharan
   Commissioner of National Housing, The Department of National Housing, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

8B. L.S. Palanasooriya
   Commissioner of National Housing, The Department of National Housing, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

8C. Prof. W.N. Karunadasa
   Commissioner of National Housing, The Department of National Housing, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

9. Hon. R. Premadasa
   Minister of Housing, Local Government and Construction, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

9A. Hon. Wimal Weerawansa
   Minister of Construction, Engineering Services, Housing and Common

Amenities, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

9B. Hon. Sajith Premadasa
Minister of Housing and Samurdhi, 'Sethsiripaya', Sri Jayawardenapure Kotte, Battaramulla.

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Respondents- Respondents

Before : K. Sripavan, CJ
Rohini Marasinghe, J
Priyantha Jayawardena, PC, J

Counsel : Lakshman Perera, PC with Jagath Wickramanayake instructed by Ms. Dissanayake for the Substituted 1A Respondent – Appellant
A.R. Surendran, PC with M. Jude Dinesh and Ms. Maithrei Rajasingam for the Petitioner – Respondent
Viveka Siriwardena, DSG for the 8C and 9B Respondent – Respondents

Argued on : 7th September, 2015

Written Submissions filed on : 21st September, 2015 by the Substituted – 1A- Respondent-Appellant
2nd October, 2015 by the Petitioner Respondent

Decided on : 12th November, 2015

Priyantha Jayawardena, PC. J,

This is an appeal filed against the Judgment of the Court of Appeal dated 11.01.2012 delivered in CA/Writ/Application bearing No. 347/1988. The Court of Appeal quashed the decisions of the Commissioner of National Housing and of the Ceiling on Housing Property Board of Review.

The facts of the instant appeal are set out below.

The Substituted – 1A – Respondent – Appellant's (hereinafter referred to as the Appellant) father late Mr. R. Wijeratne (Deceased 1st – Respondent) who was the 1st Respondent in CA/Writ/Application No. 347/88, had been the tenant and was in occupation of the premises bearing Assessment No. 27/1, presently bearing Assessment No. 27B, Sir Ernest de Silva Mawatha, Colombo 07 since June, 1965. Upon the death of the said Mr. R. Wijeratne pending the said Writ Application the Appellant was substituted in his place.

One Mrs. Lalitha Rajapakse was the owner of the said premises bearing assessment No. 27/1 (27B) being the widow of late Mr. George Rajapakse who died on 18.06.1976. By the time the Ceiling on Housing Property Law No. 01 of 1973 came into operation on 13th January, 1973 the family of late Mr. George Rajapakse owned houses in excess of the permitted number of houses stipulated in the said Law including the aforesaid premises bearing No. 27/1 (27B) tenanted to the Appellant's late father and premises bearing No. 27 1/1 (27D) tenanted to one Mrs. Roshan Peiris.

The said late George Rajapakse was the male spouse in his family. At the time the said Law came into operation, the said late George Rajapakse was living but did not file the declaration within twelve weeks from the stipulated date of 13th January 1973, as required by section 8(2) of the said Law. Sometime after the stipulated period, being the owner of the house Nos. 27/1 and 27 1/1 Mrs. Lalitha Rajapakse had informed the Commissioner of National Housing (hereinafter referred to as the Commissioner) that she did not propose to retain the ownership of the said houses by letter dated 3rd August, 1973. She had also informed that the delay in furnishing the returns on the due date in respect of the premises was because the auditors to whom she handed over the matter had failed to fill up the forms in time.

Thereafter, on the same day Mrs. Lalitha Rajapakse by her letters dated 3rd August, 1973 addressed to Mr. R. Wijeratne, the Appellant's father and Mrs. Roshan Pieris had offered to sell the said two premises. She had informed them that she did not propose to retain the ownership of the houses under the said Law that were rented to them and gave them the option of purchasing the same if they so desired. Copies of the said letters had been sent to the Commissioner by Mrs. Rajapakse. Mrs. R. Pieris by her letter dated 6th August, 1973 had informed Mrs. Lalitha Rajapakse that she did not have the money to purchase the premises in question. It was admitted at the inquiry before the Board of Review by the late Mr. R. Wijeratne that house bearing assessment No. 27/1 was offered to him for a sum of Rs. 125,000/- and he refused to purchase the house at that price.

Thereafter, an application had been made by letter dated 3rd January, 1974 addressed to the Commissioner by an Attorney-at-Law on behalf of Mrs. Lalitha Rajapakse seeking time to

dispose of the house. The letter stated that it was impossible for Mrs. Lalitha Rajapakse to dispose of the premises within the stipulated time due to the fact that considerable delay had been caused in the preparation and obtaining of the condominium plan in respect of the premises. The Commissioner by letter dated 12th January, 1974 allowed the said application and granted time till 13th July, 1974 under Section 11 of the said Law and deferred the vesting of the said premises for a period of 6 months. The said decision was published along with other similar decisions in the gazette bearing No. 94/5 dated 17th January, 1974. In the said gazette the Commissioner stated that " being satisfied that the failure to dispose of such was due to the reasons beyond the control of owners, do hereby defer vesting the said houses in the Commissioner until 13.07.1974. "

Thereafter, during the said extended time given to Mrs. Rajapakse to dispose of the house, the Commissioner by a letter dated 8th May, 1974 addressed to Mrs. Lalitha Rajapakse with copies to the tenants had informed that according to her declaration dated 3rd August, 1973 the surplus houses of which the ownership was not proposed to be retained by her are vested in the Commissioner with effect from 13th January, 1974 under sections 11 and 16 of the Law and that the tenants have been advised accordingly. However, neither the Commissioner nor any of the parties to this appeal have acted based on this letter.

Once again, the Commissioner by his letter dated 5th July, 1974 addressed to Mrs. Lalitha Rajapakse referred to his previous letter dated 12th January, 1974 and the gazette published on 17th January, 1974 granting time to dispose of the houses had informed that if the failure to dispose of the condominium property owned by her within the prescribed time period was due to reasons beyond her control, to provide details regarding the same in order to consider for a further extension. Responding to the said letter of the Commissioner, a second request for extension of one year was made by letter dated 9th July, 1974 stating that Mrs. Rajapakse was unable to dispose of the premises due to the continuing delay to register the condominium plan for various causes including the fact that the said premises had been mortgaged to the Commissioner. It further stated that the application for registration of the condominium plan of the above premises was forwarded to the Land Registry Colombo on 4.4.1974 but was held up due to the existence of the said encumbrance. Therefore, Mrs. Rajapakse requested for a further extension of one year from 13th July, 1974 to enable her to enter into the necessary agreements and obtain the consent of the Commissioner for the registration of the said condominium property and thereafter dispose of the same. Later, the gazette notification bearing No. 119/10 dated 12th July, 1974 was published. The said gazette referred to the premises under reference and several other houses belonging to other owners of excess houses. It stated that the Commissioner being satisfied that the failure to dispose of the houses in excess of the permitted number specified under the Ceiling on Housing Property Law was due to the reasons beyond the control of the owner hereby defer vesting the said houses in the Commissioner until 13.01.1975.

At the request of Mrs. Rajapakse (as the mortgagee) the Commissioner on 1st October, 1974 had written to the Registrar of Lands Colombo and granted consent to Mrs. Lalitha Rajapakse's application for registration of the condominium plan already lodged with the Land Registry Colombo. Mrs. Lalitha Rajapakse by her letter dated 8th November, 1974 addressed to the Commissioner has informed that since the premises in question (bearing assessment Nos. 27/1 and 27 1/1 respectively) come under the condominium law and as there was insufficient time for owners of condominium property to register them.

Later, Mrs. Lalitha Rajapakse by virtue of Deed bearing No. 491 dated 11.01.1975 attested by A.R. Mathew, Notary Public, Colombo had sold the said premises bearing assessment No. 27/1 (27B) to the Petitioner – Respondent in this appeal (hereinafter referred to as the 1st Respondent) and also the premises bearing No. 27 1/1 tenanted to one Mrs. Roshan Peiris had been sold to one N.H.S. Gunaratne. Accordingly, Mrs. Rajapakse had disposed of the houses within the extended time given to her by the Commissioner.

Thereafter, Mr. R. Wijeratne had made representations to the Minister of Local Government, Housing and Construction regarding the House No. 27/1 in August, 1980. Consequently, the Secretary to the Ministry of Local Government, Housing and Construction had sent the letter dated 25.08.1980 to Mr. R. Wijeratne requesting him to be present at the secretariat office on 07.09.1980 for a discussion. At the said meeting Mr. Wijeratne had informed the Commissioner his willingness to purchase the house No. 27/1 under the said Law.

Further, Mrs. Roshan Peiris also by her letter dated 24.06.1982 addressed to the Commissioner has indicated her willingness to buy the flat bearing No. 27 1/1 at a price determined by the Commissioner.

The Commissioner commenced an inquiry on the 11th September, 1982 in respect of the said applications made by late Mr. R. Wijeratne and Mrs. Roshan Peiris to purchase the houses under the said Law. As stated above by that time Mrs. Rajapakse had sold the said premises bearing assessment No. 27/1 to the 1st Respondent in this appeal and premises bearing assessment No. 27 1/1 tenanted by Mrs. Roshan Peiris had been sold to one N.H.S. Gunaratne.

The Appellant's father had based his case before the Commissioner on the basis that the sale of the two houses under reference were fraudulent transactions carried out to circumvent the applicability of Ceiling on Housing Property Law to excess houses, and the said houses were vested in the Commissioner by operation of law because there is no disposal under section 10 of the said Law.

At the inquiry the Counsel for Mrs. Rajapakse had requested the Commissioner to notice the new buyers of the houses to enable them to participate at the inquiry. However, the Commissioner made order on 16th September, 1982 vesting the houses under reference without giving a hearing

to the new buyers, namely the 1st Respondent in this appeal and Mr. N.H.S. Gunaratne, the purchaser of the house bearing assessment No. 27 1/1. The said order of the Commissioner made under section 8 (6) of the Law was published in the Gazette bearing No. 212 dated 24.09.1982.

Section 8 of the principal enactment was amended by Ceiling on Housing Property (Amendment) Law No. 18 of 1976. It inserted section 8 (6) to the said Law.

Section 8 (6) states as follows;

> " Where the ownership of any surplus house has been transferred by way of sale, gift, lease or other alienation, without the owner thereof having intimated in writing to the tenant thereof, as required by subsection (1) or subsection (2) that he ownership of such house is not proposed to be retained by him, and such tenant makes an application to the Commissioner to purchase such house the Commissioner may, with the approval in writing of the Minister, by Order published in the Gazette vest such house in the Commissioner with effect from such date as may be specified in such Order. " [emphasis added]

Being aggrieved by the said purported vesting order appeals were preferred to the Board of Review by Mrs. Lalitha Rajapakse, the 1st Respondent and said Mr. N.H.S. Gunaratne.

The 1st Respondent's appeal was assigned the number 1283. The said appeal together with appeal bearing No. 1282 lodged by the said Lalitha Rajapakse and appeal bearing No. 1284 lodged by N.H.S. Gunaratne the other purchaser who was placed in similar circumstances were consolidated and taken up for hearing. On 30th January, 1988 three orders were delivered by the Board of Review. The 2nd and 4th Respondents delivered one order dismissing all three appeals. The 5th and 6th Respondents by their order allowed the 1st Respondent's appeal. The 3rd Respondent in his order, inter-alia, dismissed the 1st Respondent's appeal and affirmed the vesting of the premises.

The 1st Respondent being aggrieved by the said order of the Board of Review filed the CA/Writ/Application bearing No. 347/88 seeking for an order in the nature of a Writ of Certiorari quashing the order of the Commissioner dated 16.09.1982 contained in the Government Gazette dated 24.09.1982 and the order dated 30.01.1988 of the Ceiling on Housing Property Board of Review.

The Court of Appeal delivered its judgment allowing the application of the Respondent and quashed the order of the Commissioner dated 16.09.1982 and the order dated 30.01.1988 of the Ceiling on Housing Property Board of Review.

Being aggrieved by the said judgment the Appellant preferred this appeal and special leave to appeal was granted on the following questions of law;

(i) Are the transferees necessary for the determination of the legality of any transaction done in order to evade the liability under the Ceiling on Housing Property Law?

(ii) If so, has His Lordship of the Court of Appeal erred in law in holding that the orders made by the Ceiling on Housing Property Board of Review has been made breaching the rules of Natural Justice?

(iii) Whether the Commissioner of National Housing has acted illegally in giving further time after the lapse of the time period specified in the statute to make the declaration of excess houses?

At the hearing the learned President's Counsel for the Appellant submitted that the said late Mr. George Rajapakse was the male spouse in his family within the meaning of Section 8(2) of the Ceiling on Housing Property Law No. 01 of 1973. When the said Law came into operation, the said late Mr. George Rajapakse was living but however failed to comply with the mandatory provisions of Section 8(2) of the said Law by failing to send the declaration specified therein within the stipulated time and therefore the houses owned by the members of the family of the said late Mr. George Rajapakse including the aforesaid houses bearing Nos. 27/1 and 27 1/1 were vested in the Commissioner of National Housing by operation of Law.

He further submitted that though a declaration was made by Mrs. Lalitha Rajapakse, she did not make the said declaration within the time period stipulated in Section 8(2) of the said Law and in any event Mrs. Lalitha Rajapakse deliberately failed to give a reasonable cause as to why the declaration was not submitted within the stipulated time period.

He submitted that it is an admitted fact that Mrs. Lalitha Rajapakse whilst informing the late father of the Appellant that she did not propose to retain the ownership of the premises under reference, long after the time period permitted to send the declaration under the Law, sent a purported declaration to the Commissioner. Further, Mrs. Lalitha Rajapakse is not entitled in Law to have made this declaration after the period set down by the Law. Section 8 must be read as a whole and is a mandatory provision which deals with the relationship between the owner of the house and the Commissioner. There is an obligation on the part of any owner of a house which falls within section 8(2) to adhere strictly to the time limits given in the said section and there is a corresponding obligation on the part of the Commissioner to impose the time limits given in the said section as at the time Mrs. Rajapakse had to make the said declaration.

It was also submitted that the Commissioner had accepted the said declaration in spite of the long delay though there is no provision in law for him to do so. Further, he did not have jurisdiction to accept the declaration in the absence of a reasonable cause contemplated by Section 8(4) of the Law. Also Mrs. Lalitha Rajapakse had failed to give notice to the Commissioner in respect of the purported sales in terms of Section 10 of the Ceiling on Housing Property Law. Later, on her request, the Commissioner had by notification published in Government Gazette No. 94/15 dated 17th January 1974 deferred the vesting of the said premises till 13th July, 1974.

However, on the 13th January 1974, the excess houses owned by the said Mrs. Lalitha Rajapakse were vested in the Commissioner as she had failed to dispose of the same within the stipulated time period specified in Section 11 (1) of the said Law.

Further, the Ceiling on Housing Property Board of Review not only had given a hearing to all the parties concerned, but allowed the parties to submit and produce documents came as fresh evidence without even considering the strict limitations of the law in relation to the same.

He also submitted that after the said Law came into operation, in or about 1973 the Petitioner's father was offered, the said premises by Mrs. Lalitha Rajapakse for a sum of Rs. 125,000/- which was way above the value of the said premises at that time and therefore the said offer was not accepted by the Appellant's father.

The Appellant also submitted that the principles of Natural Justice have not been breached. Section 8 of the Law is not dealing with the position of tenants as such. It is found in the early part of the enactment and is more concerned with the relationship imposed by law between house owners and the Commissioner. Therefore, he submitted that the Commissioner is under legal duty only to hear the person who made a declaration in terms of Section 8 (2) and that is Mrs. Lalitha Rajapakse. The Commissioner at the inquiry stage ruled that the transferees will be summoned in course of the inquiry, in case the Commissioner feels it necessary. However, the 1st Respondent who is the transferee is not entitled in law to be heard before the Commissioner as he is not the declarant under Section 8 (2) of the Law.

Moreover, in terms of Section 39 of the Law any person aggrieved by any decision or determination of the Commissioner can appeal to the Ceiling on Housing Board of Review. The Respondent had thus appealed to the Board of Review and it had given him a full hearing. Therefore, there is no violation of the principles of natural justice.

The learned President's Counsel for the 1st Respondent submitted that the order of the Commissioner is in flagrant violation of the rules of Natural Justice because the Commissioner failed to notify the 1st Respondent of the inquiry or give any hearing whatsoever to the said Respondent who was then the owner of the house before he made the impugned order. He further

submitted that as the owner of the house the said Respondent had every right to be heard before any decision depriving him of the ownership of the house was taken.

Secondly, he submitted that giving a hearing to the 1st Respondent would not have made a difference is devoid of merit. If principles of Natural Justice have been violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at even if a party had been heard.

Thirdly, it was submitted that in any event the Commissioner had given an undertaking to give a hearing to the 1st Respondent and his failure to do so is fatal to his decision.

The following question of law will be considered in the first instance.

" Whether the Commissioner of National Housing has acted illegally in giving further time after the lapse of the time period specified in the statute to make the declaration of excess houses. "

Ceiling on Housing Property Law No. 1 of 1973 came into operation on the 13th of January, 1973. The long title of the said law states " A law to regulate the ownership, size and cost of construction of houses and to provide for matters incidental thereto or connected therewith ". An analysis of the said Law shows that the sections therein are intrinsically interwoven to each other. In fact the Law was enacted for a specific purpose and it has provided the necessary framework to achieve the said object. Hence, the sections in the Law shall not be read in isolation and given interpretations.

Is it mandatory for the male spouse to submit the declaration ?

Section 8 (2) of the Law requires the male spouse of a family who is subject to the Law to make a declaration to the Commissioner indicating the excess houses within twelve weeks from the date of the Law coming in to operation. However, where such male spouse is not living or is not capable in law to do so, the female spouse shall send the Commissioner a declaration.

Further, in terms of Section 8 (3) if the person sending the declaration is not the owner of any house the ownership of which is not proposed to be retained, the declaration shall be accompanied by a statement of consent from the owner of such house. Where such owner does not give such consent, the Commissioner shall, after due inquiry, determine the houses the ownership of which shall be retained by the members of the family.

Section 8 (4) states thus; " Any person who has, without reasonable cause, failed to send the declaration within the period referred to in subsection (1) or subsection (2), as the case may

be, or has made any incorrect declaration in regard to the number of houses owned by him or by his family, as the case may be, shall be guilty of an offence under this Law, and any such house owned by such person or by any member of the family of such person as may be specified by the Commissioner by Notification published in the Gazette shall vest in the Commissioner with effect from such date as may be specified therein. " [emphasis added].

If a male spouse fails to comply with section 8 (2) of the Law, section 8 (4) has made provision to vest the surplus houses in the Commissioner owned by the other members of the family. Therefore, in such a situation a necessity will arise to make a declaration to the Commissioner indicating the surplus houses by the other members of such family if they do not wish the Commissioner to act under section 8 (4) and vest the houses owned by them.

Thus, I am of the opinion that if the male spouse does not comply with the mandatory requirement of sending the declaration the doctrine of necessity permits other members of such family to submit a declaration to the Commissioner specifying the surplus houses and the houses the ownership of which they wish to retain. The need to give such a notice may arise after the stipulated time of the said twelve weeks. Therefore, Mrs. Rajapakse is lawfully entitled in law to forward her declaration with regard to the houses owned by her.

The time frame given to declare the excess houses

As stated above, section 8 (2) of the Law requires the male spouse of a family to disclose excess houses within four weeks from the law coming into operation. However, by section 11 (1) of the said law the Commissioner is given the power to grant an extended time to owners of excess houses, if he is satisfied that the failure to dispose of the house was due to circumstances beyond the control of the owner and defer the vesting of the house for a further period not exceeding twelve months. Conferring a discretion on the Commissioner to decide on the time frame to furnish the declaration shows though it is mandatory to make the declaration under section 8 of the Law, the said declaration can be made within a time frame granted by the Commissioner in terms of section 11 of the Law. In any event, if the male spouse does not comply with the section 8 (2) of the Law, the Commissioner should take steps under section 8 (4) of the said Law to vest the houses of the other members of the family in him. This, shows that the failure to comply with section 8 (2) of the Law by the male spouse would not result in automatic vesting of the houses owned by the other members of the family in the Commissioner.

In fact, this position is very clear from the fact that the Commissioner has accepted the requests made by Mrs. Rajapakse, the owner to have an extended time to dispose of the house under reference, published the necessary gazette notifications twice under section 11 of the Law. Further, the said gazette notifications stated " being satisfied that the failure to dispose of such

was due to the reasons beyond the control of owners, do hereby defer vesting the said houses in the Commissioner ". Moreover, as stated above the Commissioner had facilitated Mrs. Rajapakse to redeem the mortgages of the houses by sending a letter to the Registrar of Lands in order to effect the disposal of the houses under the Law.

Commissioner's power to grant time to dispose excess houses

Section 10 of the said Law has permitted the owners of the surplus houses to dispose such houses within a period of twelve months from the Law coming in to operation unless the tenant of such house or any person who may under section 36 of the Rent Act succeed to the tenancy of such house, has made an application with simultaneous notice to the owner for the purchase of such house.

Admittedly, the two tenants did not make an application to the Commissioner within four months from the date of commencement of the Law in terms of section 9 of the Law. Therefore, the Commissioner had not taken steps to vest the houses in him under section 17 of the Law.

As stated above an application had been made by letter dated 3rd January, 1974 to the Commissioner seeking time to dispose of the house. The Commissioner by letter dated 12th January, 1974 allowed the said application under Section 11 of the said Law and deferred the vesting of the said premises for a period of 6 months. Later, the said decision was published along with other similar decisions in the gazette dated 17th January, 1974. In the said gazette the Commissioner had stated that " being satisfied that the failure to dispose of such was due to the reasons beyond the control of owners, do hereby defer vesting the said houses in the Commissioner until 13.07.1974. "

It is pertinent to note that the said application for an extension of time to dispose of the houses had been made within the stipulated period of one year in section 11 of the Law. i.e. before the 13th of January, 1974. Further, no steps were taken to challenge the decisions of the Commissioner to grant time to dispose the surplus houses under reference. Therefore, I hold that the Commissioner had <u>not</u> acted illegally in giving time to dispose of the houses under reference.

However, whilst the first extended time given to Mrs. Rajapakse to dispose of the house was in operation the Commissioner by his letter dated 8th May, 1974 addressed to Mrs. Lalitha Rajapakse with copies to the tenants had informed that the houses under reference are vested in the Commissioner with effect from 13th January, 1974 under sections 11 and 16 of the Law and that the tenants have been advised accordingly. However, none of the parties have acted based on that letter.

I am of the opinion that it is not possible in law to take such a decision and dispatch such a letter which is contrary to the previous decision of the Commissioner, particularly when the said order of giving extended time was in operation. Further, the Commissioner cannot rescind or cancel a decision already taken, which affects the rights of the parties without giving them a hearing as it affects their statutory rights.

Section 10 of the Ceiling on Housing Property Law No. 1 of 1973 states as follows;

> " Where, on the date of commencement of this Law, any person owns any house in excess of the number of houses, such person may, within a period of twelve months from such date, dispose of such house with notice to the Commissioner, unless the tenant of such house or any person who may under section 36 of the Rent Act, No. 7 of 1972, succeed to the tenancy of such house, has made application with simultaneous notice to the owner for the purchase of such house. "

The said section 10 was subsequently amended by the Ceiling on Housing Property (Amendment) Law No. 34 of 1974. The said amendment states;

> " Section 10 of the principal enactment is hereby amended by the substitution, for the words "within a period of twelve months from such date," of the words "if such person is an individual, within a period of twelve months from such date, and if such person is a body of persons, within a period of six months of the date on which the determination under this Law by the Commissioner or as the case may be, by the Board of Review, of the maximum number of houses that may be owned by such body was communicated to such body, or where such body applies for, and is granted an extension of time by the Commissioner, within six months from November 1, 1974. "

Section 11 (1) of the Ceiling on Housing Property Law No. 1 of 1973 provided inter-alia as follows;

> " (1) Any house owned by any person in excess of the permitted number of houses which has not been disposed of within a period of twelve months of the date of commencement of this Law shall on the termination of such period vest in the Commissioner:
>
> Provided however, that where the Commissioner, on application made to him by the owner of the house, is satisfied that the failure to dispose of the house was due to circumstances beyond the control of the owner, the Commissioner may, by Notification published in the Gazette, defer the vesting of the house for a further period not exceeding twelve months. "

The said section was subsequently amended by the Ceiling on Housing Property (Amendment) Law No. 34 of 1974. The said amendment states;

> " (1) In subsection (1) of that section, by the substitution, for the words "a period of twelve months from the date of commencement of this Law", of the words "the period within which such person may dispose of such house in accordance with the provisions of section 10. "

Section 20 of the Ceiling on Housing Property (Amendment) Law No. 34 of 1974 states as follows;

> " The provisions of this Law other than the provisions of section 3, 12, 16, 17 and 18 thereof shall be deemed for all purposes to have come into force and effect on the date of commencement of the principal enactment. "

Section 6 (3) of the Interpretation Ordinance No. 21 of 1901 provides as follows;

> " Whenever any written law repeals either in whole or part a former written law, such repeal shall not, in the absence of any express provision to that effect, affect or be deemed to have affected –
>
> (a) the past operation of or anything duly done or suffered under the repealed written law;
>
> (b) any offence committed, any right, liberty, or penalty acquired or incurred under the repealed written law;
>
> (c) any action, proceeding, or thing pending or incompleted when the repealing written law comes into operation, but every such action, proceeding, or thing may be carried on and completed as if there had been no such repeal. "

As stated above the Commissioner granted an extension of time to dispose of the house under reference until 13th July, 1974 under section 11 (1) of the said Law. Thereafter, once again the second extension was granted to dispose of the said house until 13th January, 1975. The decisions of the Commissioner granting the said extensions of time were published in Gazettes bearing No. 94/5 of 17th January, 1974 and bearing No. 119/10 of 12th July, 1974. The said amendments to sections 10 and 11 made by Amendment Law No. 34 of 1974 was certified by the Speaker on the 8th October, 1974.

Further, Mrs. Rajapakse has acquired a right to dispose of the property in terms of the extensions given to her by the Commissioner under section 11 of the Law and the said right will continue notwithstanding the amendment made to the said Law by (Amendment) Law No. 34 of 1974, in

terms of section 6 (3) of the Interpretation Ordinance No. 21 of 1901 as the said Amendment Law did not have any express provision to repeal any right existing when the repealing law came into operation. Thus, I'm of the opinion that the said amendments made to section 10 and 11 of the Law have no application to the extensions given to dispose of the said house as the decision to grant the first and second extension of time had been taken prior to effecting the said amendments to sections 10 and 11 of the said Law. Therefore, I hold that the decision contained in the said letter dated 8th May, 1974 is a nullity and has no force or effect in law.

Now I will consider the following question of law that needs to be determined in this appeal;

" Are the transferees necessary for the determination of the legality of any transaction done in order to evade the liability under the Ceiling on Housing Property Law ? "

The Appellant's father has presented his case before the Commissioner on the basis that the sale of the two houses under reference are fraudulent transactions carried out to circumvent the applicability of Ceiling on Housing Property Law to excess houses and the houses were vested in the Commissioner by operation of law because there is no disposal under section 10 of the said Law.

As stated above Mrs. Rajapakse had sold the said premises bearing assessment No. 27/1 to the 1st Respondent and also the premises bearing assessment No. 27 1/1 tenanted by Mrs. Roshan Peiris had been sold to one N.H.S. Gunaratne.

Whilst the Appellant submitted that it is not necessary to hear the new owners of the houses before making a vesting order under section 17 of the said Law, the said Respondent submitted that the owners should have been given a hearing by the Commissioner before vesting the house they purchased from Mrs. Rajapakse as it affected his property rights and they were necessary parties to the inquiry before the Commissioner. Both parties made this submission based on the principle of natural Justice. Hence, it is necessary to consider the applicability of the said principle to the inquiry held by the Commissioner.

Principles of Natural Justice

As stated above at the inquiry the Counsel for Mrs. Rajapakse requested the Commissioner to notice the new buyers of the houses to enable them to participate at the inquiry. However, the Commissioner made the vesting order without giving a hearing to the 1st Respondent and Mr. N.H.S. Gunaratne, the purchaser of the house No. 27 1/1.

Principles of natural justice are applicable to every tribunal or body of persons vested with authority to adjudicate upon matters involving rights of individuals. It is likewise applicable to

the exercise of judicial powers too. Every judicial and quasi – judicial act is subject to the procedure required by natural justice. The breach of any one of the said rules would violate the principles of natural justice. In the case of *Ridge v. Baldwin* (1964) A.C. 40 Lord Denning held that a breach of the principles of natural justice renders the decision voidable and not null and void ab initio.

An administrative official or tribunal exercising a quasi – judicial power is bound to comply with the principles of natural justice. i.e. to comply with the rules of *audi altera partem* and *nemo judex in causa sua.* A quasi- judicial decision may involve finding of facts and it affects the rights of a person. Sometimes such decisions involve matters of law and facts or even purely matters of law.

In *Russell v. Duke of Norfolk* (1949) 1 All E.R. 109 Tucker L.J. observed that one essential requirement in regard to the exercise of judicial and quasi – judicial powers is that the person concerned should have a reasonable opportunity of presenting his case.

I am of the opinion that where the power is conferred in an administrative body or tribunal which exercises power in making decisions which affect the rights of persons, such body or tribunal should act according to the principles of natural justice except in cases where such right is excluded, either by express words or by necessary implication, by the legislature.

Lord Diplock in the case of *O'Reilly v. Mackman* (1983) 2 AC 237 at 276 held that the right of a man to be given a fair opportunity of hearing what is alleged against him and of presenting his own case is so fundamental to any civilized legal system that it is to be presumed that Parliament intended that a failure to observe it should render null and void any decision reached in breach of this requirement.

A tribunal exercising quasi judicial functions is not bound to adopt a particular procedure in the absence of statutory provision. In some situations the tribunals have to act within certain limits. However, it needs to observe certain minimum standards of natural justice and fairness when discharging its functions.

The need to follow the principles of natural justice is an accepted norm in Sri Lankan courts and tribunals as well as in the world over for several decades. I am of the opinion that the need to follow principles of natural justice has now become part of the Sri Lankan law. Hence, in the absence of special provisions as to how the court or tribunal is to proceed, the law requires that the principles of natural justice to be followed.

A tribunal must do its best to act justly and to reach just ends by just means. It must give the parties notice of what was charged against them and allow them to make representations in answer. A fair opportunity should be given to a party to correct or contradict any relevant

statement made to his prejudice. The party against whom the charge is made, after he has notice of the charges, is entitled to be heard.

Whether an oral hearing is necessary or desirable depends on the relevant laws and rules or procedures which the inquiry is held, the circumstances, the nature of the right infringed, the occasion for the exercise of authority by the tribunal and the effect of the decision on a person.

The question whether the requirements of natural justice have been met by the procedure adopted in any given case depends to a greater extent on the facts and circumstances of the case in point. Tucker L.J. held in the case of *Russell v. Duke of Norfolk* (1949) 1 All E.R. 109 "There are no words which are of universal application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject matter that is being dealt with, and so forth.

In the case of *AG v. Ryan* (1980) AC 718 Lord Diplock held that the Minister was a person having legal authority to determine a question affecting the rights of individuals. This being so it is a necessary implication that he is required to observe the principles of natural justice when exercising that authority; and if he fails to do so, his purported decision is a nullity.

Commissioner ought to have followed the principles of natural justice

The Commissioner is performing quasi – judicial functions under the said Law. However, he failed to give a hearing to the new owners of the houses prior to making the order in vesting the houses under reference which affected the rights of the said new owners. The failure of the Commissioner to afford the 1st Respondent an opportunity of showing cause as to why the house should not be vested in the Commissioner violates the principles of natural justice. Further, the inquiry before the Commissioner is inquisitorial proceedings and, as such, the burden is on the Commissioner to conduct the inquiry. Further, in the absence of laid down procedure in the said Law the inquiry should be conducted according to the principles of natural justice.

Thus, the Commissioner's order is in violation of the principles of Natural Justice which require that a party such as the 1st Respondent should have been afforded an opportunity of being heard before any decision affecting his rights was made by the Commissioner. Any decision given in breach of the rules of natural justice is null and void and has no force in law.

The need to give reasons for a decision

There is an accepted rule that reasons should be given for decisions, based on the principle of fairness which permeates administrative law, subject only to specific exceptions to be identified depending on the case.

Unless the reasoning behind the decision is given, a person is unable to know whether it is lawful or not, and thus he is deprived of the protection of the law. A right to know the reasons is therefore an indispensable part of the system of judicial review.

The Commissioner did not file objections in the writ application. Hence, the Court of Appeal held *" At this point of this judgment I have to observe that the Hon. Attorney-General though appeared and represented 7 and 7A & 9A Respondents (the Commissioner of National Housing and the relevant subject Minister) did not file objections on their behalf, may be for good reasons. "*

The Commissioner did not furnish any material to defend the allegation made against him for the violation of the principles of natural justice. Thus, it appears that the Commissioner did not have an explanation to offer in this regard.

Whether a fair hearing would make no difference

Under section 39 of the Ceiling on Housing Property Law any person aggrieved by any decision or determination made by the Commissioner under the Law has a right of appeal to the Board of Review.

The learned President's Counsel for the Appellant submitted that the Board of Review not only had given a hearing to all the parties concerned including the 1st Respondent, but also allowed the parties to submit and produce documents as fresh evidence without even considering the strict limitations of the law in relation to the same. Therefore, there is no violation of the principles of Natural Justice.

Section 39 of the Law permits the Board of Review to review the decisions or determinations made by the Commissioner. It functions as an appellate body. However, the Board of Review cannot function as a substitute to the Commissioner.

Administrative Law, 10th Edition by William Wade and Christopher Forsyth at page 422 states;

" If the principles of natural justice are violated in respect of any decision it is, indeed, immaterial whether the same decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision. "

I am of the opinion that if the Commissioner violates the principles of natural justice, the Board of Review cannot rectify the said error by granting the parties a hearing that was deprived by the Commissioner. In fact a decision which is null and void cannot be resurrected by an appellate body.

Hence, I hold that the Board of Review being the appellate body cannot cure the defect of a failure on the part of the Commissioner to follow the principles of natural justice.

The right of a tenant to purchase the house

Section 9 read with section 17 of the said law provides for the tenants to purchase the excess houses.

As stated above under the Ceiling on Housing Property Law the house under reference was admittedly a surplus house. A request was made by the original owner Mrs. Rajapakse to the Commissioner of National Housing for an extension of time to dispose of the house. As a result extensions of time till 13.1.75 were granted by the Commissioner. The sale was carried out within the said extended period.

Admittedly, Mrs. Rajapakse had offered the house to late Mr. R. Wijeratne, the then tenant who declined the offer. The Appellant's position was that the house was offered for a sum of Rs. 125,000/- and it was excessive. If the sale price was high it was possible for a tenant to request the Commissioner to refer the matter to the Board of Review for the determination of the payable price under the said Law.

In terms of section 9 a tenant who wishes to purchase the house that he is occupying should make a request to the Commissioner within four months from 13th January, 1973. There is no provision in the Law to grant an extended time to a tenant to make an application to purchase a house. Thus, I am of the opinion that the compliance of section 9 is mandatory and the failure to comply with the said section wipes out the rights of a tenant to make an application to purchase the house occupied by him.

This view was expressed in the case of *Desmond de Perera and Others Vs. Karunaratne, Commissioner for National Housing* (1997) 1 SLR 148. In this case it was held that section 9 creates the opportunity for the tenant to opt to purchase the house he lives in. So the section categorically requires him to do only one single thing - namely, to apply to the Commissioner for purchase of a house. This he must do within the stipulated period of four months from the date of commencement of the law – which was 13.1.73. The language suggests a clear mandatory provision.

Thus, I am also of the opinion that the Commissioner has no power or authority to entertain any application made to purchase a house by a tenant who did not make an application to purchase the house in compliance with section 9 of the Law. Therefore, the decision made by the Commissioner to vest the house based on a belated application is ab initio void and a nullity as the Commissioner acted without power. Thus, the said decision of the Commissioner dated 16.09.1982 which is under reference is ab initio void and a nullity. Hence, there was no valid order made by the Commissioner to be considered by the Board of Review under section 39 of the said Law and, thus, the matter should have ended there.

The questions of law on which special leave was granted are answered as follows:-

(i) Are the transferees necessary for the determination of the legality of any transaction done in order to evade the liability under the Ceiling on Housing Property Law?

At the time the Commissioner held the inquiry the house under reference was transferred to the 1st Respondent. The decision of the Commissioner resulted in the said transferee losing his ownership to the said house. Thus, it is imperative to give a hearing to the transferee prior to making any order which affects his rights. In the circumstances, the failure to give a hearing to the transferee had resulted in breach of the principles of natural justice and, the decision of the Commissioner to vest the said house is null and void.

(ii) If so, has His Lordship of the Court of Appeal erred in law in holding that the orders made by the Ceiling on Housing Property Board of Review has been made breaching the rules of Natural Justice?

The failure to give a hearing to the transferee by the Commissioner resulted in a breach of the principles of natural justice.

(iii) Whether the Commissioner of National Housing has acted illegally in giving further time after the lapse of the time period specified in the statute to make the declaration of excess houses?

No, if a male spouse failed to comply with the time frame given in the Law to furnish the declaration, a female spouse is entitled to furnish a declaration in respect of her assets to the Commissioner within a reasonable period and the Commissioner has the discretion to accept such declarations, provided he is satisfied with the reasons given for the delay in submitting the declaration.

Thus, I hold that the order of the Commissioner of National Housing dated 16.09.1982 and Order dated 30.01.1988 of the Board of Review which affirmed the said Order of the Commissioner of National Housing are not in accordance with the said Law. In the circumstances, I affirm the judgment of the Court of Appeal dated 11.01.2012 which is impugned in this appeal and dismiss the appeal without costs.

Judge of the Supreme Court

K. Sripavan, CJ

I agree

Chief Justice

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 with Special Leave to Appeal granted by Supreme Court under Section 5C (i) of the High Court of the Provinces (Special Provinces) Act No. 19 of 1990 as amended by Act No. 54 of 2006.

S.C. Appeal No. 44/2012

SC.(HC) CALA Application No. 68/11
WP/HCCA/Mt./36/04(F)
DC. Moratuwa No. 335/L

Padmal Ariyasiri Mendis,
No.29, Moratumulla Road South,
Moratuwa.

Plaintiff

Vs.

Vijith Abraham de Silva,
No. 13, Peduru Mawatha,
Moratumulla, Moratuwa.

And

Vijith Abraham de Silva,
No. 13, Peduru Mawatha,
Moratumulla, Moratuwa

Defendant-Appellant

Vs.

Padmal Ariyasiri Mendis,
No.29, Moratumulla Road South,
Moratuwa.

Plaintiff-Respondent

And Now Between

Vijith Abraham de Silva,
No. 13, Peduru Mawatha,
Moratumulla, Moratuwa

Defendant-Appellant-Petitioner-Appellant

Vs.

Padmal Ariyasiri Mendis, **(Deceased)**
No.610B, Halgahadeniya Road,
Gothatuwa.

Plaintiff - Respondent Respondent -Respondent

Sarukkali Patabedige Claris de Silva,
of No. 610B, Halgahadeniya Road,
Gothatuwa.

Substituted Plaintiff-Respondent-Respondent- Respondent

* * * * *

BEFORE : **Eva Wanasundera, PC. J**

Buwaneka Aluwihare, PC.J. &

Upaly Abeyrathne, J.

COUNSEL : Faisz Musthapha, PC. with Hemasiri Withanachchi and Ashiq Hassim for the Defendant-Appellant-Petitioner-Appellant.

Ranjan Goonaratne with Sampath Perera and Rasika Dissanayake for the Plaintiff-Respondent-Respondent-Respondent.

ARGUED ON : **21.09.2015**

DECIDED ON : **14.12.2015**

* * * * * * *

Eva Wanasundera, PC.J.

This Court granted Leave to Appeal in this matter on 22.02.2012 on 10 questions of law. They are as follows:-

1. Did the Provincial High Court Civil Appeal err holding that the Deed of Gift bearing No. 1551 dated 09.05.1990 marked P2, was void?

2. Have the Honourable High Court Judges failed to properly consider whether the said Power of Attorney bearing No. 376 authorized, permitted and empowered the said Lindamulage Srimathie Miriam Silva to gift the premises which was the subject matter of the action?

3. Did the Honourable High Court Judges misdirect themselves in failing to consider that in action bearing No. 704/L of the District Court of Panadura, the said Merlyn Sylvia Fernando, (the Petitioner's vendor) fraudulently, wrongfully and unlawfully failed and neglect to warrant and defend the title acquired by her and conveyed to the Petitioner?

4. Did the Honourable High Court Judges err in holding that the judgment and decree entered in the said case bearing No. 704/L operated as res judicata against the Petitioner in as much as the said judgment and decree are vitiated by fraud?

5. Did the Learned District Judge and the Learned Judges of the High Court misdirect themselves in failing to consider that the Respondent's claim to have the said deed bearing No. 976 dated 24.09.1991 and produced marked P4 was not maintainable in as much as the action has been instituted nine years after the execution of the said deed and as such was prescribed?

6. Did the Learned Judges of the High Court err in failing to consider that the Respondent had acquiesced in, and/or ratified, the execution of the said deed

of gift and the transfer to the Petitioner and as such was estopped from seeking the reliefs prayed for in the plaint?

7. In any event, did the Learned Judges of the High Court err in not granting the Petitioner adequate compensation for the improvements effected by him?

8. Did the Honourable High Court Judges failed to consider in the circumstances of this case that the Respondent had held out that the said Srimathie Mirium Silva had authority to gift the premises in suit?

9. Has the Court dealt with the fact that the Defendant is a bona fide purchaser?

10. Has the issue of prescription been pleaded?

The subject matter is a land within the Municipal Council limits of Moratuwa of an extent of two roods and 33 perches (A0 R2 P33) with a house thereon and a cultivation of 137 teak trees. The Plaintiff-Respondent-Respondent (hereinafter referred to as the 'Plaintiff'') who is now deceased was the owner of this land and premises. He went abroad on employment giving a general Power of Attorney to his wife Miriam Srimathie Silva in 1984. Incidentally he had two children by this marriage. He visited home from time to time and returned to the island on 16.08.1990 to stay. While he was away, Mirium Silva used the Power of Attorney and gifted the land to Miriam Silva's mother Sylvia Fernando. When the Plaintiff came to know about this gift of his land to the mother-in-law, he questioned his wife as to why she did so when they had two children to receive their properties. The Plaintiff then filed action No. 704/L in the District Court of Panadura on 27.09.1991 against his wife and mother-in-law seeking a declaration of the said deed of gift No. 1551 to be null and void. By this time the husband and wife were estranged due to the wife's action of gifting this property to the mother-in-law. In the meantime the mother-in-law Sylvia Fernando sold the said property to the Defendant-Appellant-Petitioner-Appellant (hereinafter referred to as the Defendant) Vijith Abraham de Silva, who was known to the Plaintiff also as a timber merchant. The said sale was by deed No. 976 dated 24.09.1991 which was only 3 days before the District Court action No. 704/L was filed by the husband, Plaintiff. In deed No. 976 the vendor was Merlyn Sylvia Fernando and as one witness, the wife of the Plaintiff, Miriam

Srimathie Silva had signed. The Plaintiff claimed that the teak trees that he had planted, worth over 10 ½ lakhs of rupees was about to be felled by the Defendant and the house thereon had been already demolished by the Defendant. The Defendant claimed that he planted teak seedlings/or saplings which had cost him Rs.40,000/- and also claimed the cost of improvements done to the property.

The first question to be decided in this case **is whether the Plaintiff's wife Mirium Srimathie Silva acted within her powers in having gifted the property to her mother, under the Power of Attorney given to her by her husband, the Plaintiff.** The Plaintiff argued that she had acted beyond the powers given in terms of the Power of Attorney. The Defendant argued that she had acted within the terms of the Power of Attorney and the general words appearing in the Power of Attorney conferred unlimited authority to manage all the affairs of the Plaintiff husband while he was away.

The Plaintiff had given evidence in the case. He had prayed for deed No. 1551 to be declared null and void, for ejectment of the Defendant and those under him and to recover possession of the same.

The Plaintiff gave a general Power of Attorney to his wife Miriam Srimathie Silva. It reads that she is empowered **"to sell and dispose of or to mortgage or hypothecate or to demise and lease ……. convey by way of exchange** …… ". There is no empowerment given "to gift the property". However she gifted the property to her mother by way of a deed of gift dated 09.05.1990 and numbered as 1551. The Defendant argued that the Power of Attorney No. 376 dated 12.07.1984 states that the principal is "desirous of appointing a fit and proper person as my Attorney to manage and transact all my business and affairs in the said Sri Lanka" and therefore gifting the property comes under "all my business and affairs". It was argued that then the Power of Attorney holder is entitled to act under the general clause which reads-

> "Generally to do execute and perform all such further and other acts, deeds, matters and thing whatsoever which my attorney shall think necessary or proper to be done in and about or concerning the business, estates, lands, houses, debts or affairs as fully and effectually to all intents and purposes as I might or could do if I am personally present and did the same in my proper person it being

my intend and desire that all matters and things respecting the same shall be under the full management, control and direction of my said attorney ".

The Defendant's position was that the specific powers conferred in the clause "to sell and dispose of ……" does not detract from the general powers conferred by this clause. In short the Defendant argued that the general clause over powers the specific clause.

Court observes that it **is settled law in the country that the Power of Attorney should be construed strictly.** In ***Adaichappa Vs. Cook 31 NLR 385,*** it was held that "The Power of Attorney should be construed per se and not with reference to the other powers of Attorney contained in the instrument, namely the Power of Attorney."

In ***Marshal Vs. Seneviratne 36 NLR 369,*** also it was held that "the authority given by the Power of Attorney is an express authority to be found not by implication but of the terms of power appointing the Attorney. Once a person is aware that the man is dealing with acts under a power of attorney, it is at his peril not to know the extent and limits of that power."

In ***Bastianpillai Vs. Anna Fernando 54 NLR 113*** it was held that "a Power of Attorney must be construed strictly and that the special terms in the recitals controlled the general words in the operative part".

Bowstead on Agency 1st Edition Article 36 at page 59 states that "general words do not confer general powers, but are limited to the purpose for which the authority is given, and are construed as enlarging special powers when necessary, and only when necessary, for that purpose."

In the case of ***Harper Vs. Godsell (1870) LR 5QB 422 at 427***, Blackburn,J. said "the special terms of the 1st part of the power prevent the general words from having an unrestricted general effect. The meaning of the general words is cut down by the context in accordance with the ordinary rule of ejusdem generis"

In all these cases it was held that the specific powers conferred should be construed in the light of the intention of the principal who grants the power of attorney.

I am firmly of the view that the general words couched into clauses in this particular general power of attorney cannot in anyway be construed to disturb the specific clauses relevant to 'property' contained therein. The intention of the principal has to be gathered from the clauses in any Power of Attorney whether it is a special Power of Attorney or whether it is a general Power of Attorney. The intention of the husband could never have been to grant authority for the wife to donate or gift his properties to anyone else leave alone his mother-in-law.

Having gifted the property to the mother of the Power of Attorney holder, when the husband came to know the same and questioned her as to why she gifted, what was the next step taken by the Power of Attorney holder? She and her mother got together and sold the land to the Defendant soon afterwards. The mother signed as vendor and the daughter signed as witness to the deed of transfer in favour of the Defendant. The bad intention of the Power of Attorney holder can be seen by her actions after she acted under the Power of Attorney. I am of the opinion that one has to view the intention of not only the grantor of the Power of Attorney but also the intention of the grantee the holder of the Power of Attorney. Any person gives a Power of Attorney to another having full faith and trust on that person. The Plaintiff trusted his wife. He could never have dreamt of the wife gifting his hard –earned properties to anybody of his wife's choice. Supposing the wife sold the land to her mother, it would have been different because the Power of Attorney specifically mentions that she can sell, because the money she receives from the sale should go to the husband the grantor of the Power of Attorney**. It cannot be surmised that the intention of any Power of Attorney grantor is to give authority to "Gift" the properties to any person**. That is the very reason that such a word is not included in a general Power of Attorney. No sensible person would ever grant a Power of Attorney to anybody if the general clauses are interpreted to give authority to gift the properties.

The intention of the grantor can be gathered from the specific words used in the Power of Attorney. The intention of the grantee can be gathered by the actions of the grantee before acting on the Power of Attorney and after acting on the Power of Attorney. In this case it can be seen that Miriam Srimathie Silva's intention was to get the benefits

of the husband ‘s property for herself and her mother. The Power of Attorney holder has willfully acted wrongly in this matter, taking undue advantage of the fact that her husband had given her the power of attorney in trust.

Furthermore, I would like to consider other aspects of this matter since it would serve to answer the questions of law which were allowed at the inception of this case before this court.

The Plaintiff had filed action in the District Court of Panadura under case No. 704/L, long before he filed this case, i.e as soon as he came to know of this deed of gift giving his own property to his mother in law by his wife , using the power of attorney given by him to his wife. He had prayed that the deed of gift bearing No. 1551 dated 09.05.1990 be declared null and void. He made his wife Miriam and her mother Sylvia parties to that action. They filed proxy as the first and second defendants in that case and filed answer as well on 23.11.1992. Issues were also raised but on the first date of the trial, the Attorney at Law for them submitted to court that she had no instructions. The District Judge however put off the case for trial for a second date and even on that date, the lawyer submitted that she had no instructions from the defendants. Then it was fixed for exparte trial. Exparte trial was taken up on another date and court granted relief as prayed for by the Plaintiff and decreed that deed 1551 was null and void on 26.03.1997.

Counsel for the Defendant Appellant Petitioner in this case argued that case number 704/L was a collusive action and the Vendor of the Petitioner Sylvia Fernando neglected to defend the title acquired by her and that it amounted to collusive action with the Plaintiff and it was fraud. Proceedings in 704/L as aforesaid confirm that it was not fraud or collusive action but that the mother and daughter gave up contesting only at the trial stage. The mother and daughter had rushed to sell the said land to the Defendant at about the same time the case was filed, thereby passed title to another and got some money.

At the commencement of this case before the District Court on 23.05.2002, it was admitted by the Defendant that the writ of execution to eject the persons on the land was rejected by court on 15.12.2001 on the ground that the proper parties were not

named in that application for writ. Therefore, the fact that there was a decree entered in 704/L to the effect that deed 1551 was null and void remains in tact. As such, it stands in the way of any claims by the Defendant in any court action he contests with regard to the land he has bought. I am of the view that it operates as res judicata against the Defendant Petitioner with regard to paper title to the land in question, even though he was not a party to that action since title does not pass to anyone beyond the owner who owned the land prior to the deed which was declared null and void. It is apparent that the Defendant Petitioner was in possession from 24.09.1991 but the moment that deed number 1551 was declared null and void on 26.03.1997 in case 704/L, the Defendant Petitioner looses his source of title. Hence, from 26.03.1997 the Defendant Petitioner had only occupied the land without any title.

The District Court action pertinent to this Appeal was filed on 13.06.2001 under number 335/L and by that time the Defendant knew that he had no paper title to stay on the land even though the Plaintiff had failed in taking out writ of execution to evict him. Nevertheless, the Defendant had failed to specifically plead prescription and/or to raise a specific issue on prescription in the District Court. The District Judge had analysed the situation well and had rejected the argument on prescription.

The present District Court case number 335/L is a re vindication action praying for a declaration that the Plaintiff is the owner of the property and for ejectment of the Defendant from the land and premises. The Plaintiff proved his title with good evidence and got relief as prayed for, against the Defendant. The Defendant had failed to bring good evidence to show that he was a bona fide purchaser and that he had improved the land as he claimed in his answer. The Civil Appellate High Court affirmed the judgment of the District Court.

In the said circumstances, I hold that the deed No. 1551 is void *ab-initio* and therefore the title does not pass from the Plaintiff to any other person. Therefore deed which was executed thereafter, i.e. deed No. 976 is also void *ab-initio.* The Defendant does not get any title to the land. I fail to see that there was evidence to prove that the Defendant was a bona fide purchaser either. The Defendant was granted Rs.40,000/- by the District Judge, on evidence proven as the cost of baby teak plants planted by him on

the said land, and it was affirmed by the Civil Appellate High Court, as nothing more was proved by him with any evidence before the District Court.

Accordingly, I answer all the questions of law enumerated at the beginning in favour of the Plaintiff-Respondent-Respondent. I affirm the judgment of the Civil Appellate High Court and the District Court and hold further that the Substituted Plaintiff-Respondent-Respondent-Respondent is now entitled to receive the benefits of the said judgments delivered in favour of the Plaintiff- Respondent- Respondent.

This appeal is dismissed with costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Upaly Abeyrathne, J.

I agree.

Judge of the Supreme Court

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

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

S.C. Appeal No. 46/2011

S.C. (Spl) LA Application

No. 91/2010

C.A. (Writ) Application

No. 1682/2006

V. I. D. J. Perera

673 D, Kandewatta Road

Battaramulla

Petitioner

Vs.

1. University of Colombo
   Kumaratunge Munidasa Mawatha
   Colombo 03

2. Prof. Tilak Hettiarachchy, Vice Chancellor & Chairman of the Council of the University of Colombo.
   Kumaratunge Munidasa
   Mawatha, Colombo 03

3. Mr. W. N. Wilson

4. Prof. Lakshman Dissanayake

5. Prof. R. L. C. Wijesundara

6.Mr. N. Selvakumaran

7. Prof. Dulita Mendis

8.Dr. P. S. M. Gunaratne

9. Prof. S. M. P. Senanayake

10. Prof. Lalitha Mendis

11. Prof. H. D. Gunawardane

12. Mrs. Malani Peiris

13. Mr. Nalin Attygale

14. Mr. Rajan Asirwarthan

15. Dr. Tressie Leitan

16. Mrs. Ramani Amarasuriya

17. Dr. N. R. de Silva

18. Mrs. A. M. M. Hussein

19. Dr. Y. C. H. Yakandawala

20. Dr. Kingsley Wickramasuriya

21. Mr. K. Kanag-lshwaran P.C.

22. Prof. Raja Gunawardena
All Members of the Council of the
University of Colombo Kumaratunge
Munidasa Mawatha, Colombo 03

23. Prof. Hirimburegama, Director, Institute of Human Resource Advancement (formerly known as the 'Institute of Workers' Education') University of Colombo
257, Bauddhaloka Mawatha
Colombo 07

24. University Services Appeals Board
20, Ward Place, Colombo 07

25. Justice G. W. Edirisuriya
Chairman University Services Appeals
Board, 20, Ward Place, Colombo 07

26. Mr. E. M. G. Edirisinghe, Vice Chairman
University Services Appeals Board
20. Ward Place, Colombo 07

27. Mr. Anton Alfred, Member,
University Services Appeals Board
20,Ward Place, Colombo 07

Respondents

AND NOW BETWEEN

University of Colombo Kumaratunge
Munidasa Mawatha, Colombo 03.

1st Respondent- Petitioner

Vs.

1. V. I. D. J. Perera
673 D, Kandewatta Road
Battaramulla

Petitioner - Respondent

2. Prof. Tilak Hettiarachchy
Vice Chancellor & Chairman of the
Council of the University of Colombo
Kumaratunge Munidasa Mawatha
Colombo 03

3. Mr. W. N. Wilson

4. Prof. Lakshman Dissanayake

5. Prof. R. L. C. Wijesundara

6. Mr. N. Selvakumaran

7. Prof. Dulita Mendis

8. Dr. P. S. M. Gunaratne

9. Prof. S. M. P. Senanayake

10. Prof. Lalitha Mendis

11. Prof. H. D. Gunawardane

12. Mrs. Malani Peiris

13. Mr. Nalin Attygale

14. Mr. Rajan Asirwarthan

15. Dr. Tressie Leitan

16. Mrs. Ramani Amarasuriya

17. Dr. N. R. de Silva

18. Mrs. A. M M. Hussein

19. Dr. Y. C. H. Yakandawala

20. Dr. Kingsley VVickramasuriya

21. Mr. K. Kanag-lshwaran P.C.

22. Prof. Raja Gunawardena

All Members of the Council of the University of Colombo Kumaratunge Munidasa Mawatha Colombo 03

23. Prof. Hirimburegama, Director,

Institute of Human Resource Advancement (formerly known as the 'Institute of Workers' Education') University of Colombo, 257, Bauddhaloka Mawatha Colombo 07

24. University Services Appeals Board 20, Ward Place, Colombo 07

25. Justice G. W. Edirisuriya Chairman
University Services Appeals Board 20,
Ward Place, Colombo.07

26. Mr. E. M. G. Edirisinghe
Vice Chairman University Service Appeals
Boards 20, Ward Place, Colombo 07.

27. Mr. Anton Alferd
Member, University Service Appeals
Boards
20, Ward Place, Colombo 07.

Respondents-Respondents

BEFORE : Chandra Ekanayake J
Priyasath Dep PC. J
B. Aluwihare PC. J

Counsel: M.A. Sumanthiran with Riad Ameen
for the 1st Respondent-Petitioner

Senani Dayarathne with Eshanthi
Mendis for the Petitioner-Respondent

ARGUED ON: 02.09. 2014

DECIDED ON: 07.10. 2015

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ALUWIHARE PC. J

This matter relates to an application for Special Leave by the Petitioner–Respondent-Appellant (hereinafter referred to as the Appellant) challenging the decision of the Court of Appeal of the order dated 26 April 2011 quashing the decision of the University Services Appeals board (hereinafter referred to as USAB) dated 2nd May 2006.

Having heard the learned Counsel in support of this application as well as the learned Counsel for the Petitioner- Respondent (hereinafter referred to as the Respondent) Special Leave to Appeal was granted by this Court on 29.04.2011 on the questions of law enumerated in Paragraph 22 (a) to (g) of the Petition (of the Appellent) dated 04.06.2010 which are reproduced below.

a) Having concluded that the Petitioner-Respondent left the Island pending disciplinary proceedings without obtaining the concurrence of the disciplinary authority, contrary to Paragraph 20:1 of Chapter XXII of the Establishment Code, did the Court of Appeal err and/or misdirect itself in law in construing the requirement in Paragraph 20:1 as mere technicality and did not involve a consideration of the merits?
b) Did the Court of Appeal err and/or misdirect itself in law by failing to appreciate that the reason for not granting approval for the application for sabbatical leave for the second time unlike in the previous instance was because disciplinary proceedings were pending against the Petitioner-Respondent and the Council of the Petitioner-University was carefully deliberating upon the imposition of an appropriate punishment?

c) Did the Court of Appeal err and/or misdirect itself in law by condoning the conduct of the Petitioner-Respondent in leaving the Island without the aforesaid concurrence on the ground that the Petitioner-University had not responded to the application for sabbatical leave at a time when it was deliberating upon the appropriate punishment that should be imposed on the Petitioner-Respondent?

d) Did the Court of Appeal err/or misdirect itself in law by failing to appreciate that condoning the conduct of an employee who submits an application for sabbatical leave and leaves the Island without receiving approval would set an undesirable precedent in the public service

whereby an employee could simply not report for duties after submitting his/her application for leave without awaiting approval for such leave?

e) Did the Court of Appeal err/or misdirect in law by concluding that the Petitioner-Respondent did not have the requisite *animus revertendi* to vacate his post when the Petitioner-Respondent left the Island in August 2004 without the concurrence of the Petitioner-University and intentionally remained overseas, even thereafter for several months notwithstanding a written communication by the Petitioner-University to the Petitioner-Respondent requesting him to report for duties?

f) Having decided to direct the Universities Appeals Board to go into the merits of the case of the Petitioner-Respondent, did the Court of Appeal err and/or misdirect itself in law by expressing opinions on the matters that the Court of Appeal regarded as being the merits of the case?

g) Did the Court of Appeal err and/or misdirect in law by the identification of several matters regarded as being the merits of the case that are not relevant for the determination by the Universities Services Appeals Board that would result in the Board acting *ultra vires* by taking irrelevant matters into consideration?

When this matter was supported for leave, the Learned Counsel for the Respondent raised two questions of law for the consideration of this court.

h) Given the findings set out in the judgment of the Court of Appeal dated 26.04.2010 has the Court of Appeal erred in not granting the relief sought by the Respondent in prayers 'C' and 'D' of the Petition dated 17.11.2006 filed in the Court of Appeal?

i) If the above issue is answered in the affirmative by this Court, whether the Respondent is entitled to get those reliefs from the Supreme Court?

In view of the two questions referred to above (i.e (h) and (i)) raised by the learned Counsel for the Respondent and accepted by the Court, learned Counsel for the Appellant suggested the following additional question of law.

j) Whether the Petitioner-Respondent without filing a proper Petition of Appeal against the Judgment of the Court of Appeal, is entitled in law to seek the relief set out in the two questions suggested.

I wish to deal with the facts at length in view of the two questions of law, namely (h) an (i) above raised by the Respondent and the fact that the principle of proportionality may have to be considered in the instant case.

Facts pertinent to this Appeal are as follows:

The Respondent, a senior lecturer grade 1 at the time, of the University of Colombo, applied for sabbatical leave on 05.07.2001 for a period of one year by his application dated 19.06.2001 marked as 'P9'. In the said application, sabbatical leave was requested by the Respondent on a staggered basis, in accordance with Clause 9 of the University Grants Commission Circular No.408 dated 20.10.1989 'P8'.

Sabbatical leave was applied for, for the purpose of engaging in comparative study on the *'Impact of Mechanization on Labour Relations in Sea Ports'* at the Ports of New Castle-United Kingdom, Colombo and Kashima-Japan. This was approved both by the relevant Ministry (Annexure 4 P10) and the then Vice Chancellor of the University by the letter of the Vice Chancellor dated 22nd June 2001 (Annexure 3 of P10). Consequently the Respondent departed to United Kingdom in July 2001 to commence his studies. After utilising two months of the approved sabbatical leave of twelve months, the Respondent returned to Sri Lanka in September 2001 and resumed duties in his substantive post at the University on 13.09.2001. In the midst of carrying out his duties as a lecturer, the Respondent asserts that he proceeded with the proposed second limb of his study at the Port of Colombo. During this period, disciplinary proceedings (For misconduct- not obeying the orders of his superiors) were held against the Respondent and as a result the Respondent was placed on compulsory leave with full pay by letter of the 2nd Respondent (Vice Chancellor of the Appellant University) dated 06.05.2003 (P13).

During the period of the disciplinary inquiry which dragged on for a period of 21 months, the Respondent was awarded a fellowship for post-graduate research under the 'Japan Foundation Fellowship Programme 2004-2005' for a period of one year(P20). The Respondent was required to confirm the acceptance or declination of the offer within 30 days. The Respondent, desirous of making use of the said Fellowship, which afforded him the opportunity to conduct a 22 month study in Japan, by letter dated 25.06.2004 ('P21') sought to combine the ten months sabbatical leave that had already been granted to him, but which he had not utilised with a further one year's sabbatical leave which he was entitled to, by virtue of having completed nearly 14 years' of service by that time.

However, there had not been any response or acknowledgement by the Appellant or the 2nd Respondent (V.C), regarding the aforesaid request made by the Respondent in spite of having sent two reminders dated 13.07.2004 (P22a) and 26.07.2004 (P22b), channelled through the Director of the Institute of Workers Education to the Appellant. In the absence of a response from the Appellant or any other authority under the Appellant, the Respondent left for Japan on 10.08.2004 on the sabbatical leave that the University had already granted him in 2001 which still remained unutilised. Although this may not have a direct bearing on the issues that are to be determined by this court, to appreciate the perspective in which the leave application of the Respondent was dealt with, the document "P25" is very instructive and is worthy of reference. Particularly so, considering the reason given for treating the Respondent as an employee who has vacated his post.

"P25" is a letter addressed to the 2nd Respondent (Vice Chancellor) by the deputy registrar of the Appellant University dealing with the issue of the Respondent leaving the island without obtaining the required approval. The Deputy Registrar acknowledges in P25 that the application for sabbatical leave (in fact the application for leave was for the utilisation of the balance instalment of the Respondent's sabbatical leave which had been granted by the former Vice Chancellor Dr.Savithri Goonesekara) was submitted by the Respondent on 25th of June 2004 and forwarded to the Appellant (University) by the Director of Institute of Worker Education on the 6th of July 2004. Deputy Registrar also acknowledges receipt of two reminders dated 13th and 27th July 2004 sent by the Respondent with regard to his application. The Deputy Registrar in the same letter refers to the failure on the part of the administration to place the Respondent's application for consideration. The application has only been placed before the Council on the 11th of August 2004, which is six weeks after the submission of the leave application. This is in spite of the letter P20 stating the fellowship commences on the 31st July 2004. It may be mentioned, that quite in contrast, when the Respondent obtained sabbatical leave by his letter dated 18th June 2001, the then Vice Chancellor Prof Savithri Goonesekara not only sought approval from the relevant ministry within 3 days (22-June 2001) but also made a specific request to the education authorities to have the leave approved without delay to enable the Respondent to proceed overseas on his sabbatical leave as scheduled. (Annexure 3 of P10). In the instant situation the Respondent asserts that there was no response either to his application for leave or to the reminders. In January 2005 however, which was almost six months later, he was requested to report back to work. The Respondent by "P27" had brought to the attention of the 2nd Respondent, that he had commenced his

research and had renewed his request for sabbatical leave up to mid-August to complete the research he has commenced.

The Vice Chancellor (2nd Respondent) having remained silent for nearly 10 months, by letter dated 5th April 2005 (P29) through the acting Vice Chancellor, called for an explanation from the Respondent for leaving the country without obtaining the necessary approval from the University, to which the Respondent replied by "P30" setting out the reasons and the circumstances under which he had to live abroad. Subsequently, by letter dated 19th –May-2005 (P31) the 2nd Respondent (V.C), has informed the Respondent that the Council of the Appellant University, which he chaired, has decided to treat the Respondent as having vacated his post with effect from 5th January 2005.

It is ironic that the decision of Inquiry Officer was made known the day following the Respondent's departure to Japan, i.e,11.08.2004. The Respondent was found guilty and the Council (of the Appellant) decided that he would not be considered for any administrative position for 3 years with the University as a punishment.

The Respondent was informed of this on 05.01.2005 and he was requested to report for duty at the Institute of Workers' Education (IWE) with immediate effect by the letter marked 'P26'. In response the Respondent by letter dated 19.01.2005 ('P27') explained the reasons for his departure and his readiness to report for duty by mid-August 2005. However, the Council of Appellant at its 365th meeting held on 11.05.2005 decided to treat the Respondent as having vacated the post and he was notified to that effect by the letter dated 19.05.2005.('P31').

Being aggrieved by the above decision of the Council of the 1st Appellant, Respondent appealed to the University Services Appeals Board (herein after referred to as USAB) by letter dated 10.06. 2005 ('P32'). The USAB dismissed the appeal by its order dated 02.05.2006 (Annexure to 'P37').

The Chairman USAB, without going into the merits of the matter, stated that he is interested in examining *"one crucial point which goes to the root of the appellant's case"* and appeared to have dismissed the Appeal of the Respondent, relying purely on Paragraph 20:1 of the Establishment Code of the University Grants Commission (UGC).

Paragraph 20:1 states thus;

"a person against whom disciplinary proceedings are pending or contemplated should not be granted permission to leave the Island without the concurrence of the disciplinary authority"

The Respondent then filed a writ application against the order of the USAB before the Court of Appeal and the Court of Appeal in exercising writ jurisdiction, quashed the order of the University Services Appeal Board (USAB) decision dated 2nd May 2006 (P37) by its order dated 26.04.2010 directing the USAB to go into the merits of the case and to make an appropriate order.

This appeal is against the said decision of the Court of Appeal.

The main issue that has to be decided is whether the Respondent acted contrary to the Paragraph 20:1 of the Establishment Code of the UGC, when he left the country without obtaining the concurrence of the disciplinary authority. This court is of the view that the act of the Respondent leaving the country ought not to be considered in isolation, but should be considered in the backdrop of the series of events that were referred to earlier which I wish to summerise here.

As far as the disciplinary action against the Respondent was concerned, the directive of the Council was to have the disciplinary inquiry against the Respondent concluded in 3 months but it dragged on for an inordinately long period of 13 months. The Report of the Inquiry Officer (P19) is dated 16th June 2004. The inquiry officer having considered the evidence placed before him, had made his findings regarding each of the charges preferred against the Respondent. Hence the disciplinary proceedings, technically, had been concluded by mid June. Thus, it would be reasonable to infer that the said report was available to the Appellant, at the time the Respondent informed Appellant of his intention to utilise his already approved sabbatical leave on 04.07.2001 (Annexure 4 of P10). This letter was followed by two reminders dated 13th and 27 July 2004 (P22 (a)) & (P22 (b)) which stand acknowledged by an officer of the Appellant. At the very least the Appellant and the 2nd Respondent (V.C) had a duty to consider the request of the Respondent.

The learned Counsel on behalf of the Appellant University, strenuously argued that the Court of Appeal erred in treating non-compliance on the part of the Respondent, a mere "technicality". The learned Counsel contended that the entire public service operates on a set of rules and regulations contained in the Establishment Code that governs numerous aspects of employment, including overseas leave. The learned Counsel stressed that these rules in the

Establishment Code cannot be treated as a mere technicality, but as having the force of written law, and has been considered as such in a number of decisions of this court. I am certainly in agreement with the submission made by the learned Counsel.

It was also submitted on behalf of the Appellant that the Court of Appeal erred by failing to consider that the Council of the Appellant was not in a position to consider the application submitted by the respondent, (seeking permission to utilise his sabbatical leave) as the Council was deliberating on an appropriate punishment that should be imposed on the Respondent in view of the report of the Inquiry Officer.

However the decision of the Respondent to leave the country, however, must be viewed in the backdrop of a number of factors I have referred to earlier.

Firstly, by 16 June 2004, technically, the disciplinary proceedings were over and the findings were tabled before the Council of the Appellant on 14 June 2004. This was one week after the respondent sought permission to make use of his balance sabbatical leave. The officials of the Appellant university admittedly did not respond to either the application or the reminders sent by the Respondent, who had to commence his research before 31st -07-2004, in terms of the grant. It appears that the officials of the Appellant university had either by design or by remise avoided responding to the communications by the Respondent. The manner in which the officials of the appellant had acted in this instance cannot be condoned by any measure. As to sabbatical leave this court in the case of *Prof. J.W. Wickramasinghe vs. The University of Sri Jayawardenapura, et al.* (2004) 1 SLR 321 held that, sabbatical leave which has already been granted, gives rise to a legitimate expectation that such leave can be fully availed of, notwithstanding an attempt by the relevant University to curtail or truncate the same.

Sec: 20:1 of the Chapter XXII of the Establishment Code of the University Grants Commission, which deals with the disciplinary procedure, casts a burden on the administration and not on the applicant.

Sec: 20:1 reads thus *"A person against whom disciplinary proceedings are pending or contemplated,* ***should not be granted permission to leave the island*** *without the concurrence of the Disciplinary Authority."* (emphasis added)

(1) It is clear from the above provision of the Establishment Code, a duty is cast on the officials who are vested with the authority to consider the leave application of an employee, to seek the concurrence of the disciplinary authority, when leave is sought by an employee. This certainly is not a case where the Respondent left the country, keeping the administration in the dark

(2) Here is an employee (the Respondent) whose sabbatical leave that had been approved on a split basis, as permitted by virtue of clause 9 the University Grants Commission circular number 408 dated 20. 10. 1989 was seeking to enjoy the balance period of his un utilised leave.

(3) The Appellant Council was put on notice that the disciplinary inquiry had been concluded and its findings had been placed before the said Council.

(4) There is no material before this court that the Council had taken steps to inform the respondent that the matter is being deliberated and for that reason he should refrain from leaving the Island.

(5) The Appellant Council dragged its feet for nearly 4 months to reach a decision with regard to the punishment that is to be imposed on the respondent (1R 14)

(6) The Court of Appeal correctly observed that the Respondent left with a Hobson's choice; when there was no response from the authorities with regard to either to his application for leave or the reminders thereof.

The USAB if it were to arrive at a just and rational decision, ought to have considered all the matters placed before it, prior to arriving at a decision.

I hold the Court of Appeal did not err with regard to the questions of law in paragraphs (a) to paragraph (d) and (f) referred to above.

The appellant also has raised the issue in paragraph (e) as to whether the Court of Appeal has misdirected itself in law by concluding that the Respondent did not have the *animus revertendi,* when he left the Island without obtaining the concurrence of the disciplinary authority and intentionally remaining overseas in spite of communications requesting him to return. Their Lordships of the Court of Appeal have considered the efforts taken by the Respondent to obtain a response from the Appellant. By the letter addressed to the Second Respondent (V.C) dated 19 -01- 2005 (P27) the Respondent has clearly expressed his desire to report back for duty in mid August 2005 and by a similar letter dated 18- 04 -2005 (P 30) the Respondent has stated that he would not have left the Island in the manner in which he did, had the Appellant duly informed him that the

2nd Respondent (V.C) cannot consider his the application in view of the pending disciplinary inquiry.

The conduct on the part of the Respondent clearly demonstrates that he had had no intention of abandoning his post and he had the *animus revertendi.* Thus, I am of the view that the Court of Appeal had not erred, with regard to the said issue as well.

Before I deal with the two questions of law raised by the Respondent, this court needs to answer the additional question of law raised by the appellant to the effect, whether the Respondent without filing a proper petition of appeal, is entitled in law to seek the relief set out in the additional questions suggested on behalf of the Respondent, i.e. issues (h) and (i)

It was argued on behalf of the appellant that the Respondent could have filed an application for special leave to appeal against the judgement of the Court of Appeal if the Respondent was aggrieved by their Lordships' judgement. The learned Counsel submitted that it is not open to the Respondent at this stage to seek additional relief which had not been granted by the Court of Appeal, in these proceedings. The attention of this court was drawn to the fact that the Rules of this court do not permit such a course of action either.

The contention of the learned Counsel on behalf of the Appellant was, that the application by the Respondent before the Court of Appeal was an application for a writ, consequent to a decision of the USAB, whereby the Court of Appeal was expected to perform a review function and not to exercise an appellate jurisdiction. It was further argued that the Court of Appeal in view of its role as a court of review could have only quashed the decision of the USAB and directed it to re-hear the matter. I have considered the decisions in the cases of *Julian vs. Sirisena Cooray* (1993) 1SLR 238 and *Perera vs. Fernando* (1999) 3 SLR 259 where the Supreme Court was not inclined to grant relief due to the absence of a cross appeal. In answering the question of law raised by the Appellant in paragraph (j), I hold that the Respondent is not entitled in law to seek the relief as set out in questions of law raised under paragraphs (h) and (I). Thus answering the said questions of law does not arise.

For the reasons set out above, I affirm the order of the Court of Appeal dated 26 - 10 -2010 and dismiss this appeal.

This Court observes that the Respondent has been out of employment with the Appellant University since 2005 which is more than 10 years.

In the interest of justice this court directs the 24th, 25th, 26th, and 27th Respondents or their successors to comply with the order of the Court of Appeal within three months from today.

The Respondent Petitioner is entitled to costs of Rs. 50,000

Appeal dismissed.

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 application for Special Leave to Appeal against the Judgment of the Court of Appeal dated 06.12.2010

Paudgalika Tha Kamhal Himiyange Sangamaya also known as The Private Tea Factory Owners Association
No.475 1/1, Nawala Road,
Rajagiriya.

Petitioner

S.C. Appeal No. 47/2011
S.C. Spl. L.A. No. 13/2011 Vs.
CA Writ Application No. 569/2003

1. Mr. H.D. Hemaratna,
   Tea Commissioner,
   Tea Commissioner's Division,
   Sri Lanka Tea Board,
   No. 572, Galle Road,
   Colombo 03.
2. Pankandurage Jemis,
   No. 117,
   Bolawana North,
   Gilimale, Ratnapura.
3. Samastha Lanka Kuda Tea Wathu Sanvardana Samithi Sanvidanaya also known as the Sri Lanka Federation of Tea Small Holdings Development Societies , No. 70, Parliament Road, Pelawatte, Battaramulla.
4. Ratnayake Liyanage Nevil Priyanga, President of the Sri Lanka Federation of Tea Small Holdings Development Societies, No. 70, Parliament Road, Pelawatte, Battaramulla.

5. K.L. Gunarathne,
   Secretary of the Sri Lanka Federation of Tea Small Holdings Development Societies, No. 70, Parliament Road, Pelawatte, Battaramulla.
6. Kumara Gunasinghe, Treasurer of the Sri Lanka Federation of Tea Small Holdings Development Societies, No. 70, Parliament Road, Pelawatte, Battaramulla

Respondents-Respondents

AND NOW BETWEEN

Paudgalika Tha Kamhal Himiyange Sangamaya also known as The Private Tea Factory Owners Association now known as The Sri Lanka Tea Factory Owners Association.
No. 64-12A, Nawala Road,
Nugegoda.

Petitioner- Petitioner

Vs.

1. Jayantha Edirisinghe, Tea Commissioner (Acting)
   Tea Commissioner's Division, Sri Lanka Tea Board, No. 572, Galle Road, Colombo 03.
2. Pankandurage Jemis,
   No. 117, Bolawana North,
   Gilimale, Ratnapura.
3. Samastha Lanka Kuda Tea Wathu Sanvardana Samithi Sanvidanaya also known as the Sri Lanka Federation of Tea Samall Holdings Development Societies , No. 70, Parliament Road, Pelawatte, Battaramulla.
4. Ratnayake Liyanage Nevil Priyanga, President of the Sri Lanka Federation of Tea Small Holdings Development Societies, No. 70, Parliament Road, Pelawatte, Battaramulla.

5. K.L. Gunarathne, Treasurer of the Sri Lanka Federation of Tea Small Holdings Development Societies, No. 70, Parliament Road, Pelawatte, Battaramulla.

6. Kumara Gunasinghe, President of the Sri Lanka Federation of Tea Small Holdings Development Societies, No. 70, Parliament Road, Pelawatte, Battaramulla.

Respondents-Respondents

BEFORE : K. Sripavan, C.J.,
R. Marasinghe, J.
Sarath de Abrew, J.

COUNSEL Gamini Marapana, P.C. With Navin Marapana for the Petitioner-Petitioner.
Nayomi Kahawita, S.C. For 1st Respondent-Respondent.

S.T. Goonawardane for 2nd Respondent-Respondent
Dr. Sunil Cooray for 3rd - 6th Respondents-Respondents.

ARGUED ON : 4/6/2014 and 19/11/2014

WRITTEN SUBMISSIONS FILED
By the the Petitioner-Petitioner on : 8/6/14
By the the 1st Respondent-Respondent on : 22/7/14
By the the 2ndRespondent-Respndent on : 3/7/14
By the the 3rd-6th Respondents on : 12/7/14

DECIDED ON : **09.03.2015**

K. SRIPAVAN, C.J.,

The Petitioner-Petitioner (hereinafter referred to as the Petitioner) instituted an application in the Court of Appeal against the 1st Respondent-Respondent

(hereinafter referred to as the Respondent) seeking, inter alia, the following reliefs by way of Writ of Certiorari :-

(1) To quash the decision of the respondent to impose a "Reasonable Price Formula" (RPF) as evidenced by the Circulars bearing Nos. MF/BL 40, MF/BL 66, MF/BL 74, MF/BL 75, MF/BL 93, MF/BL 112, MF/BL 115, MF/BL 118, MF/BL 120, MF/BL 124, MF/BL 125,MF/BL 132, MF/BL 135, MF/BL 136, MF/BL 144 and MF/BL 146.

(2) To quash the decision of the Respondent contained in the letter dated 3rd March 2003 (**P12)** informing the Uva Halpewatte Tea Factory that it had contravened the express provisions of the Tea Control Act ,

(3) To quash the decision of the Respondent as contained in the letter dated 4th February 2003 **(P13)** to use the provisions of the Tea Control Act to enforce "Reasonable Price Formula" stipulated by the Respondent.

The legal basis upon which the Petitioner sought his reliefs are contained in paragraphs 43 and 47 of the Petition dated 3rd April 2003 which could be summarized as follows :-

(i) That the Respondent had no authority in terms of the Tea Control Act to lay down the "Reasonable Price Formula".

(ii) That the imposition of such a Formula is arbitrary, unilateral, and illegal.

(iii) That accordingly, the penal provisions of Section 8(2) of the Tea Control Act are superfluous.

(iv) That the enforcement of the provisions contained in Section 8.2 of the Tea Control Act as amended by Act No. 3 of 1993

when read with the other provisions of the Act, does not confer any right on the Respondent.

(v) That in any event, the decision of the Respondent fixing a "Reasonable Price Formula" has been made without giving the Petitioner or its members an opportunity of being heard thus violating the fundamental legal principle of a*udi alteram partem.*

The Court of Appeal, by its Order dated 6th December 2010, held, inter alia, that the Teal Control Act specifically provides that if the Tea Commissioner is satisfied after such inquiry, as he may deem necessary, he may issue the direction specified in Section 8(2) of the said Act and that the form of inquiry is left to the "Controller" to decide depending on the nature of the violation. The Petitioner preferred an appeal against the said Order and Special Leave to Appeal was granted by this Court on 27th April 2011 on the following questions of law :

1. Has the Court of Appeal erred in interpreting the provisions of the Tea Control Act ?
2. Has the Court of Appeal erred in interpreting the provisions of Section 8 of the Tea Control Act as giving the Respondent the power to impose a "Reasonable Price Formula" when the wording of the said Section deals only with the purported power given to the Tea Controller to penalise a party for not adhering to the "Reasonable Price Formula" ?
3. Has the Court of Appeal erred in ignoring the submission of the Petitioner that Section 8 of the Tea Control Act (as amended) conferred power on a non-existent Tea Controller ?

4. Has the Court of Appeal erred ignoring the fact that the Respondent had no legal basis to impose a “Reasonable Price Formula”?

5. In any event, was the application seeking relief by way of Certiorari, filed after the lapse of an unreasonable period of time, made the application unmaintainable in law?

The Learned President's Counsel for the Petitioner sought to argue that the Office of ”Tea Controller” created by Section 50(1) of the Tea Control Act No. 51 of 1957 was abolished by Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975. Counsel submitted that the Office of the “Tea Controller” ceased to exist as far back as in 1975 and at the time when the Tea Control (Amendment) Act No. 3 of 1993 was passed there was no officer known to the law as the Tea Controller. It is on this basis Learned President's Counsel argued that no amendment to the Tea Control Act could seek to clothe a non-existent officer with legal power. With profound respect to the learned President's Counsel, I am unable to agree with his submission.

The dominant purpose in construing a statute is to ascertain the intention of Parliament. One of the well recognized canons of construction is that the legislature speaks its mind by use of correct expressions and unless there is any ambiguity in the language used the Court should adopt literal construction if it does not lead to an absurdity. In construing the provisions contained in Section 9(1) and 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975 efforts should be made to ensure that each provision will have its play without any conflict with each other. The Court must look to the object which the statute seeks to achieve while interpreting the provisions in Sections 9(1) and 9(2). When the material words assists the achievement of the legislative policy, the Court would look at

the context and the object of such words and interpret the meaning intended to be conveyed by the use of such words.

It is observed that prior to the abolition of Office of "Tea Controller" by Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975, the Office of the "Tea Commissioner" was created by Section 9(1). The said Sections read as follows :

> *"9. (1) There may be appointed, for the purposes of this Law, a person, by name or by office, to be or to act as Tea Commissioner who shall, subject to provisions of this Law or any other written Law,-*
>
> (a) *exercise, discharge and perform the powers, functions and duties vested in, and imposed on, the Tea Controller under any other written law;"*
>
> *(2) The Office of the Tea Controller ….. hereby abolished and accordingly shall cease to exist.*(emphasis added)

Thus, it could well be seen that the intention of the legislature was to create the office of the "Tea Commissioner" prior to the abolition of the office of the "Tea Controller". It further provides that the "Tea Commissioner" is by law empowered to exercise, discharge and perform the powers, functions and duties vested in the "Tea Controller" under any other written law. The necessary implication is that whatever the powers, functions and duties entrusted to the "Tea Controller" under the Tea Control Act No. 51 of 1957 can now be validly exercised by the "Tea Commissioner". But the office of the "Tea Controller" shall cease to exist with effect from the date on which Law No. 14 of 1975 came into existence, namely, 17.3.1975.

Thus, there can be no doubt that the "Tea Controller" has no power to issue directions or orders after 17-3-1975 affecting the rights of the owners of the Tea Factory, as the said office of the "Tea Controller" does not exist. However, the "Tea Commissioner" may exercise and discharge the powers, functions and duties already vested in the Tea Controller .

The Tea Control Act No. 51 of 1957 was amended by Act Nos. 3 of 1983 and No. 3 of 1993. The amending Acts brought in certain amendments to the parent Act. No amending Act can operate unless the parent Act is alive at the time the later Act was passed. There is nothing to indicate that the parent Act, namely Act No. 15 of 1957 was completely repealed. Further, the amending Act No. 3 of 1983 in Section 11 states thus :

> *"11. Section 63 of the principal enactment is hereby amended by the insertion immediately after the definition of the expression "appointed date" of the following definition :*
>
> *"Commissioner" means the person appointed to be or to act as The Tea Commissioner under the Tea Board Law, No. 14 of 1975.*

The amending Act No. 3 of 1993 in Section 6 states thus:-

> "6. *Wherever, in any provision of the principal enactment, the word "Controller" occurs, there shall be substituted the word "Commissioner".*

The underlying purpose of all legislation is to promote justice among people. A construction which operates in a harsh, unreasonable and absurd manner resulting in hardship, serious inconvenience, injustice, anomaly, uncertainty or friction in the system certainly does not represent the legislative intent because it must be presumed that the legislature has acted for the welfare of the people.

Having abolished the office of “Tea Controller “ by Law No. 14 of 1975, one does not know why the legislature used the word “Controller” again in Act No. 3 of 1993. Mistakes may creep into legislation due to various circumstances and causes. They could have caused by the printer making an incorrect reproduction of the draftman's manuscript or they may be due to the draftsman's unskillfulness. They may even creep in during its passage from a Bill to an Act. However, the fact remains that considering Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975 and the amendment brought by the Tea Control Act No. 3 of 1983 and No. 3 of 1993 to Section 11 and Section 6 respectively, the intention of the legislature is very clear, namely, the “Tea Commissioner” is empowered by law to exercise, discharge and perform the powers, duties and functions vested in and imposed on the “Tea Controller” in the Tea Control Act as amended and under any other written law. In view of the said finding, the word “Tea Commissioner” would be used in this judgment wherever reference is made to the “Tea Controller” in the Tea Control Act as amended.

The primary object of Section 8 of the Tea Control Act is to decide :-

(a) Whether any person is entitled to be registered as a manufacturer for the purposes of this Act; and

(b) Whether any tea factory should be registered for the purposes of this Act.

It is well settled that the marginal note to Section 8 affords guidance in understanding the legislative intent. It simply refers to determination of questions relating to registration and furnishes a clue to the meaning and purpose of the said Section. Section 8(2) of the said Act as amended by Act No. 3 of 1993 reads thus :

"8.(2) Where the Controller is satisfied, after such inquiry as he may deem necessary:-

(a) that the building, or equipment, or manner of operation, of any tea factory is not of a standard conducive to the manufacture of made tea of good quality; or

(b) that the owner of a tea factory has paid for green tea leaf bought by him for manufacture at such factory a price lower than the reasonable price payable as determined by the Controller having regard to the price fetched for made tea manufactured as that factory; or

(c) that the owner of a tea factory has delayed payment of the reasonable price, referred to in paragraph (b) for green tea leaf bought by him for manufacture at that factory,

the Controller may suspend or cancel where necessary, the registration of such tea factory or -

(i) in any case referred to in paragraph (b), direct any broker to whom the owner of such tea factory has sold any made tea manufactured at that factory, to deduct from the proceeds of such sale, an amount equivalent to the difference between the reasonable price for green tea leaf as determined by the Controller and the actual price paid by such owner for the green tea leaf bought by him;

(ii) in any case referred to in paragraph (c), direct any broker to whom the owner of such tea factory has sold any made tea manufactured at that factory, to deduct from the proceeds of such sale, an amount equivalent to the reasonable price determined by the Controller for such green tea leaf,

and to remit the sum so deducted to him, for payment by him, to the person supplying such green leaf to such factory."

Thus, the learned State Counsel argued that the inquiry referred to therein by the Tea Commissioner was not for the purpose of determining the reasonable price but to satisfy himself with regard to any entitlement for registration of any person as a manufacturer or for registration of a tea factory. What has been overlooked by the learned State Counsel was that Section 8(2)(b) authorizes the Tea Commissioner to determine the reasonable price payable for green tea leaf.

The Act does not envisage the procedure to be followed by the Tea Commissioner in determining the reasonable price. The following extract from the speech of Lord Pearson in *Pearlberg* v. *Varty* [1972] 1 W.L.R. 534 at 537 is worth reproducing.

> *"A tribunal to whom judicial or quasi-judicial functions are entrusted is held to be required to apply those principles [i.e. the rules of natural justice] in performing those functions unless there is a provision to the contrary. But where some person or body is entrusted by Parliament with administrative or executive functions there is no presumption that compliance with the principles of natural justice is required, although, as 'Parliament is not to be presumed to act unfairly,' the courts may be able in suitable cases (perhaps always) to imply an obligation to act with fairness."*

It is therefore necessary that the Tea Commissioner adopts a fair procedure although there may not be a hearing of the kind normally required by natural justice. The said section empowers the Tea Commissioner to determine the reasonable price payable having regard to the price fetched for made tea at that factory. The use of the words "at that factory" signifies that the reasonable

price varies from one factory to another. The power conferred upon the Tea Commissioner must be exercised on the considerations relevant to the purpose for which it is conferred. Instead, if the Tea Commissioner takes into account wholly irrelevant or extraneous considerations the exercise of power by the authority will be ultra vires and the action is bad in law.

The following paragraphs of the Statement of Objections filed by the Tea Commissioner before the Court of Appeal shows the factors that were taken into account in determining the "reasonable price".

13. Answering the averments contained in paragraph 17 of the petition, the Respondent states that the Reasonable Price Formula is determined on the Net Sale Average, Elevational Average and the out turn ratio of tea factories.

14. (e) The Elevational Average is the average NSA of all tea factories in an elevation.

(k) The conversion ratio used to decide on the out turn is not an artificial conversion ratio but has been arrived at by after considering the relevant data available at factories and on data collected by the Tea Research Institute. (emphasis added)

The explanation given by the Tea Commissioner demonstrates that he has taken into account various factors in order to arrive a "Reasonable Price Formula" . The Tea Commissioner cannot have a common "Reasonable Price Formula" applicable to all tea factories based on non-factory related elevational average. It is well settled that the expression "having regard to" indicates that in exercising the power, regard must be had to the factor relevant for the exercise of that power.

In *Saraswati Industrial Syndicate* Vs. *Union of India (* AIR 1975 SC 460) the Government was empowered to fix the price of sugar "having regard to" estimated cost of production of sugar on the basis of the relevant schedule. The Supreme Court held that the only obligation of the Government was to consider as relevant data material to which it must have regard. But there was no obligation whatsoever cast upon the Government to make any "adjustment" to compensate for losses due to any previous erroneous fixation.

In *State of Karnataka* Vs. *Ranganatha Reddy* (AIR 1978 SC 215) Section 6(1)(2) of the Karnataka Contract Carriages (Acquisition) Act 1976 authorized the arbitrator to determine the amount of compensation which appeared to him to be just and reasonable. In making the award, the arbitrator was required to have regard to the circumstances of each case and the provisions of the schedule providing principles of determination of the amount of compensation. Interpreting the provision Untwalia, J. observed at 227, (AIR) :

> *"The arbitrator has to fix the amount which appears to him just and reasonable on the totality of the facts and circumstances keeping primarily in mind the amount mentioned in the schedule*".

From the cases discussed above, it becomes clear that the statutory authority cannot ignore the legislative intent and to decide the matter taking into account extraneous factors. The expression "having regard to" whenever and wherever occurs in the Statute, it requires to be construed in relation to its context and to its subject matter.

Thus, the Reasonable Price envisaged in Section 8(2)(b) has to be necessarily factory specific and not a formula of equal of application to all factories.

Accordingly, I hold that the letters marked **P12** and **P13** sent by the Tea Commissioner based on the "Reasonable Price Formula" were ultra vires the powers of the Tea Commissioner and are set aside.

One of the questions of law on which leave was granted was whether a writ of certiorari would lie in view of the unreasonable period of delay in instituting the writ application. Sharvananda J. in *Biso Menika* Vs. *Cyril de Alwis* (1982) 1 S.L.R. 368 at page 379, discussing the question of laches states thus :-

> *"An application for a Writ of Certiorari should be filed within a reasonable time from the date of the Order which the applicant seeks to have quashed. What is reasonable time and what will constitute undue delay will depend upon the facts of each particular case. However the time lag that can be explained does not spell laches or delay. If the delay can be reasonably explained, the Court will not decline to interfere. The delay which a Court can excuse is one which is caused by the applicant pursuing a legal remedy and not a remedy which is extra-legal. One satisfactory way to explain the delay is for the petitioner to show that he has been seeking relief elsewhere in a manner provided by the Law.*
>
> *When the Court has examined the record and is satisfied the Order complained of is manifestly erroneous or without jurisdiction the Court would be loathe to allow the mischief of the Order to continue and reject the application simply on the ground of delay, unless there are very extraordinary reasons to justify such rejection. Where the authority concerned has been acting altogether without basic jurisdiction, the Court may grant relief in spite of the delay unless the conduct of the party shows that he has approbated the usurpation of jurisdiction. In any such event, the explanation of the delay should be considered sympathetically. "*

The Court may therefore in its discretion entertain an application in spite of the fact that a petitioner comes to Court late, especially where the order challenged is a nullity. The conduct of the petitioner cannot be branded as unreasonable to dis-entitle it to a Writ especially when the decisions contained in the letters marked P12 and P13 are ultra vires the powers of the Tea Commissioner. The Petitioner seeks to set-aside various circulars issued by different Tea Commissioners at different times, which refer to the decisions made on sixteen occasions on the "Reasonable Price Formula". It would appear that the latest circular had been issued on 1999 and the earliest one was in 1977. The writ application was filed before the Court of Appeal in April 2003, which means nearly four years after the issuance of the latest circular of 1999 and after twenty six years of the issuance of the earliest circular of 1977. None of the Tea Commissioners who issued those circulars are parties to the writ application. Based on the said circulars the owners of the Tea factories made payments to green leaf suppliers without challenging the "formula" adopted. It is in these circumstances the Court has to consider whether the said circulars are to be set aside or not.

There has undoubtedly been great delay in challenging the validity or legality of the said circulars. However, the rule of laches or delay is not a rigid rule which can be cast in a straight-jacket formula, for there may be cases where despite delay and creation of third party rights, the Court may still in the exercise of its discretion interfere and grant relief to the Petitioner. Thus, the question whether in a given case the delay involved is such that it dis-entitles a person to relief is a matter within the discretion of Court and has to be exercised judiciously and reasonably having regard to the surrounding circumstances. Declaring the said circulars to be bad in law at this stage would result in the amounts recovered under them to be illegal and lead to serious consequences. It would be a sound

and wise exercise of discretion for the Court to refuse to exercise its discretionary power in favour of the Petitioner who does not approach expeditiously for relief and who stand by and allow things to happen and then approach the Court to try to unsettle, settled matters. Justice, equity and good conscience do not permit me to quash the said circulars.

For the reasons stated above, I answer the questions of law on which Special Leave to Appeal was granted as follows :-

(1) The Court of Appeal has misinterpreted the provisions contained in Section 8 of the Tea Control Act as amended.
(2) The Court of Appeal has erred in holding that the Tea Controller is empowered to to impose a reasonable price applicable to all tea factories on an equal basis.
(3) The powers, duties and functions vested in and imposed on the Tea Controller can validly be exercised by the Tea Commissioner.
(4) Section 8(2)(b) of the Tea Control Act as amended empowers the Tea Commissioner to determine a reasonable price.
(5) The recent practice shows where the authority has acted ultra vires or where the proceedings were a nullity an award of certiorari will not readily be denied. No hard and fast rule can be laid down as to when the Court should refuse to exercise its jurisdiction in favour of a party who moves it after considerable delay. This is a matter which must be left to the discretion of Court which discretion shall be exercised judiciously and reasonably considering the surrounding circumstances.

Considering the totality of the circumstances, I make no order as to costs.

CHIEF JUSTICE.

R. MARASINGHE, 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. 48/2010

K.G. Somapala alias R.U. Somapala
Keselgollegoda
Ginihampitiya
Hemmathagama.

PLAINTIFF

Vs.

W. A. Sumanasiri
Udawatta,
Samapura,
Hemmathagma.

DEFENDANT

AND BETWEEN

W. A. Sumanasiri
Udawatta,
Samapura,
Hemmathagma.

DEFENDANT-APPELLANT

Vs.

K.G. Somapala alias R.U. Somapala
Keselgollegoda
Ginihampitiya
Hemmathagama.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

W. A. Sumanasiri
Udawatta,
Samapura,
Hemmathagma.

DEFENDANT-APPELLANT-PETITIONER

Vs.

K.G. Somapala alias R.U. Somapala
Keselgollegoda
Ginihampitiya
Hemmathagama.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.
Rohini Marasinghe J. &
Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C. with Hirosha Munasinghe
For the Defendant-Appellant-Petitioner

Maura Gunawansa for the Plaintiff-Respondent-Respondent

ARGUED ON: 20.05.2015

DECIDED ON: 13.11.2015

GOONERATNE J.

This was an action filed in the District Court of Mawanella for a declaration that the Defendant to the original action has violated the conditions of the lease agreements bearing Nos. 2597/2705 and accordingly the agreements terminated. The prayer to the plaint inter alia seeks a declaration of title to ½ share of the property described in the schedule to the plaint and for eviction of Defendant and damages as prayed for in the said prayer to the plaint. To state very briefly, the position of each party revolves on the construction of shop premises in the land in dispute which is admittedly owned by the Plaintiff-Respondent-Respondent. In the area specified in the plan P1, the Plaintiff takes up the position that by lease P2 (2597) Defendant had to construct a shop which

constructions starts below the described road level and have a concrete slab built as the roof to enable the Plaintiff to sell betal on it. Lease P2 was operative during 01.04.1998 to 30.03.2014.

The 2nd lease (P3) as stated by the Plaintiff was to operate during the period 01.04.2014 to 30.09.2031, and another shop had to be constructed during the said period on the concrete slab. This would mean construction of two shop premises, on the land in dispute. This position was vehemently denied by Defendant-Appellant-Petitioner, who argued that construction was only for one (1) shop premises and maintained that the lease agreements were in respect of land and not shop premises. Further learned counsel for the Defendant-Petitioner-Appellant argued that subject matter of the two lease agreements are land, in extent of about 10 perches and entirety of land as per the two lease agreements would entitle him for continued possession during the duration of the lease bonds up to the year 2031. Defendant-Appellant-Petitioner also state that he has incurred certain expenses in the construction of the shop premises and plead the sums due by way of a claim in reconvention in para 12 to 15 of his answer.

Parties proceeded to trial in the original court on 27 issues, plaintiff having raised issue Nos. 1 – 17 and the Defendant-Appellant-Petitioner relied on issues 18 to 27. The learned trial Judge has answered Plaintiff's issues in the affirmative in favour of the Plaintiff, except issue No. 2 and had entered judgment in favour of Plaintiff-Respondent-Respondent. All Defendant's issues are answered in the negative as not proved except issue No. 24. The judgment of the learned District Judge was affirmed by the High Court by its judgment dated 09.11.2009. Learned District Judge in a very exhaustive judgment held in favour of the Plaintiff-Respondent-Respondent having considered very many factual positions, relevant to the case in hand.

On appeal the High Court affirmed the judgment of the learned District Judge. This court on 01.06.2010 granted Leave to Appeal on all questions of law set out in paras 11(a) – (i) in the petition dated 18.12.2009. The said questions reads thus:

(a) The said judgment is contrary to law and against the weight of evidence;

(b) The learned Judges of the High Court erred in holding that lease marked P3 was in respect of the construction of a separate boutique room;

(c) The learned Judges of the High Court erred in holding that the Defendant violated the terms of lease marked P2;

(d) The learned Judges of the High Court failed to consider that the leases marked P2 and P3 were in respect of the same land for two different periods of time;

(e) The learned Judges of the High Court failed to consider Clause 2 of leases marked P2 and P3 which specifies that the subject matter of the said leases is the land in extent of 10 perches described therein and not a shop premises.

(f) The learned Judges of the High Court failed to consider that by documents marked P2 and P3, the Plaintiff has leased the land in suit to the Defendant for a total period of 30 years and that in the circumstances, the Judgment of the District Judge preventing the Defendant from entering the second boutique room is wrongful.

(g) The learned Judges of the High Court failed to consider that the Plaintiff has acquiesced in the construction of the shop at the upper level of the main road;

(h) The learned Judges of the High Court erred in holding that the parties agreed to construct two boutique rooms;

(i) The learned Judges of the High Court failed to properly evaluate the evidence.

The judgment of the High Court focus on three main points i.e (a) whether parties agreed to construct (2) boutique rooms (b) whether the 2nd lease bond is a separate agreement to construct the 2nd boutique room and (c) whether the 2nd lease bond was signed to secure a further sum of Rs. 1,75,000/- to

construct the original building. Our attention has been drawn by both parties to certain items of evidence which they claim to support each other's case.

On a plain reading of lease bonds P2 & P3, (though not so legible and unclear copies are included in the brief) the P3 lease agreement does not in any way refer to P2 or does not in its simple terms give any indication that it is an extension or was entered as an ancillary agreement to P2 lease agreement. What is noteworthy of both contracts as highlighted by both original courts is that the two agreements refer to separate and distinct periods for due compliance of the agreements. P2 operates during 1st April 1998 to 30th March 2014. The second lease agreement (P3) was to operate during 01.04.2014 to 30.09.2031. Clause (5) of P2 specifically state a construction of a boutique room. In the lease bond P3 which is due to operate as from 01.04.2014 to 30.09.2031, it's clause (5) refer to a construction of a boutique room. Each lease agreement operates for over 15 years. If one were to bring both lease periods consecutively it's a long lease period of over 30 years, provided its terms and conditions are fulfilled. Within a period of 30 years it is hardly unimaginable to arrive at a conclusion that it was only to construct one boutique room, which was provided by the lease agreements. The evidence led at the trial and on such evidence what is suggested/analysed by both Judges of the District Court and the High Court as

regards the construction of two boutique rooms cannot in any way offend the rule contained in Section 92 of the Evidence Ordinance, but such evidence assist both courts to explain and demonstrate the necessity to have two boutique rooms within the available space, as contemplated by the lease agreements.

The law is very firmly built as in the Evidence Ordinance, and Section 91 of the Evidence Ordinance prohibits extrinsic evidence and makes it inadmissible to supersede the agreement in its documentary form. Usually oral evidence cannot be led as a substitute for the document (agreement). Mohamadu Bhai Vs. James (1919) 21 NLR 234; Pathbeniya Vs. Kachohamy 24 NLR 487; 22 NLR 343; 74 NLR 142; (1986) (1) SLR 390. The other cardinal rule in this regard is contained in Section 92 of the Evidence Ordinance but its provisos tends to relax the above position. Proviso (2) enables the existence of any separate oral agreement as to any matter on which the agreement is silent, and not inconsistent with its terms may be proved. Court can in such a situation have regard to the degree of formality of the document itself. 58 NLR 457 at 461; 18 NLR 264; 22 NLR 54. The oral evidence led in the case in hand would not offend basic rules as stated above. It is also relevant to bear in mind that parties generally express themselves in regard to the main outlines of their agreement and leave unexpressed terms upon which they have in fact agreed or deemed to

have agreed. Thus some terms which they had no intention to exclude had they given their mind to same. In these circumstance oral evidence could be led.

The position of a lessee does not differ from that of persons who are entitled to real rights. The title of a lessee is a defaceable one, and is dependent on the observance of the conditions an covenants incorporated in the lease agreement. Owner of a land naturally will impose certain duties on the lessee by the conditions and terms of the lease agreement. Failure to fulfill the terms and conditions of the lease agreement will result in a breach of agreement, the lessor would be entitled to determine and terminate the lease agreement. It is clear that clause 5 referred to above in P2 & P3 contemplates of two boutique rooms. Issue No. 6 specifically state and refer to the boutique rooms and its roof would be a concrete slabs. Appellant has <u>also admitted this fact</u> in evidence, as regards the concrete slab. I am not in a position to fault the views of the learned District Judge and the High Court Judge on an important item of evidence that transpired at the trial that the 2nd boutique room was to be built on the concrete slab. Trial Judge's explanation that it was the reason to have a flight of steps is plausible. Evidence led on this aspect is a question of fact and this court will not unnecessarily interfere on questions of fact. Further I find that issue No. 7 has

been answered by the learned District Judge in the affirmative in favour of Plaintiff-Respondent-Respondent. The said issue relates to construction of another boutique room on the concrete slab.

The Appellant in his evidence state that he had incurred a sum of Rs. 4,51,400/-. This amount exceed the stipulated amount in the lease agreement P2. If that be so, Clause 8 of P2 provides that in the event the stipulated amount exceeds the construction of the boutique room, lessors permission must be sought to utilize extra money for the construction. The evidence led at the trial clearly establish that no such permission was sought. As such the Appellant has breached Clause 8 of P2. Appellant's contention that parties agreed to enter into a further agreement (evidence at folio 106) and document V1 signed on 05.10.1998, enabled him recover amounts incurred as extra sum of money of Rs. 1,75,000/-. V1 no doubt was a disputed document, and not properly proved according to law. At the least, Notary should have been called to prove the document, as P2 & P3 were attested by the same Notary. On the other hand Plaintiff-Respondent-Respondent rejected V1 and went to the extent of alleging it to be a forged document and disputed his signature. In these circumstances will the named Notary (in P2 & P3) take it upon himself to give evidence and support the Defendant-Appellant-Petitioner's case as far as V1 is concerned in breach of

the Prevention of Frauds Ordinance, Stamp Duty Ordinance, and the Notaries Ordinance? Why did the Notary not refer to the contents of V1 when lease P3 was executed as V1 according to the Appellant was in existence when P3 was executed? In any event, V1 seems to contradict P3 with the insertion of words තට්ටු දෙකේ ගොඩනැගිල්ලක්.

There is nothing to justify the conclusion that there had been a fresh contract or an extensions to lease agreement P2. The nature of the contract is of such a nature that fulfillment of every term and condition of lease agreements P2 and P3 is essential for its due performance. It was within the contemplation of parties that if the specified sums of money exceed, further performance could be achieved only with approval of the lessor. One cannot rely on a doubtful unproved document as V1 to fulfill Clause 8 of P2.

I observe that title to the property in dispute is not contested by the Defendant-Appellant-Petitioner. Both parties do not deny lease agreements P2 and P3. As such the periods stated therein in each agreement would be an important aspect which was in contemplation of both parties whilst entering into P2 and P3, and if there was due compliance with both agreements by the Defendant-Appellant-Petitioner, he would be entitled to continue in possession till 30.09.2031 (as per P3). It is also clear that the expenses or cost to be incurred

as in P2 and P3 is a factor curtailed in the manner incorporated in Clause 8 of P2. Expenditure over and above the amounts specified in the two lease agreements would require the approval of the Plaintiff-Respondent-Respondent.

The Defendant-Appellant-Petitioner is not expected to act contrary to Clause 8 of P2 and the evidence transpired in the District Court no doubt suggest that the stipulated cost had exceeded, for which Plaintiff-Respondent-Respondent had not given his approval as required in the lease bond. There was an attempt to introduce document V1 by the Defendant-Appellant-Petitioner at the trial stage but court cannot recognize and accept the validity of document V1 as required by law. Therefore I find that the learned District Judge has correctly answered issue No. 16 i.e the 2nd agreement has been violated.

The subject matter of the agreements P2 and P3 is of a such a nature that time and period in both P2 and P3 and the cost of construction/construction of two boutique rooms are of a fundamental nature which goes to the root of the contract. The promises exchanged by the parties are interdependent and not independent. An effect of breach is in every case is to entitle the innocent party to damages – Cheshire & Fi Foot 6th Ed. P302. There may be cases that in some instances a breach may not entitle an innocent party to be discharged from further performance. That is different from the case in hand as the performance

of each party is interdependent, but has to be considered separately for each lease bond (P2 and P3). To explain further the terms in P2 are interdependent to each other and so are the terms in P3.

Evidence led and its terms referred to in each lease bond contemplate of two separate boutique rooms, the first being the room on the ground floor for which the roof has to be a concrete slab and the 2nd being for the room to be constructed on the said concrete slab. That is the reason for evidence to have transpired at the trial to have a betal shop on the concrete slab up to 2014 and on termination of the period in P2 for the lessor to shift to the ground floor and permit the Defendant-Appellant-Petitioner to construct the room on the concrete slab as per P3. As observed earlier in this judgment P3 is not an extension of P2.

The learned District Judge has carefully considered the evidence led at the trial and answered the issues and we see no basis to interfere with his Judgment. Issue Nos. 11 to 16 provides important answers by the learned District Judge. This explains the position of the case before the original court based on evidence. One cannot look at only issue No. 16 in isolation and attempt to demonstrate something different. Learned District Judge has considered very carefully the sequence of events and answered the issues, in the light of lease

agreements P2 & P3, and decided upon its legal consequences. Directions given by the learned District Judge in the last two pages of his Judgment (prior to answering issues) and entering of decree as per District Judge's Judgment remains unaltered.

The High Court affirmed the judgment of the learned District Judge and dismissed the appeal. I answer the nine questions of law contained in the petition of 01.06.2010 as follows, in favour of the Plaintiff-Respondent-Respondent.

(a) No

(b) No

(c) No – the learned High Court Judge has given reasons at pg 9 of his Judgment.

(d) High Court Judge cannot be unnecessarily faulted. Entirety of the judgment of the High Court Judge need to be considered and at pg. 8 of the judgment of the High Court refers to the periods in P2 and P3 and state it was written as separate lease bonds. P2 & P3 contemplate of two boutique rooms to be constructed on the same land.

(e) The property leased is in extent of 10 perches of land and shown by referring to extent and its situations as lot 'B', described in condition (2) of P2 & P3. There is no failure to consider this aspect by the High Court Judge.

(f) There is no failure of the learned District Judge and the High Court Judge in their reasoning in arriving at a decision as regards the lease periods in P2 & P3. If the Defendant-Petitioner-Appellant complied with terms and conditions as in P2 & P3 lease period in P3 would lapse by 30.09.2031.

(g) Based on evidence led at the trial learned District Judge and the High Court Judge has considered the position of construction of two boutique rooms, as per P2 & P3.

(h) No

(i) No

In all the above circumstances Judgment of the learned District Judge is affirmed. In fact the decision to enter Judgment as stated by the learned District Judge was not disturbed by the High Court. Accordingly we proceed to dismiss this appeal without costs.

Appeal dismissed.

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 COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

S.C . Application No. 48/2012

Samarakoon Mudiyanselage Jayathilake of
Palle Baddewela, Makehelwala

DEFENDANT-APPELLANT-PETITIONER

Vs.

Balahinna Arachchige Sarath Abeyweera of
No. 110, Aththalapitya, Hingula.

PLAINTIFF-DEFENDANT-RESPONDENT

BEFORE: Priyasath Dep P.C., J.,
Upaly Abeyrathne J. &
Anil Goonerathne J.

COUNSEL: Sunil Abeyratne with Uditha Collure for the
Defendant-Appellant-Petitioner

D.M.G. Dissanayake for Plaintiff-Respondent-Respondent

ARGUED ON: 23.03.2015

DECIDED ON: 19.06.2015

GOONERATNE J.

This is an appeal from a judgment of the Civil Appellate High Court of Kegalle Province dated 18.10.2011 dismissing an appeal from the judgment of the District Court of Mawanella. The action out of which it arises was brought by the Plaintiff-Respondent-Respondent in the District Court for a declaration of title to a land described as 'Paranawatte' more fully described in the schedule to the plaint, and to eject the Appellant from the said land, with a claim for damages. As the appeal to this court involves questions of facts and law it is necessary to examine the evidence in some detail, keeping in mind the main argument of the Appellant advanced on behalf of the Appellant that the transactions explained in the plaint are not absolute outright transfers based on deeds, but relates only to loan transactions.

Parties proceeded to trial on 3 admissions and one of which was the admission of the corpus, and on 13 issues. However in the trial court itself issue No. 12 had been rejected by the learned District Judge by his order of 19.11.2007. Issue No. 12 refer to prescriptive rights of Defendant. Issue No. 11 is whether Plaintiff identified the land? As such issue No. 13 became issue No. 12. It is evident from the record that order of 19.11.2007 was not canvassed. However on 14.02.2008 parties at the trial agreed to acceptance of the issue on prescription. Plaintiff in his evidence produced deeds marked P1 to p4. By P1 the Defendant transferred the land described in the schedule of the amended plaint to E.W.M. Asoka Chaminda Boyagoda, on 11.05.2001 and the said Boyagoda transferred the land in question to E.M. Asoka Dissanayake by transfer deed P2 of 01.02.2002. The above E.M. Asoka Dissanayake by deed P3 of 12.8.2003 transferred to Somalatha. Both the District Court and the Civil Appellate High Court accept that land described in the schedule to the deeds P1 to P3, are identical.

It is also in evidence of the Plaintiff that the land described above in deed P3 had been surveyed and divided into two lots by plan 426 of 12.12.2003 by Licenced Surveyor Weerasinghe marked P5. Lot 2 of plan P5 was transferred by Somalatha to Plaintiff-Respondent by deed 1614 of 04.01.20204, marked P4 for a

consideration of One Hundred Thousand rupees. It was Plaintiff's evidence that the Defendant and his son signed as witness to deed P4, and with the purchase of the land in question Plaintiff went into possession (folio 66) but after some time possession had been disturbed by removal of poles fixed to the ground. However Plaintiff testified that prior to the transfer of the land the above Somalatha was in possession who had leased (P6) the land to the Defendant. However later, prior to purchase of the land, lease had been cancelled.

In the evidence of the Plaintiff-Respondent he very clearly identified the corpus by referring to the metes and bounds thereof with a comparison of the Survey plan, more particularly to lot 2 of plan No. 426 (P5) as stated above. Plaintiff has also marked and produced as P6 the lease of land to Defendant by Somalatha. Plaintiff in his evidence has stated that in view of the lease he cannot purchase the land and as such Somalatha by P7 cancelled the lease.

I have also examined the Plaintiff's version in cross-examination which is important to this case, and the following points to be noted.

1. It is the Defendant who initiated the preparation of plan P5 and even showed the boundaries to the Surveyor.
2. Survey done as it was necessary to separate the lot which was to be purchased by Plaintiff.

3. Defendant was residing in the house but unaware as to the period he was in possession.

4. Defendant was not residing in the portion separated for the plaintiff (lot 2). Defendant's portion shown as lot (1) .

5. Possession of Plaintiff disturbed. As from the date of purchase Plaintiff went into the land in spite of being obstructed.

6. Plaintiff requested Somalatha to cancel lease P6.

7. Money transaction between Defendant and Somalatha, and not Plaintiff. Plaintiff denies that deed P4 was executed based on money transaction. Plaintiff unaware of transaction between Somalatha and defendant.

8. Land purchased for Rs. 100,000/- from Somalatha. Somalatha told Plaintiff to give the money to Defendant. The Defendant signed the deed as a witness. Somalatha got title to the land from Defendant's wife. Plaintiff however denies any transaction with money and loan based on deed P4.
   Plaintiff also state he is unaware of any money dealings referring to the other deeds.

9. Plaintiff specifically denies that deed P4 refer to any money or loan transaction.

10. By deed P4, Plaintiff purchased the land in question from Somalatha.

Defendant in his evidence states he had no land transaction with the Plaintiff. He executed deed P1 in favour of 'Boyagoda' and maintains that it is a money transaction and deed P1, was kept as security. He obtained a sum of Rs. 50,000. When the Defendant was questioned as to why he executed a transfer deed, it was his answer that, if not he cannot obtain money at interest. Defendant also testified about deed P2 in favour of his wife, and again states it is a loan transaction. Defendant admits he signed as a witness to deed P4. He rejects plan P5 and lease P6, and cancellation of lease P7. However in cross-examination Defendant admits that the deed P1 contains no conditions, (even as regards the other deeds P2 – P4) as a loan transaction. Defendant states he did not issue any other letter referring to a condition as a loan transaction. Defendant admits his signature in deed P4.

On a perusal of the two judgments i.e District Court and the Civil Appellate High Court I find that both courts have analysed the factual position with clarity. I would advert to the above position with reference to vital points accepted and dealt by both courts above mentioned. All 4 deeds (P1 – P4) are no doubt transfer deeds. These deeds contains no specific condition to at least give or hint at a clue that the transactions were in fact loan transaction, or that deeds in question are conditional deeds. The most relevant deed being deed marked P4

is an outright transfer from Somalatha to Plaintiff-Respondent, for valuable consideration. Further the Defendant-Appellant was a witness to such deed and signed same. It is evident that the attestation clause refer to the consideration being furnished and paid in the presence of the Notary. In fact all other transfer deeds produced by the Plaintiff is to that effect. Further even in deed marked P3 the Defendant-Appellant was a witness. If the transaction in question and more particularly deed P4 differs in its nature the best evidence that could have been placed would have been of that of 'Somalatha' the vendor. The Appellant had not been able to lead any such evidence and both courts specifically refer to same.

I also note that the learned District Judge had the great advantage of seeing the witnesses in the witness box. Learned District Judge did not err on the question of burden of proof and decided the case correctly on a balance of probability. This court also need not disturb findings of primary facts considered by the learned District Judge 1993(1) SLR 119. On question of fact Appellate Court will not overrule decisions of the lower court, unless it is a perverse order. 20 NLR 332; 1955 1 All England Reports 326; 20 NLR 282.

I would also wish to discuss the provisions contained in Section 68 of the Evidence Ordinance since an argument was advanced that the deeds in

question are not proved. In any event according to the facts relevant to the case in hand, it is apparent that on both deeds marked P1 and P4, the Defendant-Appellant had signed the deeds and admitted this fact in his evidence before the District Court. Further the transferor of P1 was by the Defendant-Appellant. In the context of the case there is due compliance with Section 68 of the Evidence Ordinance. To attest means to bear witness to a fact. An attesting witness is one who has seen the document executed and who sign it as witness. (Velupillai V. Sivakamipillai 1907(1) A.C.R 180 at 181; Marian Vs. Jesuthasan 59 NLR 348 at 349. In this context it is also important to bear in mind Section 70. Admissions of execution by party to attested document. No doubt there must be a specific admission for this purpose. Fernando Vs. Ceylon Tea Co. Ltd. (1894) 3 SCR 35. The evidence transpired in the District Court by the Defendant-Appellant itself as an attesting witness and transferor is ample testimony in this regard, as an admission and due compliance with Section 68 of the Evidence Ordinance.

Deed marked P2 was proved by calling the attesting witness. Sumanadasa. I also note that the learned High Court judge has correctly observed that the Defendant in filing the amended answer did not plead that the deeds in question were fraudulently executed nor was such execution of deeds challenged.

However it is subject to rules relating to amendment of pleading changing the nature and character of the case presented by a party.

Learned District Judge has arrived at a conclusion that deeds P1 to P4 are duly executed. Somalatha was at a certain point of time owner of the land and executed lease P6. As observed by the Civil Appellate High Court Defendant-Appellant cannot deny title of Somalatha as she derived title from the deed executed by the Defendant who had title to the land in dispute at a certain point of time and if permitted to accept Defendant's contention, in a way such contention would offend Section 116 of the Evidence Ordinance. (a tenant or person claiming through such tenant cannot deny that the landlord had title to the immovable property. The same estoppel applies to licencees of immovable property. 55 NLR 116; 70 NLR 313 at 317. However it will not apply in the case of fraud De Silva Vs. Isan Appu 31 NLR 225. A lessee would also be in the same position, as a licencee.

I also had the advantage of reading the decided case namely Piyadasa Vs. Binduva Alias Gunasekera a Judgment of the Court of Appeal 1992 (1) SLR 108 at 109, on execution of deed. This judgment has incorporated a

Judgment of the Supreme Court, viz W. Branchy Appu V. J. Poidohamy (1902) 2 Br. Rep 221, 222 where the former Supreme Court (Lawrie A.C. J with Moncreiff J. agreeing) held "The execution of a document impeached as having obtain by fraud need not be proved.

> "But when it is alleged that a person signed a blank sheet of paper, which was subsequently filled up in the form of a deed and impeached as fraudulent by such person, the execution of such document ought to be proved, not by calling the notary who attested it, but by calling at least one of the witnesses thereto".

The important question as to whether the transaction was a loan transaction need to be inferred from the attendant circumstances. The evidence led in the case and more particularly the case of the Defendant-appellant does not indicate that the transaction was a pure and simple loan transaction. The Appellant had not been able to place the best available evidence before the trial court. i.e evidence of Somalatha the last vendor to the property in dispute. There is always available to a party to a suit to lead parole evidence to establish the true nature of the transaction as a exception to the rules contained in Section 92/93 of the Evidence Ordinance, if land is transferred as security for a loan or the transfer

in fact creates a trust as per Section 83 of the Trust Ordinance such an exception would be instances permitted by law to lead parole evidence to establish the true nature of the transaction. I am in agreement with the views expressed by the learned High court Judge on this point, and there is no acceptable basis as contended by the Appellant to disturb such findings.

In the context of this case I would also wish to give my mind to whether, the Appellant never intend to transfer the beneficial interest. A proposition as the beneficial interest leads me to consider a situation where the transferor has entered into a notarial conveyance like the case in hand. If it is the position of the Appellant that this is a pure and simple loan transaction, courts tend to place a heavy burden on the transferor to prove facts to establish such a contention. The Appellant must prove he did not intend to part with the beneficial interest. In the case in hand the Appellant failed to place the best available evidence as observed above, or prove it was a constructive trust in terms of Section 83 of the Trust Ordinance.

Section 83 of the Trust Ordinance enclose:

> "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."
>
> "Attendant circumstances" in section 83 have been described as those "which precede or follow the transfer…. But are not too far removed in point of time to be regarded as attendant…."

"Whether a circumstance is attendant or not would depend on the facts of each case (1960) 62 NLR 559, 546. Whether it be a trust or loan transaction, each case need to be decided on the facts of each such case. But cases where there was held to be no trust, either the transferor remain in possession. Perera Vs. Fernando 17 NLR 486 or stated facts provide no indication as to who was in possession. Adaicappa Chetty Vs. Caruppen Chetty (1921) 22 NLR 417. On a balance of probability it is the burden of the Appellant. He need also to prove that he remains in possession and the consideration he received was adequate. A mere assertion of a loan transaction or that Respondent never had possession would not suffice. In the instant case both courts i.e the District court and the Civil Appellate High Court preferred to accept the version of the Respondent. As such I see no reason to interfere with that position.

The Appellant should have established that the transaction between Somalatha and vendee Plaintiff-Respondent, was a fictitious transaction or a sham. In this regard I have considered the decided case of Penderlan Vs. Pendarlan 50 NLR 513 where the transaction was never intended to be acted upon. The facts relevant to the case in hand does not take the Appellant's case anywhere near to the case of Penderlan Vs. Pendarlan.

In the above circumstances I am not inclined to disturb both the judgments of the learned District Judge and the High Court Judge. There is no merit in this appeal. As such this appeal is dismissed without costs. The judgment of the High Court is affirmed.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne 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 with Leave to Appeal granted by the Supreme Court against the judgment of the High Court of the Province of Sabaragamuwa held in Kegalle.

SC. Appeal 49/2012

SC/HCCA/LA No. 503/2011
PHC Kegalle
No. SP/HCCA/KAG/725/2010

DC. Kegalle No. 176/RE.

Sunil Pathirana alias
Sinhala Pedige Karunaratne of
Waligamuwa, Kotawella,
Rambukkana.

Plaintiff

Vs.

1. Hemalatha Edirisinghe (Deceased)

1A. Lalajini Hemali Edirisinghe

1B. Lalani Rukmali Edirisinghe

all of No. 17, Gemunu Mawatha,
Kinigahapitiya, Rambukkana.

2. P.M. Premarathne of No. 14A,
Main Street, Rambukkana.

Defendants

And Between

P.M. Premarathne of No. 14A,
Main Street, Rambukkana.

2nd Defendant-Appellant

Vs.

Sunil Pathirana alias
Sinhala Pedige Karunaratne of
Waligamuwa, Kotawella,
Rambukkana.

Plaintiff-Respondent

Hemalatha Edirisinghe
of No. 17, Gemunu Mawatha,
Rambukkana.
.

1st Defendant-Respondent

And Now Between

P.M. Premarathne of No. 14A,
Main Street, Rambukkana.

2nd Defendant- Appellant-Appellant

Vs.

Sunil Pathirana alias
Sinhala Pedige Karunaratne of
Waligamuwa, Kotawella,
Rambukkana.

Plaintiff-Respondent-Respondent

Lalajini Hemali Edirisinghe

Lalani Rukmali Edirisinghe

both of No. 17, Gemunu Mawatha,
Kinigahapitiya, Rambukkana.

1A and 1B Defendant-Respondents

* * * * *

BEFORE : **S. Eva Wanasundera, PC. J.**
B. Aluwihare, PC.J. &
U. Abeyratne, J.

COUNSEL : Sunil Abeyratne for the 2nd Defendant-Appellant-Appellant.

Dr. Sunil F.A. Cooray for Plaintiff-Respondent-Respondent

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ARGUED ON : **12.03.2015**

DECIDED ON : **27.03.2015**

S. Eva Wanasundera, PC.J.

In this Appeal, leave to appeal was granted on the questions of law set out in paragraphs 7(a), (b), (b) ,(c) and (d) of the Petition dated 30.11.2011. They are as follows:-

7(a) Whether the learned Judges of the High Court of Provinces Civil Appeals, Kegalle failed to consider the law relating to Section 755 of the Civil Procedure Code?

(b) Wasn't there prejudice caused to any party of the case as a result of making the original deceased 1st Defendant as the 1st Defendant-Respondent to the present appeal? (meaning the High Court appeal)

(b) Whether the learned Judges of the High Court of Provinces (Civil Appeals), Kegalle and the learned District Judge, Kegalle erred in law to consider that the Petitioner had only to **present** the Notice of Appeal to the original Court and **not to address** the same and the Petition of Appeal to the same Court?

(c) Whether the learned Judges of the High Court of Provinces (Civil Appeals), Kegalle has failed to consider the fact that the word 'order' instead the word 'judgment' has not caused any material defect to the present appeal (meaning the High Court appeal) or prejudiced any party to the appeal in this case?

(d) Whether the learned Judges of the High Court of Provinces (Civil Appeals), Kegalle erred in facts and law of this case?

I observe that in the Provincial High Court of Kegalle at the commencement of the hearing, the 1A and 1B Defendant-Respondent-Respondents had taken up two preliminary objections, ie.

(1) A deceased person is named as a Respondent and the appeal is therefore bad in law.

(2) The notice of appeal as well as the petition of appeal filed by the Appellant against the judgment of the learned District Judge of Kegalle was not in conformity with the provisions of Sections 754(3) and 754(4) ot the Civil Procedure Code.

Due to these defects, they pleaded that the notice of appeal and the petition of appeal should be dismissed in limine.

The Learned High Court Judges of the Civil Appellate High Court of Kegalle held that the appeal before them should be rejected on the basis that,

(a) The notice of appeal and the petition of appeal were not addressed to the original Court, ie. the District Court of Mawanella. .

(b) In the notice of appeal and the petition of appeal, only the name of Hemalatha Edirisinghe appeared as the 1st Defendant-Respondent which person had died pending the District Court action and therefore the notice and petition were both bad in law.

(c) The Judges of the High Court *cannot comply* with Section 755(4) when the Notice and Petition are bad in law.

In this regard, I would like to reproduce Sections 754 and 755 of the Civil Procedure Code. They read as follows:-

Sec.754**(1)** Any person who shall be dissatisfied with any judgment, pronounced by any original Court in any civil action, proceeding or matter to which he is a party may prefer an appeal to the Court of

Appeal against such judgment for any error in fact or in law.

(2) Any person who shall be dissatisfied with any order made by any original court in the course of any civil action, proceeding or matter to which he is, or seeks to be a party, may prefer an appeal to the court of appeal against such order for the correction of any error in fact or in law, with the leave of the court of appeal first had and obtained.

(3) Every appeal to the court of appeal from any judgment or decree of any original Court shall be lodged by giving **notice of appeal to the original court within such time and in the form and manner hereinafter provided.**

(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.**

(5) Notwithstanding anything to the contrary in the Ordinance, for the purposes of this Chapter-

"judgment" means any judgment or order having the effect of a final judgment made by any civil court; and

"order" means the final expression of any decision in any civil action proceeding or matter, which is not a judgment.

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

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

(b) the number of the action;

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

(d) the names of the appellant and respondent;

(e) the nature of the relief claimed;

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

(2) The notice of appeal shall be accompanied by -

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

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

(3) Every appellant shall within sixty days from the date of the judgment or decree appealed against, present to the original court, a petition of appeal setting out the circumstances out of which the appeal arises and the grounds of objection to the judgment or decree appealed against, and containing the particulars required by section 758, which shall be signed by the appellant or his registered attorney. Such petition of appeal shall be exempt from stamp duty.

Provided that, if such petition is not presented to the original court within sixty days from the date of the judgment or decree appealed against**, the court shall refuse to receive the appeal.**

(4) ……..

(5) ……..

I find that Section 759(1) and (2) and Section 770 of the Civil Procedure Code is relevant to this case in hand and as such I would like to reproduce the same as follows:-

Sec.759(1) If the petition of appeal is not drawn up in manner set out in the preceding section **it may be rejected or be returned to the appellant for the purpose of being amended, within a time fixed by court; or be amended then and there** .When the court rejects any petition of appeal under this section, it shall record the reasons for 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 amendments 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, **(other than a provision specifying the period within which any act or thing is to be done)** 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.**

The facts on which parties were before the District Court are as follows:-

The Plaintiff, as land lord instituted action in the District Court against his tenant, the 1st Defendant and the sub-tenant, the 2nd Defendant, seeking ejectment of the said Defendants on the ground of unlawful sub-letting. Anyway, the 2nd Defendant claimed tenancy under the Plaintiff. The 1st Defendant died pending the action and his wife and daughter were substituted in place of the deceased 1st Defendant as 1A and 1B Defendants. At the end of the trial the District Judge entered judgment in favour of the Plaintiff.

The 2nd Defendant (alleged in the plaint as sub tenant) who was aggrieved by the judgment lodged an appeal in the Civil Appellate High Court of Kegalle.

The High Court dismissed the appeal upholding the preliminary objections taken up by the Plaintiff-Respondent on two grounds, namely,

1. That all necessary parties who were before the District Court had not been named as parties to the appeal, and
2. That the notice of appeal was invalid.

The High Court in its judgment states that the notice of appeal was addressed to the High Court of Civil Appeals instead of addressing the same to the District Court which was the original Court. **Section 754(3) and (4) if read correctly, states how to commence an appeal.** Firstly notice of appeal should be presented to the Court of first instance. The Section **does not specifically say to which Court the notice should be addressed.** The notice is a document to be **firstly lodged within time in the original Court.** I am of the opinion that **it cannot become invalid so long as the notice is filed in the registry of the Court of first instance within time.**

The parties to the action in the District Court are the parties to the action in the appellate court, in this instance the High Court of Civil Appeals. The Petition of Appeal had not contained in the caption, the names of the substituted parties. I feel that, the mere fact that only the name of the dead person was mentioned in the caption, cannot be held against the party seeking relief from Court**. It is a lapse on the part of the Petitioner's Attorney-at-Law**. The litigant who has come before Court for relief should not be deprived of his right to seek relief due to a lapse on the part of the Lawyers preparing and filing the papers. In the case in hand, the dead person **had been substituted promptly in the District Court** and named as 1A and 1B Defendants. It is only a lapse of not writing down the caption properly. I am of the view that this is a matter **which should have been corrected by the High Court Judges as provided for in Section 759(1) and (2) .** It is not an incorrigible defect, good enough for rejecting the petition of appeal.

In the case of ***Jayasekera Vs. Lakmini (2010) 1 SLR 41***, Justice Chandra Ekanayake (with J.A.N. de Silva, CJ. and Marsoof, PC.J. agreeing) held that ,

> "if 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, and if the Court of Appeal is of the opinion that the Respondent **has not been materially prejudiced, it is empowered to grant relief to the appellant on such terms as it deemed just".**
>
> "When the notice of appeal had been filed by the registered Attorney-at-Law and the failure to comply with Section 755 appears to be a negligence on his part, such negligence though relevant does not fetter the discretion of Court to grant relief when it appears that it is just and fair to do so. **What is required to bar relief under Section 759(2) is not any prejudice but material prejudice."**

It was held further that "Section 770 shows that if it appears to the Court at the hearing of the appeal that any person who was a party to the action in the Court against whose decree the appeal is made but who was not been made a party to the appeal**, it is within the discretion of the Court to issue the requisite notice of appeal on those parties for service".**

I am of the opinion that this is a fit and proper case where the High Court of Civil Appeals, Kegalle should be directed to allow the notice and the petition to be corrected and/or the Court could correct the notice under its hand and then the appellate procedure should be allowed to proceed from there onwards. No prejudice would be caused to any party to the matter to be adjudicated namely, the Plaintiff, the 1A and 1B Defendants and the 2nd Defendant, when the notice of appeal is corrected and also when the petition of appeal is corrected because they have been filed **mainly according to Section 754(4) and Section 755(3) of the Civil Procedure Code.**

I am of the opinion that in this instance, no material prejudice would be caused to any party by correcting the notice of appeal and the petition of appeal. The

High Court should have corrected the petition and heard the appeal. Furthermore I find that the High Court sitting in appeal had considered two judgments, Talayaratne Vs Talayaratne (1957) 61 NLR 112 and Wimalasiri Vs Premasiri (2003) 3 SLR 330 and applied them wrongfully to the present case in hand. I answer the questions of law enumerated at the commencement of this judgment, in favour of the 2nd Defendant – Appellant – Appellant.

I conclude that the High Court should hear the matter on the merits after accepting the notice of appeal and after the corrections are done to the petition of appeal. The order of the High Court of Civil Appeal dated 25.10.2011 rejecting the notice of appeal and the petition of appeal, is hereby set aside. This appeal is allowed. The Registrar is directed to send this judgment forthwith to the High Court of the Province of Sabaragamuwa held in Kegalle with the High Court brief and the District Court brief if available, for the appeal to be heard on its merits.

Judge of the Supreme Court

B. Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

U. Abeyratne, 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(C)(1) of The High Court of the Provinces (Special Provisions) Act No.54 of 2006.

LVC Kuruppu

Administrator of the estate of DBH Kuruppu
Plaintiff

SC Appeal 54/2011
High Court L.A Application
No.WP/HCCA/Col.42/10 LA
DC Colombo 6063/RE

Vs

B Carolis Perera
Defendant

HA Charlot Nonna
Substituted Defendant

AND BETWEEN

HA Charlot Nonna
Substituted Defendant-Petitioner

Vs

Obrey Orvil Carrol Kuruppu
Substituted-Plaintiff-Respondent

AND NOW BETWEEN

HA Charlot Nonna
Substituted Defendant-Petitioner-Appellant

Vs

Obrey Orvil Carrol Kuruppu
Substituted-Plaintiff-Respondent-Respondent

Before : Chandra Ekanayake J
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Mhanama de Silva with N Samarasinghe for the Substituted Defendant-Petitioner-Appellant
Maura Gunawansa for the Substituted Plaintiff-Respondent-Respondent

Argued on : 4.3.2015
Decided on : 17.6.2015

Sisira J De Abrew J.

This is an appeal against the judgment of the Civil Appellate High Court (hereinafter referred to as the High Court) dated 3.12.2010 wherein the said High Court dismissed the application for leave to appeal filed by the substituted Defendant-Petitioner-Appellant (hereinafter referred to as the Defendant-Appellant) on the ground that there was no specific prayer for leave to appeal. This Court, by its order dated 5.5.2011, granted leave to appeal on questions of law set out in paragraphs 23(a) and 23(b) of the petition of appeal dated 16.12.2010 which are reproduced below.

1. Is a specific prayer for leave to appeal necessary in an application for leave to appeal, if not, has the said Civil Appellate High Court erred in law in

dismissing the petitioner's application on the basis that there was no specific prayer for leave?

2. In any event in as much as in both the petition dated 2.7.2010 and in the supporting affidavit filed in the said High Court, the petitioner had stated that she was seeking leave to appeal and in as much as the caption had stated it was an application for leave to appeal, was a specific prayer for leave to necessary and if not has the said High Court erred in law in dismissing the said application purely for lack of a specific prayer to that effect?

I now advert to the facts of this case. The Defendant-Appellant filed an application for leave to appeal (petition of appeal) in the High Court seeking leave to appeal against the order of the District Court dated 12.5.2010. On 17.6.2010 when the case was called in the High Court learned counsel for the Substituted Plaintiff-Respondent-Respondent (hereinafter referred to as the Plaintiff-Respondent) raised a preliminary objection and submitted that the application for leave to appeal should be dismissed on the ground that it did not contain a prayer for leave to appeal. The inquiry into this objection was fixed for 9.7.2010. Before the commencement of the inquiry, the Defendant-Appellant, on 3.7.2010, filed an amended petition including a specific prayer for leave to appeal. The Defendant-Appellant however did not obtain permission of the High Court to file an amended petition. It appears from the judgment that the High Court has refused to consider the amended petition. In my view the High Court was right when it refused to consider the said amended petition since the Defendant-Appellant did not obtain permission of court to file the same.

The preliminary objection raised by the Plaintiff-Respondent in the High Court was that the petition of appeal should be dismissed as it did not contain a specific prayer for leave to appeal. The learned High Court Judges considering the

judgment in the case of Sirinivaso Thero Vs Sudassi Thero 63 NLR 31 upheld the objection and dismissed the petition of appeal. This Court is invited to consider the correctness of the said judgment. I would like to state here that the judgment in the case of Sirinivaso Thero Vs Sudassi Thero 63 NLR 31did not consider the question that has arisen in this case. I have read the said judgment and in my view it is not relevant to the question that must be considered in this case.

In order to consider the question that must be decided in this case it is necessary to consider Section 757(1) of the Civil Procedure Code (CPC) which reads as follows:

> 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.

Section 757(1) of the CPC specifies particulars that should be included in an application for leave to appeal (petition of appeal). It further states that such petition should contain particulars required by section 758 of the CPC. Section 758 of the CPC states that a petition of appeal should, inter alia, contain "a demand in the form of relief claimed"

It is true that in the petition of appeal dated 12.5.2010, there is no specific prayer to grant leave to appeal. What is necessary to consider is whether the said

petition of appeal contains a demand in the form of relief claimed. In paragraph 18 of the petition of appeal dated 12.5.2010, the Defendant-Appellant had clearly prayed that leave to appeal be granted. The same facts are considered in paragraph 19 of her affidavit. Thus in my view the Defendant-Appellant, in the petition of appeal dated 12.5.2010, has clearly moved the High Court to grant her leave to appeal.

To dismiss a petition of appeal on the ground that there is no specific prayer for leave to appeal in such petition when it contains a specific paragraph praying for leave to appeal is highly technical. Supreme Court is not an academy of law but a Court of Justice and it should not be trammeled by technicalities. This view is supported by the judgment of Abrahams CJ in the case Vellupillai Vs Chairman Urban District Council 39 NLR 464 Wherein His Lordship remarked thus: "Supreme Court is a Court of Justice, it is not an Academy of Law"

In my view, the petition of appeal dated 12.5.2010 filed in the High Court contains a demand that leave to appeal be granted. I am therefore of the opinion that the said petition of appeal has complied with Section 757(1) and 758 of the CPC. In these circumstances the fact that the Defendant-Appellant filed an amended petition cannot be considered to construe that she had abandoned her petition of appeal dated 12.5.2010 (the original petition).

For the above reasons I hold that the High Court was wrong when it dismissed the petition of appeal of the Defendant-Appellant. In my view, absence of a specific prayer for leave to appeal cannot be considered as a ground to dismiss an application for leave to appeal (petition of appeal) when such petition contains a paragraph moving court to grant leave to appeal.

In view of the conclusion reached above, I answer the questions of law raised by the Defendant-Appellant in his favour.

For the above reasons, I set aside the judgment of the High Court dated 3.12.2010 and direct the High Court to consider the Petition of Appeal filed by the Defendant-Appellant.

Judgment set aside

Judge of the Supreme Court.

Chandra Ekanayake J

I agree.

Judge of the Supreme Court.

Anil Gooneratne J

I agree.

Judge of the Supreme Court.

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

SC Appeal No. 56/2008
SC (Spl) LA No. 100/2008

Anusha Wijewardena
34, Orchard Gate,
Bradly Stoke,
BS 32 OHW,
Bristol,
United Kingdom

By her Attorney
Simila Patuwatha Vithana
75/3-2, Isipathana Mawatha,
Colombo 5.

PETITIONER

Vs.

1. Minister of Lands,
Sampathpaya"
Battaramulla.

2. Minister of Lands
Govijana Mandiraya,
Battaramulla.

3. Divisional Secretary,
Kaduwela.

4. Director
Urban Development Authority,
"Sethsiripaya",
Battaramulla.

5. Sri Lanka Land Reclamation and
   Development Corporation,
   P.O. Box 56,
   No. 3, Sri Jayawardenapura Mawatha,
   Welikada,
   Rajagiriya.

6. Commissioner General of Agrarian
   Development
   Department of Agrarian Development
   42, Sir Marcus Fernando Mawatha,
   P.O. Box 537,
   Colombo 7.

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

RESPONDENTS

AND BETWEEN

Anusha Wijewardena
34, Orchard Gate,
Bradly Stoke,
BS 32 OHW,
Bristol,
United Kingdom
By her attorney
Simila Patuwatha Vithana
75/3-2, Isipathana Mawahta,
Colombo 5.

PETITIONER-PETITIONER

Vs.

1. Minister of Lands,
   Sampathpaya"
   Battaramulla.

2. Minister of Lands
   Govijana Mandiraya,
   Battaramulla.

3. Divisional Secretary,
   Kaduwela.

4. Director
   Urban Development Authority,
   "Sethsiripaya",
   Battaramulla.

5. Sri Lanka Land Reclamation and
   Development Corporation,
   P.O. Box 56,
   No. 3, Sri Jayawardenapura Mawatha,
   Welikada,
   Rajagiriya.

6. Commissioner General of Agrarian
   Development
   Department of Agrarian Development
   42, Sir Marcus Fernando Mawatha,
   P.O. Box 537,
   Colombo 7.

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

RESPONDENTS-RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Priyantha Jayawardena P.C., J. and
Anil Gooneratne J.

COUNSEL: Gamini Hettiarachchi for the Petitioner-Petitioner

Anusha Navaratne A.S.G., for the Respondent-Respondent

ARGUED ON: 01.10.2015

DECIDED ON: 24.11.2015

GOONERATNE J.

This was a matter arising under the Land Acquisition Act. Petitioner sought a Writ of Mandamus from the Court of Appeal to divest the land in question and to revoke the vesting orders marked P17 and P19 issued under the Land Acquisition Act (as described in the Amended Petition filed in the Court of Appeal). To state very briefly the Petitioner's husband purchased the land on or about 1978 by a deed of transfer. This land was gifted to the daughter of the Petitioner's husband. The Petitioner in order to develop the land, sought permission from relevant authorities. However when a boundary dispute arose,

the Petitioner, only at that stage became aware that the land in question was acquired by the State. (as pleaded).

The material placed before us by way of oral and written submission it is apparent that the acquisition is challenged on the basis that the Petitioner had no sufficient notice, and that the land had not been utilized for a public purpose. Court of Appeal dismissed the Petitioner's application without costs. Aggrieved by the order of dismissal Petitioner sought Special Leave to Appeal from the judgment of the Court of Appeal and this court granted leave on 02.07.2008 on the following questions of law.

1. Did the Court of Appeal misdirect itself in law when it failed to appreciate that the Petitioner's land has been excluded at the time of the 1997 acquisition and the significance of such exclusion on the relief, claimed by the Petitioner?

2. Did the Court of Appeal failed to appreciate that the Petitioner's land was so excluded from the land acquired in 1997, that there is no legal impediment for a revocation and/or divestiture of the Petitioner's land?

3. Did the Court of Appeal misdirect itself in law in the interpretation of the law relating to revocation and/or divestiture?

4. Did the Court of Appeal misdirect itself in arriving at the conclusion that the divestiture piece meal was not available in law in the context of divestiture of lots 1, 2 and 3 in plain No. 5415 as published in gazette notification 1187/41 of 2001?

5. In terms of Section 4(a) of the Land Acquisition Act as amended, could the appellant be entitled for the relief, she claims?

The Petitioner describes his land as “Ambalangodella Kumbura” and “Kosgahawatta”. The acquisition notice of 1979 contained in Gazette Notification dated 22.10.1979 issued under Section 38 Proviso “A” of the Land Acquisition Act describes the land as ‘Diyawanna Wagura’. Petitioner’s learned counsel advanced an argument at the hearing that Petitioner sought approval to build on the land in dispute from various authorities and approval was granted from these authorities inclusive of the UDA. However at a subsequent point of time the Petitioner received a letter from the Urban Development Authority dated 10.01.2003 cancelling the permission granted.

Learned Counsel for the Petitioner also attempted to demonstrate to this court that there were two acquisition notices, issued. The acquisition in 1979 by Gazette date 22.10.1979 was issued under Proviso ‘A’ to Section 38 of the Land

Acquisition Act refer to Diyawanna Wagura and not Petitioner's lands called "Ambalangodella Kumbura" and Kosgahawatte'. As such Petitioner's lands are not included, but I observe that the above Gazette Notification is based on plan 5415 and Petitioner's land is included as lot 1 in the said plan. Petitioner pleaded that another Gazette Notification was issued, under Proviso 'A' to Section 38 of the said Act. This Gazette also refer to plan 5415. (P18). The Gazette issued under Section 7 of the said Act in respect of the 2nd Acquisition in 1997, purports to acquire more or less the same lands purportedly acquired in terms of this Gazette based on two separate plan Nos. 7404 & 7750. Plan 7750 excludes Petitioner's lands. This futile attempt is to demonstrate that on the second Acquisition in 1997, the notification under Section 38 Proviso 'A' includes Petitioner's land whilst Gazette with regard to notice as per Section 7 of the Act, refers to two other plans, (P21 & P22 annexed to the Petition in the Court of Appeal) which excludes Petitioner's land. It is on the above basis that the Petitioner urge that the matter warranted a divestiture.

At this point of my judgment, before I express my views on the subject, I prefer to be guided by the very fundamental principles governing mandamus. A Writ of Mandamus has been sought by the Petitioner, which is a

discretionary remedy of court. A Mandamus will not be granted to correct an erroneous decision as to fact 2 CLW 14:10 Times 65; 12 law Rec 176. The grant of a mandamus is a matter for discretion of the court. It is not a writ of right and is not issued as a matter of course 1 CLW 306. Further the court before issuing a Writ of Mandamus is entitled to take into consideration the consequences which the issue of the writ will entail. 34 NLR 33. A party applying for a Mandamus must make out a legal right and a legal obligation 1 NLR at 33.

The material placed before this court indicates that the land in dispute was acquired by Gazette Notification of 22.10.1979 (P17) under proviso 'a' to Section 38 of the Land Acquisition Act. The said Gazette Notification is based on preliminary plan No. 5415 (P18) and Petitioner's land is included in lot 1 of the said preliminary plan. The tenement list P18 shows that the claimant to the land is State. Prior to issuance of the above notification a notice under section 2 of the Lands Acquisition Act had been issued and exhibited. Subsequently by Gazette Notification No. 968/1 of 24.3.1997 (P19) under proviso 'a' to Section 38 of the Land Acquisition Act was published acquiring lots 1, 2, 3 & 4 of plan No.

5415. Both acquisitions are in respect of the same land and the extent is the same

(17.199 hectares. Vide P19 & 19(b). Learned Additional Solicitor General argued that sufficient notice had been given to the Petitioner as prior to publication of the Section 38 notice, Section 2 notice was published and exhibited. It was also emphasized that Section 39A merely vests a discretionary power in the Minister to make a divesting order in a case where the preconditions referred to in that section are satisfied. A former owner cannot in any account demand such exercise of power. This court has no reason to hold a different view from that which was expressed by the learned Additional Solicitor General.

The Petitioner's position was that she and her family members were always in possession of the land in dispute. The provisions of Section 39A could be invoked on land vested absolutely in the State when actual possession of such land has been taken for or on behalf of the State under the provisions of paragraph (a) of Section 40 of the Act.

Section 39A reads thus:

> 39A(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 this 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 provisions 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 the divesting Order is published in the Gazette.

I wish to add that actual possession had not been taken over under Section 40(a) of the Act and Petitioners own showing of being in possession would not give rise to an application under the provisions of the Land Acquisition Act.

There is also another matter that cannot be ignored. Document 'X' indicates that land had been utilized to construct the 'Govijana Mandiraya' building. 'X' had been produced on a direction given by court.

Petitioner has also sought a Writ of Mandamus to revoke the vesting order marked P17 and P19 in respect of the land described in their schedules. Though these vesting orders were issued under provisio (a) to Section 38 it refers to the same land vested in the years 1997 (P19) and 1979 (P17). The extent and the boundaries are the same. Land is described as 'Diyawanna Wagura'. Petitioner's position with respect to same already dealt in this judgment.

It is evident that an order under Section 38 of the Land Acquisition Act gives a conclusive effect and all courts receive same as conclusive evidence of title of the state. This being a discretionary remedy of court, cannot afford a statutory right to a litigant, to demand the exercise of a power to revoke the vesting order. Court of Appeal has used its discretion correctly and dismissed the case of the Petitioner. The petitioner has not been successful in making out a legal right and a legal obligation to succeed in this matter. Five questions of law had been suggested at the leave stage. I would answer all five questions of law in the negative against the Appellant. Enactments for the compulsory acquisitions of

land have to be strictly construed and applied. There is no merit in this appeal. As such this appeal is dismissed without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., 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

Hatton National Bank Limited
Petitioner-Petitioner-Appellant

SC Appeal 63/2013

SC(HC) LA Application No.110/2012
High Court Colombo ARB/388.2011

Vs

Sella Hennadige Chandrasiri
Respondent-Respondent-Respondent

Before : Buwaneka Aluwihare PCJ
Sisira J De Abrew J
Anil Gooneratne J

Counsel : Palitha Kumarasinghe President's Counsel for the Petitioner-Petitioner-Appellant.
Sajeevi Siriwardene with Sandamal Madurawela for the Respondent-Respondent-Respondent

Argued on : 13.7.2015
Written Submissions
tendered on : By the Petitioner-Petitioner-Appellant on 27.7.2015
By the Respondent-Respondent-Respondents on 16.6.2014
Decided on : 15.10.2015

Sisira J De Abrew J.

This is an appeal against the judgment of the learned High Court Judge of Colombo dated 18.12.2012. The learned High Court Judge, by the said judgment, dismissed the application of the Petitioner-Petitioner-Appellant (hereinafter referred to as the petitioner) who, in terms of the provisions of

Section 31 of the Arbitration Act No 11of 1995, made an application to enforce the arbitral award dated 17.12.2010. Being aggrieved by the said judgment the petitioner has appealed to this court. This court, by its order dated 5.4.2013, granted leave to appeal on questions of law set out in paragraphs 26(1), 26(2), 26(4), 26(5), 26(7) and 26 (9) of the petition of the petitioner dated 31.12.2012 which are reproduced below.

1. Did the learned High Court Judge err in law in failing to appreciate that in the absence of an application to set aside the award in question in terms of Section 32 of the Arbitration Act No 11of 1995, the High Court, in law, is bound to enforce the award?

2. Did the learned High Court Judge err in law in failing to appreciate or in failing to give proper effect to the provisions of Section 31(6) the Arbitration Act No 11of 1995?

3. Did the learned High Court Judge err in law in failing to appreciate that the arbitration proceedings are not 'actions' within the meaning and for the purpose of the Civil Procedure Code and consequently, the provisions of Section 406 of the Civil Procedure Code has no application to such arbitration proceedings?

4. Did the learned High Court Judge err in law in holding that the arbitration proceedings in the application before the High Court are prescribed in law when the provisions of the Prescription Ordinance has no application to the arbitration proceedings.

5. Did the learned High Court Judge err in law in holding that suppression of a material fact disentitles the Petitioner to relief under Section 31 of the Arbitration Act No.11 of 1995 when the remedy provided by Section 31 of the Arbitration Act No 11of 1995 is not a

discretionary or equitable relief but is a right given by law to a party to an arbitration agreement pursuant to which an arbitral award is made?

6. Did the learned High Court Judge err in law in ordering 'penal costs' against the Petitioner in a sum of Rs.100,000/- when the law does not provide such a penalty?

The Respondent-Respondent (hereinafter referred to as the Respondent) obtained financial facilities from the Petitioner amounting Rs.925,000/- upon an agreement signed by both parties on 3.4.1997. The Respondent, by the said agreement agreed to repay the said amount with interest in 48 installments. Since the Respondent defaulted repayment of the said financial facilities, the Petitioner terminated the agreement and filed an action in the District Court of Monaragala. However the said case was dismissed by the District Judge on 3.12.2008 as the Petitioner failed to pursue the action. Thereafter the petitioner by writing dated 14.12.2009 gave due notice to the Respondent that he would refer the dispute to arbitration and requested him to respond to the said notice in terms of clause 25 of the agreement. As the Respondent failed to respond to the said notice, the dispute was taken up before the sole arbitrator appointed by the Petitioner. The Arbitration centre, by letter dated 17.8.2010, informed the Petitioner and the Respondent the date, time and place of the inquiry of the arbitration and requested the parties to be present on the said dtae. The Respondent did not respond to the said notice. Thereafter the evidence was led before the Arbitrator and he (the Arbitrator), by his award dated 17.12.2010, made an order that the Respondent should pay Rs. 1,241,917/20 together with interest at the rate of 36% per annum.

Arbitration centre, by letter dated 23.12.2010, communicated the award to the Petitioner and the Respondent. The Petitioner, acting in terms

of Section 31 of the Arbitration Act No.11 of 1995, filed an application in the High Court of Colombo for enforcement of the arbitral award. The learned High Court Judge, by his judgment dated 8.12.2012, dismissed the application and awarded penal cost amounting to Rs.100,000/-. Being aggrieved by the said judgment, the Petitioner has appealed to this Court. The learned High Court Judge observed the following grounds in refusing the said application.

1. As the Petitioner's case, filed in the District Court of Monaragala with regard to the same dispute, had been dismissed by the District Court, he is precluded from filing subsequent action regarding the same dispute.

2. The Petitioner by opting to institute action in the District Court of Monaragala is thereby prevented from referring the same dispute to arbitration.

3. The Petitioner has not disclosed to the Arbitrator the fact that action had been filed in the District Court of Monaragala.

4. The Petitioner's cause of action is prescribed in law and is therefore incapable of being referred to Arbitration and therefore the reference to arbitration is null and void.

5. The arbitral award is null and void in law as it had been obtained by misrepresentation, suppression of facts and fraudulent means.

6. The application for enforcement of the arbitral award has been made fraudulently and maliciously.

Learned President's Counsel for the Petitioner contended that the learned High Court Judge could not have considered the above grounds in view of Section 31(6) of the Arbitration Act. Learned Counsel for the Respondent

however contended that that the above grounds could be considered by the Learned High Court Judge. I now advert to the above contentions.

It is significant to note that the Respondent has not made an application to set aside the arbitral award in terms of Section 32 of the Act. How does a person affected by an arbitral award seek to set aside such an award? What is the procedure that he should adopt? The answers to the above questions are found in Section 32 of the Arbitration Act which is reproduced below.

"(1) An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefore, within sixty days of the receipt of the award

(a)where the party making the application furnishes proof that-

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the Law to which the parties have subjected it or, failing any indication on that question, under the law of Sri Lanka ; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iii) the award deals 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:

Provided however that, if the decision on the matters submitted to arbitration can be separated from those not so submitted ,only the

part of the award which contains decisions on matters not submitted

to arbitration may be set aside; or

(iv)the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act: or

(b) where the High Court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka ; or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka.

(2) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured pendning the determination of the application."

An examination of Section 32 of the Arbitration Act reveals that if a person is dissatisfied with the arbitral award which was made against him, such person must, within sixty days of the award, make an application to the High Court to set aside the award and he must establish one of the grounds set out in Section 32 of the Arbitration Act. It has to be stated here that the Respondent had not made an application to the High Court under section 32 of the Arbitration Act. The Petitioner filed the application in the High Court for

enforcement of the arbitral award under Section 31 (6) of the Act. In order to arrive at the correct decision in this case, it is necessary to consider Section 31(1) and 31 (6) of the Arbitration Act which are reproduced below.

Section 31(1) of the Arbitration Act

> "A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award, apply to the High Court for the enforcement of the award."

Section 31 (6) of the Arbitration Act:

> "Where an application is made under subsection (1) of this section and there is no application for the setting side of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in Section 33 and 34 of this Act it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered."

It is undisputed that the Petitioner filed an application under Section 31 (1) of the Arbitration Act (hereinafter referred to as the Act) within the time stipulated

in the said section. It is also undisputed that the High Court issued notice to the parties in terms of Section 31(6) of the Act.

When I consider Section 31(6) of the Act, it appears that when an application is made under Section 31 (1) of the Act for the enforcement of the arbitral award, the High Court Judge must, before making an order under Section 31(6) of the Act, be satisfied that

(1) there is no application for the setting aside of the arbitral award under Section 32 of the Act. OR

(2) court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in Section 33 and 34 of the Act.

An examination of Section 31(6) of the Act reveals that that the High Court, in an application made under Section 31(1) of the Act, cannot go beyond the above limits and that the High Court cannot consider any other grounds other than the grounds referred to above. In my view, in the absence of an application to set aside the arbitral award in terms of Section 32 of the Act, the High Court, in law, is bound to enforce the award.

Sections 33 and 34 of the Act deal with foreign arbitration. The arbitral award in question in this case is not a foreign arbitral award. It was made in Sri Lanka. Therefore the second criterion cited above has no application to the present case. It is undisputed that there was no application before the High Court

for the setting aside of the arbitral award in terms of Section 32 of the Act. When I consider the above matters, I am of the opinion that the learned High Court Judge was wrong when he considered the grounds set out in his judgment which I have stated in this judgment.

Learned counsel for the Respondent tried to contend that in England, India and Malaysia ground of prescription is considered in an application for enforcement of arbitral award. I would like to state here that in those countries the relevant Acts have brought legal provisions to the effect that plea of prescription would apply to an application for enforcement of arbitral award. But the Arbitration Act in Sri Lanka does not contain such provisions.

The learned High Court Judge, in his judgment, has ordered penal costs against the Petitioner in a sum of Rs.100,000/-. In my view the law does not provide for imposition of such a penalty. The penalty costs ordered by the learned High Court Judge cannot be permitted to stand.

In view of the above reasons, I answer the 1st,2nd and 6th questions of law in favour of the Petitioner. In view of the reasons given in this judgment, it is not necessary to answer 3rd 4th and 5th questions of law raised by the Petitioner.

For the above reasons, I hold the view that the judgment of the learned High Court Judge cannot be permitted to stand. I therefore set aside the judgment of the learned High Court Judge dated 18.12.2012.

High Court is directed to enforce the arbitral award and enter judgment and decree in terms of the arbitral award as provided in Section 31(6) of the Arbitration Act No 11 of 1995. The appeal is allowed. No costs

Appeal allowed.

Judge of the Supreme Court.

Buwenaka Aluwihare PC,J

I agree.

Judge of the Supreme Court.

Anil Goonertane J

I agree.

Judge of the Supreme Court.

IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST

REPUBLIC OF SRI LANK A

In the matter of an application for Special Leave to Appeal to the Supreme Court from an Order dated 9th February 2011 of the Court of Appeal in revision Application No. CA/ (PHC) APN 187/2010.

SC Appeal No. 67/2011

SC (SPL) Revision No. 187/2010

High Court Case No. HC-5309/10

Honourable Attorney-General
Attorney-General's Department
Colombo-12.

Complainant

Vs.

1. Ayiduroos Abdul Rahim
2. Shavul Hameed Nasir
3. Abdul Baffoor Amanullah
4. Sahibu Mohideen

Accused

AND BETWEEN

1. Ayiduroos Abdul Rahim
   No.2, Re-settlement Village
   Aajarawatta
   Norochchole.

2. Shavul Hameed Nasir
   No.A1, Kandakuliya
   Kalpitiya.

3. Abdul Gaffoor Amanullah
   Samagipura
   Puttalam.

4. Sahibu Mohideen,
   No.87/1, Obanbaduda Road,
   Puttalam.

Accused-Petitioners

Vs.

Honourable Attorney-General,
Attorney General's Department,
Colombo-12.

Complainant –Respondent

AND NOW BETWEEN

1. Ayiduroos Abdul Rahim
   No.2, Re-settlement Village
   Aajarawatta
   Norochchole.

2. Shavul Hameed Nasir
   No.A1, Kandakuliya
   Kalpitiya.

3. Abdul Gaffoor Amanullah
   Samagipura
   Puttalam.

4. Sahibu Mohideen,
No.87/1, Obanbaduda Road,
Puttalam.

Accused-Petitioners-Petitioners

Vs.

Honourable Attorney-General
Attorney-General's Department
Colombo 12.

Complainant–Respondent
Respondent

BEFORE: Priyasath Dep, PC. J

Buwaneka Aluwihare, PC J &

Sarath de Abrew, J

COUNSEL: Faiz Musthapha, PC for the Accused-Petitioners-Petitioners.

Ms. V. Hettige, SSC for the Complainant-Respondent-Respondent.

ARGUED ON: 10 -12-2014

DECIDED ON: 16 -02-2015

ALUWIHARE PC. J

The Accused-Appellants (hereinafter the Appellants) had been indicted before the High Court of Colombo for having been in possession of seven boat engines (outboard motors), exceeding fifteen horsepower, thereby violating Regulation 2 of Emergency (Restricted use of Outboard Motors) Regulation No.8 of 2006 (Hereinafter referred to as, the Regulations).

When the case came up for trial before the High Court on the 30th of November 2010, all appellants tendered an unqualified plea of guilty and the court proceeded to convict the Appellants and then were accordingly sentenced.

Each Appellant was imposed a three months term of imprisonment and a fine of Rupees five hundred thousand was imposed, with a default sentence of one year imprisonment. In addition the seven outboard motors that were in the possession of the Appellants were forfeited to the state.

The attention of this court was drawn to the Gazette Notification, bearing No.147/24 dated 29th December 2006 issued under the Public Security Ordinance (Chapter 40), under which the appellants were indicted.

In the English version of the Gazette Notification, Regulation No.6 reads as follows:-

"Any person who commits an offence under paragraph (2) of regulation 2, or paragraph (4) of regulation 3 or paragraph (2) of regulation 4 of the regulations, shall on conviction after Trial by the High Court established under Article 154P of Constitution for the Western Province Holding in Colombo , be liable to rigorous imprisonment for a term not less than three months and not exceeding five years **and** to a fine not less than Five Hundred Thousand Rupees and the outboard motor , water scooter or swimmer delivery vehicle used in or connection with the commission of the offender shall be forfeited to the Republic".

However, in the Gazette Notification published in Sinhala Regulation No.6 read as follows:-

“ මෙම නියෝගවල දෙවන නියෝගයේ වන ඡේදය යටතේ හෝ 3 වන නියෝගයේ 4 වන ඡේදය යටතේ හෝ 4 වන නියෝගයේ 2 ඡේදය යටතේ වූ වරදක් සිදුකරන යම් තැනැත්තෙක් සිදු කරන කොළඹදී පවත්වනු ලබන පස්නාහිර පළාත සඳහා ආණ්ඩුක්‍රම ව්‍යවස්ථාවේ 154 ග ව්‍යවස්ථාව යටතේ සිදුවන ලද දහඩකරණයක් විසින් පවත්වනු ලබන නඩු විභාගයකින් පසු වරදකරුවකු කරනු ලැබීමේදී මාස 3 ක නොඅඩු සහ අවුරුදු පහකට නොවැඩි කාල සීමාවක් සඳහා බරපතල වැඩ ඇතිව බන්ධනාර කිරීමකට හෝ රු 500,000 කට අඩු නොවන දඩයකට යටත් විය යුතු අතර එම වරද සිදු කිරීම සඳහා හෝ හාවිතා කරන ලද පිටපත සවි කරන ලද එන්ජින් ජල ස්කුටරය හෝ පිහිනුම්කරුවන් රැගෙන යාමේ වාහනය ජන රජය වෙත රාජසන්තක කරනු ලැබිය යුතුය”.

It was contended by the learned Counsel on behalf of the Appellants that the Regulation No. 6 referred to above the Sinhala text is different to that of the English text of said Regulation. In view of the inconsistency between the Sinhala and English texts of this Regulation, it was submitted by the Counsel that the publication in Sinhala is the authoritative Regulations and it is the Sinhala Regulations that should prevail in the event of an inconsistency. In view of the above, it was contended on behalf of the Appellants that the High Court is only empowered either to impose a sentence of rigorous imprisonment for a term not less than three (3) months and not exceeding five (5) years or to a fine of not less than Five Hundred Thousand Rupees, but cannot impose both, that is, a term of imprisonment and a fine. It was submitted that the imposition of three (3) months imprisonment and the fine of Rs. 500,000/- on each of the appellants by the learned Judge of the High Court, by her order dated 30th November 2010, therefore is an illegal sentence.

When the matter came up before the Court of Appeal their Lordships made order, suspending the sentence of imprisonment of three months imposed by the High Court for a period of ten (10) years, but did not interfere with the fine of Rs. 500,000 that was imposed on each of the Appellants.

Thus the complaint in the main by the Appellants is that the Court of Appeal without considering the Regulation No. 6 of the Gazette Notifications bearing No. 1477/24 dated 24th December 2006, declined to interfere with the fine imposed on each Appellant, without giving any reasons.

Although the Appellants complain, that the Court of Appeal by its order dated 9th February 2011 suspended the sentence of imprisonment imposed on the Appellants but did not interfere with the fine imposed on each of the Appellants without any reason. It must be noted that the Appellants came before the Court of Appeal on the premise that the minimum mandatory

sentence imposed by Regulation 6 of the Emergency (Restricted use of Outboard Motors) Regulations No.8 of 2006 is unconstitutional and is in conflict with Articles 4 (c), 11 and 12 (1) of the Constitution and therefore is illegal.

In fairness to their Lordships of the Court of Appeal it must be pointed out that the case on behalf of the Appellants was presented before the Court of Appeal on the above premise, citing the decision of this court in Reference No 03/2008, wherein this court held that, a minimum mandatory sentence in a statute is in conflict with Articles 4 (c), 11 and 12 (1) of the Constitution and the High Court is not inhibited from imposing a sentence that it deems appropriate in the exercise of its judicial discretion.

It was also argued before the Court of Appeal that the sentence imposed by the learned trial judge on the Appellants was excessive, but the inconsistency of the texts in Sinhala and English versions of Regulation 6 in the relevant Gazette, was never brought to the attention of the Court of Appeal.

It is contended on behalf of the Appellants that in the event of an inconsistency between the texts of a statute or any other law, that it is the Sinhala text that would prevail and this court is inclined to accept the said argument. The learned Senior State Counsel who represented the Attorney General also subscribed to the views expressed on behalf of the appellants. Thus, as the law stands, any person convicted of an offence under paragraph (2) of Regulation 2 or paragraph (4) Regulation 3 or paragraph 2 of Regulation 4 of Emergency (Restricted use of Outboard Motors) Regulations No. 08 of 2006, is only liable to be punished with a term of imprisonment referred to therein OR with a fine not exceeding Rupees 500,000 and imposition of a term of imprisonment and a fine would certainly be an illegal sentence.

Having considered the legal position as to the sentence referred to above, I make order setting aside the order of the Court of Appeal dated 9th February 2011.The fine of Rupees 500,000 imposed on each of the appellants by the High court by its order dated 30th November 2010 is also hereby set aside. Subject to the said variation the sentence imposed by the learned High Court judge by the said order is affirmed.

It has been brought to the attention of this court that the Appellants have already served the term of three months imprisonment imposed on them. The High Court is further directed to verify this fact before the sentence is brought into operation.

The appeal is partly allowed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C 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 dated 10.06.2013 of the Provincial High Court of Colombo HCALT 96/2010 under and in terms of Article 128(2) of the Constitution.

S.C. Appeal No. 73/2014

S.C.Spl. LA No. 175/2013
HC. Case No. HCALT/96/2010
LT. Application No. 02/1511/2008 Colombo

Kosgolle Gedara Greeta Shirani Wanigasinghe,
Alupatha, Ussapitiya.

Applicant

Vs.

Hector Kobbekaduwa Agrarian Research and Training Institute,
No. 114, Wijerama Road,
Colombo 07.

Respondent

And Between

Kosgolle Gedara Greeta Shirani Wanigasinghe,
Alupatha, Ussapitiya.

Applicant-Appellant

Vs.

Hector Kobbekaduwa Agrarian Research and Training Institute,
No. 114, Wijerama Road,
Colombo 07.

Respondent-Respondent

And Now Between

Kosgolle Gedara Greeta Shirani Wanigasinghe,
Alupatha, Ussapitiya.

Applicant-Appellant-Appellant

Vs.

Hector Kobbekaduwa Agrarian Research and Training Institute,
No. 114, Wijerama Road,
Colombo 07.

Respondent-Respondent-Respondent

* * * * *

BEFORE : **S. Eva Wanasundera, PC.J .**

Buwaneka Aluwihare, PC.J. &

Priyantha Jayawardena, PC.J.

COUNSEL : Pulasthi Hewamanne instructed by Mr. R. Navodayam for the Applicant-Appellant-Appellant on behalf of Legal Aid Commission.

N. Wigneswaran SSC. for the Respondent-Respondent-Respondent.

ARGUED ON : **29.05.2015**

WRITTEN SUBMISSIONS FILED: By the Applicant-Appellant-Appellant. on 18.06.2015
By the Respondent-Respondent-Respondent on 16.06.2015

DECIDED ON : **02.09.2015**

* * * * * *

S. Eva Wanasundera, PC.J.

This matter was considered by this court in the first instance on the 23rd May, 2014 and prior to granting leave to appeal stated thus; "we see no reason to disturb the findings of the President of the Labour Tribunal and also the Judge of the High Court. However we find that the learned President of the Labour Tribunal and the learned High Court Judge have not addressed their minds regarding the proportionality of punishment imposed by the Employer having regard to the act of misconduct, in the Labour Tribunal".

This court then granted leave to appeal on one question of law contained in paragraph 9(d) of the Petition dated 23rd July, 2013. It reads,

> "Have the learned High Court Judge of Colombo and the learned President of the Labour Tribunal failed to consider the Doctrine of Proportionality in entering their decision to terminate the services of the Appellant ?"

Facts in this case are quite pertinent to be considered since this court has to decide on the proportionality by weighing out the incidents with the punishment imposed on the Appellant. In the circumstances, I would like to narrate the facts as follows.

The Applicant- Appellant- Appellant (hereinafter referred to as the Appellant) joined the Hector Kobbekaduwa Agrarian Research Institute, which is named as the Respondent-Respondent-Respondent (hereinafter referred to as the Respondent) on 10.01.1990. She was scheduled to be on probation for three years. Due to complaints by her supervising officers at that time, with regard to her attitude and behavior, the increments were delayed and warnings were given by the Respondent and finally, after 9 years, she was confirmed in the post of Statistical Assistant Grade 1 on 15.02.1999. Due to numerous incidents which took place between the Appellant and the co - workers, and also between the Appellant and the superiors, the Appellant was interdicted and a charge sheet was served on her. A domestic inquiry was held on the charge sheet dated 16.06.2006.The Appellant was found guilty. Her services were terminated on 06.03.2008.

The Appellant challenged this decision in the Labour Tribunal by filing an application on 30.10.2008. Only the Appellant gave evidence on her behalf. The Respondent, Employer led the evidence of three witnesses who were Research Officers. The Labour Tribunal delivered the order on 03.09.2010 with the finding that the termination of the Appellant's services was just and equitable. Thereafter the Appellant appealed against the order of the Labour Tribunal to the Provincial High Court of the Western Province holden in Colombo on 07.10.2010. By judgment dated 10.06.2013 the High Court too agreed that the termination of the services of the Appellant was just and equitable and dismissed the Appeal. The Appellant being dissatisfied with the decision of the High Court has sought relief and has come before the Supreme Court.

The Appellant argued that the charges taken together were as simple as, leaving the work place without authorization, not accepting the letter of interdiction, not accepting letters issued by the Head of the Department and acting in a manner which has caused a loss of trust and confidence in the Appellant by the employer Respondent. The Respondent submitted that the services of the Appellant were terminated on several grounds set out in the charge sheet which included inter alia , (a) failure to fullfill and/or negligence and/or incompetence in carrying out her duties (b) persistent absence from the work place without obtaining prior permission and in violation of the rules imposed regarding the same, (c) insubordination demonstrated by the failure to accept the letters served on the Appellant by the Respondent, (d) disturbing the functions and/or instituting and/or threatening and/or causing mental and physical distress to the fellow employees of the Respondent which results in the welfare of the Respondent institution being compromised , (e) failing to abide by the advice and/or instructions given to the Appellant by the Respondent Institute and (f) the Appellant being wholly unfit for service at the Respondent Institute and retaining the Appellant in service would cause difficulties and disrepute to the Respondent Institute. In view of these misdemeanours, the Respondent employer had conducted a preliminary investigation prior to serving a charge sheet, specifically on a complaint made against the Appellant by a co-worker. It had been with regard to the aggressive behavior by the Appellant towards the said employee. The officer who conducted the said preliminary investigation had testified before the Labour Tribunal.

I observed when reading the evidence led before the Labour Tribunal that 29 letters given to the Appellant were marked in evidence. It is of interest to see what it is all about regarding the proportionality of punishment which is the core issue in this case. Hence, I decided to enumerate the said letters herein as follows:-

1. Letter dated 06.06.1997 – Complaint letter from Head/IAR Division to the Director about the Appellant.

2. Letter dated 12.11.1997 – Head of IAR Division requesting the Registrar to transfer the Appellant to another division **due to her arrogant manner and indiscipline.**

3. Letter dated 14.07.1998 – The registrar requested the **Appellant to give reasons for not allowing a senior officer to use the computer for an official purpose.**

4. Letter dated 17.07.1998 – Complaint against the Appellant **by 7 others** in the ARMD Division to the Director and **requested her to be transferred to another Division.**

5. Letter dated 26.08.1998 – Complaint letter about the Appellant from Dr. Tennekoon Head – ARMD to the Director and requested her to be **transferred immediately due to her misconduct.**

6. Letter dated 10.12.2000 and letter dated 08.11.2000 Dr. Tennekoon , Head of the Division ARMD requested the Director to transfer the Appellant to another Division **due to her incapability in attending to her routine duties and failed to follow his directives to use the common facilities.**

7. Letter dated 04.05.2001 – Complaint letter from the Head of ARMD to the Director/HARTI and requested her to be transferred. The reasons for this letter are that **the Appellant's performance was not satisfactory and not up to the standards, therefore the Research Officers was reluctant to assign her any duties. Also the Appellant was not willing to obey the office rules and regulations, and she continued to leave the office without making an entry in the Movement Register.**

8. Letter dated 04.05.2001 – Dr. W.G.Somaratne, Head / ARMD has requested the Director/HARTI **to transfer the Appellant to another division in order to create a pleasant working atmosphere at the division.**

9. Letter dated 12.07.2001 – Complaint letter from Dr. W.J. Somaratne Head of Division to the Director because **the Appellant had been refusing to follow the**

directives of the Research Officers they decided not to assign any work to the Appellant at the monthly meeting.

10. Letter dated 11.02.2003 – warning letter by the Registrar –Appellant was **warned not to stay at the canteen during work hours.**

11. Letter dated 03.12.2003 – Warning letter by the Registrar – **warned again not to stay at the canteen during work hours.**

12. Letter dated 11.12.2003 **– warning and transfer** by Registrar**, since all the Division Heads rejected her services, the Appellant had been assigned to the Administrative Branch and warned her to discharge her assigned duties without any misconduct.**

13. Letter dated 29.03.2004 – warning letter by the Registrar. The Appellant had **entered into office of the Head of the Statistic branch, and using his phone she has made a personal call.**

14. Letter dated 28.04.2004 – warning letter by the Registrar. The Appellant **continuously failed to come to work on time and as a result her leave has been reduced and also she was warned not to leave the institute during working hours without permission.**

15. Letter dated 28.04.2004 – warning letter by Registrar. The Appellant had **entered into the Administrative Branch and shouted in a manner disturbing others.**

16. Letter dated 10.06.2004 – warning letter by Registrar. The Appellant had **signed a register in a red pen, even after warned by the Administrative Officers not to use a red pen.**

17. Letter dated 09.09.2004 – warning letter by the Director. Interviews for the post of Static Assistant had been duly completed, but **the Appellant had written** a letter about the interviews **in a manner that damage the image of the Institute**, therefore the Appellant was warned not to do that.

18. Letter dated 22.10.2004 – Warning letter by the Registrar. The Appellant continued to run and walk around the Badminton Court, even after she had been advised not to do so.

19. Letter dated 12.05.2005 – complaint letter from the Head of Division to the Registrar regarding the Appellant. The Appellant **had not reported to him** after she got transferred to his Division on 10.05.2005.

20. Letter dated 01.07.2005 – The Head of the Division requesting the Registrar to transfer the Appellant from his Division, the reasons being **that she had been scolding the others in the Division and her behavior had been in a troubling manner to others in the Division.**

21. Letter dated 01.07.2005 – the Head of the Division requesting the Director to transfer the Appellant from his Division. One of the reasons for the request was **that she had no knowledge or capability to perform the duties.**

22. Letter dated 15.08.2005 – Warning letter to the Appellant from the Registrar. The Appellant had been leaving the institute during working hours without permission and using computers at the institute without permission.

23. Letter dated 09.11.2005 – Complaint letter from the Registrar to the Director **asking to take disciplinary action against the Appellant. Briefing all the misconduc**t the Appellant had caused till the date of the letter.

24. Letter dated 02.12.2005 – Warning letter by the Registrar. The Appellant had been eating in the canteen during the office hours.

25. Letter dated 23.02.2006 – Request from the Head of the Division **not to transfer the Appellant to that Division due to her bad record at the previous Division** he worked and therefore the entire staff in his Division including the senior officers wanted her not to be transferred to this Division.

26. Letter dated 01.03.2006 - Complaint to the Registrar regarding the Appellant by the Assistant Accountant. She had been coming to the Accounting Branch **without any reason and behaving in a disturbing manner** (read newspapers, chat with others very loudly, answer the phone at the branch, bring tea from the canteen and drink at the Accounting branch . **Even after several verbal warnings by the Accountant and Assistant Accountant, she had continued this behavior.**

27. Letter dated 17.03.2006 – Several Research Officers and staff members complained to the Head of the Division not to accept the transfer of the Appellant made to that Division, due to the reason that **her transfer would jeopardize the peaceful atmosphere of the Division.**
28. Letter dated 05.06.2006 – Research Officer, N.K.M. Damayanthi informed the Director that the **Appellant had not completed the assigned work** (after several reminders had been given) and asked him to give an appropriate punishment.

29. Letter dated 06.04.2006 – Warning letter. The Appellant was assigned certain work on 28.03.2006 but **did not complete even after an extension was granted. Most importantly she even failed to start the assigned work on the date of the letter**, but she had been reading news papers and chatting with others during working hours.

I observe that the list of letters as mentioned above, when produced before the Labour Tribunal, the President would have formed an opinion about the extent to which **the Respondent had been tolerant** and how much the Appellant had acted with **consistent negligence, insubordination, incompetence, disobedience, and disruption of the smooth functioning** of the work place. In the evidence, I noted that the vocabulary used by the Appellant at the work place is abusive, foul, offensive and appalling. At times it had been even intimidating.

This court at the time of granting of leave had stated that the findings of the Labour Tribunal and the High Court would not be disturbed by this Court. Yet I find that the reading of the evidence gives a closer picture of the real situation which would facilitate this court to decide on the question of law on proportionality. The behaviour of the Appellant at the work place had been without any discipline whatsoever. Her conduct and attitude regarding the co – workers as well as superiors has led to the interdiction, serving the charge sheet and holding an inquiry against her. At the end of the inquiry her services were terminated.

In this matter both counsel appearing for the Appellant and the Respondent have filed extensive written submissions. I wish to advert some of the judgments referred to in the submissions and analyse them.

In **State Gem Corporation Vs Srima Costa 1998, 3 SLR 191**, an employee was terminated on the grounds of abuse and threat and was reinstated by the Labour Tribunal without back wages but the Court of Appeal stated that **reinstatement is not an appropriate remedy as it would not be conducive to the maintenance of discipline and harmonious industrial relations.** Compensation was ordered instead. In many cases such as **The Electricity Equipment & Construction Company Vs Cooray, 1962, 63 NLR 164, and Reckit & Colman Ltd. Vs Peris 1979, 2 NLR 229 ,** it was held that, as a general rule, refusal to obey reasonable orders justified the dismissal from service. In De Silva Vs Ocean Foods and Trade Ltd. ……. It

has been held that dismissal of a workman for refusal to obey legitimate instructions, insulting and humiliating a superior officer and for refusing to accept a letter given to him was held to be justified. In **Colombo Apothecaries Co. Ltd. Vs Ceylon Press Workers' Union 1972, , 75 NLR 182, Weeramantry J said** ; " The fact that an earlier default had been pardoned or excused does not, in my view, wipe it off the slate so completely as to render that default totally irrelevant. That default assumes relevance and importance in the context of a complaint by the employer of successive and repeated defaults of the same nature. When one is considering how reasonable or unreasonable has been the conduct of each party it would be wrong to view the final act in the series in isolation as though it existed all by itself. Here as elsewhere in the field of Labour Law, **a proper assessment of a dispute can only be made against the background of the conduct and relationship between the parties."**

I observe that in the instant case, the Appellant was admonished, excused, warned right along and the final act of termination of services after a preliminary investigation , then issuing a charge sheet and an inquiry being held and the final act of termination of services after the inquiry, was the end result of her bad conduct, bad relationship with the Respondent employer and co-employees and the work place as a whole. The Respondent had put up with the Appellant's bad behaviour for a considerable time.

The Appellant argued that the President of the Labour Tribunal had not considered the issue of proportionality. In his order he stated thus: "**මෙම නඩුවේ ඉදිරිපත්වූ උත්තරවාද සාක්ෂි ද, ලේඛණ ද, ලිඛිත දේශන ද සලකා බැලීමේදී මා විසින් තීරණය කළ යුතු ප්‍රශ්නය වන්නේ, පහත සඳහන් චෝදනා පත්‍රයේ චෝදනාවලට ඉල්ලුම්කාරිය වැරදිකරු වන්නේද? නිවැරදිකරු වන්නේද? වැරදිකරු වන අවස්ථාවක එම චෝදනා සේවයෙන් පහ කිරීමට ප්‍රමාණවත් වන්නේද? නැත්ද? ඉහත සඳහන් ප්‍රශ්නවලට ඉල්ලුම්කාරියට වාසි සහගත තීන්දුවක් ලැබෙන අවස්ථාවක කුමන සහනයක් ලබාදිය යුතුද? යන්නත්, අවාසි සහගත තීන්දුවක් ලැබෙන අවස්ථාවක ඉල්ලුම් පත්‍රය නිෂ්ප්‍රභා කළ යුතුද යන්නත්ය**."

Accordingly , it is obvious that the President of the LT has considered the question of proportionality in the first instance. As highlighted by me above, the President had identified the question of proportionality. It is in that light that he has considered the cumulative effect of the Appellant's conduct at the work place and after consideration of

the factors before him, he had determined finally that termination of the Appellant is just and reasonable.

Even the Learned High Court Judge in turn has identified that he has to consider the order of the Labour Tribunal and decide whether termination of services is proportionate to the charges proven in evidence. At one point of his order, he says "**මෙම අභියාචනයේදී පැහැදිලිව කියා සිටින නීතිමය කරුණු වනුයේ විනිශ්චය සභාව විසින් උපකල්පන මත යම් යම් නිගමනවලට එළඹීමෙන් නීතිමය වැරදි උගත් සභාපතිවරයා විසින් සිදු කර ඇති බවත්**, **එලෙසටම නිසි ලෙස සාක්ෂි විශ්ලේෂනය කර නැති අතර**, **අභියාචකට එරෙහිව චෝදනා ඔප්පු නොවී තිබියදී මෙන්ම ඉදිරිපත්වූ සාක්ෂි අනුව ඔප්පු වී ඇතැයි සැලකෙන චෝදනා මත වුවද සේවය අවසන් කිරීමට තරම් ප්‍රමාණවත් නොවන බවත්,** කෙසේ වෙතත් ඉල්ලුම්කාරියගේ සේවය අවසන් කිරීමට යුක්ති සහගත බවට **එළඹී නිගමනය වැරදි බවත් කියා සිටින අතරේම චෝදනා පත්‍රය නිකුත් කිරීමෙන් පසුව අභියාචකගේ පසු චර්යාද සැලකිල්ලට ගෙන සේවය අවසන් කිරීම සාධාරණ බවට එළඹී නිගමනය වැරදි බවත් එහි නීතිමය දෝෂ පැහැදිලිව දක්නට ඇති බවත්ය**."

I find that the Labour Tribunal had considered all evidence submitted before it with reference to the charges raised against the Appellant**. The High Court has re considered the assessment of evidence. The High Court Judge had done the evaluation judicially.**

The Appellant argued **that she did not hold a fiduciary position** in the Respondent Institution and therefore the final charge in the charge sheet regarding "loss of confidence" does not apply to her. I see this concept in a different way. All the workers in any institution work for the employer. The employer has employed each and every person having allocated some part of the work of the employer. Let it be the Chief Executive Officer, let it be a clerk or a peon or even a sanitation labourer, they are employed under the employer. The employer trusts that they will do their part of the work properly. The employer thus has trust on them. The CEO is a very highly trusted person. The officers are also trusted with may be a little lesser degree than the CEO. The minor employee also is trusted , may be even to a lesser degree than the officer. No employee is distrusted. Without trust, an employer cannot and will not employ any person. The employee knows that he is trusted not to be negligent in his work, not to be indisciplined, not to be fraudulent, not to work without due care for co- workers etc. They are tied to the employer with the bond of trust. I am of the view that each and every

employee is holding a fiduciary position in relation to the employer**. The employee cannot break this trust and work at his or her free will and leisure.** It is the same with the employer. He cannot act in such a way in breach of the trust placed on him by law towards the employee. Trust works both ways. That is reality.

I am of the view that the employer can at all times bring a charge against the employee for 'loss of confidence', provided that there is proof of the same available.

S.R. De Silva in his book on " The Law of Dismissal" speaks of two aspects of loss of confidence.

1. In appropriate circumstances it may justify the termination of an employee's services. However the claim of an employer that he has lost confidence usually cannot relate to a person who occupies a non- fiduciary position. In other words, **though theoretically there is no restriction as to the class of employee** in respect of whom termination of **employment may be effected on the ground of loss of confidence,** it usually applies in respect of employees who hold positions of trust and confidence such as accountants, cashiers and watchers or who at least perform a certain degree of responsible work.

2. It may be a circumstance from which a court may conclude that reinstatement is not the appropriate relief despite a finding that termination is not justified.

S. R. De Silva further states that whichever way one views the concept, loss of confidence in the integrity of an employee must be supported by cogent evidence. I am of the view that the **Appellant being a Grade 1 Statistical Assistant held a fiduciary position in the Respondent Institution and ' loss of confidence', can very well be a reason for termination of services when proven. That fact was proven through evidence before the Labour Tribunal.**

In meting out the punishment, the bad record of service of the employee has made some impact on the inquiry officer as well as the President of the Labour Tribunal in making an order for her being dismissed from service. I am of the view that in this case, termination was just and equitable since she had been tolerated for a very long time by the employer, Respondent. She had been incorrigible and retaining her services

was considered to have caused a lot of damage to the work place. The charges were proven with evidence. On the Appellant's behalf, only she had given evidence.

In **Colombo Apothecaries Co. Ltd. Vs Ceylon Press Workers' Union 1972, 75 NLR 182, Weeramantry J** observed: " A management which has been considerate enough to excuse an employee repeatedly in respect of such defaults cannot in my view, be penalized for its own consideration. It is true that where defaults are repeated and are excused over and over again, with a warning that they should not be repeated, **the very last default viewed by itself may appear inconsequential and insufficient of its own force to justify drastic action** by the employer. This would however be a **most unrealistic way of viewing the matter**, for before a Labour Tribunal one is not concerned with technicalities. It is to be remembered that in considering disputes of this nature we are not in the technical field of estoppels where by reason of one party's acceptance or forgiveness of another's conduct he is prevented from placing any reliance whatsoever thereon."

" Labour laws must be worked **with justice both to employee and employer** and I do not consider realistic or satisfactory a view of a labour dispute which reduces **an employer to a state of impotence** in the face of repeated defaults of the same nature by the employee. There can very well come a time when the employer makes up his mind that he will not suffer his indulgence to be taken advantage of any longer. **It is then for the Tribunal to see whether in the context of his entire conduct towards his employer, the latter has been reasonable in taking the action he did ".**

" Any other view would seem to be lacking in that broad and general approach to labour disputes which it is the very aim and object of the labour laws to foster ".

I observe that the Respondent did not suddenly decide to terminate the Appellant's services because the Appellant left without authorization on a few days or because the Appellant refused to take delivery of the letters issued by the Head of the Department. The decision to terminate was taken in view of the abysmal record of the Appellant , who had been warned in writing many times regarding numerous misconducts prior to the domestic inquiry being held.

The Labour Tribunal found that the Appellant was guilty of the last charge as well, which was 'loss of confidence '. I am of the view that when loss of confidence is proved, then the termination of services is just and equitable. The Employer cannot keep such a person in his employment as the trust is gone and it is not there anymore.

The Appellant has quoted from **the dissent judgment of Fernando J** which the Appellant claims that proportionality of the punishment imposed was discussed. I do not find that the dissent judgment was on proportionality of punishment by terminating the services of the employee. It is more on an order concerning just and equitable relief and also on **whether the Labour Tribunal has made an order which it is not empowered to make.** On the other hand, the other **two judges S.B. Goonewardena J and Wadugodapitiya J had dismissed the appeal of the workman stating that "the appellant by his own conduct vacated his post and lost his employment".** I hold that this judgment has less relevance to the case in hand.

I have considered all the submissions made by the Appellant as well as those by the Respondent in this case. I answer the question of law raised at the commencement of this judgment in the negative to the effect that both the Labour Tribunal and the High Court have considered the doctrine of proportionality in entering this decision to terminate the services of the Appellant. I hold that there are no grounds to disturb the judgment of the High Court.

The Appeal is dismissed without costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, 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 Sri Lanka.

M. G. P. Rajashilpa,

Commissioner of Labour,

Colombo East Labour Office,

Narahenpita.

Complainant

S.C Appeal 88/2005

S. C. Spl. L. A. No:185/2005 Vs

HCMCA:412/2003

M. C. Colombo: 10046/5

Ceylon Heavy Industries and Construction Co. Ltd

Oruwela, Athurugiriya.

Respondent

AND

Ceylon Heavy Industries and Construction Co Ltd.,

Oruwela, Athurugiriya.

Respondent-Appellant

Vs

M. G. P. Rajashilpa

Commissioner of Labour,

Colombo - East Labour Office,

Labour Department,

Narahenpita.

Complainant-Respondent

AND NOW

Ceylon Heavy Industries and Construction Co. Ltd., Oruwela,

Athurugiriya.

Respondent-Appellant-Petitioner

Vs

M.G.P. Rajashilpa

Commissioner of Labour,

Colombo East Labour Office,

Narahenpita.

Complainant-Respondent-Respondent

L.D.C Perera

No.13/1 Gnanawimala Mawatha

Athurugiriya

Added Respondent

BEFORE: Buwaneka Aluwihare P.C. J

Sisira J De Abrew J

Anil Goonerathne J

COUNSEL: Uditha Egalahewa P.C for the Appellant

Mrs. Murdhu Fernanado P.C Additional Solicitor General with Rajitha Perera S.S.C for the Respondent.

Eraj De Silva for the added Respondent

ARGUED ON: 28- 07-2015

WRITTEN SUBMISSIONS: 07- 09- 2015

DECIDED ON: 28th -10-2015

Buwaneka Aluwihare J

This is an appeal from an order of the High Court of Colombo, dated 20-07-2005. The High Court had affirmed the order of the learned Magistrate dated 11-07-2003, by which the Respondent-Appellant-Appellent (hereinafter referred to as the Appellant) was directed to re-instate the Workman-Added-Respondent (hereinafter referred to as the 'Workman') in the post of 'General Manager' giving due regard to his

seniority. The Appellant aggrieved by the said direction, is challenging the legality of the orders of the High Court and the Magistrate's Court.

The sequence of events is as follows: -

The Commissioner of Labour, Complainant-Respondent-Respondent (hereinafter referred to as the 'Respondent') instituted action in the Magistrate's Court of Colombo, against the Appellant Company, on the basis that the Appellant failed to comply with 'a part of the order' made by the Labour Tribunal in favour of the Workman, and thereby contravened Section 40(1)(q) and consecuently committed an offence punishable under section 43(1) read with section 43(2) of the Industrial Disputes Act No.43 of 1950, as amended.

For clarity, the relevant portion of the Labour Tribunal order is reproduced below.

> "එම නිසා අයදුම්කරුට සහනයක් සැලසීම යුක්තිසහගත හා සාධාරණ බව නිගමනය කරන මෙම විනිශ්චය සභාව අයදුම්කරුට සේවයේ කඩවීමකින් තොරව නියමිත ජ්‍යෙෂ්ඨත්වයේ පිහිටුවා ඔහු කලින් දරණ ලද තනතුරේම නැවත පිහිටුවීමට වගඋත්තරකරුට නියෝග කරයි"

This Court granted Special Leave to Appeal on 03-11-2005 on the following issues set out in paragraph 12 (c) and (e) of the Petition of the Appellant, dated 29-11-2005 which are reproduced below.

> "(c) that the learned Magistrate erred in law in ordering the Petitioner to appoint the employee to the post of General

Manager which was not the order made by the Labour Tribunal, as the order of the Labour Tribunal was to re-instate the employee with backwages without a break in service in the same post that he held and giving him his due seniority, and the learned High Court Judge erred in law in affirming the said wrongful order of the learned Magistrate;

(e) The learned Magistrate acted beyond his jurisdiction in considering whether the order of the Labour Tribunal had been complied with by the Petitioner by ordering the Petitioner to promote the employee to the post of General Manager, which fact was not considered by the learned High Court Judge"

(As per the Petition these grounds have not been formulated in the form of questions of law.)

However, during the pendency of the trial (before the magistrate) the workman had been reinstated, as manager, the same post he was holding in 1986, when his services were terminated.

At the end of the trial, the learned Magistrate in his judgement interpreted the word 're-instatement' in the order of the labour Tribunal to mean, appointing the Workman to the post of 'General Manager' instead of the post of 'Manager' as he then was, in 1986. In arriving at this conclusion, the learned Magistrate had given his own interpretation to the words 'due seniority' that occurs in the order of the Labour Tribunal referred to above.

The relevant part of the magistrate's order is reproduced below:-

> ''තවද එකී පනතේ 43 (2) වගන්තිය ප්‍රකාරව මෙම නඩුවේ සාක්ෂිකරු වන එල්. ඩී. සී. පෙරේරා යන අයට නියමිත ජ්‍යෙෂ්ඨත්වයේ පිහිටුවා, එනම් වගඋත්තරකාර ආයතනයේ සාමාන්‍යාධිකාරී තනතුරේ පිහිටුවා ජ්‍යෙෂ්ඨත්වය මත මෙම සාක්ෂිකරු පිහිටුවීමට ද, වගඋත්තරකරුට නියම කරමි. තවද මෙම ජ්‍යෙෂ්ඨත්වය පිළිබඳව සළකා බලා මෙම නඩුවේ එල්. ඩී. සී. පෙරේරා යන අයට වහාම ක්‍රියාත්මක වන පරිදි අද දින සිට මෙම වගඋත්තරකාර ආයතනයේ මෙම සාක්ෂිකරුට නියමිත ජ්‍යෙෂ්ඨත්වයේ ස්ථාපිත කර සාමාන්‍යාධිකාර තනතුරේ පිහිටුවීමට නියම කරමි.''

The Appellant before this court, is challenging the validity of the interpretation given by the learned Magistrate, to appoint the workman in the post of General Manager. Thus the only issue before this Court is to decide the legality of the order of the learned Magistrate in ordering the Appellant to have the workman appointed as 'General Manager'.

When a Labour Tribunal makes an order exercising just and equitable jurisdiction, the law requires the parties affected to comply with such orders. In instances of non-compliance however, section 40 (1) (q) read with section 43 provides for the imposition of penal sanctions against the party responsible.

In deciding this appeal, the court should be guided solely by the two relevant sections.

Section 40 (1) (q) of the Industrial Disputes Act stipulates that-

> *"Any person, who being an employer, fails to comply with any order made in respect of him by a labour tribunal, shall be guilty of an offence under this Act."*

And

Section 43 (1)-

> *"Without prejudice to the provisions of subsection (5) every person who commits any offence under this Act, other than an offence under section 40 (1) (SS), shall be liable on conviction after summary trial before a Magistrate to a fine not exceeding five hundred rupees or to imprisonment of either description for a term not exceeding six months or to both such fine and imprisonment."* (As the law stood then).

Section 43 (2)-

> *"On the conviction of any employer for failure to comply with such term or condition of an award or any industrial court or arbitrator or labour tribunal as requires the re-instatement of any workman in any service or an order of any labour tribunal requiring such re-instatement, such employer shall be liable-*

(i) To pay, in addition to any punishment that may be imposed on such employer under subsection (1), a fine of rupees fifty for each day on which the failure is continued after conviction thereof; and

(ii) To pay such workman the remuneration which would have been payable to him if he had been in such service on each such day and on each day of the period commencing on the date on which he should have been reinstated in the service, according to the terms of the award or order and ending on the date of the conviction of such employer, computed at the rate of salary or wages to which he would have been entitled if his services had not been terminated.

Any sum which an employer is liable to pay under paragraph (ii) of this subsection may be recovered on the order of the court by which he was convicted as if it were a fine imposed on him by that court and the amount so recovered shall be paid to the workman."

I do not see any ambiguity in the provisions referred to above and the plain meaning of these sections is clear. Accordingly, when an employer is ordered to reinstate an employee consequent to an order of the Labour Tribunal, Section 43 (2) operates to ensure that the

workman gets the benefit of the Order he has so obtained from the Labour Tribunal in the event of non-compliance.

The scope conferred by the sections referred to above is very limited , all that the magistrate could have done is to impose the punishment prescribed in Section 43 (1), and order payments to be made as stipulated in Section 43 (2) and no more.

In this context the order of the learned magistrate is fundamentally flawed for two reasons; by directing the Appellant to appoint the workman to a particular post , which the magistrate is not empowered to order under Section 43(1) of the Industrial Disputes Act and secondly by interpreting that part of the order of the Labour Tribunal President which directed the Appellant to *"reinstate the workmen in the same post that he held and giving him his due seniority"* to mean that the workman should be reinstated as "General Manager".

The Industrial Disputes Act provides the mechanism to resolve any ambiguity arising from a Labour Tribunal order and Section 34 of the Industrial Disputes Act refers to the forum which is vested with the jurisdiction to interpret an order/award in instances where such order/award is vague or unclear.

Section 34(1)-

> *"If any question arises as to the interpretation of any award made under this Act by an arbitrator or by an industrial court, or of an* ***order made under this Act by a labour tribunal,*** *other than an order made on an application made under Section 31(B) of this Act, the Commissioner or any party, trade union, employer or workman, bound by the award or order, may refer such question for decision to such arbitrator or the person or persons who constituted such industrial court or* ***to such labour tribunal,*** *and if such reference is not possible for any reason whatsoever, may refer the question for decision to an industrial court; and the arbitrator to whom or the industrial court or the labour tribunal to which the question has been referred shall decide such question after hearing the parties, or without such hearing if the consent of the parties has been first obtained ;"*

The Magistrate is not vested with the powers to interpret an order with a view to granting additional reliefs not referred to in an order of the Labour Tribunal.

Hence it is evident that the learned Magistrate had acted beyond the powers vested in him and the order made by the magistrate directing the re-instatemnt of the workman in the post of 'General Manager' is one made clearly without jurisdiction.

All that the learned Magistrate could have done was to give a literal meaning in deciding the issue of non-complaince. He should have been guided solely by the applicable statutory provisions.

The magistrate appeared to have overlooked the fact that when it comes to interpretation of penal provisions, the cannons of interpretation stipulate that, punishment can be imposed only if the circumstances of the case fall clearly within the words of the enactment. Justice Widgery in the case of *R v. Chertsey 1961 2 Q.B 152* held that *" a penal provision of this kind should not be given a wider interpretation in the absence of clear words, and we prefer a construction which avoids the possible duplication of penalties..."*

In the case of *Regina vs. Williams (1962) 1 W.L.R. 1268;* Paull, J. considering the question whether the Court has any power to disqualify from holding a driving licence on a conviction of larceny of a motor car, the appellant not having convicted of the lesser crime of taking and driving away a motor vehicle without the consent of the owner held that,

> "We are of the clear opinion that the disqualification imposed was not a disqualification permitted in law. The matter is governed by the Road Traffic Act, 1956; in Schedule IV to that Act are set out the offences in respect of which disqualification may be ordered. Curiously enough, none of the offences is stealing a

motor-car. The result is that this appeal will have to be allowed, and the order of the court in so far as it disqualified the appellant from driving for five years must go."

It must be stressed that, a magistrate when imposing punishment upon conviction, is required to act strictly in terms of the statute.
In the light of these authorities this Court is of the view that, that part of the order which directs the Appellant to re-instate the Workman in the post of 'General Manager' is ultra-vires and is contrary to law and has been made without regard to the applicable statutory provisions. The learned High Court Judge however has neither considered nor addressed these issues in the order made on 20th 07-2005.

The learned Additional Solicitor General contended that the magistrate is not empowered by law to give an interpretation of an order of the Labour Tribunal and the scope of a summary trial as contemplated by section 34 of the Industrial Disputes Act before a Magistrate is limited. On this basis, it was the position of the learned Additional Solicitor General that the orders made by the learned Magistrate dated 11-07-2003 and the order of the learned Judge of the High Court made on 20-07-2005 should be set aside. This Court concurs with this argument.

The relevant portion of the order made by the Magistrate dated 11-07-2003, directing the Appellant to "re-instate the Workman to the post

of General Manager" and the order of the High Court dated 20-07-2005 affirming the above order are hereby set aside. Subject to the above variation the rest of the said order of the learned magistrate is affirmed. The two issues set out in paragraph 12 (c) and (e) of the Petition of the Appellant, dated 29-11-2005 is answered in the affirmative.

This appeal is accordingly allowed.

I make no order with regard to costs.

Judge of the Supreme Court

Justice Sisira J De Abrew

I agree

Judge of the Supreme Court

Justice Anil Goonerathne

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 Civil Appellate High Court of Colombo dated 03.11.2011.

S.C. Appeal No. 91/2012

H.C.C.A. L.A. 523/2011
WP/HCCA/COL/13/2010 (RA)
D.C. Colombo No. 8867/M

Union Trust and Investments Ltd.,
No. 347, Union Place,
Colombo 02.

Plaintiff

Vs.

1. Madagodage Thusitha Wijesena.
   52, Ward Place, Colombo 7
   And now at Nlo. 32/1D,
   Barnes Place, Colombo 07.

2. Swarna Wijesena
   51, Ward Place,
   Colombo 07
   And now at No. 32/10D,
   Barnes Place, Colombo 07.

3. Wadisinghe Arachchige Kapilaratne
   301/3, Gamunu Mawatha,
   Kiribathgoda.

Defendants

And

1. Madagodage Thusitha Wijesena.
   then of M and M Centre,
   2nd Floor, No. 431/5,
   Kotte Road, Welikada,
   Rajagiriya.

2. Swarna Wijesena
then of Ward Place, Colombo 07
and 32/10D, Barnes Place, Colombo 07
Both presently of
10/1, Reid Avenue,
Colombo 7.

1st & 2nd Defendant-Petitioners

Vs.

Union Trust and Investments Ltd.,
No. 347, Union Place,
Colombo 02
And presently of No. 30-2/1,
2nd Floor, Galle Road,
Colombo 06.

Plaintiff-Respondent

Wadisinghe Arachchige Kapilaratne
301/3, Gamunu Mawatha,
Kiribathgoda.

3rd Defendant-Respondent

And Now Between

Union Trust and Investments Ltd.,
No. 347, Union Place,
Colombo 02
And presently of No. 30-2/1,
2nd Floor, Galle Road,
Colombo 06.

Plaintiff-Respondent-Appellant

Vs.

1. Madagodage Thusitha Wijesena.
then of M and M Centre,
2nd Floor, No. 431/5,
Kotte Road, Welikada,
Rajagiriya.

2. Swarna Wijesena
then of Ward Place, Colombo 07
and 32/10D, Barnes Place, Colombo 07

Both presently of 10/1, Reid Avenue,
Colombo 7.

1st & 2nd Defendant-Petitioners-Respondents

Wadisinghe Arachchige Kapilaratne
301/3, Gamunu Mawatha,
Kiribathgoda.

3rd Defendant-Respondent-Respondent

*** * * * * ***

Before : **Eva Wanasundera, PC,J.**
Sarath de Abrew, J. &
Priyantha Jayawardena, PC.J.

Counsel : Senura Abeywardena with D. Ratnayake for Plaintiff-Respondent-Petitioner.

J.C. Boange for 1st and 2nd Defendants-Petitioners-Respondents.

Argued On : **29.10.2014**

Decided On : **06.03.2015**

* * * * *

Eva Wanasundera, PC.J.

The Leave to Appeal application was supported on 22.05.2012 and this Court has granted leave on the questions set out in paragraph 15(a), 15(b), 15(c) and 15(d) of the Petition dated 07.12.2011.

The said questions are as follows:-

15(a) Did the Provincial High Court of Civil Appeal of the Western Province err in law by holding that the order dated 15.02.2010 of the Learned District Judge, constitutes a miscarriage of justice and/or has occasioned a failure of justice?

(b) Did the Provincial High Court of Civil Appeal of the Western Province err in law by holding that the application to execute the decree cannot be permitted in terms of Section 337 of the Civil Procedure Code?

(c) Did the Provincial High Court of Civil Appeal of the Western Province err in law by exercising revisionary jurisdiction with regard to the said application of the 1st and 2nd Respondents?

(d) Did the Provincial High Court of Civil Appeal of the Western Province err in law by setting aside the said order of the learned Additional District Judge of Colombo dated 15th February, 2010 and the application made by the Petitioner to execute the decree?

The facts pertinent to this appeal in summary are as follows:-

The 1st Defendant- Petitioner- Respondent (hereinafter referred to as the 1st Respondent) entered into a hire purchase agreement with the Plaintiff-Respondent-Appellant on 10.10.1986 and he bought two Single post Lifts, two Air Compressors, two tyre inflators, two grease lubricators and two car washing machine accessories from the Appellant. The 1st Respondent agreed to pay the purchase price in 22 monthly instalments of Rs.85000/-. The conditions included that if the 1st Respondent failed to pay as agreed, the aforementioned goods were to be returned in good condition or to pay the value of the goods to the Plaintiff- Respondent-Appellant. (hereinafter referred to as the Appellant)

The 2nd and 3rd Defendant-Petitioner-Respondents (hereinafter referred to as the 2nd and 3rd Respondents) were guarantors to the hire-purchase agreement. The 1st Respondent failed to pay as agreed and action was filed by the Appellant in the District

Court of Colombo on 22.01.1990 against all three Respondents making them the Defendants in the case, praying for the recovery of Rs.1,873,850/90 with interest from 28.02.1989. The 1st and 2nd Respondents filed one answer on 02.07.1993 and the 3rd Respondent also filed answer separately on 02.07.1993. On the next calling date, the 1st and 2nd Respondents were absent. Court ordered that notices be sent to them, giving notice of the date of trial. Many times thereafter by registered post and through the fiscal, the notices were sent to them informing of the next date. They did not appear in Court. Court fixed the case finally for trial on 25.07.1995. On that date, the 1st and 2nd Respondents were absent. 3rd Respondent took part in the trial. Ex-parte trial was taken up against the 1st and 2nd Respondents. Thereafter the 3rd Defendant also did not come to Court. Again the ex-parte trial against the 3rd Respondent was also taken up and concluded on 08.02.1996. Ex- parte judgment against the 1st and 2nd Respondents was delivered on 25.07.1995. Ex-parte decree was entered. Many attempts were made by the Plaintiff to serve the ex-parte decree against her 1st and 2nd Respondents and it was finally served by way of substituted service in May 1997.

Thereafter the Appellant had made an application to execute the writ in the District Court but was unable to serve the writ as the Respondents were not in the given addresses in the court record and could not be found in those addresses. At last, in January, 2007, the Appellant made another application to execute writ and the 1st and 2nd Respondents objected to the same. An inquiry was held by the Additional District Judge of Colombo with regard to the objection taken up by the said Respondents with regard to the lapse of time of 10 years from the date of the decree and Court held that the Petitioner should be allowed to execute the writ by order dated 15.02.2010.

The Respondents filed a revision application in the Provincial High Court of the Western Province Holden in Colombo and sought to revise the order of the District Court. The Provincial High Court by its judgment dated 03.11.2011 set aside the District Court order dated 15.02.2010 and dismissed the application to execute the decree on the basis that 10 years had lapsed from the date of the decree in terms of Section 337 of the Civil Procedure Code and therefore writ could not be executed. The Petitioner has invoked the jurisdiction of this Court to set aside the judgment of the Provincial High Court dated 03.11.2011.

Section 337 of the Civil Procedure Code as amended by Act No. 53 of 1980 reads as follows:-

Sec.337 (1) No application (whether it be the first or a subsequent application) to execute a decree, not being a decree granting an injunction, shall be granted after the expiration of ten years from –

(a) the date of the decree sought to be executed or of the decree, if any, on appeal affirming the same; or

(b) where the decree or any subsequent order directs the payment of money or the delivery of property to be made on a specified date or at recurring periods, the date of the default in making the payment or delivering the property in respect of which the applicant seeks to execute decree.

(2) Nothing in this Section shall prevent the Court from granting an application for execution of decree after the expiration of the said term of ten years, where the judgment debtor has by fraud or force prevented the execution of the decree at some time within ten years immediately before the date of the application.

(3) Subject to the provisions contained in sub section (2) a Writ of Execution, if unexecuted , shall remain in force for one year only from its issue, but-

(a) such writ may at any time before its expiration, be renewed by the judgment-creditor for one year from the date of such renewal and so on from time to time; or

(b) a fresh writ may at any time after the expiration of an earlier writ be issued,

till satisfaction of the decree is obtained.

Accordingly, by law, Court is not prevented from granting the application for execution of a decree, “if the judgment debtor has by fraud or force prevented the execution of the

decree at some time within ten years immediately before the date of the application". I am of the view that if any party to a case intentionally avoids the service of papers from Court, that would amount to "fraud". In the case of *Fernando Vs Latibu 18 NLR 95*, it was held that " the systematic evasion of service by a judgment - debtor is ' fraud ' within the meaning of that term used in the proviso to Section 337 of the Civil Procedure Code, and it prevents the expiry of the statutory time limit from operating as a bar to a reissue of writ ".

The facts in this case are somewhat special. It is not a case where summons were served and the parties on whom the summons were served did not come to court. It is a case when summons were served, the parties came before court and filed answer and later failed to come to court which means that they were living in those addresses which were recorded in the pleadings filed in court, at the time exparte decrees were entered by court against them. Then, they avoided accepting the notice of decrees many times and according to the report of the fiscal, contained in the journal entries dated 20. 05.1996 and 04.10.1996, they were intentionally avoiding the service of the decree and court ordered substituted service. Finally notice of decree was served by substituted service in May, 1997.

The next step was to serve notice of the writ of execution. The Petitioner made an application to execute the decree on 27.06.1997.The journal entries show that upto 08.12.2000 the fiscal could not find the Respondents in the given addresses. It is only on 17.01.2007 that the Petitioner had filed papers again for notice of the writ of execution on the Respondents after tracing their new addresses.

It is my view that the Respondents owe a duty to inform court of any change of address since they appeared before court after receiving summons in the first instance when the case was initially filed and summons were served on them. If they never appeared in court, I would say that they do not owe a duty to inform court of any change of address. The Civil Procedure Code is fashioned in such a way that in every step of the way till execution of writ is concluded, the judgment debtor has to be notified by the judgment creditor so that the judgment debtor gets a chance to stop execution of writ against him and pay off as decreed. Parties before court should corporate with the provisions of

procedure of court and not abuse the process of court. The Respondents objected to the application for a writ of execution made by the Petitioner in 2007 and court held an inquiry and allowed the application for writ to be executed.

In a District Court case, when the notice of decree is served on the party against whom the judgment is given, then that party is put on notice of what is coming next, which means that the notice of the writ of execution would be the next to reach that party. If the said party wants to avoid the writ of execution, under Section 337 of the Civil Procedure Code, it would not be very difficult to do so by changing the address. The winning party of the case will have to chase behind the party who lost the case, searching for him in the whole country or in the whole world. According to our law, notice of the writ of execution has to be served before getting the writ executed through court.

The High Court Judge in his reasoning, overturning the District Court judgment which granted permission to execute the writ notwithstanding the lapse of ten years has mentioned that, “any person has a right to live wherever he wants and therefore the changing of address should not be found fault with”. I am of the view that the learned High Court Judge has gone wrong in his determination here, simply because if someone does not want a writ executed, all that he has to do is to move out of that address which is in the court record and avoid the notice of writ of execution being delivered to him, only for ten years.

Furthermore I am of the opinion that if the notice of decree is served to a party resident in a particular place, the notice of the writ of execution served at the said residence should be accepted in law as having served the notice of the writ of execution unless the party who receive the notice of decree informs court of his new address promptly by way of an affidavit or motion. It is at that point of receiving the notice of decree that the party receiving notice of decree gets bound to court, to inform a change of address. If he does not do so, he is giving a challenge to court, to say “ find me if you can” . The law as it is, puts the burden on the winning party or the judgment creditor in the case to find the new address, to serve the notice of writ of execution and then execute the writ to get what court has adjudicated upon. In my view, moving out of an address after

receiving the notice of decree, without informing court, amounts to " fraud " in the context of Section 337(2) of the Civil Procedure Code.

I am of the opinion that, upon a party filing a proxy and giving its address to court, any change in such address should be promptly notified to court. It is the bounden duty of such party to notify court of a change in its address. The other party cannot be faulted or made to suffer as a result of a change of address being not notified to court.

In the case of *Cross World (Pvt.) Ltd. Vs Union Trust and Investment (SC Appeal No. 36/2010)* SC Minutes of 16.05.2011, delivered by Justice Imam with the then Chief Jutice J.A.N. de Silva and the present Chief Justice K.Sripavan agreeing, it was held that , " consequent to filing of proxy and entering an appearance in court, the parties before court had a duty to inform court of the change of address". In the said case, as the journal entries revealed that court had tried to serve notice on the judgment debtor on numerous occasions, court permitted the execution of the decree despite the lapse of the ten year period set out in Section 337 of the Civil Procedure Code.

I further note that the Respondents have invoked the revisionary jurisdiction of the Provincial High Court. It is settled law that the revisionary jurisdiction of a court exercising appellate powers cannot be invoked merely because there is an error of law or fact in an order or judgment, but could only be done where there are exceptional circumstances and / or extraordinary grounds that shock the conscience of court. In the present case the Respondents have neither disclosed the exceptional grounds or pleaded extraordinary grounds disclosing such grounds to invoke the revisionary jurisdiction of the Civil Appellate High Court. The learned High Court Judge has on his own , wrongly accepted the delay as given, being due to a wrong date having been noted down in the diary of the lawyer and the purported error in the judgment as described by the Respondents as " extraordinary grounds " and entertained the revision application filed by the Respondents. I am of the opinion that those grounds which were not even pleaded as extraordinary grounds do not qualify to be good enough to come under "grounds that shock the conscience of court "to invoke the revisionary jurisdiction of an appellate court.

For the reasons given above, I answer the questions of law mentioned at the beginning of this judgment in favour of the Petitioner and conclude that the Petitioner is entitled to execute the writ against the Respondents. I set aside the judgment of the High Court dated 03.11.2011 and affirm the judgment of the District Court of Colombo dated 15.02.2010. I order taxed costs against all the Respondents.

Judge of the Supreme Court

Sarath de Abrew, J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardena, PC.J.

I agree.

Judge of the Supreme Court

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

Property Finance and Investments Kandy
(Private) Limited
Petitioner

SC Appeal 100/2008

SC(HC) LA Application No.34/2008
High Court Colombo ARB1190/2007

Vs

1. Ms.KHA Meegasmulla,
   Municipal Commissioner,
   Kandy Municipal Council, Kandy.
2. Kandy Municipal Council Kandy
   Respondent

AND NOW BETWEEN

1. WAR Wimalasiri
   Municipal Commissioner
   Kandy Municipal Council, Kandy.
2. Kandy Municipal Council, Kandy
   Respondent-Petitioner-Appellants

Vs

Property Finance and Investments Kandy
(Private) Limited
Petitioner-Respondent-Respondent

Before : Priyasath Dep PC J
Eva Wanasundera PC J
Sisira J De Abrew J

Counsel : Kushan De Alwis President's Counsel with V. Choksey and Amali Tennakoon for the Respondent-Petitioner-Appellants.
Nihal Fernando President's Counsel with Rohan Dunuwila for Petitioner-Respondent-Respondent.

Argued on : 21.7.2015
Written Submissions
tendered on : By the Respondent-Petitioner-Appellants on 11.8.2015
By the Petitioner-Respondent-Respondent on 8.10.2009

Decided on : 9.11.2015

Sisira J De Abrew J.

Respondent-Petitioner-Appellants (hereinafter referred to as the Appellant Municipal Council) entered into an agreement with the Petitioner-Respondent-Respondent (hereinafter referred to as the Petitioner-Respondent) for the running and management of the newly constructed four storied car park situated within Municipal Council limits of Kandy; management of parking of vehicles in approved city streets in Kandy; and to collect parking fees from the vehicle parked in the said streets and the car park. Under the agreement the Petitioner-Respondent should pay monthly rentals to the Appellant Municipal Council which is over Rs.280,000/- per month. When the vehicle owners refused to pay parking fees when their vehicles were parked in the said city streets and the car park, the Petitioner-Respondent requested the Appellant Municipal Council to prosecute them with the assistance of the Police. But the Appellant Municipal Council failed to take steps to prosecute those who refused to pay parking fees. As a result of the said dispute the Petitioner-Respondent could not pay the agreed monthly rentals to the Appellant Municipal Council. Thereafter acting in terms of clause 34 of the said agreement, the Petitioner-Respondent referred the dispute to Mr.RMDB Meegasmulla, the Provincial Commissioner of Local Government, Central Province and requested to appoint an arbitrator. Mr. Meegasmulla appointed himself as the Arbitrator and adjudicated on the dispute. The Arbitrator by

writing dated 3.4.2006 made his award and communicated the same to the Appellant Municipal Council (Vide document marked X5).

The Petitioner-Respondent, acting in terms of Section 31 of the Arbitration Act No. 11 of 1995, filed an application on 9.3.2007 in the High Court for enforcement of the said award. The Appellant Municipal Council filed its objection on 19.7.2007 to the said application. The learned High Court Judge, by his judgment dated 25.8.2008, made an order enforcing the arbitral award. Being aggrieved by the said judgment of learned High Court Judge, the Appellant Municipal Council has appealed to this court. This court, by its order dated 25.11.2008, granted leave to appeal on the following questions of law.

1. Whether the document X5 (dated 3.4.2006) submitted to the High Court for enforcement is an award contemplated under the Arbitration Act No. 11 of 1995?
2. Whether the learned High Court Judge erred in law by failing to consider that issue as a threshold issue?
3. Whether the learned High Court Judge was obliged in law in terms of Section 31(6) of the Arbitration Act No. 11 of 1995 to consider any objection to the award as to whether it is an award in terms of the Arbitration Act in the absence of an application to set aside it within 60 days of the receipt of the award?

Main contention of learned President's Counsel who appeared for the Appellant Municipal Council was that the decision of Arbitrator dated 3.4.2006 was not an arbitral award. He contended that the Petitioner-Respondent, by letter dated 25.6.2006 addressed to Mr. Meegasmulla (the Arbitrator) had stated that their agents had discussed with Mr. Meegasmulla not as the Arbitrator but as the Provincial Commissioner of Local Government.

On the strength of this letter, learned PC contended that the decision of the Arbitrator dated 3.4.2006 was not an arbitral award. I now advert to this contention. Although the Petitioner-Respondent submitted the said letter to Mr. Meegasmulla, he later filed an application for enforcement of the arbitral award under Section 31 of the Arbitration Act No. 11 of 1995. Therefore the contention of learned PC that the Petitioner-Respondent has admitted that the decision of the Arbitrator was not an arbitral award cannot be accepted. When considering the above contention of learned PC, it is relevant to consider the objection of the Appellant Municipal Council filed in the High Court. In paragraph 6 and 10 of the said statement of objection, the Appellant Municipal Council very clearly admitted that the decision of the Arbitrator dated 3.4.2006 was an arbitral award. With this admission the contention of learned PC fails.

The contract between the Appellant Municipal Council and the Petitioner-Respondent was regarding the running and management of the newly built car park; management of parking of vehicles in the approved city streets and the car park; and collection of parking fees. Vehicle owners refused to pay parking fees but the Appellant Municipal Council failed to prosecute them with the assistance of the Police. The Petitioner-Respondent failed to pay monthly rentals to the Appellant Municipal Council. This was the dispute that was referred to the arbitration. One of the decisions of the arbitral award was as follows:

> *"The Appellant Municipal Council, in terms of the bylaws, should take steps in respect of those who refused to pay parking fees."*

Thus it is clear that the Arbitrator has arrived at a decision on the substance of the dispute. What is an arbitral award? Answer to this question is found in Section 50 the Arbitration Act No. 11 of 1995 which reads as follows.

"'Award' means a decision of the arbitral tribunal on the substance of the dispute."

In my view, if an Arbitrator, at the end of the arbitral proceedings, arrives at a decision on the substance of the dispute referred to him, such a decision can be considered as the arbitral award of the Arbitrator. In the present case, as I pointed out earlier, the Arbitrator at the end of the arbitral proceedings has arrived at a decision on the substance of the dispute. I therefore hold that the decision arrived by the Arbitrator on 3.4.2006 is an arbitral award and it can be considered as the arbitral award on the substance of the dispute referred to the Arbitrator. For the above reasons, I reject the contention of learned PC for the Appellant Municipal Council. For the above reasons, I answer the 1st question of law in the affirmative. In view of the above answer, the 2nd question of law does not arise for consideration.

It has to be noted here that the Appellant Municipal Council has failed to make an application in terms of Section 32 of the Arbitration Act No. 11 of 1995 (the Act) to set aside the arbitral award. If the Appellant Municipal Council was dissatisfied with arbitral award, the proper procedure was to make an application under Section 32 of the Act to set aside the award. For the purpose of clarity I would like to reproduce Section 32 of the Act which reads as follows.

32.

(1) An arbitral award made in an arbitration held in Sri Lanka may be set aside by the High Court, on application made therefor, within sixty days of the receipt of the award

(a) where the party making the application furnishes proof that

(i) a party to the arbitration agreement was under some incapacity or the said agreement is not valid under the Law to which the parties have subjected it or, failing any indication on that question, under the law of Sri Lanka ; or

(ii) the party making the application was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case ; or

(iii) the award deals 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:

(iv) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with the provisions of this Act, or, in the absence of such agreement, was not in accordance with the provisions of this Act: or

(b) where the High Court finds that

(i) the subject matter of the dispute is not capable of settlement by arbitration under the law of Sri Lanka ; or

(ii) the arbitral award is in conflict with the public policy of Sri Lanka.

(2) Where an application is made to set aside an award, the High Court may order that any money made payable by the award shall be brought into Court or otherwise secured penning the determination of the application.

An examination of Section 32 clearly reveals that an application for setting aside the arbitral award must be made within sixty days of the receipt of the award. It must be stated here that the Appellant Municipal Council has not made an application under Section 32 of the Act.

Since the Petitioner-Respondent made an application to the High Court under Section 31 of the Act it is relevant to consider Section 31(1) and 31(6) of the Act which are reproduced below.

> 31 (1) A party to an arbitration agreement pursuant to which an arbitral award is made may, within one year after the expiry of fourteen days of the making of the award apply to the High Court for the enforcement of the award.
>
> 31 (6) Where an application is made under subsection (1) of this section and there is no application for the setting aside of such award under section 32 or the court sees no cause to refuse the recognition and enforcement of such award under the provisions contained in sections 33 and 34 of this Act, it shall on a day of which notice shall be given to the parties, proceed to file the award and give judgment according to the award. Upon the judgment so given a decree shall be entered.

In my view, if the Appellant Municipal Council failed to make an application under section 32 of the Act, it cannot, in an application for enforcement of the award under Section 31 of the Act, move the High Court to set aside the award. In the case of local arbitration, High Court is not obliged, in an application under Section 31 of the Act, to consider an application for the setting aside of an award if the affected party had failed to make an application under section 32 of the Act. In an application for enforcement of arbitral award, High court must be satisfied on following matters that,

1. there is no application for the setting aside of the award under Section 32 of the Act or

2. the court sees no cause to refuse the recognition and enforcement of the award under the provisions of Section 33 and 34 of the Act.

It is noted that Sections 33 and 34 of the Act deal with foreign arbitration. The case that I am considering is a local arbitration. Therefore the High Court must be satisfied only on the 1st ground set out above.

In view of the above reasons, I answer the 3rd question of law in the negative.

For the above reasons, I affirming the judgment of the High Court, dismiss the appeal of the Appellant Municipal Council with costs.

Appeal dismissed.

Judge of the Supreme Court.

Priyasath Dep 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 from an order of the Provincial High Court under an in terms of Section 31DD of the Industrial Disputes Act (as amended)

Lanka Banku Sevaka Sangamaya
(On behalf of EAA Dayananda)

Applicant

SC Appeal 106/2012
HCA LT No.NCP/HCCA/LTA/07/2010
LT Case No. 27/Anu/1509/05

Vs

Peoples' Bank
Respondent

AND BETWEEN

Peoples' Bank
Respondent-Appellant
Vs
Lanka Banku Sevaka Sangamaya
(On behalf of EAA Dayananda)
Applicant-Respondent

AND NOW BETWEEN

Peoples' Bank
Respondent-Appellant-Appellant
Vs
Lanka Banku Sevaka Sangamaya
(On behalf of EAA Dayananda)
Applicant-Respondent-Respondent

Before : Eva Wanasundera PC, J
Sisira J De Abrew J
Priyantha Jayawardene PC, J

Counsel : Manoli Jinadasa for the Respondent-Appellant-Appellant
Niroshana Egalahewa for the Applicant-Respondent-Respondent

Argued on : 26.2.2015
Decided on : 9.6.2015

Sisira J De Abrew J.

The Labour Tribunal, on an application made by the workman who was attached to the Peoples' Bank as a clerk challenging his termination, held that the termination of services of the workman was justified but ordered compensation amounting to Rs.584,425/25. The High Court, by its judgment dated 23.3.2011, affirmed the order of the Labour Tribunal. Being aggrieved by the order of the High Court, the Peoples' Bank has appealed to this court. This Court by its order dated 13.6.2012, granted leave to appeal on the questions of law set out in paragraph 16 of the petition of appeal dated 29.4.2011 which are reproduced below.

1. Whether the order of the Provincial High Court and the Labour Tribunal awarding compensation to the workman, in the circumstances where the workman had been found guilty of misconduct and termination of his services was held to be justified, is erroneous in law?
2. Whether the Provincial High Court erred in law in the evaluation of evidence and has made the order without a consideration of the totality of the evidence?

The workman was a clerk attached to the Peoples' Bank (Appellant Bank) and served the bank for 25 years. He appealed to the High Court against the order of the Labour Tribunal and his appeal was dismissed by the High Court. He did not appeal against the said order to any Superior Court. Thus the order of the Labour Tribunal which held his termination justified has been accepted by him.

According to the circular of the Appellant Bank marked R1, the employees of the bank should not issue cheques from their personal accounts to thirds parties without sufficient funds in their accounts. The Appellant Bank, by R1, has clearly informed its employees that punishments including even termination of services would be imposed in the event of cheques being issued without sufficient funds in their accounts. Therefore the workman (the applicant to the Labour Tribunal) who worked in the Appellant's Bank for 25 years should be aware of this circular.

Why did the Appellant Bank terminate the services of the workman? He on, several occasions, had issued cheques from his personal account without sufficient funds in the account. He had committed these acts in May/June 2001. The Appellant Bank warned him and directed him to refrain from this behaviour. The workman, despite the said warning, again in 2002 issued several cheques for very large sums to third parties from his account when the account had been closed. The above acts of the workman demonstrate his dishonest intention. The Appellant Bank, after an inquiry, terminated his services for the said acts of misconduct. The Labour Tribunal however ordered compensation amounting to Rs.584,425/25 to be paid to him by the Appellant Bank. It is established that his services were terminated for the acts of misconduct committed by him. Then why should the Appellant Bank pay compensation to a person who was found guilty of misconduct and violated disciplinary circulars of the bank. This was the question that was presented, at the hearing of this appeal, to this court by learned counsel for

the Appellant Bank. The most important question that must be decided in this case is whether the workman whose termination of services was held to be justified by the Labour Tribunal is entitled to compensation especially when he was found guilty of acts of misconduct. When considering this question I must consider the following matters.

1. The workman had not caused any monetary loss to the Appellant Bank and the acts of misconduct committed by him are private transactions.
2. Whether the workman had an unblemished record.

I now advert to these matters. It is correct to say that acts of misconduct committed by him are private transactions between him and third parties and that he had not caused any monetary loss to the Appellant Bank. As I pointed out earlier the cheques issued by him have been dishonoured by the bank on the grounds that there were no sufficient funds in his account and that the cheques were issued after the account had been closed. These acts clearly demonstrate that he was dishonest when he issued the cheques. When an employee of the Appellant Bank committed the above mentioned dishonest acts, they will affect the reputation of the bank and such acts would undoubtedly erode the confidence of the people that they have towards the bank. Needless to say that the existence of a bank depends on public confidence. When employees of the Appellant Bank behave in this manner, it will affect the reputation of the Bank and therefore the Bank must take disciplinary actions against such employees. In my view such persons cannot function in Banks. When compensation is awarded to the employees who committed the above acts of misconduct, such a decision can be construed as an encouragement to commit further acts of misconduct.

Learned counsel who appeared for the Respondent tried to contend that the workman had an unblemished record for the last 25 years and that this was the first

occasion he committed acts of misconduct. I am unable to agree with the above submission for the following reasons.

In May and June 2001, he had issued several cheques without sufficient funds in his account and the Bank, by letter dated 15.2.2002, imposed following punishments on him.

1. He was warned.
2. He was instructed to close his current account and was not permitted to open up current account during his service period in the bank.
3. He was transferred to a remote station.

It appears that even after he committed the above acts of misconduct, he was permitted to be in the bank service. Document marked R3 (a letter sent by the workman) indicates that his account was closed on 27.6.2001. But he issued a checque for Rs.425,000/- on 25.11.2001. Thus the contention that he had an unblemished record and that this (the act of misconduct on which his services were terminated) was his first act of misconduct cannot be accepted.

When considering the question whether the Respondent (the workman) is entitled to compensation from the Appellant Bank, I would like to consider certain judicial decisions.

In Saleem Vs Hatton National Bank [1994] 3 SLR 409 the workman who was the Manager of Badulla branch of the Hatton National Bank was dismissed from service on the account of loss of Rs. 100,000/- from the vault of the Bank. The only act of misconduct established at the inquiry was his negligence on the ground that he physically failed to verify the cash in the safe from time to time. The workman who detected the loss promptly reported the matter to the Bank and the Police. His termination of services was held to be justified but Supreme Court ordered compensation at the rate of ½ month's salary for each year of service. It is

seen from the facts of the case of Saleem Vs Hatton National Bank that there was no dishonesty on the part of the workman. But in the instant case, as I pointed out earlier, the workman was dishonest when he committed the acts of misconduct. Therefore the decision of the Saleem's case (supra) has no application to the present case.

In Somawathie Vs Baksons 79 (1) NLR 204, the services of the applicant who was admittedly a good worker were terminated by her employer mainly because she indulged in false gossip about a man under whose supervision she worked. Her termination on the ground of indiscipline and misconduct was held to be justified but the Supreme Court granted her compensation as the cause of her termination of services was not a serious act of misconduct. In Somawathie's case there was no dishonesty on the part of the workman. In my view the decision of Somawathie has no application to this case.

In National Savings Bank Vs Ceylon Bank Employee's Union [1982] 2 SLR 629 the applicant, an employee of the Bank was dismissed from service for cheating at an examination conducted by the Bankers Training Institute. Labour Tribunal directed re-instatement but did not award back wages. On appeal the Court of Appeal affirmed the decision of the Labour Tribunal. The Supreme Court holding that the Bank is under a special duty to ensure honesty of the servants, set aside both orders of the Labour Tribunal and the Court of Appeal and affirmed the decision of the dismissal of the workman. In the above case the question of compensation did not even arise for consideration.

In the case of the Board of Governors for Zahira College Vs Naina Mohamad [1999] 2SLR 309 *"A large number of students forcibly entered the office of the Principal, Zahira College, during school hours. They behaved in an unruly and*

boisterous manner and coerced the Principal to issue a letter withdrawing a letter issued earlier by the Principal requiring certain teachers to vacate the hostel. While all this was happening the applicant-respondent, a teacher at Zahira College, was standing near the Principal. He did nothing to dissuade the students from behaving in the way they did. He was found guilty of misconduct and dismissed from service by the employer-appellant (the Board of Governors of the College). The Labour Tribunal dismissed the application against the termination of services." The Labour Tribunal held the termination justified. The High Court on appeal did not find the termination unjustified but following the decision of the Supreme Court in Saleem Vs Hatton National Bank (supra) awarded Rs.250,000/- as compensation. The Supreme Court on appeal distinguished the case of Saleem Vs Hatton National Bank (supra) and did not award compensation as the workman's (teacher's) conduct was totally unworthy of a member of the teaching staff in a school.

In Alexander Vs Gnanam [2002] 1 SLR 274 the Labour Tribunal held that the termination of services of the appellant-workman (the workman) was justified in view of a series of lapses during a period of 7 years and that his conduct was contemptuous of the management and fell far short of the expected standard but granted compensation in a sum of Rs. 57,000/-. But the Supreme Court held that that the workman who was at fault is not entitled to compensation.

In the present case as I pointed out earlier the workman was dishonest when he committed the acts of misconduct. Banks expect high standard of honesty from its employees. If the employees of banks do not maintain the above standard of honesty, confidence that the members of public have kept in bank system will erode. When I consider the facts of this case and the above judicial decisions, I

hold the view that the workman (the respondent) is not entitled to compensation. I therefore set aside both judgments of the labour Tribunal and the High Court and allow the appeal. In view of the conclusion reached above, I answer the two questions of law in the affirmative. I allow the appeal but do not order costs in view of all the circumstances of the case.

Appeal allowed

Judge of the Supreme court

Eva Wanasundera PC, J

I agree.

Judge of the Supreme Court.

Priyantha Jayawardene 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. 111/2014
SC/HCCA/LA/150/2014
SP/HCCA/TAN/LA/06/2013
D.C. Tangalle Case No. 2687/L

Lutz Paproth
Seenimodara
Tangalle.

PLAINTIFF

Vs.

1. Otto Geissler
Seenimodara
Nakulugamuwa.

2. Dirk Bryant Flamer – Caldera
No. 47/17, Ward place,
Colombo 7.

DEFENDANTS

AND BETWEEN

Dirk Bryant Flamer – Caldera
No. 47/17, Ward place,
Colombo 7.

2ND DEFENDANT-PETITIONER

Vs.

Lutz Paproth
Seenimodara
Tangalle.

PLAINTIFF-RESPONDENT

Vs.

1. Otto Geissler
Seenimodara
Nakulugamuwa.

1ST DEFENDANT-RESPONDENT

AND NOW BETWEEN

Dirk Bryant Flamer – Caldera
No. 47/17, Ward place,
Colombo 7.

2ND DEFENDANT-PETITIONER-APPELLANT

Vs.

Lutz Paproth
Seenimodara
Tangalle.

PLAINTIFF-RESPONDENT-RESPONDENT

Otto Geissler
Seenimodara
Nakulugamuwa.

1ST DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Chandra Ekanayake J.
P. B. Aluwihare P.C., J. &
Anil Gooneratne J.

COUNSEL: S.A. Parathalingam P.C. with Razik Zarook P.C. and
S. Cooray for the 2nd Defendant-Petitioner-Appellant

Krishantha Nissanka instructed by Anoma Munasinghe
For the 1st Defendant-Respondent-Respondent

Panni Subasinghe with Ajith Liyanage instructed by Simon & Associates
For the Plaintiff-Respondent-Respondent

ARGUED ON: 11.05.2015

DECIDED ON: 04.08.2015

GOONERATNE J.

This is a land case and I am very conscious of the fact that a decision favourable to either party necessarily involves some measure of hardship to the other. At the outset I am inclined to observe as above since the action bearing No. 2687/L involves a declaration of title and for a right of way over the land of the 1st Defendant-Respondent-Respondent and 2nd Defendant-Petitioner-Appellant. Whilst the said suit was pending a 3rd party, one L.Y. Priyanthi filed a partition action on or about 02.12.2010 against the 2nd Defendant-Petitioner-Appellant and 1st Defendant-Respondent-Respondent to partition a land called 'Indihena' in extent of 3 Acres: 2 Roods and 23 Perches. Plaintiff-Respondent-Respondent intervened in the above partition action to preserve his right of way which he claimed in the other case (2687/L) may be in anticipation of his right of way getting wiped out after final decree in the partition case.

It would be necessary to ascertain the position in the land case (2687/L) by perusing the pleadings and plans, prior to examining the order made by the learned District Judge and the learned High Court Judge, where both courts

held against the 2nd Defendant-Petitioner-Appellant on the question to lay-by the case (2687/L) until finality is reached in the above mentioned partition case (P4071). The plaint (para 2) in case 2687/L describes the land in dispute as 'Amuhena' in extent of about 3 Acres. It is also inter alia pleaded that (para 4) a road which is 12 feet wide and 300 feet in length, provides a right of way to the land called 'Amuhena' across the lands belonging to the 1st Defendant-Respondent-Respondent which land is called 'Sooriyagahawatte' and that of the 2nd Defendant-Petitioner-Appellant described as 'Indihena'. In para 4 of the plaint it is pleaded that the Plaintiff-Respondent-Respondent had purchased the above right of way by deed No. 151 of 11.03.1981 as shown in plan No. 2599 of 18.02.1981 although Plaintiff-Respondent-Respondent claims to have prescribed to same , as stated in para 5 of the plaint. It is also the case of the Plaintiff-Respondent-Respondent that the two defendants in the case had obstructed his access and caused loss and damage to him, as stated in para 9 of the plaint. Plaintiff-Respondent-Respondent has also sought a commission from court to show his access and the alleged obstruction.

The survey plans supportive of the Plaintiff-Respondent-Respondent are plan Nos 2599 and 1244 of Surveyor Dharmapala and Kodippilli, respectively.

Both plans show the road access from land called 'Amuhena' up to land described as 'Sooriyagahawatta'. Plan No. 1244 seems to show a better picture of the situation of the above lands. The said plan depicts the main road and the right of way as lots A, B, C & D. Lot 'D' is the stretch that runs through land called 'Indihena' which is also described according to the two plans as 'Thalagodalle' which land is occupied by Abanchi Appu. Lot 'C' also runs through 'Indihena' up to the main road. Lot 'B' runs across the main road and enters lot 'A' which is within a land called 'Ihiniyagalawatte'.

The two answers filed in case No. 2687/L on behalf of the two Defendants (1st Defendant-Respondent & 2nd Defendant-Petitioner-Appellant) are identical. Both of them reject the claim by the Plaintiff-Respondent-Respondent for a right of way, and plead that the deeds relied upon by Plaintiff-Respondent-Respondent are forged deeds and move for dismissal of Plaintiff-Respondent-Respondent's action. At the trial 17 issues had been recorded and parties have concentrated and suggested issues to incorporate the gist from each parties' pleadings.

It may not be necessary to re-consider the question of intervention by the Plaintiff-Respondent-Respondent in the partition action and which was

allowed by the learned District Judge to be added as a party Defendant. However learned President's Counsel for the 2nd Defendant-Petitioner-Appellant submitted to this court in his oral and written submissions the very nature of the application to intervene by the Plaintiff-Respondent-Respondent, based on 3 points, emanating from paras 2, 3 & 4 of the Plaintiff-Respondent-Respondents, Petition and affidavit filed in the partition action to intervene as a party Defendant. I note the following:

(1) a right of way has been sought over the corpus of the partition case (Indihena) against the Defendant-Respondent in the partition case.
(2) Plaintiff-Respondent-Respondent is a necessary party to be added as per Section 18 of the Civil Procedure Code.
(3) If Plaintiff-Respondent is not made a party to enable him to preserve the alleged right of way, there is a likelihood of it being wiped out on entering the final decree in the partition case.

Learned President's Counsel for the Appellant drew the attention of this court to certain oral submissions of learned Counsel for Plaintiff-Respondent-Respondent in the application for intervention in the partition case. However the issue that concerns this court where leave to proceed was granted is the question whether the Plaintiff-Respondent-Respondent's case bearing No. 2687/L should be laid by, pending the determination of the partition case. Even though the

learned District Judge before whom both cases were heard i.e the right of way case and the partition case, was not agreeable to lay by case No. 2687/L and that decision being affirmed by the High Court, the following two questions of law need to be considered. This court granted leave to Appeal on 09.07.2014, on the question of law set out in paragraph 16(e) and 16(f) of petition dated 24.03.2014 which reads thus:

16(e) that the Plaintiff-Respondent-Respondent will in the circumstances has to take part in the partition action and prove his claim to alleged right of way over the corpus and that the Plaintiff-Respondent-Respondent's claim for such a right of way will be accepted or rejected only at the conclusion of the said partition action by the entering of the partition decree.

16(f) that in the conclusion of this action pending the partition action will be futile and will not benefit the Plaintiff-Respondent-Respondent as he will have to await the decision in the partition action to establish his claim for a right of way over the Petitioner's and 1st Defendant-Respondent-Respondent's lands which are included in the land sought to be partitioned in the partition action.

What is relevant to note is the position taken up by both, the Plaintiff-Respondent-Respondent and the 1st Defendant-Respondent who opposed the application of the 2nd Defendant-Appellant to lay by the case

pertaining to Plaintiff-Respondent-Respondent's 'right of way', in the lower court, the High Court and before us in the Supreme Court, notwithstanding the fact that Plaintiff-Respondent-Respondent sought to intervene in the partition case and whose application was allowed, for the reason that Plaintiff-Respondent-Respondent need to preserve his position regarding a 'right of way'. Further both defendants inclusive of the Appellant and the 1st Defendant-Respondent, challenged the Plaintiff's right of way case, and even go to the extent of disputing a deed relied upon by the Plaintiff-Respondent-Respondent to be a forgery. We have noted the contents of the written submissions filed before this court and submissions of all learned counsel, who addressed court on the date of hearing.

Learned counsel who opposed the application to lay by the case in question emphasized that there is no provision in the Civil Procedure Code to lay by cases and invited us to consider certain decided cases where courts disapproved the practice to lay-by cases and held that such a practice should ordinarily be avoided vide *Bonser C.J. in Fernando Vs. Curera (1896) 2 NLR 29; Samsudeen V. Eagle Star Insurance Co. Ltd., 64 NLR 372.* I do agree with the submissions of learned counsel for 1st Defendant-Respondent-Respondent and Plaintiff-Respondent-Respondent on this aspect and state that an application to lay by a case should be allowed only in very limited circumstances and court need

to be extra cautious of such an application. However the case in hand is different and need to be distinguished from very many other cases, reported earlier.

The main issue for determination would have to be decided according to the Partition Decree. The alleged road-way extends from the land called 'Amuhena' owned by the Plaintiff-Respondent-Respondent across the land sought to be partitioned (Indihena) and land described as 'Sooriyagahawatte'. Necessarily Plaintiff-Respondent-Respondent has to prove his right of way over the corpus of the land sought to be partitioned. Unless Plaintiff establish the right of way as described above the case filed by the Plaintiff-Respondent-Respondent (2687/L) would not bring good results for the Plaintiff-Respondent-Respondent as a Partition Decree would be final and conclusive.

I would at this stage wish to make certain observations on the two orders pronounced by the learned District Judge and that of the learned High Court Judge as regards the application to lay by the 'right of way' case. (2687/L) I do appreciate that both courts identify the need to ensure early disposal of the 'right of way' case. Learned District Judge accepts and appreciates the finality of the partition decree, but gives way to the question of prejudice being caused to the Plaintiff in the event of dismissal of the partition case. However the legality of the partition decree and its finality has not been considered in detail by the

learned District Judge. If orders are to be made in anticipation, perhaps more prejudice would be caused to all parties in the absence of a valid order by a court of law, being challenged at the correct point of time. Both Judges are correct in observing that the partition case will take a long time to reach finality, but courts should not surmise the outcome of a case and pronounce orders. Plaintiff-Respondent-Respondent no doubt filed case No. 2687/L to fortify his position as regard his right of way. He also made the correct decision to intervene in the partition case as the alleged 'right of way' as shown in the survey plans relied upon by Plaintiff-Respondent-Respondent and submitted to court as indicated that the 'right of way' takes the route or goes over the corpus of the land sought to be partitioned (Indihena). In these circumstances finality of the partition decree takes precedence over and above any other case where a 'right of way' is in issue. Plaintiff-Respondent-Respondent is an added party in the partition case. As such all parties are represented in the partition case.

In Selvadurai Vs. Raja 41 NLR 423 held: "A court has inherent power to lay by a case pending the decision of an action in another court between the same parties in which the matters in dispute are identical. The learned High Court Judge emphasis the prejudice that would be caused to the Plaintiff-Respondent-Respondent in the event the case is laid by. It is also stated that the Plaintiff-

Respondent-Respondent came to court first and the case (2687/L) is at the concluding stages. It is further stated by the learned High Court Judge that no harm could be caused to the Plaintiff in the partition case. It may be so, but more harm and prejudice would be caused to Plaintiff-Respondent-Respondent if he failed to intervene in the partition case to preserve his 'right of way'. Learned High Court Judge further observes that there is no reason to lay by a case merely because a partition case has been filed. Learned High Court Judge no doubt in his order compare and contrast both the 'right of way' case and the partition case, and support the Plaintiff-Respondent and others opposing to lay by the case, the said order does not consider the legality of a partition decree, at least to the bare extent of the District Judge's observations on same. Therefore I will proceed to set aside the orders of the learned district Judge and the order affirming the District Judge's order by the learned High Court Judge.

I will at this stage of the judgment consider the legal position that would be the foremost position in the context and circumstances of the case in hand.

Plaintiff-Respondent-Respondent was not a party to the partition case, but he intervened and the trial Judge added the Plaintiff-Respondent-

Respondent as a party in the partition case. In *Girigoris Vs. Mammadu Meedin 1 Bal. Report 177.*

Pg. 97 of K. D. P. Wickremesinghe – The Law of Partition in Ceylon

> In Girigoris Vs. Mammadu Meedin, Perera J. said that although a person having a right of way cannot be regarded as a co-owner, still he is entitled to claim to be made a party to a partition suit. It was held in this case that a person claiming a right of way over a land is not entitled to institute action to partition the land, but he is entitled to be made a party to the action to establish his servitude over the land.

There is also a reported case which recognized the right to go over the common property to reach the adjoining land. In *Chellan V. Ponnan* *56 NLR 95*……

> Where in the partition of a land owned in common a portion of it is reserved as common property for use as a lane, a co-owner is entitled to use the lane in order to reach an adjoining land which belongs solely to him if by doing so he does not interfere with the substantial rights of the other co-owner.

On the question of an express grant or reservations in *Rodrigo V. Narayanasamy* *56 NLR 402* ……

> When land which is owned in common has been amicably partitioned, a former co-owner is not, as a general rule, entitled to claim a right of way over a portion allotted to another co-owner unless it has been expressly granted or reserved in the cross-conveyances executed by the co-owners, even though a well-defined footpath had existed prior to the severance of the common property.

I have also in process examined the law on the subject i.e via Vicinalis and via publics which necessarily has to be considered and the Plaintiff-Respondent-Respondent need to be mindful of same. In *Amarasinghe Vs. Wanigasuriya 1994(2) SLR at pg. 207/208…* In the book titled 'Servitudes' by *Hall & Kellaway 2nd Ed pg. 43.*

> "The courts have repeatedly laid down that there are two kinds of public roads, via publica and via vicinalis …. A via publica is a road which has been proclaimed as a public road by an authority empowered by statute to do so, while a via vicinalis is a right of way which the public becomes entitled to use through immemorial user … Two other methods of creating public rights of way exist viz. by reserving them in Crown grants of land and through the owner of the land dedicating a road which crosses his property to public use".

The authors have further explained the acquisition of via vicinalis as follows

> "These roads were originally roads used by a number of neighbours jointly and known in Holland as 'buyrwegen' (Grotius, 2.35.10; van Leeuwen 2.21.9; Voet, 43.7.1). In Peacock v. Hodges, de Villiers, C.J. said that they are either roads in a village or roads leading to a town or village, but close connection with an urban area does not seem to have been

> required in earlier times. Use from the time immemorial without interference from the owner of the land over which they run is an essential factor… Upon proof of user for thirty years and upwards the court is justified in holding that a state of things had existed from time immemorial if no evidence is adduced to show when it originated."

In the above case (Amarasinghe Vs. Wanigasuriya), although it is a Judgment of the Court of Appeal, the law remains unaltered and stands firm since it relates to the scheme of partition which was confirmed by the District Judge but the Appellate Court held it was a fundamental error which considered a matter in dispute which related to a road, as depicted along the North Western boundary of the corpus in the final plan. Petitioners were not parties to the above action as they had no interest in the corpus, but the Petitioner claimed the road to be a private 'road' serving the Petitioners who own the land to the west of the corpus to be exclusion of the co-owners of the corpus.

They submitted that their rights are affected by the scheme of partition as contained in the final plan wherein the Surveyor has partitioned the corpus using the said 'private road' as the only means of access to the lots 2, 3, 4 and 5 of the corpus.

> The order confirming the scheme of partition and the final decree that has been entered, have the effect of creating a servitude of way in favour of the parties to the partition action over the 'private road' which is outside the corpus, without the

petitioners being heard on this matter. On this basis, they moved that the final decree be set aside and suitable direction given by this Court to the District Court to safeguard the interests of the petitioners in relation to the 'private road' to which they are exclusively entitled.

S. N. Silva J. held that:-

1. in the process of partitioning, proper rights of way should be provided from within the corpus as access to a public right of way.
2. the road claimed by the petitioners was not a *via vicinalis*. There was no proof of immemorial use of the disputed roadway or prescription.
3. there was fundamental error in confirming the scheme of partition without affording the petitioners an opportunity to object to it.
4. a glaring blemish which taints the proceedings in a partition action and results in a miscarriage of justice to a person not being a party to the action may appropriately be remedied by an application in revision."

The above would be an instance which the final decree was set aside for good reasons, and recognize the use of a right of way.

In the context of the case in hand I wish to refer to the following authorities which demonstrate finality aspect of a partition decree and instances where a court is not bound to accept a final decree in very limited circumstances.

Partition Decree does not bind the Crown where the Crown has not been a party to the action 2 N.L.R. 369; 3 Law Rec. 174; 1 Law Rec. 163; 23 N.L.R. 150. A partition decree creates a title which is good and conclusive for all purposes. It eliminates the title of a

previous and true owner who is not a party to the proceedings but allows him an action for damages against the person by whose tortuous act this was caused. 30 N.L.R at 18; 1 C.W.R. at 85. It is conclusive even as against a person owning an interest in the land partitioned whose title has by fraudulent contrivance been concealed from the Court. 8 Law Rec. at 141; 9 S.C.C. 198; 4 Law Rec. at 51. It binds even minors. 9 N.L.R 241 F.B. It extinguishes all easements not especially provided for in the decree whether such easements be claimed as between co-owners or by the owners of neighbouring lands over the land partitioned. 26 N.L.R 374; 6 Law Rec. 54; 2 Times 232. A partition decree entered without investigation into title but by mere consent of parties does not, however, have a conclusive effect as a decree under the Ordinance. 20 N.L.R 27. Where a decree under the Ordinance is pleaded as a basis of title it is open to the party against whom it is pleaded to show that it is not a decree "given as hereinbefore provided' and so has not the conclusive effect given to decree under section 9. 6 Law Rec. 87. A Court cannot vary a final decree even with the consent of parties, 2 C.L.W 252; 1 C.L.W 370, or where the procedure has been irregular. 2 C.L.W. 267. The proposition that a District Court does not have the right to set aside an order of dismissal made by it is not only good law but necessary for the proper working of partition actions. 34 N.L.R at 441. A partition decree does not of itself interrupt the running of prescription in favour of a person claiming title. 5 Law Rec, 191.

I have also noted the following case law as regards finality and good title in a partition decree.

In *Bernard Vs. Fernando (16 N.L.R. 438)* Supreme Court held that the partition decrees are conclusive by their own inherent virtue and do not depend for their final validity upon everything which the parties may or may not afterwards do. They are not like other decrees affecting land, merely declaratory

of the existing rights of the parties inter se: they create a new title in the parties absolutely good against all other persons whomsoever.

In the case of *Abdul Caffoor Vs. Pattumuttu (17 N.L.R. 173)* 'A' being allotted a certain portion of land in a decree in a partition suit, conveyed that portion to 'B' and the decree is subsequently varied and 'A' was allotted another portion in lieu of the portion conveyed by him. Thereafter the plaintiff brought this action to have the relevant deed rectified. The Supreme Court held that the plaintiff cannot maintain this action for rectification of the deed of conveyance.

Fernanod Vs. Marsal Appu (23 N.L.R. 370) was an action for declaration of title the defendants claimed under a partition decree. The plaintiff impeached it on the ground that it was obtained by fraud and collusion. In the Supreme Court Ennis J. held that, under section 9 of the Partition Ordinance the plaintiff was bound by the decree.

It was further held as follows:

"I have not considered it necessary to go into the question as to whether in exceptional circumstances, where the property is still in the sole possession of the parties whose fraud is set up the Court could not on proof of fraud take away the property from them."

In *Umma Sheefa Vs. Colombo Municipal Council (36 N.L.R. 38) Garvin J.* held that the conclusive character of a judgment entered in accordance with the provisions of the Partition Ordinance is sufficient to wipe out the effect of the

vesting order made under section 146 of the Municipal Councils Ordinance No. 6 of 1910.

The investigation into title which is an essential requirement compliance with which is one of the conditions upon which a decree in a partition case is accorded the effect of a judgment *in rem* is an investigation made by Court with the object of determining whether the title of the parties claiming to be owners of the land has been strictly proved.

Where in a partition case there were admissions and agreements in respect of the rights of parties *inter se* but no evidence that they or any of them were entitled to the premises or to any share thereof at the dates material the action. There was no proper investigation into title which would give the decree entered thereafter the conclusive effect given to it by section 9 of the Partition Ordinance.

In *Muthumenika Vs. Appuhamy (50 N.L.R. 162)* Supreme Court held that failure to notice a party disclosed in the surveyor's report does into destroy the conclusive effect of a final decree in a partition action.

It is the duty of the plaintiff to see that the necessary parties are before the court. Where therefore, the plaintiff knew that there was an intervenient disclosed in the Surveyor's report, his failure to make such intervenient a party amounts to such a breach of duty as would given rise to a claim for damages under section 9 of the Partition Ordinance.

In the case of *Dharmadasa Vs. Meraya (50 N.L.R. 197)* Supreme Court held that the partition action proceeds on oral as well as documentary evidence and the failure to notice the reservation of a life interest in a deed is an

accidental slip or omission which gives the Court jurisdiction to amend the decree under section 189 of the Civil Procedure Code. Where a decree is so amended with notice to the parties it is *res judicata* and cannot be attacked in a collateral action.

Hendrick Vs. Podinona (57 N.L.R. 494) was a partition action where the appellant, who was not mentioned as a defendant in the plaint, was ordered by Court to be made a party. His name thereafter appeared as one of the defendants and he took part in the proceedings between interlocutory decree and final decree. He admitted that the share allotted to him in the interlocutory decree was correct.

In *Mohamedaly Adamjee Vs. Hadad Sadeen (58 N.L.R. 217)* the Privy Council held that a decree entered under section 8 or section 9 of Partition Ordinance No. 10 of 1863 is conclusive against all persons whomsoever, and a person owning an interest in the land partitioned whose title even by fraudulent collusion between the parties had been concealed from the Court in the partition proceedings is not entitled on that ground to have the decree set aside, his only remedy being an action for damages (even though the property is still in the sole possession of the parties whose fraud is set up.)

Although a partition decree entered without any investigation of title does not have the conclusive effect provided by section 9 of the Partition Ordinance, a decree entered after a defective or inadequate investigation of title is conclusive,

as long as it has not been set aside on an appeal in the same action. Once it appears that the Court did hold an investigation into title, although the investigation was not sufficiently exhaustive to prevent the fraud which was perpetrated by the parties in regard to the title of a person who had not been made a party to the action, any defect in the method of investigation would not vitiate the decree. The person so defrauded is not entitled to seek by separate action to set aside the decree or in a separate action to challenge its conclusive effect. The fact that the lack of proper investigation of title may be sufficient for the Appeal Court acting in the same case to set aside a decree does not detract from the conclusive effect of section 9 of the Partition Ordinance when the decree is being considered in a separate case.

In the circumstances of this case it is observed that a partition decree cannot be the subject of any kind of private arrangement, between parties. Even if the partition case is time consuming finality and conclusiveness of the decree had been recognized by statute and case law. Plaintiff-Respondent-Respondent intervened in the partition suit for good reasons and more particularly to preserve his access through the land sought to be partitioned. In law and in cases filed before our courts parties keep options open to get the best deal for themselves. In the process delays may be inevitable, merely because a party filed a case first and others came in late would not be a ground to refuse applications, to lay-by cases, more particularly as a partition decree is conclusive and final. In these

circumstances and in the context of this case, this court is inclined to allow the application of 2nd Defendant-Respondent-Appellant. As such I answer the two questions of law in favour of the 2nd Defendant-Respondent-Appellant and in the affirmative, directing the trial Judge to lay-by case No. L/2687 until finality is reached in the partition case, as per sub para (d) of the prayer to the petition of the 2nd Defendant-Petitioner-Petitioner.

Appeal allowed. No costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

P.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 appeal under and in terms of Section 5C of the High Court of the Provinces (Special Provisions) (Amendment) Act No 54 of 2006.

SC / Appeal No / 117/2013

SC/ HCCA/LA/ No 134/2013

WP/HCCA/MT No 48/08/F

DC (Mt. Lavinia) No 4695/04/D

Hilary Howard Dunstan De Silva,
No 18/1, Dakshinarama Road,
Mount Lavinia.

Plaintiff

Vs.

Rani Lokugalappaththi,
C/O Shakila Achini De Silva,
No. 26, Fathima Mawatha,
Welikadamulla Road,
Mabola, Wattala.

Defendant

AND

Rani Lokugalappaththi,
C/O Shakila Achini De Silva,

No. 26, Fathima Mawatha,
Welikadamulla Road,
Mabola, Wattala.

Defendant Petitioner

Vs.

Hilary Howard Dunstan De Silva,
No 18/1, Dakshinarama Road,
Mount Lavinia.

Plaintiff Respondent

AND NOW BETWEEN

Rani Lokugalappaththi,
C/O Shakila Achini De Silva,
No. 26, Fathima Mawatha,
Welikadamulla Road,
Mabola, Wattala.

Defendant Petitioner Appellant

Vs.

Hilary Howard Dunstan De Silva,
No 18/1, Dakshinarama Road,
Mount Lavinia.

Plaintiff Respondent- Respondent

BEFORE	:	B. P. ALUVIHARE, PC, J. UPALY ABEYRATHNE, J. ANIL GOONARATNE, J.
COUNSEL	:	Kamaran Aziz with Ershan Ariyaratnam for the Defendant- Petitioner- Appellant V. K. Choksy with D. Timirige for the Plaintiff -Respondent- Respondent
ARGUED ON	:	15.06.2015
WRITTEN SUBMISSION ON:		13.11.2013 (Appellant) 30.10.2013 (Respondent)
DECIDED ON	:	02.10.2015

UPALY ABEYRATHNE, J.

This is an appeal from a judgment of the High Court of Civil Appeal of the Western Province holden in Mount Lavinia dated 06.03.2013. By the said judgment the learned High Court Judges of the High Court of Civil Appeal, Mount Lavinia have dismissed the appeal of the Defendant Petitioner Appellant (hereinafter referred to as the Appellant). The Appellant sought leave to appeal from the said judgment and this Court granted leave on the following questions of

law set out in paragraph 18 (d), (g), (j) and (n) of the petition of the Appellant dated 04.04.2013, namely;

(d) Has the High Court of Civil Appeal misdirected itself by failing to appreciate that the Petitioner had lawful and/or genuine and/or reasonable grounds for her default in appearing before the District Court of Mount Lavinia on 4th July 2006, having particular regard to the fact that the petitioner was in extremely poor health at the material time as established in Petitioner's evidence and/or by the evidence of the Doctor of indigenous medicine summoned to give evidence and/or by the medical certificates duly submitted to Court on behalf of the Petitioner?

(g) Has the High Court of Civil Appeal misdirected itself in fact and/or law by affirming the determinations contained in the order of the learned District Judge when such impugned order clearly failed to take in to account the totality of the evidence led at the inquiry?

(j) Has the High Court of Civil Appeal erred in law by determining that the medical certificate issued by the Ayurvedic Physician marked as P2 cannot be accepted as genuine and/or relevant evidence?

(n) Has the High Court of Civil Appeal misdirected itself in law by failing to take adequate cognizance of the fact that Ayurvedic Physician who gave evidence at the inquiry had prescribed leave for the Petitioner due to her medical condition and this fact should necessarily have convinced the District Court that

the Petitioner had established on a balance of probability that the Petitioner was unable to attend Court and/or appoint an Attorney-at-law prior to 4th July 2006 upon reasonable and genuine grounds?

The Plaintiff Respondent-Respondent (hereinafter referred to as the Respondent) in this case instituted the said action against the Appellant seeking for divorce *a vinculo matrimonii* on the ground of constructive malicious desertion. They had got married on 4th of July 1992, but they had no children by the said marriage. It was an admitted fact that both the Appellant and the Respondent had children by their previous marriages. The Appellant filed an answer denying the averments contained in the plaint and praying for divorce *a vinculo matrimonii* on the ground of constructive malicious desertion by the Respondent. After the replication was filed by the Respondent the case was fixed for trial. As reflected in Journal Entry (J.E.) No 15 dated 29.03.2006 when the case was taken up for trial on the said date the Appellant tendered papers in order to revoke the proxy given to her Attorney At Law and thereafter the case had been re-fixed for trial on 04.07.2006 to enable the Appellant to obtain legal assistance. When the case was taken up for trial on 04.07.2006, the Appellant was absent and unrepresented. Then the learned District Judge had dismissed the Appellant's claim in reconvention and had taken up the main case for an ex-parte trial and entered a decree nisi in favour of the Respondent as prayed for in the plaint.

Upon the receipt of the said ex-parte decree the Appellant had made an application under Section 86(2) of the Civil Procedure Code seeking to set aside the said ex-parte judgment and the decree and to permit the Appellant to proceed with her defence as from the stage of default. At the inquiry into the said application to vacate the ex-parte decree, the Appellant had closed her case leading

her evidence and the evidence of an Ayurvedic Doctor, H.T.P.P. Thilakarathna. Also a medical certificate issued by the said Ayurvedic Doctor had been produced marked Pe.2. The Respondent had not led any evidence. After the said inquiry the learned District Judge had refused the said application of the Appellant without cost. Being aggrieved by the said order dated 30.06.2008 the Appellant had appealed to the High Court of Civil Appeal of the Western Province, Mount Lavinia. After the hearing of the said appeal the learned High Court Judges of the High Court of Civil Appeal, Mount Lavinia have dismissed the appeal of Appellant by the abovementioned judgment dated 06.03.2013.

It has transpired from the evidence led at the said inquiry under Section 86(2) that on the date of trial relevant to this application, i.e. 04.07.2006, the Appellant was absent from court on the advice of said Ayurvedic Doctor as she was under medical treatment for dislocation of her knee joint due to a fall. In proof of that she has produced the said medical certificate issued by the said Ayurvedic Doctor marked Pe. 2. The said Ayurvedic Doctor in his evidence had testified that he treated the Appellant for dislocation of her knee joint and also issued the said medical certificate Pe. 2 dated 28.06.2006 recommending leave for a period of 14 days commencing from 28.06.2006 to 11.07.2006. No doubt that 04.07.2006 which was the date of trial had fallen within the said period of 14 days of medical leave. Said evidence had not been contradicted at the cross examination. Also there had been no any other evidence led by the Respondent in order to counter the said position of the Appellant.

Apart from that it is important to note that at the said inquiry before the learned District Judge, the Appellant was given a chair at her request as she was not fit enough to give evidence whilst standing. Said position of the Appellant indicates that she was suffering with an ailment in her legs.

In the said context when I examine the impugned judgment of the Civil Appellate High Court of Mount Lavinia dated 06.03.2013 and also the order of the learned District Judge dated 30.06.2008 it is clear to me that both courts have failed to appreciate the said evidence led on behalf of the Appellant and the obvious physical condition of the Appellant. The learned High Court Judges, in the said judgment, have not expressed a word in considering the said evidence of the Appellant and the Ayurvedic Doctor together with the medical certificate marked Pe.1. At page 04 of the impugned judgment the learned High Court Judges have merely stated in a few lines that "Ayurvedic Physician has only recommended leave but had not examined nor prescribed any medicine for her ailment. A doctor who had not treated a patient cannot issue a medical certificate of that nature. Further such certificate cannot be accepted in a court of law and should stand rejected". Apart from the said few lines of the impugned judgment the High Court has not considered at all the totality of the evidence led by the Appellant.

It is important to note that in an inquiry under Section 86(2) of the Civil Procedure Code a Court of Law should come to a just and fair conclusion having regard to the totality of the facts and circumstances revealed at the inquiry before the court. But in the present case before me, both the High Court and the District Court in contrary to the said requirement of Section 86(2), has made an attempt to place a heavy burden of proof on the Appellant paying their attention to trivial contradictions and infirmities of the medical certificate and have reached a conclusion which cannot be justified on the evidence led before the District Court.

It must be noted that the burden of proof cast upon an Applicant who makes an application under Section 86(2) of the Civil Procedure Code is not similar to a proof of balance of probability. It is much less than that. What is required under Section 86(2) is that to adduce 'reasonable grounds for default' to

the satisfaction of Court. Section 86(2) stipulates that "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."

In the said order dated 30.06.2008, the learned District Judge having referred to the Appellant's petition dated 28.11.2006, has come to a conclusion that the Appellant was suffering from arthritis but in her evidence she has stated that she could not come to court on 04.07.2006 due to dislocation of her knee joint due to a fall and thereby she had contradicted her own evidence with the averments contained in her petition and affidavit dated 28.11.2006. It must be noted that at the inquiry before the District Court, during the cross examination of the Appellant, the Respondent has neither touched the facts and circumstances elaborated in the said petition and affidavit nor has challenged the evidence of the Appellant on the said basis in order to contradict the averments contained in the said petition and affidavit. When the facts and circumstances contained in the petition and affidavit are not disputed at the inquiry by the parties it is not opened for the learned District Judge to mark contradictions in the evidence of the Appellant upon facts which were not so challenge.

On the aforesaid premise when I consider the facts and circumstances of the case revealed at the inquiry I have no option but to reach the conclusion that the said questions of law raised by the Appellant before this court should be answered in the affirmative as the Appellant has adduced reasonable grounds for her default to the satisfaction of court. Hence I set aside the said judgment of the

High Court of Civil Appeal of the Western Province holden in Mount Lavinia dated 06.03.2013 and the order of the learned District Judge dated 30.06.2008 and permit the Appellant to proceed with her defence as from the stage of default. Appeal of the Appellant is allowed with cost in all courts.

Appeal allowed.

Judge of the Supreme Court

B. P. ALUWIHARE, PC, J.

I agree.

Judge of the Supreme Court

ANIL GOONARATNE, J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 122/2011
WP/HCCA/Col/51/07(F)
D.C Colombo Case No. 19725/D

Mangalika De Silva (nee Hemachandra)
No. 378, Nawala Road,
Rajagiriya.

PLAINTIFF-RESPONDENT-PETITIONER

Vs.

Prabhath Joseph De Silva
Jambo Restaurant
No. 86/A-2, Negombo Road,
Thudella, Ja-ela.

DEFENDANT-APPELLAN-RESPONDENT

Pushpa Kumari Jayawardena
No. 72A, Kaleliya Road,
Kapuwatta, Ja-ela.

CO-DEFENDANT-RESPONDENT-RESPONDENT

BEFORE: Eva Wanasundera P.C., J.
Sisira J. de Abrew J. &
Anil Gooneratne J.

COUNSEL: Nihal Fernando P.C., with Rohan Dunuwila
for Plaintiff-Respondent-Petitioner

M.U.M. Ali Sabry P.C with Nuwan Bopage for
Defendant-Appellant-Respondent

ARGUED ON: 16.03.2015

DECIDED ON: 26.06.2015

GOONERATNE J.

This was a divorce suit filed in the District Court of Colombo. The learned Additional District Judge by his judgment of 16.1.2007 granted a divorce to the wife on grounds of malicious desertion and adultery, of the husband (Defendant-Appellant-Respondent). The trial Judge having granted relief as aforesaid proceeded also to make an order in terms of Section 615(1) of the Civil Procedure Code and ordered the Defendant-Appellant-Respondent to transfer an undivided half share belonging to him in the matrimonial house to his wife.

Defendant-Respondent-Appellant appealed to the High Court, and the learned High Court Judge by judgment of 02.08.2010 vacated the judgment of the learned District Judge and directed that trial de novo be held. Appeal to this Court is from the judgment of the High Court by the wife, Plaintiff-Respondent-Petitioner. Supreme Court granted Leave to Appeal from the judgment of the High Court on 29.08.2011 limited to a question of law as follows.

"Whether the learned Judge was correct in law in directing that the Defendant-Respondent-Respondent shall transfer his ½ share of the matrimonial property to the Plaintiff-Respondent-Respondent"(wife). It is recorded in the proceedings/journal entry of 29.08.2011 that both parties do not wish to go for re-trial with regard to the entire matter relating to the divorce and both parties are satisfied with the Decree of Divorce granted by the learned District Judge. As such the only issue to be decided is whether the direction given by the learned District judge to transfer ½ share of the matrimonial home is legally acceptable and correct in law. In fact this appeal is only limited to that question.

The attention of this court was drawn by learned President's Counsel on either side to the provisions contained in Section 615(1) of the Civil Procedure Code and more particularly to Section 615(1)(a) of same.

It may be important initially to discuss the law on this subject since the judgment of the Apex Court in this case may have far reaching consequences which would have a bearing on the life style of either spouse irrespective of one or both of them are guilty of a matrimonial offence. Whatever views could be expressed, the case in hand fall within the ambit of family law. 'Family' is a recognized unit all over the globe. In Huang Vs. Secretary of State for the Home Department (2007) UKHL 11; (2007) 2AC 167 para 18, House of Lords emphasized, thus:

"Human beings are social animals. They depend on others. Their family or extended family , is a group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives". I wish to comment on another aspect, pertaining to family law. Will the family law fall into a crisis with so many divorce suits and separations being filed in our courts due to change in patterns of life style among the Sri Lankan communities, may be due to the influence of the western society. When spouses divorce or separate, what happens to their property on separation? Whilst parties are married the law does very little to interfere in the property interest of parties. By contrast, on separation, the law is

willing to intervene to ensure that the spouses or civil partners financial interest are adequately protected. The law in the process of doing so may cause some ill feelings among the spouses or hardship to one of them. Duty of court is to pronounce very reasonable understanding orders to minimize hardship to at least some extent. No doubt difficulties arise to divide property on divorce and dissolution. There is wide spread perception that divorce would cause financial ruin for a wealthy spouse.

Let us now look at the applicable statutory provisions. Section 615 of the Civil Procedure Code reads thus:

(1) The court may, if it thinks fit, upon pronouncing a decree of divorce or separation, order for the benefit of either spouse or of the children of the marriage or of both, that the other spouse shall do any one or more of the following:-

(a) make such conveyance or settlement as the court thinks reasonable of such property or any part thereof as he may be entitled to;
(b) pay a gross sum of money;
(c) pay annually or monthly such sums of money as the court thinks reasonable;
(d) secure the payment of such sums of money as may be ordered under paragraph (b) or paragraph (c) by the hypothecation of immovable property or by the execution of a bond with or without sureties, or by the purchase

of a policy of annuity in an insurance company or other institution approved by court.

(2) The court may at any stage discharge, modify, temporarily suspend and revive or enhance an order made under subsection (1).

The said section was introduced to the Code by Amendment Act No. 20 of 1977. Old Section 615 of the Code had been replaced by Section 615 introduced by Act No. 20 of 1977. Section 616 and 617 of the old code has been repealed. However Section 618 remains unchanged. There is an area of discretion vested with the court as per Section 615(1). An order under this section could be made "if it thinks fit". Section 615 (1)(a) could be resorted to, if the court thinks it be ' reasonable' to make a conveyance of property. Much emphasis has to be placed on the words "if it thinks fit" and 'reasonableness'. If the court wish to act in terms of Section 615(1)(a) it could do so if it thinks fit and make a reasonable order. This would not attract any kind of order to favour one of the two spouses. What is contemplated is the reasonableness to make an order having considered the entitlement to property of each spouse. Further such an order could be made upon pronouncing a decree for divorce or separation. As such court necessarily has to make an order for divorce on the available grounds for divorce, and thereafter decide to make such conveyance or settlement which is reasonable. It

is my view that the grounds of divorce should not influence the trial Judge if he decides to act under Section 615(1)(a).

It could be argued that on one hand statutory provisions introduced to the Civil Procedure Code in this regard may cause some difficulty when reallocations of property rights between spouses are to be considered. No doubt whilst examining the decided cases the consensus of judicial opinion appears to favour the view that although express statutory provisions the common law principles of forfeiture of benefits continue to apply. Let me examine some of the cases which showed reluctance to reject the common law principles.

In Dondris Vs. Kudatchi (1902) 7 NLR 107 court held that a wife divorced from her husband on the grounds of adultery, forfeits for the benefit of the innocent spouse everything which according to common law or by antenuptial contract or otherwise, would have been acquired by her out of his property. What must be noted, in this connection is that the offending spouse forfeited not his or her own property but only the benefits derived from the marriage either under common law or by antenuptial contracts. De Silva Vs. De Silva (1925) 27 NLR 289 at pg. 304. As such the benefits derived by either of the spouses seems to be the deciding factor. i.e if the wife had transferred the property to the husband as an

absolute and outright transfer during subsistence of marriage. Husband subsequently is at fault for matrimonial misconduct, then the husband is bound to restore the property to the wife, if it was a benefit derived on account of marriage.

There is also authority to the effect that if the wife retained separate ownership over her dotal property, then even if she would be held responsible for destruction of marriage, she would not lose her rights over her property as it is not a benefit she derived from marriage. (Savithri Gunasekera "Recovery of Dowry and Other Property on a Dissolution of Marriage" The Colombo Law Reports (vol. 3 Col. 1972) Pg. 1 at 6/7)

Fernando Vs. Fernando 63 NLR 416

"This common law remedy was not abrogated as a result for the enactment of these sections (sections 617 and 618 of the Civil Procedure Code), but rather remedies envisaged by these sections are complementary to the action available under the common law. However … the parties cannot have the benefit of both remedies but should elect to claim either the remedy under the common law or those available under the Civil Procedure Code.

Under the common law the rule of forfeiture of benefits as between spouses does not apply to the separate property of the offending spouse.

Two months prior to the marriage between the plaintiff-appellant and the defendant-respondent (wife and husband respectively) the plaintiff's brothers donated certain property to the plaintiff and defendant in equal shares 'as a token of mental pleasure and for their future prosperity" which the donors had "towards the marriage of the said donees". After dissolution of marriage on the ground of malicious desertion by the plaintiff, the plaintiff and the defendant claimed in the present action each other's share of the donated property. The trial Judge allowed the claim of the defendant and dismissed that of the plaintiff.

Held, that the defendant, while he was entitled to retain the share which had been donated to him, was not entitled to the share of the plaintiff, despite the fact that the plaintiff was the offending spouse. It could not be said that the share which vested in the plaintiff under the deed of donation was as a result of an ante-nuptial contract. Nor could it be said that the share which the plaintiff received was a benefit she derived from her spouse by marriage. She was already vested with title when she married and, therefore, this was her separate property and, as such, it was not subject to forfeiture.

In a more recent case namely P. Samarasinghe Vs. L. Samarasinghe (this is a Court of Appeal judgment and this court is not bound by the said judgment) 1990 (1) SLR 31 it was held.

Dowry is a marriage portion where movable or immovable property is given by a parent or a third party to a woman in consideration of marriage. The fact that this

gift is given in contemplation of marriage distinguishes it from an ordinary free will gift.

A married woman is capable of acquiring, holding or disposing by will or otherwise any movable or immovable property as her separate property as if she were a feme-sole.

When dowry or any portion thereof given on behalf of a wife is actually given to or used by the husband or if the husband has already derived any benefits there from or will derive in the future any benefits by reason of that marriage, them if the marriage is dissolved due to the fault of the husband he has to forfeit those benefits.

In an action for judicial separation too, it would appear that an order for forfeiture of accused benefits. (but not future benefits) could be obtained.

If the marriage is dissolved owing to the fault of the husband he is liable to forfeit those benefits. This could be done in one of the following ways:-

(1) Restitution of total property on the basis that it belongs to the wife and that the husband had only the usufruct thereof;

(2) Where dominium has passed to the husband, it could be reclaimed on the basis of forfeiture of benefits.

(3) On the basis that the husband holds such property in trust for the wife;

(4) Where cash is given to or expended on his behalf by the wife, the wife can ask for return of same on the basis of forfeiture of benefits.

Under section 618 of the civil Procedure Code the Court may, if it thinks fit, upon pronouncing a decree of divorce or separation, after going into these matters (i.e matters which relate to the forfeiture of benefits) at the main trial itself, order the settlement of property. Questions which can relate to forfeiture of benefits by the guilty spouse could be put in issue at a trial for divorce or separation.

On a perusal of all above authorities emerging from the statute and common law, tends to safeguard all property which does not bring in benefits derived from marriage. The principle of forfeiture of benefits under common law would not interfere with separate property of the offending spouse. In brief property of the innocent party which is actually given to the offending party who has benefitted or would benefit in the future on accounts of marriage, then the offending party is liable to forfeit those benefits. There is no doubt an element of reasonableness to a great extent that touch the root of the problem which is separate from grounds of divorce or separation, has to be considered and kept in mind if a decision has to be made in this regard.

At this point of the judgment it is desirable to look at other jurisdictions especially the English Law on distribution of property on dissolution of marriage.

Family Law - 6th Ed. Jonathan Herring

Pg. 210…

Proceedings for financial orders on divorce is a controversial issue. There is a wide range of competing policies that the law seeks to hold together. There is a desire to ensure that on divorce a fair redistribution of the property takes place so that one party is not unduly disadvantaged by the divorce. On the other hand, there is the desire to enable the parties to achieve truly independent lives after the divorce. As the Law Commission put it:

> The reality of divorce means that former spouses should not be tied to each other for life, the law gives them freedom to re-marry and take on new responsibilities, and this is hampered if the financial commitment of a former relationship is unnecessarily prolonged. For the economically weaker party, dependence means vulnerability to another's employment, health and willingness to pay.

At 212/213….

Why should there be any redistribution?

Partnership. The view here is that marriage should be regarded as analogous to a partnership. The husband and wife co-operate together as a couple as part of a joint economic enterprise. It may be that one spouse is employed and the other works at home, but they work together for common benefits. Therefore, on divorce each spouse should be entitled to their share, normally argued to be half each. Lord Nicholls in **Miller v Miller** accepted the validity of what he called the 'equal sharing' principle. He put the argument this way:

> (in marriage) the parties commit themselves to sharing their lives. They live and work together. When their partnership ends each is entitled to an equal share of the assets of the partnership, unless there is a good reason to the contrary. Fairness requires no less,

But the partnership model does not necessarily lead to an equal division, John Eekelaar suggests;

> At the end of the relationship the investment which each party has put into the marriage is assessed on one side of the balance sheet and set against the value of the assets which each is taking out of it and also the earning power which each has at that time. If there is a disparity between the parties with regard to what was put in and what is being taken out, an adjustment will be made to equalize the position between them. Marriages is a joint enterprise in a capitalist society demanding, at least prima facie, equal rewards for effort.

I have also prior to making up my mind, although sufficient material had to be gathered from various jurisdictions, very important and relevant comments of legal consequences of separations and divorce are discussed in the text of, law and the marriage relationship in Sri Lanka 2nd Ed by Professor Shirani Ponnambalam. At pgs. 436 & 437 of same useful observations and a guide to the problem is discussed.

At 436 ….

> While the Sri Lankan law continues to apportion blame on one party thereby holding one spouse entirely responsible for the dissolution of the marriage, the statute also recognizes a divorce on proof of separation a *mensa et thoro* for seven years. In the light of these fault and non-fault based grounds for divorced it is difficult to determine the extent to which the conduct of the parties should influence our courts in the ancillary question of property rights subsequent to a divorce. For instance, if a divorce is obtained under the Marriage Registration Ordinance will the court invariably deny or reduce the "guilty" spouse's right to a beneficial interest or title to property? While there is evidence of this policy in the early Sri Lankan law it is submitted that a rule such as this loses sight of the fact that a final repudiation of the marital tie is most often the culmination of a slow process of deterioration of a relationship brought about by the blameworthy conduct of both parties. In other words, husband and wife together share, though sometimes unequally, the responsibility for a breakdown of the marriage. In circumstances such as this, to impose a sanction on one spouse, who is ostensibly "guilty' of blameworthy conduct, is indeed unfair and ought to be discouraged. However, the exception accepted in the English law, of taking into consideration conduct which is so reprehensible that "to order one party to support another whose conduct falls into this category is repugnant to anyone's sense of justice" may be usefully adopted by our courts.

At 436/437…

> It would appear then that in our legal system the spouses have a choice of two widely divergent and mutually exclusive remedies when seeking redistribution of assets on divorce. While the application of the common law rule of forfeiture of benefits requires an allocation of fault, the statutory provision may be applied irrespective of the guilt of the parties. The salient merit of the rule of forfeiture is that it leaves undisturbed property rights in the hands of the spouses and affects only benefits obtained by a spouse during the tenure of the marriage. In other words, legal title to property determines the question of ownership and if a spouse had transferred property to the other and if the donee spouse was responsible for terminating the marriage, the property transferred would revert to the transferor because, according to the rule of forfeiture of benefits, a spouse is not allowed to enjoy a benefit derived as a consequence of a marriage which he is responsible for wrecking.

The judgment of the High Court refer to certain important details derived from the judgment of the learned District Judge. I find at pgs 4 and 5 of same with sub paras (a) to (g) being focused at the learned trial Judge's views, on which has influenced the learned trial Judge to grant relief as described as final conclusion of the learned trial Judge in his judgment dated 16.01.2007. That last portion of the trial Judge's judgment focus on the several relief as (1) to (4)

granted by him inclusive of transfer of ½ share of the matrimonial house owned by the husband to be transferred to the wife. The above (a) to (g) in a gist refer to the following

(a) children born to the co-defendant due to the relationship between the Defendant-Appellant-Respondent and the co-defendant, being taken very lightly by the Defendant-Appellant-Respondent.
(b) During the pendency of the marriage, two other children born due to an illicit affair with the co-defendant.
(c) due to the fact that there were no children born during lawful wedlock and the husband was not in favour of adoption of a child, is no reason to commit adultery which is illegal.
(d) Appellant's conduct of arriving at the matrimonial home very late in the evening and on many occasions after consuming liquor and causing disturbances in the house.
(e) After 1994 Defendant-Appellant regularly consumed liquor.
(f) Position of the Defendant-Appellant regarding payment of permanent alimony and transfer of property unacceptable to court.
(g) Desertion of the wife (Plaintiff-Respondent) due to the fact that there were no children from the marriage has no justification.

The learned High Court Judge emphasis the fact that the trial Judge's views inter alia contained in (a) to (g) above has prejudiced the trial judge and had influenced him to make an order against the Defendant-Appellant to transfer ½

share of the property in question to the wife the Plaintiff-Respondent. Even if I am not fully convinced of the above, I have to observe that the High Court Judge was more or less correct in arriving at that conclusion as there is much emphasis by the learned trial Judge as regards (a) to (g) of his judgment. As such I endorse the view of the learned High Court Judge that as per Section 615(1) of the Civil Procedure Code, the learned trial Judge has erred to the extent of making an order to transfer ½ share of the property in question in favour of the wife. In this regard I would also incorporate an extract from the judgment of the trial Judge, more particularly referred to in the judgment of the learned High Court Judge as follows:

"පැමිණිලිකාරිය දැනට පත්ව ඇති අසීරු තත්ත්වය මා දැනටමත් විග්‍රහ කර ඇත. එය විත්තිකරු විසින් ද පිළිගෙන ඇත. එකී වාතාවරණය යටතේ පැමිණිලිකාරිය දැනට පදිංචි නිවස ඇතුලත් අංක 378 නාවල පාර, රාජගිරිය, පිහිටි පරිවස් 27.3 ක් විශාල පැමිණිලිකාරිය නොබෙදූ, භාගයක හවුල් අයිතිය දරණ ඉඩමේ විත්තිකරු විසින් පැමිණිලිකාරියට පවරාදීමට කරනු ලබන ඉල්ලීම මෙම නඩුවේ සියලුම සිද්ධිමය කරුණු අනුව හැම අතින්ම සාධාරණ ඉල්ලීමකි. එය කුමන දෘෂ්ඨිකෝණයකින් බැලුවද අසාධාරණ නොවේ. එබැවින් විත්තිකරු විසින් එකී දේපළේ ඔහුට ඇති නොබෙදූ, 1/2 ක අයිතිය පැමිණිලිකාරියහට පවරා දිය යුතු බවට මා නියෝග කරමි. එසේ විත්තිකරු

නොකරන්නේ නම් විත්තිකරුට නොතිසි සහිතව එය අධිකරණයේ රෙජිස්ට්‍රාර් මගින් කර ගැනීමේ අයිතිය පැමිණිලිකාරියට ඇත.”

There is no dispute that the property in question was purchased for Eight Hundred and Fifty Thousand rupees (Rs. 8½ lakhs) in the name of both parties. Evidence also reveal that property in question (deed No. 1123) was purchased subject to a mortgage and monthly instalements paid by the husband the Defendant-Appellant, from his Bank account for a period of 15 years. There is also some evidence that after the breakdown of the marriage relationship Plaintiff paid the remaining balance. As such both parties had contributed to purchase the property in question.

My attention has been drawn to certain items of evidence at pgs. 282, 280, 152, 284 & 172. Perusal of same gives some indication as to how the property in question was purchased. It is evident that a loan had been obtained and the Defendant-Appellant had taken steps to repay the loan in monthly instalements and he was involved in business which was doing well at a certain stage during the pendency of the marriage. It is not possible to ascertain the position as to disbursements of money by each party and arrive at a conclusion based on a balance sheet. The gist of the evidence indicates that all recognizable steps to initiate and purchase the property had been taken and done by the

husband, and the wife had also a share in it and made a fair contribution to achieve the purpose. At the point of breakdown of the marriage, parties tend to exaggerate and blame each other, which would not have been in their contemplation during better times of their relationship. I also note that evidence had been placed before the trial court that the property in question is worth about 90 million rupees. Evidence of the Defendant-Appellant husband, was that a perch could be valued at 6 to 7 million rupees. (This evidence had transpired/in/June 2006).

I also note that both parties tend to demonstrate by way of evidence that each ones contribution is more than the other. In fact in the written submissions filed on behalf of the Plaintiff-Respondent (wife) state that 86.30% of the purchase price of the property was paid by the wife, though the deed in question is written in favour of both parties. The Plaintiff-Respondent had also obtained certain financial assistance from her father and on request the father had readily extended a helping hand not only to purchase the property but for their other needs. The wife admittedly born rich, and her family gave necessary financial assistance at various stages, of her life. The husband's beginning may have been very simple but picked up in business and acquired certain wealth but the business had a lean period.

In all the above facts and circumstances this court is strongly of the view that it would be unreasonable to make such conveyance or settlement of the property in favour of the wife (Plaintiff-Respondent) and deprive the Defendant-Appellant-Respondent of his ½ share to the property. Irrespective of each parties contribution to the property, both have enjoyed and derived benefits from the property as long as the marriage subsisted. It is not possible to get a fair assessment of each ones contribution to the property in question. To give the entirety of the property to the wife alone would be unfair as it is necessary in terms of our statute law to make a reasonable order. In the circumstances and in the context of the case it is necessary at the end to view the situation with Section 615 of the Civil Procedure Code in mind and to view the situation broadly in a reasonable manner and see if the proposal (relief claimed by the wife) meet the justice of the case. As I have already observed earlier in this judgment, matrimonial faults or offences committed cannot form the basis of a settlement to give effect to the provisions contained in Section 615 of the Civil Procedure Code. I have discussed in this judgment that the influence of the common law of deriving benefits from marriage should be sacrificed but not to the extent of giving up the each other's half share to the disputed property. The position would have been different if the wife alone had purchased the property and conveyed

the entirety to the defendant-Appellant-Respondent. If that was so, an order by this court to re-convey the entire property to the wife is reasonable and justifiable. It is not the case. Principles applicable to grant a divorce (i.e adultery, malicious desertion etc.) is one thing and distribution of assets after divorce or dissolution of marriage is another. The two aspects cannot be so closely connected to give a benefit to a spouse which enable court to re-distribute property, unless in limited situations recognized by law and as discussed above.

Therefore I affirm the order of the learned High Court Judge only in so far as setting aside the judgment of the learned District Judge, wherein the learned District Judge directed the Defendant-Respondent-Appellant to transfer ½ share of his entitlement of the matrimonial house at No. 378, Nawala Road, Rajagiriya to the wife the Plaintiff-Respondent-Petitioner. I hold that the Defendant-Respondent-Appellant is entitled to ½ share of the matrimonial house at 378, Nawala Road, Rajagiriya.

As such I answer the only question of law referred to in the proceedings/journal entry of 29.08.2011 in the negative. The house and property remains co-owned by the Appellant and the Respondent. Parties have indicated to court that they do not wish to go for a re-trial as ordered by the High Court and would abide by the ruling of the learned District Judge granting a divorce to the

wife on the ground of malicious desertion and adultery. This court affirms that part of the judgment of the learned District Judge. The trial Judge had not ordered permanent alimony as order was made to transfer ½ share of the matrimonial house. The learned District Judge has also allowed taxed costs payable in favour of the wife and damages in a sum of Rs. 15 lakhs payable by the co-defendant. This court observes that, only those orders of the learned District Judge granting a divorce and the order against the co-defendant and payment of taxed cost would be enforceable, and would remain unaltered. However the innocent party was the Plaintiff-Respondent-Petitioner and she would be entitled

to an order in her favour for permanent alimony. Accordingly order is made to pay a sum of Rs. 3 million as permanent alimony to the wife.

Subject to the above variations this appeal is dismissed. No costs.

JUDGE OF THE SUPREME COURT

Eva Wanasundera 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

S.C Appeal 125/2011
SC/HCCA/LA No. 300/2010

In the matter of an application for Leave to Appeal under Section 5(C) of the High Court of the Provinces (Special Provisions) Act No. 54 of 2006

Benthota Arachchige Kanthi Pushpa Ranjini
"Karunawasa",
Kiralawelkatuwa,
Embilipiriya.

PLAINTIFF

Vs.

Handagalage Dhammika Wajirapriya
Sarathchandra Textiles
Pallegama
Embilipitiya.

DEFENDANT

AND BETWEEN

Handagalage Dhammika Wajirapriya
Sarathchandra Textiles
Pallegama
Embilipitiya.

DEFENDANT-PETITONER

Vs.

Benthota Arachchige Kanthi Pushpa Ranjini
"Karunawasa",
Kiralawelkatuwa,
Embilipiriya.

PLAINTIFF-RESPONDENT

AND NOW BETWEEN

Handagalage Dhammika Wajirapriya
Sarathchandra Textiles
Pallegama
Embilipitiya.

DEFENDANT-PETITIONER-APPELLANT

Vs

Benthota Arachchige Kanthi Pushpa Ranjini
"Karunawasa",
Kiralawelkatuwa,
Embilipiriya.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: S.E. Wanasundara P.C., J.

B. P. Aluwihare P.C., J. &

Anil Gooneratne J.

COUNSEL: Manohara de Silva P.C. with Avindra Wijesurendra
For the Defendant-Petitioner-Appellant

Harsha Soza P.C., with Upendra Walgampaya
for the Plaintiff-Respondent-Respondent

WRITTEN SUBMISSIONS TENDERED ON:

28.10.2011 (by the Appellant)
11.11.2011 (by the Respondent)

ARGUED ON: 14.09.2015

DECIDED ON: 02.12.2015

GOONERATNE J.

This was an action filed in the District Court of Embilipitiya for a declaration of title and eviction/damages against Defendant-Petitioner-Appellant from the land described in the schedule to the plaint. Defendant-Petitioner-Appellant by his answer has made a claim in reconvention. It is pleaded inter alia in the answer that a cause of action has accrued to the Defendant to claim for a declaration of title to the same land in question. In paragraph 12 of the answer it is

pleaded that the sums of money referred to therein are also claimed by the Defendant for improvements, and as such would be entitled to retain the land in question until satisfaction of the said sum.

The land in question is in extent of about 30 perches as described in the schedule to the plaint. In the plaint (paragraph 4) it is pleaded that Plaintiff-Respondent-Respondent obtained a loan from the Defendant-Petitioner-Appellant keeping as security the land described above on a promissory deed bearing No. 1122 of 11.12.1990 marked as 'X', which deed is annexed to the plaint. The deed 'X', indicates that having kept the land in question as security the Plaintiff-Respondent-Respondent obtained a loan of Rs. 150,000/- from the Defendant-Petitioner-Appellant. It is apparent that Clause 3 of 'X' refer to the position that if the amount stated in deed 'X' is not paid in the manner described in the said deed, the land described above, possession, ownership and all rights would pass to the Defendant-Petitioner-Appellant. The relevant clause and condition in deed 'X' had not been fulfilled by the Plaintiff.

In this appeal learned President's Counsel on either side raised an interesting point of law. i.e despite non-fulfillment of the said conditions by the plaintiff, does legal title to the property in dispute vest in the Defendant-Petitioner-Appellant? It is the position of the Plaintiff-Respondent-Respondent that the

Defendant-Petitioner-Appellant would be entitled only for possession of the property as per deed 'X' and that legal title does not vest in the Appellant. The facts presented to this court would reveal that the money due to the Defendant-Petitioner-Appellant had not been paid by the Plaintiff within the prescribed period.

Three preliminary issues were raised before the Learned District Judge, which had been tried by the District Judge based only on written submissions of parties. Learned District Judge by his order of 03.02.2010 held with the Plaintiff-Respondent-Respondent, and answered the said issues against the Defendant-Petitioner-Appellant. Being aggrieved by the above order, Defendant-Petitioner-Appellant, filed a Leave to Appeal application in the High Court, but leave was refused by the High Court, and the High Court affirmed the order of the learned District Judge on 31.08.2010. This court on 16.09.2011 granted Leave to Appeal on questions of law set out in paragraph 20 of the petition dated 13.09.2010. The said questions are as follows:

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

(b) The High Court erred by holding that title of the subject matter of this action cannot be conveyed in terms of the terms and conditions of Promissory Deed No. 1122 to the Defendant-Petitioner-Petitioner as the Plaintiff-Respondent-Respondent "has not

executed a Deed of Transfer in terms of Section 02 of the Prevention of Frauds Ordinance",

(c) The High Court erred by failing to properly consider the application of Section 115 of the Evidence Ordinance,

(d) The High Court erred by holding that the Plaintiff-Respondent-Respondent was not estopped from maintaining this action as pleaded by the Defendant-Petitioner-Petitioner,

(e) The High Court erred by holding that if issue Nos. 11, 12 and 13 are answered in favour of the Defendant-Petitioner-Petitioner, his claim in reconvention would remain un adjudicated, whereas issue No. 13 states "if the issues 11 and 12 above are answered as "yes" is the defendant entitled to obtain any of one of the reliefs prayed for in paragraphs (a), (b), (d) and (f) in the prayer to the answer?

(f) The High Court erred by holding that it is unable to come to a decision on the admissions alone without hearing evidence led with regard to the terms and conditions of the Promissory Deed.

(g) The High Court and the District Court erred in failing to answer issue No. 11 in favour of the Defendant-Petitioner-Petitioner notwithstanding the fact that the Plaintiff had admitted the terms and conditions of the Promissory Deed 'X', including Clause 04 and 06 of the deed wherein it is stated that upon non-payment of the sums set out therein, the right, title and interest of the land would vest in the Defendant, and also by the admission No. 5 by which it was admitted by the parties that the monies has under the promissory deed has not been paid by the Plaintiff to the Defendant,

(h) The High Court erred by holding that the action of the Plaintiff-Respondent-Respondent was a rei vindicatio action and therefore the period of prescription has not lapsed. However in terms of the admissions recorded at the trial (vide paragraph 11 above), the cause of action, if at all, accrued on the Plaintiff-Respondent-Respondent on 27.11.2000 and an action to set aside a notarially executed document must be filed within 3 years from the date the cause of action arose.

(i) The High Court erred in not identifying the difference between prescription of the land and prescription of the action,

(j) The High Court erred by not applying Section 10 of the Prescription Ordinance,

(k) The High Court erred in holding that the Plaintiff's action was not prescribed within 03 years (from the date of the Deed or within 03 years from 27.11.2000) in terms of Section 10 of the Prescription Ordinance,

(l) The High Court erred by holding that the Defendant-Petitioner-Petitioner has failed to prove that the action of the Plaintiff is prescribed.

In the District Court parties recorded 5 admissions and raised about 21 issues, and issue Nos. 11, 12 & 13 were raised as preliminary issues, as being issues of law. It is important even for this court to consider the initial steps that took place in the original court. In a gist the corpus, Promissory Deed 'X' and its conditions are admitted. Further paras 7 & 8 of the plaint were also admitted. The said paragraphs refer to the fact that possession was handed over to the Defendant-Petitioner-Appellant from the date of executing deed 'X' i.e 11.12.1999. It is averred in

paragraph 8 of the plaint that the Plaintiff-Respondent-Respondent failed to repay the principal sum of Rs. 150,000/- due to the Defendant and the interests due on same within 12 months as from 11.12.1999.

The issues that were tried in the original court are as follows:

(a) Based on the admissions recorded, can the Plaintiff have and maintain this action?

(b) Is the action of the Plaintiff prima facie prescribed?

(c) If (a) & (b) above are answered in the affirmative is the Defendant entitled to obtain the relied prayed for in sub paragraphs (a), (b), (d) & (f) of the prayer to the answer. ((a) is for dismissal, (b) declaration of title in favour of Defendant (d) retention of land and buildings (improvements) till amounts reflected in prayer (d) is paid. (f) such other and further relief as deemed by court)

The learned District Judge held in favour of the Plaintiff-Respondent-Respondent. Having tried the preliminary issues as issues of law, the learned District Judge also observed that although parties have admitted the several conditions in deed 'X', parties were at variance as to what is really meant by those conditions or its meaning "අර්ථය කුමක්ද"? (folio 78 & pg. 57). At folio 79 and pg. 8 of the learned District Judge's judgment I find in its first paragraph that the trial Judge having on his own posed several questions connecting deed 'X', observes

that court cannot arrive at a conclusion based solely on question of law, and state it is improper to do so without a full trial of the case.

The trial Judge further elaborate on this point as follows:

එහෙයින්, පුර්ණ නඩු විභාගයකදී සාක්ෂි මෙහෙයවමකින් පසු හා එම සාක්ෂි, අදාල වය හැකි නීතිමය කරුණු සමග විශ්ලේෂණය කර සලකා බැලීමකින් තොරව, හුදෙක්ම මෙම නඩුවේ සටහන් කර ඇති පිලිගැනිමේ මත පමණක් පදනම්ම පැමිණිලිකාරියට මෙම නඩුව පවරා පවත්වාගෙන යා හැක්කේ ද යන්නට හෙවත් 11 වන නීතිමය විසදිය යුතු ප්‍රශ්ණයට විත්තියේ වාසියට පිළිතුරු සැපයිමට නොහැකි බවට තීරණය කරම්.

The learned High Court Judge in its judgment has held that issues No. 11, 12 & 13 would not dispose of the entire case before the District Court, but affirm the order of the learned District Judge. Both the Original Court and the Civil Appellate Court expressed the view that the case ought to proceed to trial. As observed above the learned District Judge seems to have realized the importance of hearing evidence, which decision he could have taken at the very outset. However we in the Apex Court cannot fault either court, on certain matters, as an open judicial mind need to be maintained at any stage of the case in the best interest of justice. Trial of issues of law to be tried initially is embodied in Section 147 of the Civil Procedure Code. It reads thus:

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

I would prefer to consider some case law on the point although our courts have pronounced several judgments under Section 147 of the Code.

Courts have power to dismiss an action on an issue of law without recording any evidence. 15 NLR 389; to dispose of a case on a preliminary issue, it should be a pure question of law. As far as practical Judges of the original court should go through the entire trial and answer all issues 1994(3) SLR 11; in what manner the issues are to be tried is best left to the Original Court, and Appellate Courts ought to be slow to interfere 1997(3) SLR 202. Per Hector Yapa J. in Mohinudeen Vs. Lanka Bankuwa 2001(1) SLR 290. “Section 147 of the Code gives a wide discretion to the trial Judge, so that even if he has decided earlier to try an issue as a preliminary issue of law, it is open to him to decide such an issue later, if he is of the view that it cannot be decided without taking evidence”.

In a case where questions of law are intricately tied up with questions of fact the trial court need to, as far as possible, go through the entire trial and answer all issues. A question of prescription could involve factual matters. As observed by the learned District Judge, even though the parties accept and agree

to the condition in 'X', trial Judge states that parties are at variance as to what those conditions really mean. My attention has been drawn to condition No. 7 of 'X'. It states in the event of a breach of condition in deed 'X' parties could have recourse to a legal remedy, or enforceable through legal action.

Having perused both judgments of the District Court and the High Court, I would take the view that as stated by the learned District Judge this case ought to proceed to trial, but from the beginning. I do not think that based on admissions alone, issue Nos. 11, 12 & 13 could be tried as preliminary issues. An important issue based on prescription cannot be tried or should not be tried in the absence of ascertaining all the factual positions, in a case of this nature. It is so because deed 'X' though described as a promissory deed, it is in fact a conditional transfer. I would fortify my views based on the following principle of law gathered from case law.

It must be borne in mind that both parties to the suit, had willingly entered into deed marked 'X', and its terms and conditions must be strictly followed and applied.

Conditional Transfers-Promissory Deed-Agreement to re-convey

If a deed absolute on the face of it contains an agreement to re-convey, conditions therein have to be complied with on time and time is of the essence of the contract.

So said Gratiaen J. in Thambipillai v. Muthukumaraswamy 58 NLR 387

"Time is of the essence of the contract in contracts of this nature"

Terms of the contract were unambiguous. P3 operated as an absolute transfer. But there were conditions such as repayment.

At pg. 388

> In due course, the plaintiff instituted this action claiming a conveyance of the land from the appellants on payment of the purchase price which was not however deposited in Court and is apparently not yet forthcoming. Time is of the essence of the contract in a *pactum de retrovendendo*, and the plaintiff's failure to tender the stipulated consideration within time is therefore fatal to his claim. The learned Judge took the view, however, that the transaction was in reality a mortgage and not a sale. I would reject this conclusion for the same reasons as those recorded in the recent judgments of my brother Sansoni and myself in Setuwa v. Ukku. Accordingly, there is no room for the application of the principle "once a mortgage, always a mortgage".
>
> It is unnecessary to consider whether in any event the plaintiff could alone have exercised the option of repurchase. His claim fails *in limine*. owing to his omission to make a valid tender within the time fixed in P2. I would therefore set aside the judgment, under appeal and dismiss the plaintiff's action with costs (in favour of the appellants) in both Courts.

So the unambiguous terms of the deed indicate that it is a sale subject to an agreement to re-convey.

The transferee must observe the conditions within the time stipulated.

The tender of the price within the time agreed upon constitutes a condition precedent to obtaining a re-conveyance.
One cannot claim a retransfer if he has not complied with the condition. Supposing he has failed to tender the money on time.

Conditional sale having the effect of passing title on the fulfilment of the conditions is well known to Roman Dutch Law 16 NLR at 147.

Velupillai Sanmugam and others v. Kathiravelu Thambiaiya,B.L.R. (1990) Vol.111 Part 1 p. 27 (SC).

Notice compelled in Section 93 of the Trust Ordinance-Conditional transfer – Trust.
Held that Dismissing the Appeal and affirming the judgment of the District Judge (per Bandaranayake J. with H.A.G. de Silva, J and Kulatunga, J agreeing):

1. The conclusion of the District Judge that the promissory note was invalid and hence insufficient to discharge liability on the conditional transfer was unimpeachable on the evidence;
2. The Court of Appeal was mistaken in coming to the view that the 'notice' contemplated in Section 3 of the Trusts Ordinance meant only notice of matters appearing on the face of the Registers and that knowledge gathered from other sources was irrelevant. Such a view is too restrictive and not a proper view of the Law.
3. Where the condition underlying the conditional transfer is not fulfilled the transferee becomes absolute owner in terms of the agreement of parties free from any obligation to re-transfer. No question of a trust arises in such a context as there was no existing contract.

Gnanasambandam v. Bin Adaham and Another, (1998) 2 SLR L.R. 305 (CA).

Conditional transfer – Deed not signed by vendee – Rights to obtain retransfer.

Held that

> A deed of transfer of a land embodying a condition to retransfer on payment of the purchase price plus interest within five years binds the vendee to retransfer the land on being paid the purchase price and interest within the stipulated time although the vendee had not signed the deed.
>
> The property was transferred with a condition attached to it. The condition cannot be disengaged from the property. The failure of the defendant-appellant to sign the deed does not entitle him to wriggle out of his obligation to retransfer. The obligation was intrinsic in the transfer itself.

If oral evidence is led there could be more clarity to the conditions contained in deed 'X'. Subject to the views expressed above it would be in the best interest of both parties to commence the trial from the beginning. In these circumstances I would set aside both judgments of the District Court and the High Court as per sub paragraphs (c) & (d) of the prayer to the petition of the Defendant-Petitioner-Petitioner, dated 13.09.2010, with a direction to commence trial de nova.

I would answer the questions of law (a) to (L) as follows:

(a) No oral evidence led. Does not arise

(b) Yes, but all necessary evidence need to be led.

(c) Yes, to arrive at a final decision, but oral evidence should be led.

(d) Yes, based on the limited material, but all necessary evidence need to be led.

(e) Yes from the limited evidence, but all necessary evidence need to be led.

(f) No

(g) Yes, but merits of the case should be considered after leading all available evidence.

(h) Nature of the case is such that all available material should be placed before court to consider the question of prescription.

(i) Same as (h) above

(j) Same as (h) above.

(k) Same as (h) above

(l) Same as (h) above

Appeal allowed as above, subject to the directions given by this court.

JUDGE OF THE SUPREME COURT

S. E. Wanasundera P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

B. P. Aluwihare P.C., J

I agree.

JUDGE OF THE SUPREME COURT

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

In matter of an application for Special Leave to Appeal from a judgement of the Court of Appeal.

S.C.Appeal No: 140/2011
S.C.SPL.LA.No:92/2009
CALA No.489/2005
D.C.Colombo No.36175/T

In the matter of the Last Will and Testament of the late Thimbiripolage Sushila de Silva nee Fernando of No.06 Annie Avenue, Dehiwala.

DECEASED

Balange Sarojin de Silva,
of No.06 Annie Avenue,
Dehiwala

PETITIONER

Vs.

Nalange Samanthi Sadhana Dharmabandu nee de Silva, of No.20 Saddle Crescent, Walkely Heights, South Australia, 5015, *Appearing by her Attorney* Ajantha Demetrius Wijesena of No.29B,2nd Lane, Koswatte, Nawala.

RESPONDENT

Mallika Homes Limited,
No.45, Visakha Road,
Colombo 04.

INTERVENIENT-PETITIONER

AND

In the matter of an application for Leave to Appeal from an order of a District Court.

Balange Sarojin de Silva, of No.06, Annie Avenue, Dehiwala.

PETITIONER-PETITIONER

[deceased]

Shan Tissaka Wijesekara,

No.162/1 Galle Road, Dehiwala,

SUBSTITUTED PETITIONER-PETITIONER

Vs.

Nalange Samanthi Sadhana Dharmabandu nee de Silva, of No.20 Saddle Crescent, Walkely Heights, South Australia, 5015,

Appearing by her Attorney Ajantha Demetrius Wijesena of No.29B, 2nd Lane, Koswatte, Nawala.

RESPONDENT-RESPONDENT

Mallika Homes Limited,

No.45, Visakha Road,

Colombo 04.

INTERVENIENT-PETITIONER-RESPONDENT

AND NOW

Balage Sarojin de Silva

of No.06Aniie Avenue, Dehiwala,

PETITIONER-PETITIONER

[deceased]

Shan Tissaka Wijeyesekara

No.162/1, Galle Road Dehiwala.

SUBSTITUTED PETITIONER-PETITIONER -PETITIONER

Vs.

Nalange Samanthi Sadhana Dharmabandu nee de Silva.

Of No.20 Saddle Crescent Walkley Heights, South Australia 5015

Appearing by her Attorney

Ajantha Demetrius Wijesena of No.29B, 2nd Lane, Koswatte, Nawala.

RESPONDENT-RESPONDENT-RESPONDENT

Mallika Homes Limited,

No.45, Visakha Road,

Colombo 04.

INTERVENIENT-PETITIONER-RESPONDENT

Before: Chandra Ekanayake, J

Wanasundera PC, J

Aluwihare PC, J

Counsel: Saliya Peiris for the Substituted Petitioner-Petitioner-Appellant

Manohara de Silva, PC with Somasiri for the Intervenient- Petitioner- Respondent.

Ruwantha Coorey for the Respondent-Respondent-Respondent

Written submissions tendered on: By Substituted Petitioner-Petitioner-Appellant on 09/11/2011

By Respondent-Respondent-Respondent on 19/12/2011

By Intervenient- Petitioner- Respondent on 10/06/2014

Decided on: 29.07.2015.

Chandra Ekanayake J,

(1) The Substituted-Petitioner-Petitioner-Appellant (herein after sometimes referred to as the

Substituted Appellant) by Petition dated 12/05/2009 has sought inter alia leave to appeal against the judgement of the Court of Appeal dated 02/04/2009, to set aside the same and the order dated 24/11/2005 of the Additional District Judge of Colombo, for a dismissal of the application for Probate in the District Court and for termination of these proceedings. When this application was supported on 28/09/2011 this Court had granted special leave to appeal on the questions of law set out in paragraph 13(1) (b) to (f) of the aforementioned petition to this Court. For ease of reference same are reproduced below :-

> **"** 13.1 (b). The Court of Appeal erred in Law in holding that the **District Court had the power to permit** a respondent to prosecute the application for probate when the Petitioner had withdrawn his application for probate.
>
> (c). The Court of Appeal erred in Law in holding that there was **no necessity for a specific provision** of Law giving such power to the District Court.
>
> (d). The Court of Appeal erred in holding that when the application under Section 517 of the Civil Procedure Code is withdrawn the proceedings under **Section 516 cannot be terminated**, and that in such circumstances, the District Court had a **duty to act under Section 517 or 518 or even 520**, and to grant probate or issue Letters of Administration in order to prove the Will while affording an opportunity for the opponents to challenge the same.

(e). The Court of Appeal has referred to the decision **In the matter of the Insolvency of M.L.Marikar Abdul Aziz** 1 N.L.R at 196, that the **Insolvency Ordinance** is exclusive and comprehensive in respect of insolvency proceedings, but has erred in Law by failing to note that Section 21 of that Ordinance contains a **specific provision** giving the power to the District Court to permit a creditor to take over and continue with Insolvency Proceedings when the original petitioner does not continue with it.

(f). The Court of Appeal erred in law by not following the decision in **Abeyratne v Wijemanne** 63 N.L.R. 173 at 175, where the Supreme Court held that an application for Letters of Administration **comes to an** end with the death of the applicant.**"**

(2) The original petitioner had made an application to the District Court of Colombo under case No.36175/T (together with his affidavit) to prove the Last Will and Testament bearing No.3141 of 16.12.2001 purported to have been left by his wife the deceased T.Sushila de Silva nee Fernando and for probate in his favour on the basis that he was the sole executor appointed under the will. The above Respondent-Respondent-Respondent namely N.S.Sadhana Dharmabandu nee de Silva (hereinafter sometimes referred to as the Respondent) had objected to the above application by statement of objections dated 20.10.2003 to the issuance of probate to her father on the ground that the aforementioned Last Will was not the act and deed of her deceased mother. Further whilst moving for a dismissal of the application of the

original petitioner she had moved for letters of administration to administer her deceased mother's intestate estate on the basis that her mother died without leaving a Last Will. Thereafter having allowed an application for intervention made by Mallika Homes Limited, it had been named as Intervenient-Petitioner-Respondent which shall be sometimes referred to as the Intervenient in this judgement.

(3) At the commencement of the inquiry in case No.36175/T at the request of the Counsel who represented all the parties in the said case and also in the connected case bearing 36268/T both cases having been consolidated inquiry had commenced. Perusal of the District court proceedings makes it amply clear that after recording the evidence of the 1st witness and the evidence in examination -in-chief of the 2nd witness to the Last Will, the original petitioner had made an application for withdrawal of the application for probate pending before that Court. This application for withdrawal had not been objected to by the Respondent. However the Intervenient- Petitioner- (Mallika Homes Limited) whilst objecting to the application for withdrawal appears to have moved the District Court to allow it to prosecute the application with the aim of proving the Last Will as it was a beneficiary under the said Will. However after filing of case bearing No.36175/T the Respondent (Sadhana Dharmabandu) had filed a testamentary case bearing No.36268/T on the basis that no Last Will was left by her mother prior to her death and moved for letters of Administration in her favour by petition dated -- October 2003. In the above petition the deceased original petitioner and the present Intervenient had been named as 1st and 2nd Respondents respectively. Then the District Judge after considering the submissions made by all the parties had allowed the application of the original petitioner for withdrawal and ordered the inquiry to proceed from the point it was stopped with regard to the claims of the Respondent and the Intervenient. This order of the learned District Judge dated 24/11/2005 was assailed in the Court of Appeal by way of a Leave

to Appeal application bearing No.CALA/489/2005. The learned Judges of the Court of Appeal by the impugned judgement dated 02/04/2009 dismissed the above application of the Substituted-Appellant in the Court of Appeal. This is the judgement that has been challenged in this Court.

(4) At the hearing of the Appeal in this Court the learned Counsel for the Respondent laid heavy stress on the fact that in the absence of any fresh application by the Intervenient- Petitioner-Respondent (Intervenient) in the District Court seeking letters of Administration (with the Will annexed), the same application cannot be proceeded with. Further it was contended that if the Court wishes to proceed the Court is mandated to order fresh publication.

(5) It would be pertinent to note that procedure in testamentary actions is prescribed in Chapter xxxviii under 'Testamentary actions' in the Civil Procedure Code (Amendment Act No.14 of 1993). Needless to stress that Sections 516 and 517 become relevant with regard to the issue in hand.

Section 516 of the Civil Procedure Code reads thus:-

> " When any person shall die leaving a will in Sri Lanka, the person in whose keeping or custody it shall have been deposited, or who shall find such will after the Testator's death, shall produce the same to the District Court of the district in which such depository or finder resides, or in the District Court of the district in which the testator shall have died, within three months after the finding of the will, and he shall also make oath or affirmation, or produce an affidavit

in Form No.81 in the First Schedule verifying the time and place of death, and stating (if such is the fact) that the testator has left property within the jurisdiction of that or any other, and in that event what court, and the nature and value of such property ; or, if such is the fact, that such testator has left no property in Sri Lanka.

The will so produced shall be numbered and initialled by the Probate Officer and deposited and kept in the record room of the District Court", and

Section 517 :-

(1) When any person shall die leaving a will under or by virtue of which any property in Sri Lanka is in anyway affected, any person appointed executor therein may apply to the District Court of the district within which he resides, or within which the testator resided at the time of his death, or within which any land belonging to the testator's estate is situate, within the time limit and in the manner specified in Section 524, to have the will proved and to have probate thereof granted to him; any person interested, either by virtue of the will or otherwise, in having the property of the testator administered, may also apply to such court to have the will proved and to obtain grant to himself of administration of the estate with copy of the will annexed.

(2) If any person who would be entitled to administration is absent from Sri Lanka a grant of letters of administration

with or without the will annexed, as the case may require,

may be made to the duly constituted attorney of such person".

(6) In terms of the provisions in Section 519 where there is no person fit and proper in the opinion of the Court to be appointed as the administrator or no such person is willing to be so appointed, the court shall appoint the Public Trustee as the administrator. It was the contention of the Appellant that when the application to obtain probate was withdrawn the application should have been dismissed altogether.

(7) On a careful scrutiny of the reasons given by the Judges of the Court of Appeal it has been concluded that an application made to the District Court under Section 517 to have the Will proved and the commencement of the proceedings under Section 516 has to be differently identified and what was withdrawn in this instance was only the application made under Section 517 which has no connection to the proceedings commenced under Section 516. Based on the above premise learned Judges of the Court of Appeal had further concluded that the procedure that has to be followed in testamentary actions should not necessarily be guided by the general provisions in the Civil Procedure Code. On that footing Respondent's contention had been rejected. Thus the above conclusions of the Judges of the Court of Appeal needs careful examination.

(8) A perusal of the order made by the Learned Additional District Judge dated 24/11/2005, makes it amply clear that the case can be proceeded with between the present Respondent-Respondent- Respondent and the Intervenient-Petitioner-Respondent on the issues framed by

them despite the original petitioner withdrawing the Petition filed by him to get the Will in issue proved. He had further concluded that in view of the circumstances which has led to the present situation, the Intervenient is also entitled to amend its issues and to proceed with the new issues and also issues could be framed as to whether probate should be granted to the Intervenient-Petitioner-Respondent or to the Public Trustee, if at the conclusion of the inquiry, the Last Will is held to be proved by Court. He has also held that at the conclusion of the inquiry, if the Last Will is not proved, letters of Administration could be issued to the Respondent – Respondent – Respondent. The Court of Appeal has upheld the said order of the Learned District Judge.

(9) It was contended before us, that the District Court had no power to permit a Respondent to prosecute the application for probate when the Petitioner has withdrawn his application for probate. An examination of the issues framed in this case shows that the Intervenient-Petitioner- Respondent had framed issues on the basis as to whether the said Last Will is an act and deed of the deceased and if so, should probate be issued to the original petitioner.

The Respondent- Respondent- Respondent has framed issues as to whether the deceased died without leaving a Last Will [Issue No 3] and if so should the Letters of Administration be issued to her (i.e. Petitioner in 36268/T) (see Issue No.4]. Those issues and the issues framed by the original petitioner have been framed in terms of Section 532 (1) and 533 of the Civil Procedure Code and the Court is obliged to try the issues so framed at the inquiry. In the circumstances if the original petitioner were to withdraw his application, it will not debar the Court from proceeding with the issues already framed upon which inquiry had commenced.

(10) In our view the District Judge is entitled to permit the present Respondent and the

Intervenient to proceed with the inquiry pending before that Court from the point it was stopped and further it is not necessary for the Intervenient to file a fresh case to get the last will proved. **However, to prevent any prejudice that would be caused to the Respondent-Respondent-Respondent she is also at liberty to amend her existing issues and/or frame additional issues (if necessary) with the permission of the District Judge.** The Learned Counsel for the Substituted-Appellant has contended that no express provisions are found in the Civil Procedure Code to cover the situation that has arisen in this case. But we are inclined to take the view that the District Judge is entitled to make appropriate orders exercising the inherent powers in a situation such as this.

In this regard we are compelled to cite with approval Justice Tambiah's observation in **Seneviratne Vs Abeykoon 1986 (2) SLR page 1** at page 5, which is to the following effect :

> "An extraordinary situation had arisen and to deal with it, there was no express provision in the Civil Procedure Code. It is to meet such a case that s. 839 was enacted. It empowered a Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of Court. Dealing with the corresponding section in the Indian Civil Procedure Code (s. 151) which is identical with s. 839, Chitaley and Rao state (Code of Civil Procedure, 3rd Ed., Vol. 1) -
>
> "Every Court, whether a Civil Court or otherwise, must therefore, in the absence of express provision in the Code for that purpose, be deemed to possess, as inherent in its very

> Constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the administration of justice (p. 1199) -
>
> It is in the ends of justice that an injury should be remedied and needless expense and inconvenience to parties avoided (p. 1212) .

The jurisdiction to make restitution is inherent in every Court and will be exercised whenever the justice of the case demands it. (p. 1155)" and

Sarker in his "Code of Civil Procedure" (Vol. 1, at p. 842) says:

> "where a contingency happens which has not been anticipated by the framer of the Civil Procedure Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation."

(11) We are therefore of the view that, the Learned Additional District Judge has exercised the discretion vested in Court correctly and judicially in making the said order permitting the case to be proceeded with between the Respondent and the Intervenient-Petitioner-Respondent (Intervenient) and Court of Appeal has been correct in upholding the said order.

(12) The decision **In the matter of insolvency of M.L.M Marrikar Abdul Aziz (1) NLR 196,** dealing with the provisions of the Insolvency Ordinance is irrelevant and has no application

to the case in hand. The judgement cited by the Learned Counsel for the Appellant in **Abeyratne Vs Wijemanne 63NLR 173** at 175 where it was held that, "An application for Letters of Administration comes to an end with the death of the applicant prior to the issue of letters and accordingly, where the last will of the deceased person is discovered after the death of the applicant for letters, application for probate of the will may be made without taking any steps to vacate an order absolute entered in the previous administration proceedings," is equally irrelevant and has no application to the present case.

(13) We have also considered the submission made by Learned Counsel for the Appellant that when a person other than the original petitioner seeks Letters of Administration, he should follow the procedure set out in Section 524 of the Civil Procedure Code including publication. This submission, in our view is erroneous as the present inquiry into the will has commenced upon publication and consequent response thereto. Further it is needless to stress that Civil Procedure Code, requires only one publication in respect of an estate of a deceased person and several claims/objections made thereto will be considered and proceeded with, in terms of Sections 532(1) read with 534(1) of the Civil Procedure Code at the hearing. This is also seen from the provisions contained in Section 536 of the Civil Procedure Code, which permits a party who has not responded to the notice published under Section 529, to participate at the inquiry by filing a caveat, in the same court against the allowing of the petitioners claim or a notice of opposition thereto. This is to enable the court to try all issues at the hearing of the matter conclusively. The above mentioned section 536 thus reads as follows :-

> "At any time after the notice published under section 529 and before the final hearing of the petition, it shall be competent to

> any person interested in the will or in the deceased person's property or estate, though not a person specified in the petition, to intervene, by filling in the same court a caveat as set out in Form 93 in the first Schedule against the allowing of the petitioner's claim or a notice of opposition thereto, and the court may permit such person to file objections, if any, and may adjourn the final hearing of the petition."

(14) Accordingly the issues of law set out in paragraph 13(1) (b) to (f) upon which Special Leave to Appeal has been granted by this Court are answered in the negative. This appeal is hereby dismissed subject to the variation referred to in paragraph 10 above with regard to conclusion No.5 contained in page 21 of the District Judge's order dated 24.11.2005. In all the circumstances of the case no order is made as to costs of this appeal.

(15) The Registrar of this Court is directed to transmit copies of this judgement to the Registrars of the District Court of Colombo and Court of Appeal forthwith. She is further directed to forward the original records in the above two cases namely D.C.Colombo No.36175/T and Court of Appeal No.CALA/489/2005 to the Colombo District Court and the Court of Appeal.

JUDGE OF THE SUPREME COURT

Eva Wanasundera PC, J.

I agree.

JUDGE OF THE SUPREME COURT

Aluwihare PC,J.

I agree.

JUDGE OF THE SUPREME COURT.

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

In the matterof an Appeal with Special Leave to Appeal granted by the Supreme Court against the Judgment of the Court of Appeal under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka

S.C. Appeal No. 141 / 11

S.C.Spl. LA No. 68/2011
C.A. Appeal No. 805/96(F)
D.C. Colombo No.12137/MR

Prins Gunasekera,
No. 26, Flodden Road,
London, SE5 9LH.

Plaintiff

Vs.

Associated Newspapers of Ceylon Limited,
No. 35, D.R. WijewardenaMawatha,
Colombo 10.

Defendant

And Between

Prins Gunasekera,
No. 26, Flodden Road,
London, SE5 9LH.

Plaintiff-Appellant

Vs.

Associated Newspapers of Ceylon Limited,
No. 35, D.R. WijewardenaMawatha,
Colombo 10.

Defendant - Respondent

And Now Between

Associated Newspapers of Ceylon Limited,
No. 35, D.R. WijewardenaMawatha,
Colombo 10.

Defendant-Respondent-Appellant

Vs.

PrinsGunasekera,
No. 26, Flodden Road,
London, SE5 9LH.

Plaintiff-Appellant-Respondent

* * * * *

BEFORE : **Chandra Ekanayake, J.**
S.Eva Wanasundera, PC.J .&
Sisira J.deAbrew, J

COUNSEL : Gomin Dayasiri with Palitha Gamage and Ms. Manoli Jinadasa for Defendant-Respondent-Appellant.

Manohara de Silva, PC. with R.Hathurusinghe and Hirosha Munasinghe for Plaintiff – Appellant - Respondent.

ARGUED ON : **16 .07.2014 & 05.09.2014**

WRITTEN SUBMISSIONS FILED: By the Defendant-Respondent-Appellant.on 04.11.2014
By the Plaintiff-Appellant-Respondent on 21.10.2014

DECIDED ON : **23. 03. 2015**

* * * * * *

S.Eva Wanasundera, PC.J.

In this matter, Special Leave to Appeal was granted on the questions of law in paragraph 17(a) and (c) in the Petition dated 08.04.2011, which read as follows:-

17(a) Does the alleged newspaper article carry the ingredients necessary to establish the alleged defamation as set out **in paragraph 16** of the Petition?

(c) Was the relevant law considered in determining damages and quantifying of damages set out in the said judgment of the Court of Appeal?

The facts pertinent to this case can be narrated in brief as follows. An Article of news under the heading "Tarbrush Campaign Against Lanka in London" appeared in the 'Daily News' newspaper on 17.05.1990. On 08.05.1992, the Plaintiff-Appellant-Respondent (hereinafter referred to as the "Plaintiff-Respondent") instituted legal action against the Defendant – Respondent -Appellant (hereinafter referred to as the "Defendant- Appellant") in the District Court of Colombo, for the recovery of a sum of rupees five million (Rs. 5000,000/-) claiming that the publication in the newspaper was defamatory to the Defendant - Appellant. The Defendant - Appellant filedanswer on 11.12.1992 seeking a dismissal of the action. The District Court commenced the trial with 2 issues raised by the Plaintiff - Respondent and 7 issues by the Defendant - Appellant. Issues Nos. 3 and 4 were raised as preliminary issues of law by the Defendant – Appellant and the District Judge at that time answered the issues in favour of the Plaintiff – Respondent by order dated 28.07.1993 and commenced the trial. The Plaintiff-Respondent did not give evidence on his own behalf as Plaintiff but led the evidence of one witness and marked 2 documents P1 and P1(a) and closed the case. The Defendant-Appellant did not lead any oral evidence but formally marked twodocuments marked as D1 and D2 which were applicable only to the preliminary objection and closed the case on 19.09.1995.

By judgment dated 12.09.1996 the District Judge dismissed the plaint with costs on the basis that the case was not proved. On 25.10.1996 thePlaintiff - Respondent filed an appeal in the Court of Appeal. The Court of Appeal delivered judgment on 28.02.2011 allowing the Appeal with costs and granting 5 million rupees to the Plaintiff - Respondent as damages. The Defendant - Appellant is before this Court being aggrieved by the said judgment of the Court of Appeal.

The 1st question of law to be determined by this Court as stated above refers to **paragraph 16 of the Petition** of Appeal by the Defendant – Appellant. What is contained in that paragraph can be summarized to read that,

(a) The Court of Appeal judgment is erroneous,
(b) the Court of Appeal has not properly considered the contents of the said Newspaper Article
(c) the Court of Appeal has not considered the elements of public benefit / interest and fair comment in the publication,
(d) the Court of Appeal has not considered animus injuriandi as the main ingredient of the tort of defamation,
(e) the Court of Appeal has not considered that the statements in the Article are not defamatory in the mind of a reasonable man
(f) the Court of Appeal has not considered the evidence placed in favour of the Appellant,
(g) the Court of Appeal has not considered the fact that the Appellant had not given evidence on his own and not considered the elements necessary to establish damages, and
(h) the Court of Appeal has not considered the ambiguous statements in the publication.

I am of the view that the whole of the publication should herein be set down for an analysis in order to decide on the two questions of law aforementioned to adjudicate on this matter. It is as follows:-

……

[“Tarbrush Campaign Against Lanka in London”

The disruption to the educational institutions and the way of life in Sri Lanka caused by terrorist activity forced me to enter the U.K. in June 1989 to continue my studies. No Sri Lankan can forget the terror experienced till about the end of 1989.

People were so sick of the situation that they would have had no objection to Rohana Wijeweera being made a minister let alone even offered the premiership, if the violence could have been halted and people allowed to live their own lives.

The People blamed the government – the President in particular for not coming down hard on the terrorists till ultimately the President’s patience exhausted – the crackdown commenced and the situation brought under control.

Those who fostered and spawned these terrorist groups were forced to flee the country and many of them are here in the U.K. unable to return now that their “ Jekyl and Hyde “ existence has been exposed. Many have now come to realize that the people who were in the most dangerous were not so much the assassins who pulled the trigger, but the political masters drawn from the intelligentsia and the leadership who fingered those who had to be destroyed and those who gave the orders to do so.

It is sad to see a small group of Sri Lankans residing in the U.K. teaming up with these purveyors of violence, to engage in a campaign accusing the Sri Lankan government of violations of Human Rights etc.

Where were these so called campaigners of Democracy and Human rights when the JVP and the northern terrorists slaughtered people by the hundreds and destroyed vital facilities and wrecked the economy? What right have they to claim to be patriots and champions of Democracy, when all they did these many years was stay away from the troubled homeland, making no contribution to help restore the situation?

Now when things are peaceful and the country making an effort to salvage the battered economy these groups dare to suggest that the aid donor countries should stop all aid to Sri Lanka.

Two organizations in the U.K. that are engaged in this campaign of vilification are the Sinhala Bala Mandalaya led by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekera and Clem Perera.

The enclosed documents are just a few of the type they keep churning out trying to influence people in high office to think badly of Sri Lanka. Does the British P.M. have to depend on such dubious individuals when she has her ambassador in Colombo who should be in the best position to tell her the truth.

It is well known that these small groups of Sri Lankans in the U.K. comprise of those who never achieved any form of recognition in their own country or even in the U.K.. Now quite suddenly they appear fired by a spirit of patriotism, whereas the real motive is to gain some publicity for themselves .

Another motive is to use this activity to fool Sri Lankans In the U.K. and other philanthrophic organizations to donate funds which these scheming individuals pocket for themselves.

I am not for a moment condoning any excesses by the Armed Forces or Police. What we have to realize is that during the last 2 years it was a veritable war situation and in such a situation we have to accept that innocents do get caught up in the crossfires and conflicts. This sad to say is inevitable and is the sad experience all over the world.

Sri Lankans have come to realize that all the havoc and chaos was created by minority sick and demented individuals who were hell bent on destruction. I am sure that no right thinking Sri Lankan will ever allow a resurgence of the terrorist situation.

They have come to realize that they too should be prepared to even sacrifice their lives and resist such activity if they are to ensure that their children would have a future to look forward to.

It was only today that I received a telephone call from my brother in Colombo who is now in the university. He said that the May Day that was held this time was an excellent barometer of the feelings of the people. In previous years May Day was a day of clashes between rival groups, burning and stoning of buses and general tension but this

time he said the people treated it like a festive occasion thrilled that they could get about without any fear.

Isn't this a loud and clear message from the people of the present state of peace and quiet in the country and a rebuff to those Political parties and Trade Unions that have been exploiting them for their own ends.

I would be grateful if you could find space in your esteemed journal to publish this letter of mine

London A True Patriot **]**

……

The Plaintiff-Respondent's position in this case is that the article is **per-se defamatory** of the Plaintiff-Respondent,Mr.PrinsGunasekera. The Defendant-Appellant's position is that it is not defamatory but written and published **in the interest of the public and it was a fair comment.** The Defendant-Appellant submitted that the Plaintiff-Respondent has **failed to prove his case** and **calculation of damages did not have any basis.**

It is interesting to note that the preliminary issues of law raised at the beginning of the District Court case was on 'res judicata'. The Plaintiff-Respondent had filed action No. 1990 G 5175 in the High Court of Justice, Queen's Bench Division, England against the Associated Newspapers of Ceylon Limited, the Defendant- Appellant in this case, and had obtained an ex parte judgment in a sum of UK pounds of 150,000/- against the Defendant– Appellant.Thereafter, the Plaintiff-Respondent had instituted the application No. 3583/Spl in the District Court of Colombo under the Reciprocal Enforcement of Judgments Ordinance (Cap.94) for the registration of the said judgment in Sri Lanka which was obtained in the U.K. on the said same newspaper article. The District Court had made order for registration of the same on 28.08.1993. The Defendant-Appellant had filed an application to set aside the District Court order of registration dated 28.08.1993 and as such the matter of consideration of registration to be set aside was pending at the time that this case (D.C. Colombo 12137/MR) was about to start the trial. The District Court overruled the preliminary objection of res-judicata on the basis that the registration of the U.K. Judgment had not at that time reached a finality, and

made order to set down the present District Court case to be taken up for trial. I observe that neither party to this Appeal has brought to the notice of this Court whether it has reached a finality or not as of today.

The Plaintiff-Appellant's only two issues in the District Court were as follows;

(1) Is the publication **per se defamatory** to the Plaintiff?

(2) If the answer is 'Yes', is the Plaintiff entitled to claim **damages and in what sum?**

It is observed that whatthe Plaintif-Respondent contends is that the publication by itself is defamatory of himself, namely Mr. PrinsGunasekera.

In the case of ***Muir Vs January 1990 BLR 388,*** it was held that, any person who brings an action for defamation should set out in his plaint the very words about which the complaint is made. It is not sufficient to give the substance or purport of it. In the said case, Chief Justice Livesay Luke stated*, "In an action for defamation the actual words used are the material facts. It is an elementary rule of pleading that all material facts must be pleaded. Therefore in an action for defamation the actual words used, or the part complained of, must be pleaded by setting them out in the declaration. It is not enough to describe their substance, purpose or effect ……..Failure to comply with this rule of pleading rendered the pleading defective, and in the absence of an amendment to cure the defect, the plaintiff could not obtain judgment on the basis of the pleading".*

The Plaintiff –Respondent has not pointed out to any specific words that is defamatory but has kept his stand that "the publication per-se is defamatory to the Plaintiff" in his plaint. I observe that when the evidence of the only witness for Plaintiff-Respondent, Mr. JeyarajFernandopulle was led, he was never asked to point out which part or which words of the article has defamed Mr. PrinsGunasekeraand Mr. J. Fernandopulle did not point out to any part of the publication which was defamatory of the Plaintiff – Respondent.

In any publication, **defamation can be 'per se' or by 'innuendo'**. The Plaintiff should prove that the contents of the newspaper article is false. Then only the defense gets the chance to show that the contents of the article is true.

I observe that the article reads in the middle as “Two Organizations in the U.K. engaged in the campaign of vilification are the Sinhala Bala Mandalaya by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekera and Clem Perera.” In this paragraph it can be understood by a reasonable person that Prins Gunasekera leads the campaign for Democracy and Human Rights in Sri Lanka and he is engaged in the campaign of vilification. **If it is defamatory to him, he must prove either that he does not lead that campaign or if he leads the campaign that he does not engage in vilification.**

The Plaintiff’s only witness Mr. Jeyaraj Fernandopulle did not utter a word about anything with regard to the Plaintiff’s position in this regard. I hold therefore that it was not proved at all. The truth of the statement stands unchallenged. If ‘X’ says what is written in the article is defamatory, ‘X’ must at least state that it is wrong firstly and then state how it defames him**. Evidence only, to the effect that the person alleged to be defamed is a ‘very good person with a good image in the society’ does not help at all in proving that he was defamed.** It is different from a case where the words used in the printed article straightly abuses using abusive words which need no explanation at all, like in the case ***of Claude Perera Vs. Arasu 1983 2 SLR 484*** where the Plaintiff called the Defendant , “Bloody swine, Bloody rogue, Bloody crook who robbed the University “ , where the words of defame were crystal clear.

Publication of the Statement was admitted. To decide whether the statement is ‘ per se defamatory’**, the test to be adopted is the test of a reasonable man**. C.F. Amarasinghe in his book “Defamation and other Aspects of the Actio Injuriarum in Roman Dutch Law (in Ceylon and South Africa)” states that the first to be determined is whether the words have a particular meaning and then the question must be answered whether the meaning has the effect of lowering the Plaintiff in the situation of the society. The words complained of must tend to lower the Plaintiff in the situation of reasonable persons or persons of ordinary intelligence, the court taking the place of these reasonable persons. The evidence led through Mr. Jeyaraj Fernandopulle did not point to any particular portions of the Article defaming the Plaintiff – Respondent. He did not say that any particular sentence or set of words had the meaning to lower the Plaintiff in the situation of the society. He placed evidence before court that Mr. Prins

Gunasekera was a lawyer practicing in Sri Lanka who left to U.K. and was practicing as a lawyer in U.K.; he was a gentleman of high reputation; he was not aware of Mr. Gunasekera collecting funds for any organization and that he did not believe for a moment that he would misappropriate any funds collected. That was all the evidence led through the Plaintiff – Respondent's only witness, Fernandopulle, which evidence I find totally lacking in proof of defamation alleged by the Plaintff – Respondent against the Defendant – Appellant.

Nevertheless, giving the mind of Court as a reasonable man would do, I would like to consider the paragraph which contains Mr. Prins Gunasekera's name in it, mentioning that he is in the campaign of vilification . It cannot be held that it is per-se defamatory. Vilification means "speaking ill of" or "slandering". So the article states that Mr. Prins Gunasekera speaks ill of the Sri Lankan Government or slanders the Government . If Prins Gunasekera by name is called a 'rogue' or a 'swindler', it would mean per-se defamatory. I don't see this paragraph as defamatory per se or by innuendo.

Wille's Principles of South Africa in Law, eighth edition, edited by Dale Huchinson, Belinda van Heerden, D. P. Visser and C. G. van der Merve at page 687, states **"**Some statements are defamatory per se, that is, in their plain and ordinary meaning, namely the meaning which an ordinary reasonable man would give to the statement, and not necessarily that intended by the author. The fact that the audience or readers of the statement do not believe the allegation, does not affect the question whether or not they are defamatory in their natural and ordinary meaning. The plaintiff need prove nothing more than that the publication was by the Defendant**."** In the case in hand, the statements are not defamatory, in their plain and ordinary meaning.

Reading the article, I find that the writer connects the 1st paragraph of the article to the penultimate paragraph of the same, from which anyone reading the article can perceive that it is written in the interest of the public. It has no words of directing any meaning to defame anybody. It has brought to the notice of the public what is going on in the U.K.. The Plaintiff is mentioned by name in the 8th paragraph along with the names of two more persons . He is not singled out and defamed. The word 'vilification' does not carry any per-se defamatory meaning. It simply means ' speaking ill of '. It can be gathered that what the writer says is that Mr.Prins Gunasekera is speaking ill of the

government. I fail to understand how such a statement could be a defamatory statement towards Mr. Prins Gunasekera.

The Court of Appeal has discredited the District Court Judge for not having given due weightage to the publication of the photograph of Mr. Prins Gunasekera with the newspaper article in question. I observe that the photograph of the Plaintiff is not distorted. I feel that it has been used to attract the attention of the reader. Underneath the photograph only his name is written. The name is not distorted either. The case of ***Independent Newspaper Vs. Nissanka Wijeratne 1995 2SLR 253*** is a case where the Plaintiff relied on 'per-se defamation'. Supreme Court held that; "Where a *Plaintiff pleads* ***per-se defamation***, then the passage complained of or its photographs and the sub-title as in this case **must be by themselves defamatory** and the *Plaintiff cannot contend that they convey such and such a meaning.* ". In the U.K. case of ***Charleston & Smith Vs. News Graph Newspapers Ltd. (1995) 2 AC 65; 1995, 2 WLR 450, 1995 2 AER 313***, the issue being whether the publication of the photographs was capable of bearing a defamatory meaning, whether viewed on their own or with the headlines and captions, the House of Lords held that a claim for libel could not be founded on a headline or photograph in isolation from the related text.

The focus of the newspaper article is obviously not on the plaintiff alone but on the conduct of small groups of Sri Lankans who have formed themselves to various organizations in the guise of patriotism. Mr. Prins Gunasekera is merely referred to as a member of a group. The Plaintiff – Respondent cannot claim damages for defamation on the basis of any references to the entire group. **He did not give evidence on his behalf in his case.** Instead only one witness giving evidence said that he has a very good character and placed him in a different category from the groups that were referred to in the article.

The Plaintiff – Respondent did not give any clue as to how the damages alleged to have been caused to the Plaintiff – Respondent should be calculated. The judge of the Court of Appeal has just granted what was asked for in the Plaint going out of the way calculating even the conversion in foreign currency, of the sum of money in rupees to be granted to the Plaintiff in the District Court. The judgment of the Court of Appeal in

favour of Mr. Prins Gunasekera, the Plaintiff – Respondent, simply has no basis whatsoever for calculating the damages granted.

I am of the opinion that the Court of Appeal has misinterpreted the principles in the law of defamation without recourse to the judgments of our courts or courts of other jurisdictions. The Court of Appeal has misguided itself in law on the photograph by reading into it,much material, unsupported at all by the evidence led in the case. I hold that the newspaper article is not per- se defamatory to the Plaintiff – Respondent and as such no damages could be granted to him. I answer the questions of law before this Court as enumerated above in favour of the Defendant – Appellant.

I set aside the judgment of the Court of Appeal dated 28.02.2011 and affirm the judgment of the District Court dated 12.09.1996. However, I order no costs.

Judge of the Supreme Court

Chandra Ekanayake, J.

I agree.

Judge of the Supreme Court

Sisira J. de Abrew, J

I disagree.

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 Court of Appeal in CA Appeal No. 805/96(F)

Prins Gunasekera
Plaintiff

SC Appeal 141/2011
SC/CA/SPL/LA/68/2011
CA Appeal 805/96 (F)
DC Colombo 12137/MR

Vs

Associated News Papers of Ceylon Limited
Defendant

And Between

Prins Gunasekera
Plaintiff-Appellant

Vs

Associated News Papers of Ceylon Limited
Defendant-Respondent

And Now Between

Associated News Papers of Ceylon Limited
Defendant-Respondent-Appellant

Vs

Prins Gunasekera
Plaintiff-Appellant-Respondent

Before : Chandra Ekanayake J
Eva Wanasundera PC J
Sisira J De Abrew J

Counsel : Gomin Dayasiri for the Defendant-Respondent-Appellant
Manohara de Silva PC for the
Plaintiff-Appellant-Respondent

Argued on : 18.6.2014 and 5.9.2014
Written Submission
tendered on : By the Appellant on 4.11.2014
By the Respondent on 21.10.2014

Decided on : 23.3.2015

Sisira J De Abrew J.

I have read the draft judgment of Justice Eva Wanasundera. As I am unable to agree with the said judgment, I have decided to write this judgment.

The Plaintiff-Appellant- Respondent in this case (hereinafter referred to as the Plaintiff) filed a case in the District Court of Colombo against the Defendant-Respondent-Appellant (hereinafter referred to as the Defendant) for recovery of damages in a sum of Rs.5,000,000/- arising from a libelous publication published in Ceylon Daily News of 17 of May 1990. The learned District judge, after trial, dismissed the action of the Plaintiff. Being aggrieved by the said judgment, Plaintiff appealed to the Court of Appeal. The Court of Appeal, by its judgment dated 28.2.2011, set aside the judgment of the learned District Judge; held in favour of the Plaintiff and granted damages in a sum of Rs.5,000,000/- to the Plaintiff. Being aggrieved by the said judgment of the Court of Appeal, the Defendant appealed to this court. This court, by its order dated 29.9.2011, granted leave to appeal on questions of law set out in paragraph 17(a) and 17 (c) of the petition of appeal which are reproduced below.

1. Does the alleged article carry the ingredient necessary to establish the alleged defamation as set out in paragraph 16 of the petition?
2. Was the relevant law considered in determining damages and quantifying of damages set out in the said judgment?

Since the above questions of law refer to paragraph 16 of the petition of appeal, the said paragraph is reproduced below.

"Being aggrieved by the aforesaid judgment delivered on 28.2.2011, the Defendant-Respondent-Petitioner seeks Special Leave to Appeal from Your Lordship's Court against the said judgment on the following among other grounds that may be urged on behalf of the Defendant-Respondent-Petitioner at the hearing of this application.

1. *The said judgment is contrary to and/or inconsistent with the evidence placed before court and in the circumstances erroneous in law;*
2. *It is submitted with respect that the Court of Appeal has erred in law and failed and/or neglected to consider the fundamental ingredients necessary to establish defamation and had failed and/or neglected to correctly and/or properly evaluate and/or analyze the contents of the said article accordingly;*
3. *It is submitted with respect that the elements of public benefit/public interest and fair comment which are the prime factors for the publication of the aforesaid alleged article and the matters in issue have not been considered by the Court of Appeal.*
4. *The Court of Appeal has erred in law by failing to take cognizance of the fact that there is a complete failure on the part of the Plaintiff-Appellant-Respondent to establish animus injuriandi on the part of the Defendant-Respondent-Petitioner and the burden is on the Plaintiff-Appellant-*

Respondent to aver, put in issue and prove this ingredient and as such the main ingredient for the tort of defamation has not been established;

5. *The Court of Appeal has erred in law and failed and/or neglected to consider that the evidence of the witness presented on behalf of the Plaintiff-Appellant-Respondent does not establish and/or support a claim of defamation and in fact the said evidence establishes that the purported defamatory statements in the said article were not attributed to or associated with the Plaintiff-Appellant-Respondent in any manner in the mind of a reasonable man. The non consideration of the aforesaid important evidence amounts to an error of law.*
6. *It is submitted that the Court of Appeal has failed to consider the aspect of evidence of the Plaintiff's witness which are favourable to the defendant-Respondent-Petitioner;*
7. *It is submitted that the Court of Appeal has failed to consider that the Plaintiff-Appellant-Respondent did not give evidence and has awarded the full amount of damages sought without considering the elements necessary to establish and quantify damages where reputation is in issue has not been led or presented by the Plaintiff-Appellant-Respondent;*
8. *It is submitted that the Court of Appeal has erred in law and failed and/or neglected to consider the evidence in a defamation case where ambiguous statements are under consideration, such as in this present case."*

The main issues in this case are whether (1) the Article is attributable to the Plaintiff and (2) the Article is per se defamatory of the Plaintiff.

At the trial the Defendant admitted the publication of the Article in the Ceylon Daily News of 17th of May 1990 which was marked as A1. The said Article is reproduced below.

"The disruption to the educational institutions and the way of life in Sri Lanka caused by terrorist activity forced me to enter the UK in June 1989 to continue my studies. No Sri Lankan can forget the terror experience till about the end of 1989.

People were so sick of the situation that they would have had no objection to Rohana Wijeweera being made a minister-let alone even offered the premiership, if the violence could have been halted and people allowed to live their normal lives.

The people blamed the Government- the President in particular for not coming down hard on the terrorists till ultimately the President's patience exhausted- the crackdown commenced and the situation brought under control.

Those who fostered and spawned these terrorist groups were forced to flee the country and many of them are here in the UK unable to return now that their Jekyl and Hide existence has been exposed. Many have now come to realize that the people who were the most dangerous were not so much the assassins who pulled the trigger but the political masters drawn from the intelligentsia and the leadership who fingered those who had to be destroyed and who gave the orders to do so.

It is sad to see a small group of Sri Lankans residing in the UK teaming up with those purveyors of violence to engage in a campaign accusing the Sri Lankan Government of violations of human rights etc.

Where were those so called campaigners of Democracy and Human rights when the JVP and the Northern terrorists slaughtered people by the hundreds and destroyed vital facilities and wrecked the economy? What right have they to claim to be patriots and champions of Democracy when

all they did these many years was stay away from the trouble homeland making no contribution to help restore the situation.

Now when things are peaceful and the country making an effort to salvage the battered economy, these groups dare to suggest that aid donor countries should stop all aid to Sri Lanka.

Two organizations in the UK that are engaged in this campaign of vilification are the Sinhala Balamandalaya led by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekara and Clem Perera.

The enclosed documents are just a few of the type they keep churning out trying to influence people in high office to think badly of Sri Lanka. Does the British P.M. have to depend on such dubious individuals when she has her ambassador in Colombo who should be in the best position to tell her the truth?

It is well known that these small groups of Sri Lankans in the UK comprise of those who never achieved any form of recognition in their own country or even in the UK. Now quite suddenly they appear fired by a spirit of patriotism whereas the real motive is to gain some publicity for themselves.

Another motive is to use this activity to fool Sri Lankans in the UK and other philanthropic organizations to donate funds which these scheming individuals pocket for themselves.

I am not for a moment condoning any excesses by the Armed Forces or Police. What we have to realize is that during the last two years it was a veritable war situation and in such a situation we have to accept that innocents do get caught up in the crossfire and conflicts. This sad to say is inevitable and is the sad experience all over the world.

Sri Lankans have come to realize that all the havoc and chaos was created by minority groups sick and lamented individuals who were hell bent on destruction. I am sure that no right thinking Sri Lankan will ever allow a resurgence of the terrorist situation.

They have come to realize that they too should be prepared to even sacrifice their lives and resist such activity if they are to ensure that their children would have a future to look forward to.

It was only today that I received a telephone call from my brother in Colombo who is now in the University. He said that May Day that was held this time was an excellent barometer of the feelings of the people. In previous years May Day was a day of clashes between rival groups, burning and stoning of buses and general tensions but this time he said that the people treated it like a festive occasion thrilled that they could get about without any fear.

Isn't this a loud and clear message from the people of the present state of peace and quiet in the country and a rebuff to those political parties and Trade Unions that have been exploiting them for their own ends?

I would be grateful if you could find space in your esteemed journal to publish this letter of mine.

A True Patriot

London."

The defendant has, in the middle of the article, published a photograph of the plaintiff and below the photograph the words 'Prins Gunasekera' are printed.

I will now consider whether the said article is attributable to the Plaintiff. Two organizations in the UK have been identified in the said article as being 'engaged in the campaign of vilification'. One is Sinhala Balamandalaya led by a petrol

pumper named Gamini Keerthichandra Fernando and the other one is the 'Campaign for Democracy and human Rights in Sri Lanka' led by Prins Gunasekara. The only photograph published in the article is that of the plaintiff. When I consider the above matters, there is no difficulty in deciding that the said article has referred to the plaintiff and many groups of people. For the above reasons, I hold that the article is attributable to the Plaintiff. I must mention here that the Defendant did not give evidence nor did it produce any evidence.

Next question that must be decided is whether the article is per se defamatory of the Plaintiff. In deciding this question, it is interesting to note that the article carries the following matters.

> *"Another motive is to use this activity to fool Sri Lankans in the UK and other philanthropic organizations to donate funds which these scheming individuals* ***pocket for themselves.*** (Emphasis added).
>
> *Those who fostered and spawned these terrorist groups were forced to flee the country and many of them are here in the UK unable to return now that their Jekyl and Hide existence has been exposed. Many have now come to realize that the people who were the most dangerous were not so much the assassins who pulled the trigger but the political masters drawn from the intelligentsia and the leadership who fingered those who had to be destroyed and who gave the orders to do so.*
>
> *It is sad to see a small group of Sri Lankans residing in the UK teaming up with those purveyors of violence to engage in a campaign accusing the Sri Lankan Government of violations of human rights etc.*
>
> *Where were those so called campaigners of Democracy and Human rights when the JVP and the Northern terrorists slaughtered people by the hundreds and destroyed vital facilities and wrecked the economy? What*

right have they to claim to be patriots and champions of Democracy when all they did these many years was stay away from the trouble homeland making no contribution to help restore the situation.

Two organizations in the UK that are engaged in this campaign of vilification are the Sinhala Balamandalaya led by a petrol pumper named Gamini Keerthichandra Fernando and the Campaign for Democracy and Human Rights in Sri Lanka led by Prins Gunasekara and Clem Perera.

The enclosed documents are just a few of the type they keep churning out trying to influence people in high office to think badly of Sri Lanka. Does the British P.M. have to depend on such dubious individuals when she has her ambassador in Colombo who should be in the best position to tell her the truth?"

The only witness who gave evidence on behalf of the plaintiff was Jeyaraj Fernandopulle who was the Deputy Minister of Policy Planning, Ethnic Affairs and National Integration. Mr. Fernandopulle who was an Attorney-at Law knew the Plaintiff from 1970. It is important to consider certain portions of Mr. Fernandopulle's evidence which are reproduced below.

Q. What sort of a gentleman the plaintiff is.

A. He is a gentleman of high reputation in Sri Lanka.

Q. was he a practicing lawyer in Sri Lanka.

A. In 1970 he was appearing for cases in Negombo Courts. He was a very popular criminal lawyer.

Q. He also played a leading role in Human Right cases in Sri Lanka.

A. Yes. Fighting for the rights of people.

Q. latter part of 1960 he was in Parliament and sometime later he left for England.

A. He was forced to leave the country as his stay in Sri Lanka was dangerous for his life. He was appearing for Human Right cases and therefore some unknown elements were after his life.

Q. For his safety he left the country.

A. Yes. He campaigned for democracy and human rights in Sri Lanka.

Q. Mr. Prins Gunasekera was a leading figure in Sri Lanka.

A. Yes.

Q. You said that you saw the defamatory article in the papers.

A. Yes. I read the article dated 17th May 1990.

Q. Having known Mr. Gunasekera for such a long time, do you believe for a moment that he would misappropriate any funds collected?

A. He was a person who appeared free of charge for litigants in cases. He was not a person who would misappropriate money.

Q. Are you aware that Mr.Gunasekera collected public funds for any organization.

A. He has not collected public funds for any organization. I have met him in London before this article and after this article. I met him in London twice. He has a very high reputation.

Defendant, in cross-examination did not make any attempt to controvert the evidence of Mr. Fernandopille. According to the evidence of Fernandopulle, the Plaintiff who had a high reputation was a leading Criminal Lawyer in Sri Lanka. He was elected as a Member of Parliament in 1960 and held that post for twelve years. In considering the question whether the article is per se defamatory, I would like to consider a passage from a book titled “Defamation and other aspects of the

action iniuriarum in Roman-Dutch Law (in Ceylon and South Africa)" by Chittharanjan Felix Amerasinghe wherein the learned Author at page 19 states thus: *"It must be determined whether the words have a particular meaning and then the question must be answered whether the meaning has the effect of lowering the Plaintiff in the estimation of society. ..... It has repeatedly been stated that the words complained of must tend to lower the Plaintiff in the estimation of reasonable persons or persons of ordinary intelligence, the court taking the place of these reasonable persons"*

In "Wille's Principles of South African Law 8th Edition edited by Dale Hutchinson, Belinda Van Heerden, D P Visser and CG Van der Merwe at page 687 the learned Author states thus: *"Some statements are defamatory per se, that is, in their plain and ordinary meaning namely the meaning which an ordinary reasonable man would give to the statement, and not necessarily that intended by the author. The fact that the audience or readers of the statement do not believe the allegations does affect the question whether or not they are defamatory. Where the words complained of are defamatory in their natural and ordinary meaning the Plaintiff need prove nothing more than that and their publication by the Defendant".*

In this case, the publication is admitted. The article describes that the small groups of people including the group led by the plaintiff have got involved in collecting funds and pocketing the same. Further the article indicates that the Plaintiff has been misappropriating the donations made to the Campaign for Democracy and Human Rights in Sri Lanka. When I consider the article published in the news paper and the evidence of Fernandopulle, I am of the opinion that the article has the effect of lowering the Plaintiff in the estimation of society.

For the above reasons I hold that the article is per se defamatory of the Plaintiff. Thus the judgment of the Court of Appeal is correct to this extent.

The next question that must be considered is whether awarding Rs. 5,000,000/- (5 Million) is excessive or not. In deciding this matter it is important to note that the plaintiff did not give evidence. According to the judgment of the Court of Appeal, the plaintiff is permanently residing in England. There is no dispute on this matter. Even learned President's Counsel for the Plaintiff, at the hearing of this appeal, did not dispute this matter. There is no evidence to suggest that the plaintiff would come and settle down in Sri Lanka. Then how does the article affect his life in Sri Lanka. The plaintiff must, by way of evidence, say as to how the article affects his reputation both in Sri Lanka and London. This evidence is necessary in order decide whether the quantum sought could be granted. But his evidence is not necessary to decide whether the article is defamatory of him. Mr. Fernandopulle who was called by the Plaintiff has stated, in his evidence, that the plaintiff has a very high reputation in London. He had met the Plaintiff in London only on two occasions. In order to decide whether the court can grant the quantum that the plaintiff has asked for, there must be evidence as to how the article affected his reputation in London and Sri Lanka or there must be positive evidence on this matter. Is there any evidence to suggest that the people in Sri Lanka and or London made inquiries from the Plaintiff about the truth or falsity of this article? The answer is no. When I consider all these matters, granting of Rs.5,000,000/- (5 Million) is, in my view, excessive. I therefore set aside the part of the judgment of the Court of Appeal awarding Rs.5,000,000/- However Mr. Fernandopulle says that the plaintiff was a leading Criminal lawyer in Sri Lanka. This shows that he was a leading figure in Sri Lanka. Therefore, in my view, he is entitled to some kind of compensation. I also note that the plaintiff does not live in Sri Lanka.

Considering all these matters I grant a sum of Rs.2,000,000 (Rs.Two Million)/- as compensation. However I have earlier decided that the judgment of the Court of Appeal was correct when it decided that the article was defamatory of the plaintiff. I affirm the judgment of the Court of Appeal to the said extent. But I set aside part of the judgment of the Court of Appeal which awarded Rs.5,000,000/- (Rs.5 Million) to the plaintiff and award only Rs.2,000,000/- (Rs.Two Million).

In view of the above conclusion reached by me, I answer the 1st question of law in the affirmative but answer the 2nd question of law in the negative.

Judgment of the Court of Appeal varied.

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(2) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 read with Article 118 of the Constitution.

SC / Appeal / 142/14

SC/ HC/LA/ 41/2014

HC (Civil) 329/2013 MR

Ace Containers (Pvt) Ltd.
315, Vauxhall Street,
Colombo 2.

Plaintiff

Vs.

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razeek Fareed Mawatha,
Colombo 1.

Defendant

AND NOW BETWEEN

Commercial Bank of Ceylon PLC,
Commercial House,
No. 21, Sir Razeek Fareed Mawatha,
Colombo 1.

Defendant Appellant

Vs.

Ace Containers (Pvt) Ltd.
315, Vauxhall Street,
Colombo 2.

Plaintiff Respondent

BEFORE	:	CHANDRA EKANAYAKE, J. SISIRA J DE ABREW, J. UPALY ABEYRATHNE, J.
COUNSEL	:	Maithri Wickremasinghe PC with R. Jayatunga for the Defendant Appellant M.U.M. Ali Sabry PC with Shamith Fernando for the Plaintiff Respondent.
ARGUED ON	:	20.01.2015
WRITTEN SUBMISSION ON:		23.10.2014 (Appellant) 04.12.2014 (Respondent)

DECIDED ON : 08.07.2015

UPALY ABEYRATHNE, J.

This is an appeal from an order of the learned Judge of the High Court of the Western Province exercising commercial jurisdiction holden in Colombo dated 20.06.2014. By the said order the learned High Court Judge of the Commercial High Court has refused an application made by the Defendant Appellant (hereinafter referred to as the Appellant) seeking to add Lankem Development Ltd. as a necessary party to the action. This Court granted leave to appeal. It seems from the minutes of this Court dated 29.08.2014 that leave has been granted on the question of law; i.e. should the Lankem Development Ltd be added as a necessary party to the action.

According to the facts of the case the Plaintiff Respondent (hereinafter referred to as the Respondent) had entered in to a contract (A 1 and A 2) with Lankem Development Limited (Lankem) for the surfacing of the Respondent's container yard at Mabole. By the said contract the Respondent agreed to pay an advance payment equivalent to 30% of the estimated sum to be paid to the Lankem on submission of a valid Bank Guarantee from a Bank acceptable to the Respondent. Accordingly Lankem had furnished an Advance Payment Guarantee No DBUGTELKR0804390 dated 24.10.2008 (A 3) for a sum of Rs. 22,080,000/- from the Appellant Bank which was valid for 06 months. Thereafter the validity of the said Bank Guarantee was extended from time to time and finally by letter dated 07.06.2013 the validity of the said Bank Guarantee was extended from 22.06.2013 to 21.09.2013 (A 4 i to A 4 xv).

The Respondent by letter dated 14.08.2013 has preferred a claim for the full value of the said Bank Guarantee (Rs. 22,080,000/-) to the Appellant Bank on the basis that the Lankem has failed to return the advance paid to them in full. Upon the said claim the Appellant, by letter dated 16.08.2013, has forwarded their pay order No 846736 for a sum of Rs. 1,371,655.19 on the basis that the remaining balance of advance payment is Rs 1,192,743.64 with the applicable taxes of Rs 178,911.55. The Appellant has further informed the Respondent that they are in receipt of payment certificates issued by the Lankem and certified by the Respondent stating that the remaining balance of advance payment is Rs. 1,192,743.64. Said letter and the said payment certificate have been produced marked A 7 and A 8.

The Respondent, whilst contending that the Appellant was not entitled to rely on the said payment certificate A 8, set out a claim for a sum of Rs 14,485,325.75 as reflected in paragraph 16 to 24 of the plaint and prayed for a judgment against the Appellant. Upon the receipt of summons of the said action, the Appellant by way of a motion dated 13.12.2013 made an application to the Commercial High Court of Colombo seeking an order to add Lankem Dvelopment Ltd. as a party defendant to the action on the basis that the Respondent has failed to join Lankem Developments Limited as a defendant upon the averments contained in the plaint.

The Appellant contended that the advance payment guarantee A 3 was not the usual advance payment guarantee as the value of the guarantee was reduced by the value of every repayment of the advance guarantee by Lankem upon receipt of certificate signed by Lankem or the Respondent. In this regard the Appellant heavily relied upon the following paragraph of the advance payment guarantee (A 3) which is as follows;

> "Provided always that if any part of the advance payment under the said contract is repaid to you, the amount of this guarantee shall automatically be reduced and we shall accordingly be entitled to write down our liability in our books under the guarantee by the full value of all and every such repayment of the said advance payment made from time to time by Lankem Developtments Ltd to you, upon receipt from Lankem Developments Ltd or you of a certified copy of a certificate of payments issued showing the amount of such repayment/s made."

The Appellant whilst admitting A 3 as an advance payment guarantee issued in favour of the Respondent to be paid on first written demand has contended that it is not the usual advance payment guarantee. His position was that if any part of the advance payment under the main contract between the Respondent and Lankem is repaid to the Respondent, the amount of the guarantee is automatically reduced and the Appellant is entitled to reduce the liability under the guarantee. It seems from the averments contained in the plaint that the Respondent also has admitted the aforesaid position. That is why in paragraphs 18, 19 and 20 of the plaint the Respondent has set out a claim for an amount less than the amount indicated in the advance payment guarantee marked A 3 when he was informed of the payment certificate (A 8) issued by Lankem. Hence I am of the view that the contention of the Appellant that A 3 is not the usual advance payment guarantee, should necessarily fail because the guarantee A 3 falls clearly within the scope of demand guarantee.

Paget's Law of Banking [12th edition Chapter 34.3 page 730] described that "The construction of a guarantee under which a bank undertakes to pay on first written demand may raise three somewhat different issues. The first is

whether the contract is a suretyship or a demand guarantee. The second is whether, if the instrument is a demand guarantee, it requires the beneficiary to assert a breach of contract by the principal. This is a question of construing the guarantee. The third is whether the documents presented by the beneficiary comply with the terms and conditions of the guarantee. This raises the issue of the required degree of strictness of compliance".

In Esal (Commodities) Ltd and Reltor Ltd. Vs. Oriental Credit Ltd and Wells Fargo Bank NA [1985] 2 Lloyd's Rep 546, CA, the words 'we undertake to pay the said amount on your written demand in the event that the supplier fails to execute the contract in perfect performance' were construed not to require the beneficiary to prove a failure to perform.

In the case of Siporex Trade SA Vs. Banque Indosuez [1986] 2 Lloyd's Rep 146 the guarantee provided 'We hereby engage and undertake to pay on your first written demand any sum or sums not exceeding US $ 1,071,000 in the event that, by latest 7 December 1984 no bankers irrevocable documentary letter of credit has been issued in favour of Siporex Trade SA by Comdel. Any claim(s) hereunder must be supported by your declaration to that effect'. Hirst J made the observation that "The whole commercial purpose of a performance bond is to provide a security which is to be readily, promptly and assuredly realisable when the prescribed event occurs; a purpose reflected in the provision here that it should be payable 'on first demand'. The defendant's approach in this part of the case would frustrate that essential purpose". In this case the guarantee was construed to be a demand guarantee.

Upon the aforesaid legal context I find no merit in the submission of the Appellant on the said terms embodied in the guarantee bond A 3.

The Appellant further contended that in view of the averments contained in paragraphs 15, 16, 17, 18 and 19 of the plaint, the Lankem is a necessary party to the action since the Appellant made the payment of the value of the guarantee of Rs 22,080,000.00 less the value of the repayment certificate (A 8) relating to the payments made by the Lankem and certified by the Respondent and then the Respondent claimed a reduced sum but greater than the sum set out in the monthly interim payment certificate (A 8) relating to the repayments made by Lankem.

On the question of addition of party as necessary party to the action the Appellant submitted that the decisions in Arumugam Coomaraswamy Vs. Andiris Appuhamy and Others [1985] 2 Sri L. R. 219 has settled the law. In this case it was held that "In deciding whether the addition of a new party should be allowed under section 18 (1) of the Civil Procedure Code the wider construction adopted by English Courts is to be preferred. Whenever a Court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that other actions may be brought in respect of that transaction the Court has the power to bring all the parties before it and determine the rights of all in one proceeding. It is not necessary that the evidence on issues raised by the new parties being brought in should be exactly the same. It is sufficient if the main evidence and the main inquiry will be the same. Even if the narrower construction is adopted a person who has to be bound by the result of the action, or has a legal right enforceable by him against one of the parties to the action which will be affected by the result of the action should be joined ; so also where the question raised by the party seeking to be added is so inextricably mixed with the matters in dispute as to be inseparable from them and the action itself cannot be decided without deciding it, then the addition should be made ; if the plaintiff can show that he

cannot get effectual and complete relief unless the new party is joined or a defendant can show that he cannot effectually set up a defence which he desires to set up unless the new party is joined, the addition should be allowed."

It must be noted that the facts of the said case is totally different to the facts averred in the present case before us. In the said case His Lordships have clearly stated therein that " ……. Whenever court can see in the transaction brought before it….". Said part of the decision clearly demonstrates that Their Lordships have arrived at the said conclusion solely upon the facts adumbrated before court. Hence the dicta in the said case cannot be applied to each and every case irrespective of the facts of the case upon which it becomes necessary for addition of parties. In this regard it is pertinent to reproduce Section 18(1) of the Civil Procedure Code which reads thus;

> "18(1) The court may on or before the hearing, upon the application of either party, and on such terms as the court thinks just, order that the name of any party, whether as plaintiff or as defendant improperly joined, be struck out; and the court may at any time, either upon or without such application, and on such terms as the court thinks just, order that any plaintiff be made a defendant, or that any defendant be made a plaintiff, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action, be added."

When one looks at the said provisions it clearly appears that a party can be added as a necessary party to a pending action in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in that action. In the present case the cause of action has arisen upon an advance payment guarantee (A 3) issued by the Appellant in favour of the Respondent. Said advance payment guarantee (A 3) inter alia stipulates that "A demand here under shall be in writing and shall precisely specify the amount demanded and state that the above named Lankem Developments Ltd has failed to repay the advance made to it. Any such demand shall be conclusive evidence that Lankem Developments Ltd has failed to repay the said advance and we are liable to pay to you the sum demanded provided the same does not exceed the limit of LKR 22,080,000.00 (Sri Lanka Rupees twenty two million & eighty thousand only) as aforesaid."

Said clause is clear and unambiguous. It precisely specifies the parties involved in the transaction and also their liabilities towards each other and also the procedure how to discharge the liabilities cast upon them. The modus operandi is very clear. Lankem has no role to play in the said recovery procedure. However it appears that the liabilities under the guarantee (A 3) are subjected to certain rights of the Appellant. The last paragraph of the advance payment guarantee on which the Appellant heavily relied upon, has set out somewhat an exceptional circumstance wherein the Appellant can deny a claim preferred by the Respondent for the total value to the advance payment guarantee. At such an instance a burden would cast upon the Appellant to prove that upon the receipt of payment certificates issued by Lankem he was entitled to write down his liability according to the payment certificate issued showing the amount of such repayments. In the circumstances Lankem need not to be added as a necessary party to the pending action between the Appellant and the Respondent. As the learned High Court

Judge correctly stated, the Appellant is at liberty to list Lankem as a witness to his case if he wishes so to do.

In the case of Edward Owen Engineering Ltd Vs Barclays Bank International Ltd [1978] Q.B. 159 Lord Denning examined the nature of the business transaction called a performance guarantee or a performance bond issued by a bank and the legal implications of such transaction. In this case a contracting party who caused a bank to issue a performance guarantee sought to restrain the bank by injunction from making payment on that guarantee. On the facts, the contracting party to whom payment was to be ultimately made (a Libiyan customer of the Plaintiff) was in default on the main contract but it was held that an injunction could not issue to restrain payment on the guarantee on that basis. Lord Denning, on an examination of parallel transactions opined as follows at page 983; "So, as one takes instance after instance, these performance guarantees are virtually promissory notes payable on demand. So long as the Libiyan customers make an honest demand, the banks are bound to pay and the banks will rarely, if ever, be in a position to know whether the demand is honest or not. At any rate they will not be able to prove it to be dishonest. So they will have to pay. All this leads to the conclusion that the performance guarantee stands on a similar footing to a letter of credit. A bank which gives a performance guarantee must honour that guarantee according to its terms. It is not concerned in the least with the relations between the supplier and the customer; nor with the question whether the supplier has performed his contracted obligation or not; nor with the question whether the supplier is in default or not. The bank must pay according to its guarantee, on demand if so stipulated, without proof or conditions. The only exception is when there is a clear fraud of which the bank has notice."

In Power Curber International Ltd. Vs. National Bank of Kuwait SAK [1981] 3 All ER 607 the court expressed the view that "They were established as a universally acceptable means of payment equivalent to cash in trade and commerce, on the basis that the promise of the issuing bank to pay was wholly independent of the contract between the buyer and the seller and the issuing bank would honour its obligations to pay regardless of the merits or demerits of the dispute between the buyer and the seller.

In Harbottle (Mercantile) Ltd. Vs. National Westminster Bank Ltd. [1977] 2 All ER 862 the court took up the view that "It is only in exceptional circumstances that courts will interfere with the machinery of obligations assumed by the banks. They are the lifeblood of international commerce. Such obligations are regarded as collateral to underlying rights and obligations between merchants at either end of the banking chain. Courts will leave the merchants to settle their disputes under the contracts by litigation. The courts are not concerned with the difficulties to enforce such claims. These are risks which merchants take.

In Boliventer Oil SA Vs. Chase Manhattan Bank [1984] 1 All ER 351, 352 it was observed that "If court interferes with a bank's undertaking it will undermine its greatest asset - its reputation for financial and contractual probity."

Paget's Law of Banking 12th edition Chapter 34.2 at page 730 describes the characteristics of Demand Guarantees as follows "The essential difference between a guarantee in the strict sense (i.e. a contract of suretyship) and a demand guarantee is that liability of a surety is secondary, whereas the liability of the issuer of a demand guarantee is primary. A surety's liability is co-extensive with that of the principal debtor and, if default by the principal debtor is disputed by the surety, it must be proved by the creditor. Neither proposition applies to a

demand guarantee. The principle which underlies demand guarantees is that each contract is autonomous. In particular, the obligations of the guarantor are not affected by disputes under the underlining contract between the beneficiary and the principal. If the beneficiary makes an honest demand, it matters not whether as between himself and the principal he is entitled to payment. The guarantor must honour the demand, the principal must reimburse the guarantor (or counter-guarantor) and any disputes between the principal and the beneficiary, including any claim by the principal that the drawing was a breach of the contract between them, must be resolved in separate proceedings to which the bank will not be a party."

The autonomy principal embodied in article 2b of the Uniform Rules for Demand Guarantees published by the International Chamber of Commerce (ICC publication 458 published in October 1992) reads thus; "Guarantees by their nature are separate transactions from the contract(s) or tender conditions on which they may be based, and the Guarantors are in no way concerned with or bound by such contract(s), or tender conditions, despite the inclusion of a reference to them in a Guarantee. The duty of the Guarantor under a Guarantee is to pay the sum or sums therein stated on the presentation of a written demand for payment and other documents specified in the Guarantee which appear on their face to be in accordance with the terms of the Guarantee."

In the above context I am of the view that the dispute between the Appellant and the Respondent should be confined to them. Lankem (Principal) cannot be a party to such an action since Lankem is an outsider to the advance payment guarantee between the Appellant and the Respondent. A 3 is an independent agreement outside the main contract between the Respondent and Lankem. Hence the Appellant has no option under the guarantee A 3 but to honour

the written demand of the Respondent since it falls within the jurisdiction of the guarantee and to pay the sum therein stated in accordance with the terms and conditions of the guarantee. If the Appellant relies upon the certificates of payments issued showing the amount of repayments, he must prove it. For the said purpose Lankem need not be added as a party to the present action.

In the aforesaid circumstances I see no reasons to interfere with the order of the learned High Court Judge of the Commercial High Court, Colombo dated 20.06.2014. Therefore I dismiss the appeal of the Appellant with cost.

Judge of the Supreme Court

CHANDRA EKANAYAKE, 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

The matter of an application under and in terms of Section 31DD (1) of the Industrial Disputes Act as amended by Act No. 32 of 1990.

W.A.A.M. Dharmasena,
Aluketiya,
Hongamuwa,
Ratnapura.

Workman

Vs.

SC. Appeal No. 142/10

Supreme Court Leave to Appeal No. 254/2009

HCCA No: SP/HCCA/RAT/LT/RA/01/2008

Labour Tribunal Ratnapura No: R/6198/05

1. Superintendent,
   Kekunagoda Estate,
   Elapatha,
   Ratnapura.

2. Lal Wasantha Abeywickrama,
   Alevihala,
   No. 252, Main Street,
   Ratnapura.

Respondents

AND

Lal Wasantha Abeywickrama,
Alevihala,
No. 252, Main Street,
Ratnapura.

2nd Respondent- Petitioner

Vs.

W.A.A.M. Dharmasena,
Hapugastanna Plantation Ltd.,
Alukeliya,
Hongamuwa,

Workman-Respondent

And Now Between

Lal Wasantha Abeywickrama,
No. 132/15, Moragahalandha Mawatha,
Pannipitiya.

2nd Respondent-Petitioner-Appellant

Vs.

W.A.A.M. Dharmasena,
Hapugastanna Plantation Ltd.
Alukeliya,
Hongamuwa.

Workman-Respondent-Respondent

Before : Priyasath Dep, PC. J.
Sarath de Abrew, J.
Priyantha Jayawardena, PC. J.

Counsel : Saliya Pieris with Anjana Rathnasiri for 2nd Respondent-Petitioner-Appellant.

Workman- Respondent- Respondent absent and unrepresented.

Argued on : 5th June, 2014

Decided on : 13th August, 2015

Priyantha Jayawardena, PC. J,

This is an appeal filed to have the Judgment of the learned High Court Judge of Ratnapura dated 30.09.2009 set aside. The High Court affirmed the order of the learned President of the Labour Tribunal of Ratnapura overruling an objection raised during an inquiry to dismiss an application filed by the Workman in the said Tribunal. The main issue to be decided in this application is the validity of the order made by the Labour Tribunal in respect of the maintainability of the application filed before the Labour Tribunal of Ratnapura which was affirmed by the High Court of Ratnapura. The facts of the instant appeal are set out below.

The Applicant-Workman-Respondent (hereinafter referred to as the Workman) made an application to the Labour Tribunal of Ratnapura against the 1st and 2nd Respondents and in his application he stated inter-alia that he was an employee of the Kekunagoda Construction (Pvt.) Ltd since 1990 and that thereafter he served as a field officer in the Kekunagoda Estate belonging to the aforementioned company and his services were unjustifiably terminated.

The Respondents in the said application filed a common answer and in their answer denied the position taken up by the Workman and stated that there is no company named Kekunagoda Construction (Pvt.) Ltd. and that the Workman had entered into a contract with one Ms. K.C. Abeywickrama who is the owner of the Kekunagaoda Estate "C" division to work as an assistant field officer and the said contract was for a period of 4 years and that it had come to an end.

Thereafter, the Workman filing his replication stated that he was in service in the work sites of the said company and denied the fact that he had entered into a contract with one Ms. K. C. Abeywickrama.

At the inquiry before the Labour Tribunal of Ratnapura, the Workman started his case as the employment was denied by the Respondents and while the Workman was giving evidence, the Counsel for the 2nd Respondent raised the following objections and moved that the application of the Workman should be dismissed;

(i) the employer of the Workman is not the 2nd Respondent, and

(ii) Kekunagoda Construction and Development Company (Pvt) Ltd. is not a party to this action.

Thereafter, parties had filed written submissions and the Respondents had annexed documents to the written submission in support of their objections though they were not produced in evidence of the case.

The Respondent in his written submission filed before the Labour Tribunal has stated that the 2nd Respondent namely Lal Wasantha Abeywickrama is not the employer of the Workman but the sister of the 2nd Respondent namely, K.C. Abeywickrama. He has further stated facts proposed by the Workman are irrelevant to the matter.

The learned President of the Labour Tribunal overruled the said objections and delivering his order has stated that the questions had to be determined only after conducting a proper inquiry into all evidence. Further, he has stated that the definition given to the term 'employer' in the Industrial Disputes Act is very wide. Therefore, the question as to who the employer of the Workman is (whether the 2nd Respondent or someone else), has to be decided only after the conclusion of the inquiry and the learned President had overruled the said objections raised by the Respondents.

The 2nd Respondent being aggrieved by the said order of the learned President of the Labour Tribunal has filed a Revision Application in the Provincial High Court of Ratnapura and he had sought to revise the said order on the following grounds;

(i) that the learned President of the Labour Tribunal had considered only one of the two preliminary objections raised by the 2nd Respondent;

(ii) the order made by the learned President is unlawful in view of the ample evidence produced by the 2nd Respondent to show that the employer of the Workman was not the 2nd Respondent; and

(iii) the Workman in his application had stated that he was a permanent employee of a private company and therefore this case cannot be instituted and maintained unless that company is made a party to this case.

Thereafter, the Workman had filed his objections and stated inter-alia that the learned President should conduct a proper inquiry into all the evidence in order to determine the said objections. Further, he stated that the 2nd Respondent has not, with his petition, filed a copy of evidence led up to the point where the learned President was called upon to give a ruling on the objection raised based on the partly led evidence before the Tribunal. This is a flagrant violation of Rule 3(1) (b) read with Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990 which itself warrants the summary dismissal of the application in limine.

The learned High Court Judge of Ratnapura has held that the objection of the 2nd Respondent is not a pure legal question and that it is a mixed question of fact and law. Thus, the learned President of the Labour Tribunal could not have answered the question in the 2nd Respondent's favour and dismissed the application filed by the workman even before the workman's evidence was concluded. Therefore, the learned High Court Judge has dismissed the said Revision Application and has directed the Registrar to send a copy of his order to the Labour Tribunal of Ratnapura to proceed with the inquiry. Further, the learned High Court Judge held that the said Revision Application is contrary to Rule 3(1) (b) read with Rule 3(1) (a) of the Court of Appeal (Appellate Procedure) Rules 1990.

The 2nd Respondent being aggrieved by the said order of the High Court Judge of Ratnapura has made a leave to appeal application to this court and court granted leave to appeal on the following questions of law;

(i) Has the learned Provincial High Court Judge of Ratnapura and the learned President of the Labour Tribunal erred in not dismissing the application of the Applicant in the Labour Tribunal since he had failed to make the Company Kekunagoda Construction and Development (Pvt.) Ltd a party to his application?

(ii) On the Workman's own application is he estopped from denying that his employer was Kekunagoda Construction and Development (Pvt.) Ltd and therefore due to the failure to make the said Company a party should his application in the Labour Tribunal be dismissed?

(iii) Did the learned High Court Judge and the learned President of the Labour Tribunal err in holding that the preliminary objections of the Petitioner could not be dealt with at the outset and that the inquiry had to proceed before the Labour Tribunal?

(iv) Did the learned Provincial High Court Judge of Ratnapura err when he determined that the failure to annex a copy of evidence led in the Labour Tribunal was contrary to the rule 3(1) (b) of the Court of Appeal rules whereas, the said evidence was not material to the determination of the objection raised by the Petitioner?

The main issue that needs to be decided in this appeal is the legality of the order made by the learned President of the Labour Tribunal overruling the said objections of the Respondent which were affirmed by the High Court. In order to decide the said question of law, it is necessary to consider the duties and powers of a Labour Tribunal.

Duties and Powers of a Labour Tribunal

The Labour Tribunals were established by an amendment brought to the Industrial Disputes Act No. 43 of 1950 by the Industrial Disputes (Amendment) Act No. 62 of 1957. Under section 31B of the Industrial Disputes Act as amended states inter-alia that a workman can make an application to a Labour Tribunal for relief or redress in respect of the termination of his services by his employer. Accordingly, the jurisdiction of a Labour Tribunal can be invoked by filing an application under this section.

Section 31C of the said Act stipulated the duties and powers of the Labour Tribunal in regard to applications under section 31B. Section 31C (1) of the Industrial Disputes Act provided as follows;

> "31C. (1) Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the Tribunal to make all such inquiries into that application as the Tribunal may consider necessary, hear such evidence *as may be tendered by the Applicant and any person affected by the application*, and thereafter make such order as may appear to the Tribunal to be just and equitable. [Emphasis added]
>
> (2) Subject to such regulations as may be made under section 39 (1) (ff) in respect of procedure, a Labour Tribunal conducting an inquiry may lay down the procedure to be observed by it in the conduct of the inquiry."

The duties and powers of a Labour Tribunal in regard to applications under section 31B were amended by Industrial Disputes (Amendment) Act No. 4 of 1962. By the said amendment the duties and powers of a Labour Tribunal were enhanced by amending section 31C (1) as follows;

> "Where an application under section 31B is made to a Labour Tribunal, it shall be the duty of the Tribunal *to make all such inquiries into that application and hear all such evidence as the Tribunal may consider necessary* and thereafter make such order as may appear to the Tribunal to be just and equitable." [Emphasis added]

Thereafter, the said section was amended by the Industrial Disputes (Amendment) Act No. 32 of 1990. By the said amendment section 31C (2) was repealed and a new section was substituted.

Later, the said section was further amended by section 5(1) of the Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act No. 13 of 2003. The amendments made to section 31C (1) by the aforesaid amending Acts have not made any changes to the scope of the inquiry before a Labour Tribunal but only introduced a specified time frame for such an inquiry.

Regulations have been framed inter-alia in respect of the procedure relating to an inquiry before a Labour Tribunal. Regulation 30 states that a Labour Tribunal may call upon the Parties as the tribunal thinks fit to state their case. Further, the said regulations deal with the representation of parties before the Labour Tribunal. This right is given by section 41 of the Judicature Act No. 2 of 1978 as amended. However, the said regulations do not provide a comprehensive procedure that needs to follow by a Labour Tribunal.

Effect of the Amendments

The amendments made to section 31C (1) shows that the legislature has conferred wider powers on the Labour Tribunals with regard to an inquiry before a Tribunal. This was confirmed in the case of *Meril J. Fernando & Co. v. Deiman Singho* (1988) 2 SLR 242, the Court of Appeal commenting on the difference between the duties and powers of a Labour Tribunal under section 31C (1) as contained in the original provisions in amendment Act No. 62 of 1957 which required the Tribunal to "hear such evidence as may be tendered" which was amended by section 6 of amendment Act No. 4 of 1962 to "hear all such evidence as the Tribunal may consider necessary", stated that the latter was indeed a very salutary provision which the Tribunal should not have lost sight of.

In the case of *Indrajith Rodrigo v. Central Engineering Consultancy Bureau* (2009) 1 SLR 248 it was held that a Labour Tribunal, in the process of redressing grievances of workmen in a just and equitable manner, cannot lose sight of procedural propriety and evidentiary legitimacy and that an unduly technical approach should not be adopted towards the equitable remedy provided by

section 31B of the Industrial Disputes Act. In this case Marsoof J. held that it is expressly laid down in section 31C (1) of the Industrial Disputes Act that every Labour Tribunal is bound 'to make all such inquiries into any application filed before it' and 'hear all such evidences as the Tribunal may consider necessary, and thereafter make such orders as may appear to the Tribunal to be just and equitable'.

In this case Marsoof J. further held that the Labour Tribunal is endowed with a wide discretion in regard to the grant of just and equitable relief to any workman invoking its beneficial jurisdiction. As Wijetunga J. observed in *Up Country Distributors (Pvt) Ltd. v. Subasinghe* (1996) 2 SLR 330 at 335, "The legislature has in its wisdom left the matter in the hands of the tribunal, presumably with the confidence that the discretion would be duly exercised. To my mind, some degree of flexibility in that regard is both desirable and necessary if a tribunal is to make a just and equitable order."

The need to make a Just and Equitable Order

In terms of section 31C (1) of the Industrial Disputes Act as amended a Labour Tribunal shall make a just and equitable order. In fact, the sole purpose of an inquiry by a Labour Tribunal is to arrive at a just and equitable order. The nature of a just and equitable order that needs to be made by a Labour Tribunal has been discussed in *Millers Ltd. v. Ceylon Mercantile Industries and General Workers Union* (1993) 1 SLR 179 at 183. In this case G.R.T.D. Bandaranayake J. observed that an award is just and equitable only if it takes into consideration the interest of all the parties.

In the case of *Indrajith Rodrigo v. Central Engineering Consultancy Bureau* (supra) it was held that the equitable nature of the jurisdiction of Labour Tribunals has consistently been recognized in the decisions of our courts. However, in the process of redressing grievances of workmen in a just and equitable manner, one cannot lose sight of procedural propriety and evidentiary legitimacy.

Further, in *Associated Cables Ltd. v. Kalutarage* (1999) 2 SLR 314 it was held that although the Labour Tribunal was required to make a just and equitable order it must not only be just and equitable but the procedure adopted to that end must be legal and every judicial body exercising judicial powers must so arrive at an order only on legal evidence.

Applicability of the Evidence Ordinance

Section 36(4) of the Industrial Disputes Act as amended by Act No. 62 of 1957 provides as follows;

> " In the conduct of proceedings under this Act, any industrial court, Labour Tribunal, arbitrator or authorized officer or the Commissioner shall not be bound by any of the provisions of the Evidence Ordinance. " [Emphasis added]

However, in *Ceylon University Clerical and Technical Association v. University of Ceylon* 72 NLR 84 it was held that although Labour Tribunals are not bound by the Evidence Ordinance it would be well for them to be conversant with the wisdom contained in it and treat it as a safe guide.

Thus, certain limitations have been imposed on the inquisitorial powers conferred on a Labour Tribunal.

Section 9 of the Industrial Disputes (Hearing and Determination of Proceeding) (Special Provisions) Act No. 13 of 2003 provides that;

> "The provisions of the Evidence Ordinance shall not apply to the conduct of proceedings before a Labour Tribunal under this Act." [Emphasis added]

This amendment is similar to section 36(4) of the Industrial Disputes Act. The provisions relating to the non-applicability of the provisions of the Evidence Ordinance shows that the legislature has conferred a wide discretion on a Labour Tribunal in determining the issues before it unrestricted by the rules of evidence. Given the fact that an inquiry before a Labour Tribunal is a mixture of an inquisitorial and adversarial systems it is useful to use the Evidence Ordinance as a guide when conducting an inquiry by a Labour Tribunal. However, a Labour Tribunal may use its discretion where and when necessary in order to arrive at a just and equitable order subject to the principles of natural justice.

The Industrial Disputes Act has introduced a more flexible procedure than the rigid procedure of law applied in the adversarial system. Section 31C (1) of the Industrial Disputes Act, the Regulations published thereunder, the provisions of the Judicature Act No. 2 of 1978 as amended and the decided cases show that section 31C (1) of the Industrial Disputes (Amendment) Act No. 62 of 1957 conferred the inquisitorial powers on the Labour Tribunal which was later widened by Act No. 4 of 1962. However, section 41 of the Judicature Act as amended, the said Regulations and the requirement to make a just and equitable order in terms of section 31C (1) of the Industrial Disputes Act as amended require a Labour Tribunal to follow certain aspects of the adversarial system too. Thus, an inquiry before a Labour Tribunal under section 31C (1) is a mixture of an inquisitorial and adversarial systems. In that context the dicta used in the following cases could be used as guidelines in conducting an inquiry before a Labour Tribunal.

In *Anura Bandaranaike v. Ranasinghe Premadasa* BALR (1983) Vol. 1 Part 1 Page 7 it was held that the court can exercise its discretion only in areas where there is no law relating to civil procedure regulating the order in which witnesses should be called. Where the question is governed only by practice the court may if the circumstances demand it depart from the practice and control the order of calling the witnesses in the exercise of its discretion.

In *Ariyadsa v. Weerasinghe and (Western) Provincial Housing Commissioner* 2005 (2) Appellate Law Recorder 19 it was held that the strict legal approach typical of a Court of Law with respect to the conduct of proceedings is unsuitable for an inquiry conducted by a tribunal or administrative officer and that tribunals should maintain a high measure of flexibility.

It was further held that the issues confronted by tribunals and administrative agencies should not be viewed so much as a *lis inter partes* – a contest between two sides. Consequently, it is sometimes, said that a tribunal, unlike a Court of Law, should adopt an inquisitorial approach and make an inquiry into the case so as to make sure that justice is done by uncovering the truth. I think that it is a well accepted fact that salient and salutary principles adhered to by ordinary Courts of Law should not be jettisoned altogether by tribunals whilst guarding against over judicialisation of procedure in the tribunal system.

In this context a Labour Tribunal shall not disregard the said features of the adversarial system whilst exercising the powers of the inquisitorial system in conducting an inquiry under section 31C (1) of the Industrial Disputes Act as amended. Labour Tribunal should not be bound by strict procedural requirements in the process of making just and equitable awards. However, an inquiry should be held in conformity with the principles of natural justice in order to arrive at a just and equitable order, not only for the employee and the employer but also for the promotion of industrial peace in general. The Tribunal has the power as mentioned above to use its discretion in the absence of specific provisions applicable to an inquiry. However, such discretion should not be unduly fettered.

These wide powers shall be used subject to the supreme duty to see that a fair inquiry should be enjoyed by the parties. A Labour Tribunal shall not use such powers under section 31C (1) to the prejudice of any party or to industrial peace in general. Although a Tribunal has very wide powers in conducting an inquiry such powers shall not be so used as to afford ground for the legitimate criticism that a party has not had the benefit of a fair inquiry before the Tribunal.

In the instant case while the Workman had been giving evidence at the inquiry before the Labour Tribunal the Counsel for the 2nd Respondent had raised two objections namely that the employer of the Workman is not the 2nd Respondent but the sister of the 2nd Respondent; and that the proposition by the Workman that the Kekunagoda Construction and Development Company (Pvt) Ltd is the employer of the Workman is irrelevant to this matter and especially the said Company is not a party to this action.

However, the learned President of the Labour Tribunal had overruled the said objections and had stated that the said objections shall be determined only after conducting a proper inquiry into all evidence.

The said order of the learned President of the Labour Tribunal on the said objections which was affirmed by the learned High Court Judge of Ratnapura is in accordance with section 31C (1) of the Industrial Disputes Act as amended as the said objections are not pure questions of law but a question of law mixed with facts. Thus, the said objections cannot be decided as preliminary objections since they are dependent on facts.

Further, the documents produced by the 2nd Respondent along with his written submission were not led in evidence. The documents that were not led in evidence cannot be considered by a Tribunal or Court unless such documents are admitted by all the parties in a case. An order of a Labour Tribunal or a judgment of a court should be based strictly on the evidence on record and not on other material. Therefore, the documents tendered along with the written submissions cannot be used to decide the objections in the instant case.

There was no evidence before the Tribunal to decide the said objection at the time the learned President was called upon to decide on it. In terms of section 31C (1) of the Industrial Disputes Act (as amended) the President of a Labour Tribunal is required to make all such inquiries into the application before him and hear all such evidence as the Tribunal may consider necessary and thereafter make such order as may appear to the Tribunal to be just and equitable. Thus, the decision of the learned President in overruling the objections is in accordance with section 31C (1) of the Industrial Disputes Act as amended.

Further, an objection which leads to a disposal of an application filed in a Labour Tribunal cannot be decided as a preliminary objection if it involves facts and law. Thus, when the facts are involved a Labour Tribunal is required to hold the inquiry under section 31C (1) in order to decide such objections.

In the circumstances, I hold that the decision to overrule the preliminary objection by the learned President which was affirmed by the High Court is in accordance with the law. Thus, I dismiss the appeal and send it back to the Labour Tribunal to continue with the inquiry and dispose the same at its earliest. Further, the Labour Tribunal is directed to consider the said objections raised by the Respondents after making all such inquiries as required by section 31C (1) of the Industrial Disputes Act.

The other questions of law set out above were not considered as the main issue was dealt in this judgment.

I order no costs.

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 Appeal with leave to appeal having been granted by the Supreme Court under Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 146/2013

S.C.HC. (CALA) No. 98/2013
CP/HCCA/CA No. 139/10
D.C. Kandy Case No. 2644/RE

1. Dr. Rasiah Jeyarajah,
2. Rassiah Yogarajah,
   Both of No. 43/A, Yatinuwara Street, Kandy . appearing by their duly appointed Power of Attornney holder Sanmugam Sabhapathi Ganeshan.

Plaintiffs

Vs.

Yogambihai Thambirajah nee-Renganathan Pillei,
No. 43, Yatinuwara Street,
Kandy .

Defendant

And

Yogambihai Thambirajah nee-Renganathan Pillei,
No. 43, Yatinuwara Street,
Kandy .

Defendant-Appellant

Vs.

1. Dr. Rasiah Jeyarajah,
2. Rassiah Yogarajah,
   Both of No. 43/A, Yatinuwara Street, Kandy . appearing by their duly appointed Power of Attornney holder Sanmugam Sabhapathi Ganeshan.

Plaintiffs-Respondents

And Now

1. Dr. Rasiah Jeyarajah,
2. Rassiah Yogarajah,
   Both of No. 43/A, Yatinuwara Street,
   Kandy . appearing by their duly appointed Power of Attornney holder Sanmugam Sabhapathi Ganeshan.

Plaintiffs-Respondents-Appellants

Vs.

Yogambihai Thambirajah nee-Renganathan Pillei,
No. 43, Yatinuwara Street,
Kandy .

Defendant-Appellant-Respondent

* * * *

BEFORE : **S. Eva Wanasundera, PC. J**

Buwaneka Aluwihare, PC.J. &

Upaly Abeyrathne,J.

COUNSEL : Ikram Mohamed, PC. with S. Mitrakrishnan for the Plaintiff-Respondent-Appellants .

Sanath Weerasinghe for the Defendant-Appellant-Respondents.

ARGUED ON : **24.06.2015**

DECIDED ON : **12.08.2015**

* * * * * *

S. Eva Wanasundera, PC. J.

This is an appeal arising from a judgment of the Civil Appellate High Court dated 12.02.2013. Leave was granted on 21.10.2013 on the questions set out in paragraphs 28(a), (b), (c), (d) and (e) of the Petition dated 18.03.2013. I find that paragraph 28(e) does not pose a question of law to be decided. Therefore, the questions of law to be decided by this Court are as follows:-

28(a) Is the said judgment contrary to law and against the evidence available in the record?

(b) Did the High Court of Civil Appeal err in holding that this action should be viewed as rei vindicatio action and not as one based on privity of contract?

(c) In any event did the High Court of Civil Appeal misdirect itself in fact and in law when deciding that in every case where a declaration of title is sought it automatically becomes a rei vindicatio action disregarding the basic principles of law set out in Pathirana vs. Jayasundara and Majubudeen and others vs. Simon Perera?

(d) Did the High Court of Civil Appeal in any event err by holding that the entire action should be dismissed when at least the relief of ejectment could have been granted by reducing the scope of relief that could be granted to the Petitioner, particularity in view of the fact that the lease agreement was accepted by the High Court as having been proved and the fact that the High Court of Civil Appeal rejected the defense position of the Respondent being a statutory tenant?

The property in question is business premises in the town of Kandy contained in the Schedule to the plaint. The Defendant is the person who took the premises on lease from the Plaintiffs who are brothers. The Defendant's husband was the first lessee. After his death the Defendant herself entered into a lease agreement with the Plaintiffs. The lease ended but the Defendant did not vacate the place.

The Plaintiffs filed action on 21.5.2003 praying for a declaration that the property in the Schedule to the plaint be declared to be a property owned by the Plaintiffs, for ejectment of the Defendant from the premises, and damages. The 1st Plaintiff gave evidence and produced P1 to P4, ie. lease agreements P1, P3 and P4 and a letter P2 promising that the Defendant will vacate the premises on or before 30.04.2003 which she failed to do. In 2009, the Defendant gave evidence and accepted that she has not paid the lease rent according to the lease agreement she had signed from the month of April, 2003. She said that her husband came into the shop in the year 1959 as an employee of the Plaintiffs and later on became a lessee on 20.07.1996 by lease agreement No. 1119, marked as P3. Thereafter her husband and one Gunaseelan

who was a partner in the business signed a lease at the end of the lease period in P3. The said lease No. 1320 was signed on 20.08.1998. It was marked as P4. Those agreements had ended on 20.08.2000. Thereafter Gunaseelan had left the premises. Then only the Defendant's husband carried on the business till he died. He died on 22.11.2001. On 01.6.2002 another lease agreement, No.1865 marked as P1 was signed by the Defendant for 10 months which was effective from 01.6.2002. When that lease period also ended, the Defendant did not leave the premises. Letter P2 was signed by the Defendant promising to leave the premises on or before 30.4.2003. The damages per each day after that was agreed upon as Rs. 4000/- per day. This amount was contested by the Defendant and it was noted by the District Judge that in all the lease agreements there was a clause that Rs.2000, Rs. 2500 etc. was agreed as damages for a day to be paid for over staying and in the last agreement, it was an increased amount as Rs.4000/- per day. It is to be noted that a clause for damages was contained in every agreement that was signed by the Defendant and her husband. The Defendant admitted that she was staying in the premises without paying any lease rental from 2003.

The District Judge at the end of the trial granted relief as prayed for in the plaint including the declaration that the Plaintiffs are the owners of the property in suit. The Civil Appellate High Court Judges reversed the decision of the District Court on the basis that there was not a single issue raised regarding title of the Plaintiffs and title was not proved and therefore the Plaintiffs were not entitled to the reliefs prayed for and granted by the District Judge.

The High Court held that it was a rei vindicatio action. The Plaintiff-Appellants argued that the District Court case is not a re-vindicatio action but an action based on privity of contract; the Defendant was an over holding lessee; the Defendant is stopped from denying the Plaintiff's title to the premises. The Defendant-Respondent argued that she is a statutory tenant. Incidentally the business is that of selling mainly coconut oil, cattle feed made with coconut dust etc.

I observe that the action filed by the Plaintiffs in the District Court **is not by itself only 'a rei vindicatio' action. The action was mainly intended to eject the Defendant who was an over-holding lessee.** The main theme of the action and the main theme

in the evidence placed before Court by the lawyer of the Plaintiff-Appellant seems to be "ejectment of the over-holding lessee" and nothing else. It is true that the Plaintiff-Appellant's lawyer had failed to raise any issues with regard to title of the Plaintiffs. I further observe that in the plaint dated 21.5.2003 in paragraph 2 the Plaintiff has pleaded the title deeds of the two Plaintiffs and annexed the said title deeds with markings on the same and pleaded them as part and parcel of the plaint. It reads thus:-

> "**මෙහි පහත උපලේඛණයේ විස්තර කර ඇති දේපල මහනුවර ප්‍රසිද්ධ නොතාරිස් පී බාලසිංහම් මහතා විසින් 1979-04-25 වෙනි දින සහතික කල අංක 4084 සහ 4085 දරණ සින්නක්කර ඔප්පු අනුව පැමිණිලිකරුවන්ට අයිතිව හුක්ති විඳින බවය. එම ඔප්පුවල සහතික පිටපත් පැ1 සහ පැ2 වශයෙන් ලකුණු කර මේ සමග මෙම පැමිණිල්ලේම කොටසක් සහ කැබැල්ලක් ලෙස ආයාචනා කර සිටිම්**."

The Plaintiff's lawyer, by mistake, I believe, has failed to frame an issue and lead the deeds in evidence at the trial. The deeds are dated 25th April, 1979 and are deeds of transfer. It is to be noted that the Defendant never took up a position that the Plaintiffs were not the owners, in their answer but has denied all the twelve paragraphs of the Plaint in one paragraph of her answer and narrated her stand in this matter in the rest of the answer. Anyway I am of the opinion that proof of title to the land has not been done formally in the District Court proceedings.

Leaving that aside, I observe that the Civil Appellate High Court had set aside the judgment of the District court on the basis that the action was a rei-vindicatio action **merely because a declaration of title was sought in limb 1 of the prayer to the plaint.**

The High Court Judges said that no issue was raised to that effect and title to the land was not proved and therefore the Plaintiff's action should be dismissed. I find that the **High Court Judges also have failed to see or consider the other reliefs that were prayed for in the plaint filed in the District Court when dismissing the whole action, by their judgment.**

The main grievance of the Plaintiffs was that the Defendant's husband came into the business premises on a lease, which was extended and when he died it was leased out to the Defendant for 10 months and gave an extension for one more month; the

Defendant gave a written undertaking that she would leave on a particular date; she did not leave; she is an over holding lessee and therefore a judgment to eject the Defendant was what was mainly sought by the Plaint**.**

Reading the evidence led at the trial it is obvious that the case heard by the District Judge was one of privity of contract. The Plaintiffs had a lease agreement which is a contractual relationship. I am of the view that the observations and conclusion of the District Judge with regard to the evidence given by the 1st Plaintiff and the Defendant should not be disturbed. The District Judge has believed the Plaintiff's evidence. The District Judge decided that the Defendant had no right to stay on, any longer, in the premises and that she should be evicted.

In **Pathirana Vs. Jasyasundera *58 NLR 169*** Gratien J. has explained this situation very well, thus; **"A decree for a declaration of title may, of course be obtained by way of an additional relief either in a rei-vindicatio action proper (which is in truth an action in rem) or in a lessor's action against his over holding tenant(which is an action in personam). But in the former case, the declaration is based on proof of ownership; in the latter, on proof of the contractual relationship which forbids a denial that the lessor is the true owner ".**

I am of the view that in the instant case the Civil Appellate High Court was wrong in totally dismissing the action without considering the evidence regarding the over stay by the over holding lessee. Even if the title to the premises was not proved by the Plaintiff, the High Court should have given the other reliefs prayed for by the Plaintiffs, for ejectment of the Defendant on the over whelming evidence before Court with regard to the lessee having stayed much longer than agreed and not paying any lease rent to the Plaintiffs.

In a rei- vindicatio action, a Plaintiff comes to Court to get a declaration for title and that would be proof of his title to the land against the whole world. In the instant case **the relief praying for a declaration of title is incidental to the relief prayed on the contractual relationship which was the main relief begged of Court**. Apparently there was no contest on the ownership.

In the case ***of Majubdeen and Others vs. Simon Perera*** *2003, 2 SLR 341,* it was again held that an action on privity of contract disentitles the Defendant from denying the Plaintiff's title. In fact no evidence was led formally to prove title; the Plaintiff based his case on the footing that he had inherited the premises from his father. Edissuriya,J. clearly said that even though the pleaded title was not proved, **on the basis of privity of contract, the question of title did not arise and the Defendants were disentitled from denying the Plaintiff's title.** I am of the view that the moment that a lease agreement is admitted, the need to prove title to the premises in question does not arise. The lessor is entitled to get the over holding lessee ejected from the premises.

Accordingly, I answer the questions of law raised at the commencement of the hearing of this case before this Court , in favour of the Appellants. I hold that judgment of the Civil Appellate High Court was contrary to law and against the evidence available on record. **The present action is not a rei-vindicatio action but it is an action based on privity of contract.** Every action where a declaration of title is sought does not automatically become a rei-vindicatio action. **The decision in *Majubdeen and Others vs. Simon Perera 2003, 2 SLR 341* and *Pathirana Vs. Jasyasundera 58 NLR 169* have set down the law to be applied in this kind of situation.**

I set aside the judgment of the High Court of Civil Appeal of the Central Province holden in Kandy dated 12.2.2013. I affirm the judgment of the District Court of Kandy dated 04.6.2010. The Appeal is allowed. However, I order no costs.

Judge of the Supreme Court

Buwaneka Aluwihare, PC.J.

I agree.

Judge of the Supreme Court

Upaly Abeyrathne,J.

I agree.

Judge of the Supreme Court

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

S.C. Appeal No. 155/2011

SC/HCCA/LA No. 224/2011

NWP/HCCA/KUR/08/2005(F)

D.C. Kuliyapitiya Case No. 3901/L

Ranasinghe Arachchilage Samadara Malini Ranasinghe

(**Deceased)**

PLAINTIFF

1A. Senarath Arachchilage William Singho

1B. Senarath Arachchilage Thushara Senarath

1C. Senarath Arachchilage Samindra Senarath

1D. Senarath Arachchilage Lasantha Senarath

All of Weralugama Kuliyapitiya (Post)

SUBSTITUTED-PLAINTIFFS

Vs.

Adhikari Appuhamilage Appuhamy

(**Deceased)**

DEFENDANT

1A. Wijesinghe Arachchilage Rosalin Nona
(C/o. Balagolla Kade, Kobeygane (Post)

1B. Kalubowila Appuhamilage Rosalin Nona

1C. Adhikari Appuhamilage Ariyawansha

1D. Adhikari Appuhamilage Gunawansha

1E. Adhikari Appuhamilage Gunasinghe

1F. Adhikari Appuhamilage Wijesinhge

1G. Adhikari Appuhamilage Weerawansha

1H. Adhikari Appuhamilage Ariyakusum

1I. Adhikari Appuhamilage Chandra Kusum

1J. Adhikari Appuhamilage Dimuna Sanjeewanie

All of No. 13, Jayasirigama, Pannala (Post)

1K. Jayalath Balagallage Solomon Dias

1L. Jayamanna

Both of Thalammehera, Pannala (Post)

SUBSTITUTED-DEFENDANTS

AND BETWEEN

1k. Jayalath Balagallage Solomon Dias

Thalammehera, Pannala (Post)

1K SUBSTITUTED-DEFENDANT-APPELLANT

Vs.

Ranasinghe Arachchilage Samadara Malini Ranasinghe

(**Deceased)**

1A. Senarath Arachchilage William Singho

1B. Senarath Arachchilage Thushara Senarath

1C. Senarath Arachchilage Samindra Senarath

1D. Senarath Arachchilage Lasantha Senarath

All of Weralugama Kuliyapitiya (Post)

SUBSTITUTED-PLAINTIFFS-RESPONDENTS

Adhikari Appuhamilage Appuhamy

(**Deceased)**

1A. Wijesinghe Arachchilage Rosalin Nona

Balagolla Kade, Kobeygane (Post)

1B. Kalubowila Appuhamilage Rosalin Nona

1C. Adhikari Appuhamilage Ariyawansha

1D. Adhikari Appuhamilage Gunawansha

1E. Adhikari Appuhamilage Gunasinghe

1F. Adhikari Appuhamilage Wijesinhge

1G. Adhikari Appuhamilage Weerawansha

1H. Adhikari Appuhamilage Ariyakusum

1I. Adhikari Appuhamilage Chandra Kusum

1J. Adhikari Appuhamilage Dimuna Sanjeewanie

All of No. 13, Jayasirigama, Pannala (Post)

1L. Jayamanna

of Thalammehera, Pannala (Post)

SUBSTITUTED-DEFENDANT-RESPONDENTS

AND NOW BETWEEN

1k. Jayalath Balagallage Solomon Dias

Thalammehera, Pannala (Post)

1K SUBSTITUTED-DEFENDANT-APPELLANT-APPELLANT

Vs.

Ranasinghe Arachchilage Samadara Malini Ranasinghe

(**Deceased)**

1A. Senarath Arachchilage William Singho

1B. Senarath Arachchilage Thushara Senarath

1C. Senarath Arachchilage Samindra Senarath

1D. Senarath Arachchilage Lasantha Senarath

All of Weralugama Kuliyapitiya (Post)

SUBSTITUTED-PLAINTIFF-RESPONDENT-RESPONDENTS

Adhikari Appuhamilage Appuhamy

(**Deceased)**

1A. Wijesinghe Arachchilage Rosalin Nona

Balagolla Kade, Kobeygane (Post)

1B. Kalubowila Appuhamilage Rosalin Nona

1C. Adhikari Appuhamilage Ariyawansha

1D. Adhikari Appuhamilage Gunawansha

1E. Adhikari Appuhamilage Gunasinghe

1F. Adhikari Appuhamilage Wijesinhge

1G. Adhikari Appuhamilage Weerawansha

1H. Adhikari Appuhamilage Ariyakusum

1I. Adhikari Appuhamilage Chandra Kusum

1J. Adhikari Appuhamilage Dimuna Sanjeewanie

All of No. 13, Jayasirigama, Pannala (Post)

1L. Jayamanna

of Thalammehera, Pannala (Post)

SUBSTITUTED-DEFENDANT-RESPONDENT-RESPONDENTS

BEFORE: Chandra Ekanayake J.,
Rohini Marasinghe J. &
Anil Gooneratne J.

COUNSEL: W. Dayaratne P.C. with Ms. D.N. Dayaratne
for the 1K Substituted-Defendant-Appellant-Appellant
Dr. Jayatissa de Costa P.C., with Daya Guruge
For the Substituted-Plaintiff-Respondent-Respondent

ARGUED ON: 11.02.2015

DECIDED ON: 02.04.2015

GOONERATNE J.

This is an appeal from the judgment of the High Court (Civil Appeals) of the North Western Province, delivered on or about 19.5.2011. Leave to Appeal was granted by this court on 07.10.2011, on questions of law referred to in

paragraphs 17(a), (b), (c) and (i) of the petition of 1K Substituted-Defendant-Appellant-Petitioner. (reference to above paragraphs will be done subsequently) It would be necessary to briefly refer to the facts of the case and to the order made by the Court of Appeal on 02.10.1992, for a trial De Nova, prior to considering the judgment of the said High Court, and the Appellant's case.

The original Plaintiff was one Malani Ranasinghe who filed action in the District Court of Kuliyapitiya in case No. 3901/L for a declaration of title to the land described as lot 2 of "Meegahamulawatta' alias Kongahamulawatta in an extent of about 2 Roods, 37.5/.24 perches and for damages and ejectment of the Defendant-Respondent. Original-Plaintiff's position was that the land in dispute was partitioned on or about 1954 (Plaintiff's grand-father by virtue of the partition decree became entitled to said lot 2) and that the Defendant was in possession of the land with the permission of the said Plaintiff's grand-father. However Defendant made a claim to the land in dispute based solely on prescriptive title. It was the view of the Court of Appeal (vide order of 02.10.1992) that there were certain shortcoming in placing evidence before the District Court and both parties have not proved each other's case and as such the Plaintiff should have taken a commission to identify the land in dispute properly, since the

land in question had been described by more than one name. Court of Appeal set aside the judgment and decree entered by the learned District Judge, dismissing the action, and ordered a trial De Nova. In doing so the Court of Appeal observed that it is open for parties to lead any further oral or documtentary evidence.

In compliance with the Court of Appeal order fresh trial was held in the District Court on issues already settled earlier before the District Court. However the learned District Judge dismissed the claim based on prescriptive title of the Defendant-Appellant and entered judgment in favour of the Plaintiff. In the appeal to the High Court by the Defendant-Appellant the learned High Court Judge dismissed the appeal.

It must be noted that the 1st abortive trial commenced on 24.11.1977. During the course of the second trial before the District Court both original Plaintiff and Defendant died and 1A to 1D substituted Plaintiffs and 1A to 1L Substituted Defendants were substituted. In the second trial before the District Court which is in fact relevant to this appeal, Plaintiff's party led the evidence of Surveyor, substituted 1A Plaintiff, and led evidence of the depositions and read in evidence the depositions as per Section 33 of the Evidence Ordinance of original Plaintiff's wife Leanora. Deposition produced and marked as P12 which was her

evidence in the first trial. In the same way the deposition of one Dhanapala was produced and marked as P14 & P14a, without any objection.

The learned President's Counsel for the Appellant contended before this court that Plaintiff failed to establish title to the land in dispute or to the title pleaded in the plaint and that the Defendant-Appellant has placed sufficient evidence of undisturbed and uninterrupted adverse possession of the corpus for a period of over 40 years. On that basis learned President's Counsel for Appellant argued that his client has prescribed to the land in dispute. He further argued that based on the evidence of the Plaintiff's party alone, the Appellant was successful in establishing undisturbed, uninterrupted and independent possession to the land in question. At a certain point of time in his submissions, learned President's Counsel also thought it fit to submit to this court that the inventory filed in the testamentary case which was filed after the demise of the original owner Plaintiff's father does not include the land in dispute, although Plaintiff's mother Leanora Ranasinghe was the executor and beneficiary to the last will.

I would at this point of the judgment advert to some of the salient points emphasized by the learned President's Counsel on behalf of the Appellant.

(a) Civil Appellate High Court failed to consider whether the District Court properly investigated title of the original plaintiffs.

(b) Civil Appellate High Court failed to consider the directions given by the Court of Appeal to commence the trial De Novo which is also a direction to adopt the previous evidence of the abortive first trial in the District Court

(c) In a rei vindication suit it is not necessary to consider whether Defendant has title and possession where Plaintiff fails to prove title to the corpus. If it is so action should be dismissed by the learned District Judge.

On the other hand learned Counsel for the Substituted Plaintiff-Respondent in his brief submissions supported both the judgment of the learned District Judge which was delivered on 18.01.2005 and the judgment of the Civil Appellate High Court. Learned Counsel for the Respondent emphasized that Plaintiff had good paper title based on a partition decree of 1954 which by a process and inheritance devolved on the Plaintiff. He also submitted that the burden of proof in a case of this nature would shift to the Defendant party to prove title, as per Section 3 of the Prescription Ordinance.

It is also Trite Law that Plaintiff should set out his title on the basis on which he claims a declaration of title to the land in dispute and the burden rest

on the Plaintiff to prove that title as against the opposing Defendant party. Vide Wanigaratne Vs. Juwanis Appuhamy 65 NLR 167. The other important principle would be as set out in *Karunadasa Vs. Abdul Hameed 60 NLR 352 per Sansoni J.* "In a rei vindication action it is highly dangerous to adjudicate on an issue of prescription without first going into and examining the documentary title of the parties.

The aspect of evidence which is of much significance is the depositions produced and read in evidence marked P12, P14 & P14a. Evidence given under Section 33 of the Evidence Ordinance is substantive evidence used to prove the truth of facts and not merely used to contradict. S.S. Fernando Vs., the Queen 55 NLR 392; King Vs. Sudu Banda 47 NLR 183; 47 NLR 203. No doubt the trial Judge approached the case with a clear understanding of all above and the factual and legal position of the Defendant-Appellant's case, and that of the Plaintiff-Respondent.

This was an action that spread over a fairly long period of time. The learned counsel on either side argued this appeal of Substituted parties. In fact over the years parties had to go through and taken along the path which resulted in four judgments being pronounced by our courts, prior to this appeal being heard, by

the Appex Court. Notwithstanding the position taken up by the Appellant the starting point for the parties concerned emerge from the judgment pronounced by the Court of Appeal which gave a ruling as regards the future course of action which set aside the 1st judgment of the District Judge. In civil disputes parties could come to certain understandings and agree on certain matters. As such in the 2nd trial an admission was recorded and both parties agreed as regards the corpus, and identity of the land in dispute. (lot (1) in plan 764) Parties also agreed to proceed to trial on issues raised in the 1st abortive trial.

I find that the learned trial Judge has adequately investigated title of the predecessors of the Substituted-Plaintiff-Respondent and that of the Plaintiff-Respondent, Samadara Malini Ranasinghe. Documents relevant to the case had been produced marked P1 – P16. Although the Apex Court or any other court sitting in appeal is not required to re-write the judgment and evidence led at the trial, it would be prudent to refer to certain items of evidence which fortify Substituted-Plaintiff-Respondent's case. The Surveyor's evidence remains uncontradicted. Documents P1- P4 being documents relevant to the testamentary case pertaining to the original owner of the property in dispute, conditional transfer deed, the transfer deed in favour of original Plaintiff S. Malini Ranasinghe and the important documents inclusive of documents pertaining to

partition decree were all produced and marked without any objection. So are the other documents produced on behalf of the Plaintiff-Respondent. At the close of the Plaintiff's case all Plaintiff's documents were read in evidence without any objection. The learned trial Judge has given his mind to each and every document produced by the Plaintiff's party. There are also findings of the trial judge as regards the Substituted-Appellant's predecessor's possession to the land in dispute. It was the view of the learned trial Judge that the original Defendant being a relative of the Plaintiff entered the land in dispute and possessed it with the permission of the original Plaintiff's, father.

Evidence of Leanora Ranasinghe (P12) also suggest that her husband used to collect and enjoy the produce (coconuts) and after his death she had collected the coconuts from the land in dispute.

Partition decree may not bind the state, but such a decree would be good and conclusive against all persons whomsoever. Therefore the Substituted-Plaintiff's party had good title, to begin with this suit.

It is of much importance to consider the last will P1 and deed marked and produced P2. Trial Judge has given serious consideration to deed P2 which was a conditional transfer in favour of one Karunaratne, and deed P2 refer to

deed No. 2356 and its schedule and also includes the land in dispute described by its name and details of lot 2 in plan No. 237 emanating from the partition decree covering the extent of 2 Roods and 37.5/24 perches. P2 also state that Leanora Ranasinghe became entitled to the land in dispute by virtue of testamentary case Anuradhapura No. 655/T. Thereafter both Leanora Ranasinghe and the above named Karunaratne transferred the property in dispute to the original Plaintiff by deed P3. Trial Judge emphasis that both P2 and P3 deeds, refer to the land which devolved from partition case 9259/P and described in plan 237 as lot 2 and that it is the same land described in deed P4 (land subject to the final partition decree). Therefore the land described in plan P5 is one and the same land referred to in P1 – P4. It is also shown in Plan P9.

I wish to observe that this court need not be concerned of the abortive first trial and judgment which was set aside by the Court of Appeal. It is the second trial that matters since parties agreed to proceed to trial based on certain understandings and admissions reached between them. As such I would reject the submission that, Plaintiff's action was dismissed by the learned District Judge in the abortive trial, on the basis that title was not established by original Plaintiff. In fact it would be misleading and unnecessarily confusing to select and apply items of evidence from the abortive trial, merely to match and suit the

Appellant's case. The learned trial Judge has analysed title of Plaintiff's party in an acceptable and convincing manner according to law. I also emphasis that the original Plaintiff's mother Leanora Ranasinghe was the beneficiary and heir to all the properties of her deceased husband Kiribanda Ranasinghe. In the last will the husband had also nominated her as the executor. The last will was duly proved in the testamentary proceedings. If any argument was advanced that the subject property was not included in the inventory cannot have any impact to defeat the title of any property lawfully devolved on the original owner Kiribanda Ranasinghe who bequeath all his properties to his wife Leanora. As such one cannot be permitted to pick on another clause in the last will where the testator required his funeral rights to be performed along with his five children. Such a request and desire is separate and distinct to the testators wish to convey all his properties to his wife, to the exclusion of all others.

The only issue relied upon by the Defendant is issue No. (6) based on prescriptive rights. Learned District Judge very correctly observes that the evidence of 1K Defendant-Appellant only suggest mere possession, and the two witnesses who gave evidence on behalf of the Defendant was highly unsatisfactory and unsupportive of possession as no specific knowledge or instances of possession had not been demonstrated by them. The items of

evidence established by the Plaintiff's party that the original Defendant entered the land with the permission of Kiribanda Ranasinghe had not been disproved by the Defendants-Appellant's party. There is nothing to show that the nature of possession as above changed or turned to be adverse and independent to that of the original owner. If it was the case that Defendant was in possession for long years (possession of Defendant party not denied by Plaintiff's party) something equivalent but nothing short of 'ouster' could bring the desired result for the Appellant to prescribe to the land in dispute. Let us see what type of acts could be considered as 'ouster'.

In the case of *Rajapakse Vs. Hendrick Singho 61 NLR 32.*

There was overwhelming evidence that the defendants, since the year 1922 were not only in occupation of the land but also took its produce to the exclusion of the plaintiffs and their predecessors in title and gave them no share of the produce, paid them no share of the profits, nor any rent, and did not act from which an acknowledgement of a right existing in them would fairly and naturally be inferred, It was held in this case that the evidence disclosed an ouster of the plaintiffs by the defendants and that the ouster continued for a period of over ten years.

In this case the acts like the occupation of the land by the defendants since 1922, taking the produce to the exclusion of the plaintiffs, non-payment of the share of profits to the plaintiffs and the act of not giving any share of the produce to the plaintiffs were considered as "ouster".

Mere possession for a period of time cannot give rise to a plea of 'ouster'. As recognized in the above case, to prevent possession and enjoyment of the produce derived from the land in question to the exclusion of the owner would be an essential fact. Evidence of the Defendant party suggest only mere possession.

I would fortify my views with reference to the following decided cases.

Navaratne Vs. Jayatunge 44 NLR at pg. 517…..

Where a person enters into occupation of property belonging to another with the latter's permission he cannot acquire title to such property by prescription unless he gets rid of his character of licensee by doing some overt act showing an intention to possess adversely.

Naguda Marikar v. Mohammedu (7 N.L.R. 96) followed.

Sirajudeen and Two Othrs Vs. Abbas 1994(2)S.L.R at pg. 365…

Where the evidence of possession lacked consistency, the fact of occupation alone or the payment of Municipal rates by itself is insufficient to establish prescriptive possession.

Where a party invokes the provisions of section 3 of the Prescription Ordinance in order to defeat the ownership of an adverse claimant to immovable property, the burden of proof rests

squarely and fairly on him to establish a starting point for his or her acquisition of prescriptive rights.

A facile story of walking into abandoned premises after the Japanese air raid constitutes material far too slender to found a claim based on prescriptive title.

As regards the mode of proof of prescriptive possession, mere general statements of witnesses that the plaintiff possessed the land in dispute for a number of years exceeding the prescriptive period are not evidence of the uninterrupted and adverse possession necessary to support a title by prescription. It is necessary that the witnesses should speak to specific facts and the question of possession has to be decided thereupon by Court.

One of the essential elements of the plea of prescriptive title as provided for in section 3 of the Prescription Ordinance is proof of possession by a title adverse to or independent of that of the claimant or plaintiff. The occupation of the premises must be of such character as is incompatible with the title of the owner.

The judgment of the Civil Appellate High Court delivered on 19.5.2011, ultimately decided to dismiss the appeal. When a Court of law sit in an Appellate capacity according to law, there cannot be a necessity to refer to all items of evidence and re-write the evidence. The Civil Appellate High Court has no doubt examined two important aspects of this case. i.e Plaintiff-Respondent's title to the property in dispute and the claim of the 1K Defendant-Appellant based on

prescriptive rights. On the question of title the High Court takes the view that with or without a last will, under the common law, on inheritance title devolves on a half share basis to the original owner's wife Leanora and the Plaintiff. This part of the analysis by the High Court Judge would be to demonstrate, in any event the entitlement of Plaintiff, under laws of succession and inheritance. However the Civil Appellate High Court has considered the last will P1 of the original owner "Kiribanda", who bequeath all his properties both movable and immovable to his wife Leanora. The last will P1, was duly proved in the testamentary proceedings, held in the District Court of Kurunegala. Even if a doubt as regards the subject property being not included in the inventory filed in the testamentary case, it cannot defeat the original owner's right and title to the properties, he owned during his life time. On an examination of the last will P1, it is clear beyond doubt that the original owner's wish and intention was to bequeath all his properties to his wife, Leanora.

Therefore all deeds executed by Leanora the mother of the original Plaintiff would be valid for all future 'transfers' and 'gifts' of property. As such this court is not in a position to disturb the findings of the Civil Appellate High Court. Further on the question of prescriptive rights, the views of the Civil Appellate High Court need not be disturbed, as it is clear that the provisions contained in Section

3 of the Prescription Ordinance had not been adequately proved before the Original Court, by the Appellants. I have already dealt with the question of 'ouster', from which Appellants are unable to get any benefit based on same. As such I have no alternative but to dismiss this appeal. The questions of law are answered as follows:

17. (a) Have their Lordships of the Civil Appellate High Court completely failed to consider whether the learned Additional District Judge has properly and adequately investigated the title of the original Plaintiff?

This question is answered in the negative. Based on the investigation of title by the learned District Judge, the Civil Appellate High Court dismissed the appeal.

17. (b) Civil Appellate High Court failed to consider that in the order of the Court of Appeal to hear the case de novo it was clearly stated that at the trial de novo it will be open to the parties to lead any further oral or documentary evidence by calling witnesses which will help in the decision of the case which is a direction to adopt the previous evidence as part and parcel of the proceedings of the trial de novo which was not complied with the learned District Judge, and adopted part of the evidence produced under Section 33 of the Evidence Ordinance?

The Court of Appeal set aside the judgment of the trial court and directed that trial de novo be held. Court of Appeal never gave any direction to adopt the evidence in the abortive 1st trial. Only observation by the Court of Appeal was to enable parties to lead both oral and documentary evidence. Learned District Judge cannot be faulted in any manner for compliance of an order of the Court of Appeal. I observe that the Appellant merely seeks to confuse the issues, but the learned District Judge had correctly adhered to the directions given by Court of Appeal.

17. (c) Have Their Lordships of the Civil Appellate High Court completely failed to consider the well-established legal principle that rei vindicatio action, it is not necessary to consider whether the defendant has any title or right to possession where the Plaintiff has failed to establish title to the corpus and the action ought to be dismissed?

Civil Appellate High Court based on the learned District Judge's judgment examined title of Plaintiff-Respondent. learned High Court Judge has also considered prescriptive rights in relation to the provisions contained in

Section 3 of the Prescription Ordinance. As such the question posed does not arise.

17. (i) Have their Lordships of the Civil Appellate High Court misdirected themselves in considering the lack of evidence as to the nature of possession of the original Defendant and the capacity in which he entered upon the corpus when their Lordships should have in fact considered those issues in relation to the original Defendant and not in relation to the Petitioner who has been merely substituted in his place?

The Civil Appellate High Court as well as the learned trial Judge very correctly considered the judgment of the Court of Appeal. Judgment delivered by the 1st trial Judge has been set aside by the Court of Appeal. There was no application by the Substituted-Defendant-Appellant to read in evidence as per Section 33 of the Evidence Ordinance the evidence of the original Defendant in the previous proceedings between parties. In these circumstances, there is no obligation vested in the original court to consider the evidence as suggested by the Appellant, in the abortive trial, as regards the Appellants.

Accordingly this appeal is dismissed, and the Judgment of the Civil Appellate High Court is affirmed. There shall be no costs in all the circumstances of this case.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake 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

R.L.P. Nihal,
No. 303C, Bai Watte,
Nivandana North,
Ja-Ela.

Applicant

SC (Appeal) No.182/2012

SC (HC) LA 70/12

SC (Revision) Application

No. HCRA/86/2010

LT Application No. 2/1619/2008

Vs.

1. Board of Directors,
   Salacine Television,
   Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

2. Niranga Hettiarachchi,
   Chairman/Executive Officer,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

3. Lester S. Rupasinghe,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

4. Lakshitha Jayawardhana,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondents.

AND THEN BETWEEN

In the matter of an application In terms of section 3 of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 read with Article 154 P of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Niranga Hettiarachchi,
   Chairman/Chief Executive Officer,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo07

2. Lester S. Rupasinghe,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

3. Lakshitha Jayawardhana,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondent-Petitioners

Vs.

1. R.L.P. Nihal,
   No. 303C, Bai Watte,
   Nivandana North,
   Ja-Ela.

Applicant-Respondent

2. Board of Directors,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondent-Respondent

AND NOW BETWEEN

In the matter of an application under and in terms of section 31DD of the Industrial Disputes Act (as amended) read with section 9 of the High Court of the Provinces Special Provisions Act No. 19 of 1990 for Special Leave to Appeal.

1. Niranga Hettiarachchi,
   Chairman/ Chief Executive Officer,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

2. Lester S. Rupasinghe,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

3. Lakshitha Jayawardhana,
   Director,
   Salacine Television Institute,
   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

Respondent-Petitioners-Petitioners.

Vs.

1. R.L.P. Nihal,
   No. 303C, Bai Watte,
   Nivandana North,
   Ja-Ela.

   Applicant-Respondent-Respondent.

2. Board of Directors,

   Salacine Television Institute,

   SLBC Training Institute,
   Torrington Square,
   Colombo-07.

   Respondent-Respondent-Respondents.

BEFORE: Chandra Ekanayake J
Rohini Marasinghe J
Buwaneka Aluwihare P.C.J

COUNSEL: Uditha Egalahewa P.C with Amaranath Fernando for the Respondent-Petitioner –Petitioner -Appellant

D.M.G Dissanayake with Upali Lokumarakkala for the Applicant-Respondent-Respondent

J.B.S Perera with Pathum Wickramarathne for the Respondent - Respondent

ARGUED ON: 03/02/2014

WRITTEN SUBMISSIONS: 20th February2014

DECIDED ON: 30th July 2015

Aluwihare J

The Applicant Respondent (hereinafter referred to as the Respondent) filed an Application against the Respondent Petitioners Appellants (hereinafter referred to as Appellants) before the Labour Tribunal on the basis that the services of the Respondent were terminated wrongfully.
When the matter was taken up for inquiry before the learned President of the Labour Tribunal two preliminary objections were raised on behalf of the Appellants as to the maintainability of the impugned action before the Tribunal.
The learned President of the Labour Tribunal overruled the preliminary objections raised and being aggrieved by the said order, the Appellants moved by way of revision before the High Court. The learned High Court judge having considered

the preliminary objections that were raised on behalf of the Appellants affirmed the order of the Labour Tribunal.

The appellants are now canvassing the said order of the High Court relating to the said preliminary objections, in these proceedings.
This court granted leave on the following questions of law referred to paragraph 17 of the Petition of the Appellants dated 31st July 2012

(a) Did the learned judge of the High Court err in law, having concluded that the Petitioners ceased to hold any post in the said Salacine Television Institute and thereby failing and/or neglecting to set aside the order of the learned President of Labour Tribunal.

(b) Did the judge of the High Court err in law by directing the Labour Tribunal to continue with the inquiry when the Labour Tribunal lacked jurisdiction in terms of Section 31B read with Section 49 of the Industrial Disputes Act.

The facts relating to this matter in brief, are as follows:-

The Respondent was employed as a camera technician with the Salacine Television Institute (herein after referred to as "Salacine") from 1st March 1988 and it is alleged that his services were terminated wrongfully. The Appellants filing answer before the Labour Tribunal took up the position that the termination of the services of the Respondent was due to serious acts of misconduct which were established sequel to a formal disciplinary inquiry.

In deciding the questions of law in respect of which leave was granted, it would be pertinent to refer to the sequence of events that transpired before the Labour Tribunal for reasons I will be dealing with, later in this order.

On 6th March 2009, the Appellants raised an objection before the Labour Tribunal to the effect that the Appellants are neither natural nor juristic persons and for that reason the application cannot be maintained. This objection was based on the decision of this court in The *Superintendent, Nakiyadeniya Group, Nakiayadeniya V. Cornelishamy 71 N.L.R 142,* which followed the decision in *Superintendent Deeside Estate Maskeliya Vs. I.T Kazakam 70 N.L.R 279,* wherein the court held that "inasmuch as the application failed to name a natural or legal person as an employer, the order of compensation was not an enforceable order".

The learned President of the Labour Tribunal afforded an opportunity for the parties to tender written submissions and counter submissions had also been filed by the Appellant. In their written submissions Appellants raised both questions of law on which leave was granted by this court.

The learned Labour Tribunal President made order over ruling the preliminary objections raised by the Appellants solely based on written submissions and it appears to me that the material placed before the Labour Tribunal was insufficient to arrive at a definite finding on the issues raised, particularly in view of the decisions handed down by this court in relation to the scope of section 49 of the Industrial Disputes Act.

I wish to deal with the second question of law initially for the reason that I am of the view that the said issue is the one that is pivotal in deciding the possibility or otherwise of the continuation of the inquiry before the Labour Tribunal.

It is the contention of the Appellants that the Labour Tribunal is not vested with jurisdiction to inquire and determine the Application filed by the Respondent by virtue of Section 49 of the Industrial Disputes Act (Hereinafter the Act).

Section 49 of the said Act states thus:-

> "Nothing in this Act shall apply to or in relation to the State or the Government, in its capacity as an employer, or to or in relation to a workman in the employment of the state or the Government"

It is the position of the Appellants that they were merely members of a body called and known as "Salacine Television Institute" (Hereinafter "Salacine") which is the media arm of the Ministry of Media and Media Information (hereinafter the "Ministry"). The Appellants have also contended that the salaries of the Respondent were paid from the monies advanced to "Salacine" from the funds of the Ministry. In this context, it was contended by the Appellants that the State or the Government is the employer of the Respondent and for that reason, by virtue of Section 49 of the Act, the Respondent cannot seek redress under the provisions of the said Act, in other words Industrial Disputes Act does not apply to the Respondent.

Before I deal with the facts relevant to the issues before this court, I wish to consider the decisions in the case of *Coconut Research Board V. Subramaniam 72 N.L.R 422*

and the case of Colombo Gas and Water Company Workers Union V. Government of Sri Lanka 1986 CALR Vol. III 169.

In the case of the Coconut Research Board, Justice Weeramanthri held, that a Corporation such as the Coconut Research Board, depending on and controlled by the Government, may nevertheless be the employer of persons in its services, within the meaning of the definition of "employer" in the Industrial Disputes Act. In such a case, such Government control does not bring the Corporation within the scope of the exemption provided by the Section 49 of the Industrial Disputes Act. The rational for this conclusion by Justice Weeramanthri was that, dependence on the Crown for funds does not have the effect, by itself, of making a Corporation a Government institution or a Government undertaking, nor does Government control necessarily render a Corporation a servant or agent of the Crown.

In the case referred to, Justice Weeramanthri observed that "though dependent on Government funds, the Board (Coconut Research Board) has full power and authority generally to govern, direct and decide on all matters connected with the appointment of its officers and servants and the administration of its affairs.

Thus, I am of the view that in deciding an issue of the nature that has arisen in the instant case requires the Labour Tribunal to apply the *control test* as in the case of the Coconut Research Board and a duty is cast on the tribunal to inquire into the aspects referred to by Justice Weeramanthri and arrive at a finding. The relevant aspects would be as to *who had the full power and authority generally to govern, direct and decide on all matters connected with the appointment of its officers and servants and the administration.*

In the instant case it is common ground that "Salacine" is not a body corporate in contrast to the Coconut Research Board. However, no material was placed before the Labour Tribunal as to who exercised authority to govern, direct and decide on matters connected as to the appointment and dismissal of its officers and servants. The only material, if one can call it that, is the letter of appointment issued to the Respondent.

The Appellants, in their written submissions filed before the Labour Tribunal have contended that "Salacine" is not a corporate body, but merely the media unit of the Ministry and is a section of the Ministry. The Appellants further contend in the

written submissions that "Salacine" is neither a Government Corporation, a corporate body, nor a legal entity and cannot sue and be sued in its name.

I also have given my mind to the decision in the case of *Colombo Gas and Water Company Workers Union V. Government of Sri Lanka (Successor to the Business Undertaking of) Colombo Gas and Water Company Ltd. 1986 CALR Vol. III 169,* which also addressed the very issue.

In the case of Colombo Gas and Water Company, the applicant trade union filed action before the Labour Tribunal on behalf of a workman for alleged wrongful termination. The said Company, a private entity was vested in the Government under the provisions of Business Undertakings (acquisition) Act No 35 of 1975. As a result, since February 1975 the Company became an entity owned by the Government yet maintaining its corporate veil. In this case too, the scope of Section 49 of the Industrial Disputes Act came in to review as an objection was raised as to the maintainability of the application before the Labour Tribunal in view of the fact that the Government now is the owner- employer of the Colombo Gas and Water Works Company.

Having considered the issue Justice Bandaranayke in delivering the order of the Court of Appeal expressed the view that in resolving this issue i.e. the application of Section 49, one needs primarily to consider two aspects. Is it a situation where the Government was the owner of a business and running it? Or on the other hand, although the Government was the owner, the actual running of the business was in the hands of a third party. In the latter case, Justice Bandaranayke held that the employer- employee relationship would exist with the third party and the workman and not between the Government and the workman. In applying this test Justice Bandaranayke held that, with the vesting, all employees became employees of the State and the preclusive clause found in Section 49 of the Industrial Disputes Act applies to the workman and he now being an employee of the State, is excluded from seeking the protection of the Industrial Disputes Act.

Both judgements referred to above propounded tests for determining the question whether an agency may claim State or Government's privilege. Considered views expressed on the matter, both by the Supreme Court and the Court of Appeal make it abundantly clear that in deciding the issue, one must necessarily examine the degree of control exercised by the Government through the provision of finance or

some other means and thereafter decide the issue as to whether the workmen is a State or a Government employee or not. This question depends on the independence and control enjoyed by the recruiting authority in the appointing of its employees, administration and discontinuation of services of an employee, while the dependence on the state funding is not the sole deciding criteria.

Close examination of, whether the employer is the State or the Government becomes all the more significant in view of the views expressed by Samarakoon CJ in the case of Dahanayake Vs. De Silva 1978-79 1 SLR 41 wherein he held "that even if the entity in question is an agent of the State, it is not however necessary that it is ipso facto an alter ego of the State so that such agents could enter into ordinary contracts of service with their employees without being deemed public servants.

In this context, it was incumbent on the labour Tribunal to inquire into these aspects. However neither the learned Labour Tribunal President nor the learned High Court judge had addressed their minds as to whether the employer- employee relationship existed between the Respondent and the Government or was it between the Respondent and a third party. As this issue is pivotal to the proceedings, I am of the view that the learned Labour Tribunal President ought to have inquired into this matter fully rather than relying purely on written submissions, which is inadequate in deciding on an issue of this nature.

In this regard, Section 31C (1) of the Industrial Disputes Act is significant. The said Section stipulates that "Where an application is made to a Labour Tribunal, it shall be the duty of the Tribunal to make all such inquiries into that application and hear all such evidence as the Tribunal may consider necessary…. This I find a very salutary provision and the labour Tribunal appears to have lost sight of this Section, in deciding the issue as to who exactly is the employer of the Respondent. In the case of Dharmadasa vs. P.H. Wilfred De Silva, SC 24/ 69, it was held by G.P.A de Silva S.P.J that the Labour Tribunal has a duty to make all inquiries and lead all necessary evidence before making an order as to the applicability of Section 49 of the Industrial Disputes Act. Thus the learned Labour Tribunal President, instead of merely relying on the written submissions ought to have inquired in this issue in order, not only to ascertain who the employer of the Respondent was but the status of "Salacine" as well.

When one considers the attendant circumstances, it is apparent that the learned labour Tribunal President has arrived at his decision without sufficient material and his findings in my view are not safe to be allowed to stand. I further hold that the findings of the Labour Tribunal on the issue of applicability of section 49 ought to be set aside.

The other legal issue raised on behalf of the appellant was that the learned High Court judge having arrived at the conclusion that the Appellants have ceased to hold office, erred by his failure to set aside the order of the learned President of the Labour Tribunal. The question of law referred to by the Appellants arise in the following manner.

Subsequent to the termination of the services of the Respondent, the Appellants have ceased to be Directors of Salacine Television institute and they have been replaced by three others who had been cited as 5th, 6th and 7th Respondents in the application before the Labour Tribunal by the Respondent workman to the instant Appeal. The issue before this court is, in view of the developments referred to above, whether the Appellants can remain as Respondents in the application before the Labour Tribunal.

Section 31 (B) (6) of the Industrial Disputes Act deals with this very situation. The said provision reads thus:-

" Notwithstanding that any person has *ceased to be an employer*, -

(a) an application claiming relief or redress form such person may be made under subsection (1) in respect of any period during which the workman to whom the application relates was employed by such person, and proceedings thereon may be taken by a labour tribunal,

(b) if any such application was made while such person was such employer, proceedings thereon may be commenced or continued and concluded by a labour tribunal, and

(c) a labour tribunal may on such application order such person to pay to that workman any sum as wages in respect of any period during which that workman was employed by such person, or as compensation as an alternative to the reinstatement of that workman, and such order may be enforced against such person in like manner as if he were such employer :"

Bandaranayke J considered this issue in the case of Albert v Gunesekara and others (CA 729/83).

This was a case where Albert, who was employed as a Bar keeper at the Colts Cricket Club, an unincorporated social club for the promotion of sports, had come before the Labour Tribunal seeking reinstatement or compensation for wrongful termination. Having recorded the evidence of the workman the learned President of the Labour Tribunal made an order, that as the members of the committee that had employed Albert were no longer committee members of the club at the time of the inquiry and that he cannot make an order capable of execution because the respondents were now not holding office as committee members and therefore should not be treated as employers.

Having considered Section 31 (B) (6) of the Industrial Disputes Act, Bandaranayke J held that the "respondents as former members of the Committee of managements in office at the time of termination of services come within the definition of "employer" under the Industrial Disputes Act. In this context the learned President of the Labour Tribunal as well as the Learned Judge of the High Court in my view have not erred in holding that the Appellants can be treated as "Employers" in terms of Section 31 (b) (6) of the Industrial Disputes Act , as far as the Appellants of this case are concerned and that the inquiry can be proceeded with, by adding the incumbent chairman and directors of "Salacine" as respondents.

When one considers the nature of the preliminary issue that has been raised, it is not in my view an issue that can be resolved purely based on oral and written submissions but an issue that can only be resolved upon recording evidence.
As to the question of law referred to in paragraph 17 (b) of the Petition of the appellant, this court directs the President of the labour Tribunal to *inquire,* as required to do so, under Section 31 (1) (c) of the Industrial Disputes Act to ascertain as to whether the jurisdiction of the Labour Tribunal is ousted in terms of Section 49 of the said Act as far as "Salacine" is concerned **as part of the main inquiry.** In order to facilitate this process the orders made by the Learned President of the Labour Tribunal and the High Court as to the application of Section 49 of the Industrial Disputes Act is hereby set aside.

This court is mindful of the fact that some Labour Tribunals are burdened with a heavy workload and necessarily the issue arises in one's mind as to how practice it would be to inquire into such preliminary issues exhaustively.

However, one needs to bear in mind that preliminary issues of this nature are so pivotal to the maintainability of applications before the Tribunals and there is no alternative other than to inquire into such issues applying the criteria spelt out both in the case of *Colombo Gas and Water Company Workers Union V. Government of Sri Lanka (Successor to the Business Undertaking of) Colombo Gas and Water Company Ltd.* as well as in the case of *Coconut Research Board V. Subramanian.*

At the commencement of the hearing of this appeal Counsel representing the parties to this case intimated to the court that they are representing the parties in connected cases, namely case numbers SC Appeal 183/12, SC Appeal 184/12 and SC Appeal 185/12, and further the questions of law as well as the facts and circumstances of those cases are identical to the instant case. The counsel further contended that they would abide by the decision in this case in respect of those three cases as well and there is no necessity to argue them separately.

Accordingly the learned labour Tribunal President is further directed to comply with the directions given in this order in respect of the Labour Tribunal Applications connected to case nos. SC Appeal 183/12, SC Appeal 184/12 and SC Appeal 185/12.

Judge of the Supreme Court

Chandra Ekanayeke 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 from the judgment dated 25th July 2012 of the Provincial High Court of the Western Province holden in Colombo exercising Civil (Appellate) Jurisdiction under and in terms of the High Court of the Provinces Special Provisions Act No. 54 of 2006 read together with Article 127 (2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

SC. Appeal 192/2012

SC.H.C.CA. LA. 368/12
WP/HCCA/COL/99/11 LA
D.C. Colombo No. 23/2010 DRE

Mapatunage Roland Perera,
4/62A, 4th Lane, Thalakotuwawatta,
Polhengoda, Colombo 05.

Plaintiff

Vs.

Sunder Ayyar Rajagopalan,
No. 44/83, St. Anthony's Mawatha,
Colombo 13.

Defendants

And Between

Sunder Ayyar Rajagopalan,
No. 44/83, St. Anthony's Mawatha,
Colombo 13.

Defendant-Petitioner

Vs.

Mapatunage Roland Perera,
4/62A, 4th Lane, Thalakotuwawatta,
Polhengoda, Colombo 05.

Plaintiff-Respondent

And Now Between

Mapatunage Roland Perera,
4/62A, 4th Lane, Thalakotuwawatta,
Polhengoda, Colombo 05.

Plaintiff-Respondent-Appellant

Vs.

Sunder Ayyar Rajagopalan,
No. 44/83, St. Anthony's Mawatha,
Colombo 13.

Defendant-Appellant-Respondent

* * * * *

BEFORE : **S. Eva Wanasundera, PC. J.**
Priyantha Jayawardena, PC. J.
Upaly Abeyrathne, J.

COUNSEL : Saman Liyanage with Thilina Sooriyaarachchi for the Plaintiff-Respondent-Appellant.

Sulari Gamage for the Defendant-Appellant-Respondent.

ARGUED ON : **11.05.2015**

DECIDED ON : **05.08.2015**

* * * * * *

S. Eva Wanasundera, PC.J.

In this appeal, this Court has granted leave on 30.10.2012 on the following questions of law contained in paragraph 9 (a), (b) (c) and (d) of the Petition dated 03.09.2012.

9(a) Is the judgment of the Civil Appellate High Court of Colombo contrary to law and against the established legal precedents?

(b) Is the said judgment misconceived in law and/or against the weight of the evidence of the said case?

(c) Have the Civil Appellate High Court Judges erred and/or misdirected themselves by holding that grave and irremediable injustice would be caused to the Respondent unless he is permitted to file his amended answer?

(d) Has the Civil Appellate High Court of Colombo failed to consider the scope of Section 93(2) of the Civil Procedure Code by holding that even on or after the first date of the trial of the action that the Respondent is entitled to amend his answer?

The subject matter of this case is a house built on less than two perches, i.e. 1.08 perches of land in St. Anthony's Road, Colombo 13. The Plaintiff-Respondent-Appellant (hereinafter referred to as the Plaintiff) instituted action in the District Court of Colombo under case No. DRE 23/10 on 07.05.2010. The plaint was amended on 07.06.2010. The Defendant-Appellant-Respondent (hereinafter referred to as the Defendant) filed answer to the amended plaint on 29.09.2010. The Plaintiff filed replication on 01.11.2010. The case was called to fix for trial on 01.11.2010. Then it was fixed for trial on 07.02.2011.

On 07.02.2011, the Defendant moved to amend his answer and the Plaintiff objected to the same. Court permitted the Defendant to file a 'draft amended answer' subject to the objection of the Plaintiff. Plaintiff filed objection on 21.04.2011 and after considering the written submissions of both parties, Court delivered judgment on 26.08.2011 in favour of the Plaintiff by not allowing the proposed amendment to the answer. The Defendant appealed to the Civil Appellate High Court of Colombo from the judgment of the District Court. On 25.07.2012 the Civil Appellate High Court delivered judgment in favour of the Defendant, setting aside the District Court judgment dated 26.08.2011. In summary the Civil Appellate

High Court allowed the amended answer which was filed on the first date of the trial.

This Court has to decide whether the decision of the Civil Appellate High Court which allows the amended answer is in accordance with Section 93(2) of the Civil Procedure Code.

Section 93(2) of the Civil Procedure Code as amended by Act No. 9 of 1991 reads as follows:-

> "On or after the day first fixed for trial of the action and before the final judgment, no application for the amendments of any pleadings shall be allowed unless the Court is satisfied, for reasons to be recorded by the Court that grave and irremediable injustice will be caused if such amendment is not permitted, and on no other ground, and that the party so applying has not been guilty of laches."

I observe that the application for the amendment of answer was made by the Defendant on the day the case was first fixed for trial of the action, i.e. on 07.02.2011. Therefore the application for amendment comes within the scope of Section 93(2) of the Civil Procedure Code. According to the section, the party applying for the amendment should satisfy Court on two grounds, i.e. **grave and irremediable injustice will be caused if the amendment is not allowed and that the said party applying for the amendment is not guilty of laches.**

The answer filed by the Defendant in the first instance is dated 29.09.2010 and **it contains a claim in reconvention of Rs.1.8 million rupees for improvements done to the house.** The plaint contains in the 'Schedule to the plaint', the boundaries and extent of the land on which this house is situated and the fact that the said house was taken on a lease by the Defendant is admitted by the Defendant in his answer. The Plaintiff had filed replication on 01.11.2010. The amendment to the answer was sought on 07.02.2011, i.e. after 3 months from the date of the replication and after

4 months from the date of the answer first filed. This time lapse has not been explained even in the written submissions filed in the District Court by the Defendant for the District Judge to make an order whether the amendment should be allowed or not. I observe that there is no explanation given by the Defendant as to how and in what circumstances "grave and irremediable injustice would be caused if the amendment is not allowed". Instead, it is given in the written submissions that the proposed amendment is something which could not be included in the answer by "mistake" (අතපසුවීමකින්). I believe that it amounts to 'laches' on the part of the Defendant, admittedly.

Anyway the two amendments sought amount to including the same Schedule regarding the boundaries and extent of the land (which is already in the plaint) into the answer and adding a prayer to the effect that the **Plaintiff should pay back Rs.1.8 million to the Defendant and interest thereon as of right before the Defendant leaves the premises.** I find that the answer already filed on 29.09.2010 contains a prayer praying Court for a decree for Rs.1.8 million due and owing to the Defendant from the Plaintiff. I view the two amendments suggested by the Defendant as clauses which cannot in anyway be categorised under "grave and irremediable injustice would be caused, if not allowed". Moreover the Defendant has not even tried to prove that it would cause grave and irremediable injustice. No reasons were given as expected to come under Section 93(2) of the Civil Procedure Code as amended.

The Defendant's only argument in the lower Courts had been, that "the amendments would not cause any prejudice to the Plaintiff". I fail to see how that argument can be brought forward instead of showing 'good reasons' according to Section 93(2) of the Civil Procedure Code.

The Civil Appellate High Court has gone wrong in interpreting the law, taking up the aforementioned argument of "not causing any prejudice to

the Plaintiff" and also coming to a finding that "irreparable loss and damages would be caused to the Defendant if he is unable to recover this money." The Civil Appellate High Court has not seen or considered the answer already filed which contained the relief claimed already in different words and furthermore it has failed to see the other amendments sought is something which **is highly unnecessary** since the Schedule of the land and house is accepted as in the plaint by the Defendant and that amendments requested to be included in the answer are quite an unnecessary move by the Defendant. It is my observation that the Defendant has suggested these amendments to prolong the Court proceedings, taking advantage of or misusing the provisions of law contained in the Civil Procedure Code. Very sadly, and very unfortunately he has succeeded in prolonging the action filed against him from 2010 to 2015 by misusing the process of law.

In *Gunasekera Vs. Abdul Latiff 1995*, 1 SLR 225, the amendment to the Civil Procedure Code, No. 9 of 1991 was very much discussed. The Supreme Court thus expressed its views. "The amendment act No. 9 of 1991 has for the first time taken away the power of Court *ex-mero motu* to amend the pleadings. An amendment could be allowed only upon the application of a party. If the application was made before the first date of the trial, the Court once again enjoyed the full power of amendment at its discretion. However, if the application for amendment of pleadings was made on or after the first date of trial the Court powers were severely curtailed.

Further, in the said case, the Supreme Court stated thus; "The Petitioners have to clear two hurdles. They have to satisfy the Court that (1) grave and irremediable injustice will be caused to them if the amendment is not permitted. (2) there has been no laches on their part in making the application. This hurdle is overcome; they are further required to satisfy Court the circumstances that warrant an amendment to pleadings under

Section 93(1) also exists."

This judgment was confirmed in *Colombo Shipping Company Ltd. Vs. Chiragu Clothing (Pvt) Ltd. 1995, 2 SLR 97*, *Nanayakkara Vs. Attygalla* Bar *Journal 1998 Vol.2 Part 2 Pg. 333* and *Ceylinco Insurance Co. Ltd. Vs. Nanayakkara 1999 3 SLR 50.*

In the present case, the District Court should proceed to hold the trial on pleadings filed already without the proposed amendments and decide on the issues drawn from the pleadings which are already before Court. What is contained in the amendments are substantially contained already in the answer which is filed of record.

I hold that the Defendant-Appellant-Respondent has failed to satisfy Court on both legal requirements contained in Section 93(1) of the Civil Procedure Code as amended by Act No. 9 of 1991.

I hereby set aside the judgment of the Civil Appellate High Court of Colombo dated 25.07.2012 and affirm the order of the District Court of Colombo dated 26.08.2011. Appeal is allowed. I order costs of Rs.10,000/- to be paid by the Defendant-Appellant-Respondent to the Plaintiff-Respondent-Appellant.

Judge of the Supreme Court

Priyantha Jayawardena,J., PC.

I agree.

Judge of the Supreme Court

Upaly Abeyrathne, 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 with Leave to Appeal granted by Supreme Court under Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. Appeal No. 199/2012

S.C. LA No.SC/HCCA/LA/178/2012
Civil Appellate High Court of Mt. Lavinia
Case No. WP/HCCA/MT/31/2011/LA
D.C. Nugegoda Case No. 284/2010/L

Mahawattage Dona
ChanikaDiluniAbeyratne,
No. 227/2, Stanley
ThilakaratneMawatha,
Nugegoda.

Plaintiff

Vs.

1. Janaka R. Gunawardena,
   No. 17, 1st Lane,
   Colombo 5.

2. Jaykay Marketing Services (Pvt.) Ltd.,

   Registered Office
   No. 130, Glennie Street,
   Colombo 2.

   Place of business
   Keels Super Market,
   No. 225, Stanley ThilakaratneMawatha,
   Nugegoda.

Defendants

And Between

Jaykay Marketing Services (Pvt.) Ltd.,
No. 130, Glennie Street,
Colombo 2.

Carrying on business at:
Keels Super Market,
No. 225, Stanley ThilakaratneMawatha,
Nugegoda.

2nd Defendant-Petitioner

Vs.

Mahawattage Dona
ChanikaDiluniAbeyratne,
No. 227/2, Stanley
ThilakaratneMawatha,
Nugegoda.

Plaintiff-Respondent

Janaka R. Gunawardena,
No. 17, 1st Lane,
Colombo 5.

1st Defendant-Respondent

And Now Between

Mahawattage Dona
ChanikaDiluniAbeyratne,
No. 227/2, Stanley
ThilakaratneMawatha,
Nugegoda.

Plaintiff-Respondent-Appellant

Vs.

Jaykay Marketing Services (Pvt.) Ltd.,
No. 130, Glennie Street,
Colombo 2.

Carrying on business at:
Keels Super Market,
No. 225, Stanley ThilakaratneMawatha,
Nugegoda.

2nd Defendant-Petitioner-Respondent

Janaka R. Gunawardena,
No. 17, 1st Lane,
Colombo 5.

1st Defendant-Respondent-Respondent

* * * * *

ORDER ON THE PRELIMINARY OBJECTION

BEFORE : **S. Eva Wanasundera, PC. J**

Sisira J. de Abrew, J. &

Sarath de Abrew. J.

COUNSEL : Manohara de Silva, PC. for the Plaintiff-Respondent-Petitioner.

Suren Fernando for the 2nd Defendant-Petitioner-Respondent.

Kuvera de Zoysa, PC. With Niranjan de Silva for the 1st Defendant-Respondent-Respondent.

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PRELIMINARY OBJECTION ARGUED ON: 11.11.2014

WRITTEN SUBMISSIONS FILED : By the Plaintiff –Respondent – Appellant on 09. 12. 2014
By the 2nd Defendant-Petitioner-Respondent on 11.12.2014
Bythe1st Defendant-Respondent-Respondent on 10.12.2014

DECIDED ON : **24. 03 .2015**

* * * * * *

S. Eva Wanasundera, PC.J.

When this matter was taken up for hearing on 11.11.2014 the Counsel for the 2nd Defendant-Petitioner-Respondent (hereinafter referred to as the "2nd Respondent"), as well as the Counsel for the 1st Defendant-Respondent–Respondent (hereinafter referred to as the "1st Respondent") submitted that they are raising a preliminary objection to be

considered by this Court before hearing the main Appeal,i.e. “that the written submissions of the Petitioner has been **filed out of time** in this Appeal and as such the Appeal **should be dismissed** on that ground”.

This Court decided to hear the oral submissions with regard to the preliminary objection on that date itself and at the end of oral submission, directed parties to file written submissions on the preliminary objection. Accordingly, the 1st Respondent and the 2nd Respondent as well as the Appellant have filed written submissions on the same.

Leave to Appeal was granted on the main Application on 14th November 2012 in terms of the Supreme Court Rules [Rule 30(6)] . The Appellant was obliged to file her written submissions on or before 26th December 2012, ie. within 6 weeks from 14th November 2012. The 2nd Respondent filed written submissions in compliance with the Supreme Court Rule 30(7) on 6th February 2013. While filing written submissions the 2nd Respondent drew the attention of Court to the Appellant’s failure to file written submissions within 6 weeks. The Appeal was listed for hearing on 20th June 2013. The Appellant’s written submissions were filed with a motion dated 20th June 2013. The appeal was taken up for hearing finally on 11.11.2014 due to the case having got postponed a few times for different reasons.

The Supreme Court Rules applicable in this instance are contained in Part II of the Supreme Court Rules Under General Provisions Regarding Appeals and Applications.

Rule 30(1)- 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.

(2) The submissions shall be typewritten, printed or lithographed, and shall be in the form of paragraphs numbered consecutively.

(3) The submissions of the appellant shall contain as concisely as possible-

(a) a chronological statement of the relevant facts, referring to the evidence, both oral and documentary,(and wherever possible, the pages of the brief at which such evidence appears), indicating also

which facts are agreed, or have been established, or are otherwise no longer in dispute and which facts are disputed;

(b) the questions of law or the matters which are in issue in the appeal;

(c) a specification of the errors alleged to have been committed by the Court the judgment of which is under appeal; and reference to and discussion of the authorities (judicial decisions, text books, statutes and subordinate legislation) relied on to justify the reversal, variation or affirmation of the judgment (or any part thereof) under appeal; and

(d) a conclusion specifying the relief which the appellant claims.

(4) The submissions of the respondent shall contain as concisely as possible-

(a) a statement, in reply to the appellant's statement of facts, confirming whether, and if not to what extent, the respondent agrees with such statement of facts; and a statement of the other relevant facts, referring to the evidence, both oral and documentary, (and wherever possible the pages of the brief at which such evidence appears, indicating which of such facts, according to the respondent, have been established or are otherwise no longer in dispute, and which facts are disputed;

(b) the questions of law or the matters which are in issue in the appeal;

(c) reference to and discussion of the authorities (judicial decisions, text books, statutes and subordinate legislation) relied on for the dismissal of the appeal or to justify the affirmation of the judgment (or any part thereof) under appeal; and

(d) a conclusion specifying the relief which the respondent claims.

(5)- Submissions not in substantial compliance with the foregoing provisions may be struck out by the Court, whereupon such party shall not be entitled to be heard.

(6)- 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.

(7)- 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".

(8)- Every party shall tender to the Registrar, not less than one week before the date first fixed for the hearing of an appeal, a complete list of the authorities which he proposes to refer to or rely on at the hearing, so as to ensure that there is full disclosure and to preclude surprise, together with at least one set of copies or photocopies of such authorities or the relevant portions thereof (other than statutes of Sri Lanka, subordinate legislation published in the Subsidiary Legislation of Ceylon), Law Reports published in Sri Lanka, and such other authorities as may be specified by the Chief Justice from time to time.

Rule 34 - 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.

According to Rule 40, the Appellant can apply for an extension of time for the filing of written submissions. It reads as follows:-

Rule 40 - An application for a variation, or an extension of time, in respect of the following matters shall not be entertained by the Registrar, but shall be submitted by him to a single judge, nominated by the Chief Justice, in Chambers:

(a) tendering notices as required by rules 8(3) and 25(2);
(b) deposit of brief fees as required by rules 16(5) or 27(5);
(c) filing written submissions as required by rule 30;
(d) furnishing the address of a respondent as required by rules 8(5) and 27(3);
(e) filing counter-affidavits and counter-submissions as required by rule 45;
(f) furnishing material as required by rule 38.

(c) filing written submissions as required by Rule 30;

The 1st and 2nd Respondents supporting the preliminary objections have directed the attention of Court to the following cases.

1. Balasingham vs. Puranthiran (minor) by his next friend Sivapackyam (2000) 1 SLR 163,
2. Wijesooriya vs. Pussadeniya, Commissioner of National Housing (1983) 2 SLR 42.
3. Samarawickrema vs. AG. (1983) 2 SLR 162.
4. Gunawardenavs. Pussadeniya Commissioner of National Housing 1983 2 SLR 458.
5. Mendis vs. Abeysinghe (1989) 2 SLR 262
6. Jayawickrema, Someswaran and Mantry& Co. vs. Jinadasa(1994) 3 SLR 185.
7. Fernando vs. Francis Fernando (2010) 1 SLR 25.

8. Sudath Rohana Vs. M.C.M. Zeena (SC/HCCA/LA 111/2010, SC. Minutes of 17.03.2011)

9. Muthappan Chettiar Vs. Karunanayake and another (2005) 3 SLR 327.

10. Samarasinghe Arachchige Premasiri vs. Adamjee Lukmanjee and Sons Ltd. (SC./CHC Appeal 19/2009, SC. Minutes of 29.09.2014)

The Respondents' argument was that due to the Appellant not having complied with the Supreme Court Rules, the Appeal should stand dismissed for not prosecuting diligently, under Rule 34. They submit that even though written submissions were filed by the Appellant very late, she has not given any excuse for the delay in filing the written submissions. They further submit that the Appellant neglected to cure the defect in spite of the Respondents' pointing out that the written submissions were delayed and that the Appellant did not obtain an extension of time to file written submissions under Rule 40.

The Appellant has directed the attention of Court to the following cases.

1. Piyadasa and others vs. Land Reform Commission (SC. Appeal 30/97 SC. Minutes of 08.07.1998)

2. Fernando vs. Francis Fernando (2010) 1 SLR 25.
3. Ananda Dharmasiri Bandara vs. Leelawathie Menike (SC/ 172/2011, SC. Minutes of 22.01.2014)

4. Union Apparels (Pvt.) Ltd. Vs. Director General of Customs (2000) 1 SLR 27.
5. Mendis vs. Abeysinghe(1989) 2 SLR 270.

Let me analyze Rule 30(1), which says that any party shall not be entitled to be heard unless 5 copies of his written submissions are filed, complying with the Provisions of Rule 30.

If the Appellant fails to file written submissions as aforesaid, "he shall not be heard". Court can disallow him to make oral submissions at the hearing of the appeal. What happens, when Court disallows him to make oral submissions? The Court will not be able to hear that party, i.e. one of the parties to the case. Other parties who have filed written submissions on time shall speak up in Court.

Finally Court looses the chance of hearing the argument of one side, which means firstly, as much as that party is at a disadvantage of not being able to place his case before Court, the Court hearing the case will not have his assistance in arriving at a justifiable decision with regard to the case before Court.

Court has to write a judgment anyway. Court gets to hear only one side. It is the duty of Court to arrive at a proper decision considering the legal provisions, the pertinent facts leading up to the legal issues etc. and with one party being unable to contribute to the arguments, Court is at a disadvantage to arrive at the correct decision. After all, the Supreme Court is the Apex Court and there's no other appeal from thereto anywhere else. Therefore this Court is duty bound to give its mind to all matters before it.

Before arriving at a justifiable decision, I am of the opinion that disallowing one party from being heard, Court is taking upon itself a bigger burden of finding the position of that party. It will be an added burden to the Judges hearing the case even though Rule 30(1) means well to regulate Court procedure. The punishment given by the Rule to one party boomerangs on the Court sitting in judgment trying to do justice.

It so happened in a case where I had to deliver the judgment where the party failing to file written submissions was not allowed by Court to make oral submissions, of course according to the Supreme Court Rules. I do not wish to place on record the case number etc. of the said matter. Yet, justice conveyed by me , with my two other colleagues agreeing with me, was in favour of the party who failed to file written submissions and thus not allowed to make oral submissions. Who had to find authorities and write the arguments in favour of the party who got judgment in its favour? It was none other than the Court. It was the burden on the judge writing the judgment which means that the Court is burdened more, having disallowed that party to at least make oral submissions.

When the Appellant fails to file written submissions, the Respondent's application always, is to dismiss the Appeal for ' not prosecuting diligently ' under Rule 34. Let me analyze this situation also. Leave to Appeal is granted after the Supreme Court has gone through the hearing of both parties at the commencement of the procedure of the

case before Court. Is it a simple task for the Petitioner to support his application to get leave or as against that matter, is it a simple task for the Respondent to oppose the granting of leave? Both the tasks are not easy. I would say it is difficult. More over, it takes a lot of valuable time of Court.

Then Court grants leave. Next step is to file written submissions. It is when Court thinks that the Appellant has a grievance on one or two or several points of law which should be gone into thoroughly that leave is granted. This is the terminal point where Court decides that " there is some good reason to look into the decision of the lower Court which might have considered the law in the wrong way ".

After granting leave, i.e. when Court has made up its mind to look into the matter more deeply, can this Court at a later stage, turn a blind eye to the grievance of the litigant who has managed to spend so much and finally has brought it before the eyes of this Court to be looked into more carefully**, just because** his Attorney at Law on whom the client had placed all his trust upon, to do the right thing by filing written submissions has failed to do his part of the work ? The intention of the Court should be to do nothing but justice. Is it right for Court to dismiss the Appeal without hearing the Appellant? Would justice be done, if Court fails to hear him.

The litigant might have been jubilant on the day Court granted leave. Then his lawyer does not file written submissions on time and Court dismisses the Appeal for not prosecuting diligently. Whose fault is it? Whom are we punishing? It is none other than the Appellant himself who gets punished for no fault of his that he knows of. It is the litigant, the part of the public whom the judges are serving who gets thrown out of Court without " an effort being made to reach justice " It is not within my conscience to turn down a litigant who has almost reached the peak of the uphill task of litigation to the end, having come before the Supreme Court to reach justice.

On the other hand, the litigants are given the chance to chase behind the lawyers for negligence, if and when an appeal is dismissed for not prosecuting diligently. Would that be welcome by the lawyers? Is that something which should be encouraged? It might have a deterrent effect on the lawyers who are negligent but does the Supreme Court , by dismissing the Appeal make its way for the development of the law or serve the

public to meet the ends of justice. I am of the opinion that dismissing the Appeal for ' not diligently prosecuting' does not serve the litigants who are aggrieved and who have been granted leave in the first instance. I am further of the view that the Supreme Court should give priority to the litigants and their aspect of the problem before court.

The present Rules of the Supreme Court have been laid down on 07. 06. 1991.and named as Supreme Court Rules 1990. Part II of the said Rules set down " General Provisions Regarding Appeals and Applications ". Rule 30(6) and 30(7) read with Rule 34 are the relevant Rules pertinent to the matter in hand. These Rules have been made under Article 136(1) (a) of the Constitution which reads as follows:-

Article 136 (1) – Subject to the provisions of 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 the practice and procedure of the Court including:-

(a) rules as to the procedure for hearing appeals and other matters pertaining to appeals including the terms under which appeals to the Supreme Court and the Court of Appeal are to be entertained and provision for the dismissal of such appeals for non – compliance with such rules;

(b) ……..

The rules are definitely made for regulating the work of the work to be done by Court. Without the rules the Supreme Court cannot function. If the work is done according to the rules, working in Court is not difficult. It is a healthy way of conducting the work to be performed to reach the ends of justice. It is well and good if everyone does their part properly. If they do not do their part, the Supreme Court should give priority to the interests of the litigants. Court must look at the big picture which includes the lay people, the parties to the case, the bone of contention in the case, the repercussions which would give rise to more serious humane problems etc. rather than look at the limited picture with only " the rules which are not complied with by the lawyers ". The lawyers are responsible for non – compliance of the rules. The litigants are not. Where lawyers are formally responsible for non-compliance of the rules, it is unfair and unjustifiable to penalize the litigants.

Do the clients of the lawyers know that written submissions have to be filed within a particular time? They do not. Do they have a say in how to get it done? They do not. If and when an Appeal is dismissed for non–compliance of the Rules, what is the message the Supreme Court gives the public? The public expects the Apex Court to look into their grievances with regard to the decisions of the lower courts and they do not expect anything more. Both and/or all parties to a case do not understand about the Rules. Only the lawyers should understand about the rules and what those rules are in place for. The litigants expect nothing but justice regarding the main Appeal before Court.

The scenario is different when cases are dismissed for not prosecuting diligently, for other reasons except for "not having filed written submissions according to rules". When court can fully well observe that the application is of a frivolous nature and /or on a technical point taken up just to delay legal process taking place to reach justice as laid down by any law of this country, and the Petitioner has not moved forward in any way after filing the leave or special leave to appeal application, then the Supreme Court is at liberty to dismiss the application for "not prosecuting diligently".

I have given my mind to and considered all the authorities which both parties have submitted as enumerated above. For the aforementioned reasons I decide that this Appeal should be heard on the merits accepting the written submissions on record by all parties to this appeal.

I overrule the preliminary objection taken up by the Respondents. This matter is re-fixed for hearing on the merits, having accepted all the written submissions filed by all the parties to this Appeal on the main matter. This matter will be mentioned on a date convenient for the parties to be fixed for hearing on a date convenient to counsel representing the parties.

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 application for leave 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

SC Appeal No. 209/12

SC No. SC (HC) LA 56/2011

WP/HCCA/KA/05/2010 (LT)

L.T. Case No. 18/KT/2669/2002

Lanka Banku Sevaka Sangamaya,

(On behalf of L.D. Dayananda),

No. 20, Temple Road, Maradana,

Colombo 10.

Applicant

Vs.

People's Bank

Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2.

Respondent

AND BETWEEN

People's Bank

Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2.

Respondent- Appellant

Vs.

Lanka Banku Sevaka Sangamaya,

(On behalf of L.D. Dayananda),

No. 20, Temple Road, Maradana,

Colombo 10.

Applicant- Respondent

AND NOW BETWEEN

People's Bank Head Office,

Sir Chittampalam A Gardiner Mawatha,

Colombo 2.

Respondent- Appellant- Petitioner

Vs.

Lanka Banku Sevaka Sangamaya,

(On behalf of L.D. Dayananda),

No. 20, Temple Road, Maradana,

Colombo 10.

Applicant- Respondent- Respondent

BEFORE: - Priyasath Dep P.C.J

Rohini Marasinghe J

Buwaneka Aluwihare P.C J J

COUNSEL:- Minoli Jinadasa with Malaka Wimalagunerathne for the Respondent -Petitioner- Appellant

Ronald Perera P.C, with Nalin Amarajeewa for the Applicant-Respondent-Respondent

ARGUED: - 28-04-2014

WRITTEN SUBMISSIONS: - 27-05-2014

DECIDED ON: 16-11-2015

Buwaneka Aluwihare P.C J

This is an appeal against the judgement of the Provincial High Court of Kalutara dated 11.05.2011 wherein the High Court, affirmed the Order of the learned President of the Labour Tribunal. At the conclusion of the inquiry before the Labour Tribunal, the learned President held in favour of the Applicant-Respondent-Respondent, a trade union, which filed action on behalf of the workman L.D Dayananda, whose services had been terminated by the Respondent- Appellant -Petitioner (hereinafter referred to as the 'Appellant- Bank').

This Court on 29.11.2012, granted leave to appeal on the following questions of law contained in paragraph 16 of the Petition of the Appellant dated 21-06-2011:-

a) Whether the Provincial High Court and the Labour Tribunal erred in the evaluation of evidence and has made an order without considering the totality of the evidence?
b) Whether the granting of relief to a workman, who had committed gross misconduct, by relying on the fact that another employee embroiled in the said transaction had escaped punishment is justified?

c) Whether the orders of the Labour Tribunal and the Provincial High Court for reinstatement is erroneous in law considering the facts and circumstances which leads to a loss of confidence of a bank employee?
d) Whether the workman is entitled to pension rights, which is not a relief prayed for in the application to the Labour Tribunal and no evidence has been led to establish the right?

Briefly the facts of this case are as follows:-

The Applicant-Respondent-Respondent (hereinafter referred to as "the Respondent") filed an application in the Labour Tribunal of Kalutara complaining that the services of the workman, L.D Dayananda (hereinafter referred to as 'the workman') had been unjustly and inequitably terminated by the Appellant Bank with effect from 02.06.2000 by the letter dated 04.04.2004.

It would be necessary in my view, to consider the background facts that led to the termination of the Workman for the reason that the first question of law on which leave was granted, is based on the failure on the part of both the Labour Tribunal as well as the High Court to consider the totality of the facts, relevant to the incident, in arriving at the decisions.

A customer of the bank named Thamara Dayani Kannangara had opened a savings account at the Baduraliya Branch of the Appellant Bank on or about 19.07.1981 (A/C No. 10046). Sometime in the year 1991 this account had been updated and thereafter no transactions have been carried out in respect of this savings account. According to the evidence led before the Labour Tribunal, if no activity relating to an account is recorded for a period of two years, such accounts are treated as dormant accounts. Accordingly the account of Thamara Kannangara had also been treated as a dormant account since 20.02.1992. A feature peculiar to a dormant account is that to make the account active again, certain specific steps need to be taken, including keying in the password of the manager.

The aforesaid account holder visited the Bank on 09-08-1999 in order to withdraw money for an emergency and to her dismay, she found that her account balance of Rs.20, 648/-lying to her credit on 04.05.1992 had only a credit balance of Rs.2000/-. Consequently the account holder had complained to the bank of the discrepancy in her bank balance as she had not withdrawn any money. Thus an internal investigation was carried out by the Regional Office of the Appellant Bank in the course of which it transpired that in four instances money had been withdrawn from the bank account of the account holder Kannangara, although it was a dormant account at the time the four withdrawals were carried out.

One of the issues that this court is called upon to consider is whether the Learned President as well as the learned High Court Judge failed to evaluate the evidence regarding the disbursement of money from the bank account in issue on three of the four withdrawals referred to above, that is on 26.04.1998, 15.05.1998 and 02.07.1998 and the complicity of the workman concerned. The Appellant asserts that it was the Workman, who as the cashier, had carried out the three impugned transactions on the dates referred to above. It was the contention of the learned Counsel for the Appellant Bank that, both the learned President of the Labour Tribunal and the Learned High Court Judge had neither considered the cogent and credible evidence led at the inquiry nor, had evaluated the evidence led at the inquiry in its proper context. It was further argued, had that been done the only reasonable conclusion that could have been arrived at is that the termination of the services of the workman is just and equitable under the circumstances.

At the outset, I wish to refer to the decision of this court in the case of the *Associated Battery Manufacturers Ceylon Ltd vs. United Engineering Workers Union, 77 NLR page 541,* wherein the court held,

> "*where in an enquiry before a Labour Tribunal it was alleged that the reason for the termination of employment was that the workman was guilty of criminal act involving moral turpitude, the allegation need not*

be established by proof beyond reasonable doubt as in a criminal case.Such an allegation has to be decided on a balance of probability, the very elements of the gravity of the charge becoming part of the whole range of circumstances which are weighed in the balance, as in every other civil proceedings.

Subsequently, in the case of *Sithamparanathan vs.Peoples Bank ,(1986) 1 SLR 411,* it was held that,

"allegations involving misconduct or moral turpitude in prceedings before a Labour Tribunal must be proved by a balance of probabilities. It is not necessary to call for proof beyond reasonable doubt"

This principle with regard to burden of proof referred to above had been followed by our courts over the years and now has virtually hardened in to a rule of law.

It is in this backdrop that I wish to consider the material placed before the inquiry in this case.

Mr. Nimal Weerasinghe who had investigated the disputed withdrawals from the savings account of Dayani Kannangara, is a computer analyst attached to the Peoples Bank. Giving evidence on behalf of the Appellant Bank at the inquiry , witness Weerasinghe had explained, that in order to reactivate a dormant account, the cashier who operates the computer terminal must feed the Withdrawal Form to the computer terminal and when this is done, the Form comes out with the endorsement 'WDL isa/ dormant osa' and the terminal generates a 'P' number. (i.e. the Form marked and produced as "R4"). In fact the three withdrawal forms relating to dormant accounts of some other customers produced on behalf of the Workman also carry the computer endorsement referred to above, (documents produced as V1, V2 and V3). Thereafter the withdrawal slip has to be signed by the manager and two other officials of the Bank authorising the transfer of the dormant account to an active account. After the authorization the Withdrawal Form is fed to the

computer for the second time and the earlier 'P' number generated by the computer has to be keyed in. Then the computer permits carrying out transactions of a dormant account. It is in evidence that the Workman had operated the computer terminal and has acted as the cashier in respect of the three impugned withdrawals from the savings account on the three dates referred to above, which the Workman in his evidence, has admitted. The Workman has also admitted that the savings account at issue was a "dormant account" when he carried out the impugned transactions.

Witness Weerasinghe in his testimony had placed a crucial piece of evidence which remains unassailed. That is, all operations relating to bank accounts at the Badureliya branch of the Bank hitherto that were carried out manually was computerised in June 1995, that is 11 years after Thamara Kannangara opened the Savings Account.

What is significant is that after computerisation, the bank had issued new "Pass Books" which are compatible with the new system that was put in place, replacing the old ones where entries were entered manually. Hence it appears that the bank had issued new Pass Books to customers as and when they produced the old one to carry out a transaction. The evidence is that, upon cancellation of the old Pass book, a new Pass book compatible with the system was issued.

Witness Newton, who testified on behalf the Appellant Bank has stated in his evidence that he recorded a statement from the customer concerned and collected the pass book which was issued to her when the bank was making entries manually.

None of the entries relating to the impugned transactions were recorded in the pass book (R2). He had added that according to the computer entries, on each of the days, the impugned transactions were carried out, a new passbook had been issued. According to the statement of the customer which is marked R 10, she had not withdrawn any money from her savings account on the dates referred to in documents (withdrawal slips) R5, R7 and R9. According to

witness Newton when he commenced the investigation, neither the signature card nor the mandate relating to the bank account concerned were available at the branch of the bank. Testifying further, he has said that none of the withdrawals from this dormant account had been authorised by the manager of the bank nor authorised by other bank officials, which is a requirement before a payment is made from a dormant account. Although it is a common ground that the account concerned was dormant at the point withdrawal slips R5, R7 and R9 were fed into the computer none of the withdrawal slips carry the usual endorsement that they ought to carry, that is 'WDL isa/ dormant osa'. In explaining the absence of this endorsement witness Newton had stated that if another slip of paper had been inserted into the computer instead of feeding the withdrawal slip at the first instance, one cannot expect to see the dormant account endorsement on the withdrawal slip. The Workman concerned had admitted in the course of his evidence before the Labour Tribunal, that it was he who carried out the transactions depicted in withdrawal slips R5, R7 and R9. This witness has stated that the Workman had no right to make any of the payments on R5, R7 and R9.

It was the contention of the Workman concerned that it was savings accounts officer Gunerathne who authorised the payment on R5 and it was he who issued a fresh Pass Book and he only updated it and gave it to the customer. However Gunerathne had been permitted to retire from the Bank when this fraud came to light ostensibly, by grace of the Bank in view of the complicity on the part of Gunerathne in these transactions. In fact the Workman stated that Gunerathne issued two new Pass Books when transactions on R7 and R9 took place. What is puzzling here is assuming that the transaction on R5 was a payment made on a mistaken identity, why then was the old Pass Book not cancelled. Even if the maximum benefit is accorded to the Workman that due to a lapse on his part he failed to do so, this could have been done on any of the subsequent alleged withdrawals on R7 which was about two weeks later or when the alleged withdrawal on R9, which was subsequent to transactions R5 and R7 took place. The fact remains that when the customer complained to

the Bank in 1999, she still had the original Pass Book issued to her without any cancellation. One other factor that is worth making reference to, the customer concerned had stated in her statement made to witness Newton that due to an anomaly in her name she obtained a new National Identity Card (NIC) in 1995 and a copy of it was produced as part of the case of the Appellant Bank. The new NIC bore the same number, but the date of issue is 18-03-1995 and her position is that she surrendered the old NIC to the Grama Seveka. However, on the reverse of the withdrawal slips R5, R7 and R9 the NIC number and the date of issue is recorded. The date of issue that has been written down is 22-08-1973, which is the date of issue of the customer's old NIC. The Workman admitted in his evidence it is he who recorded the NIC number and the date of issue on the reverse of R5, R7 and R9. Considering the above evidence it would in my view reasonable to infer that none of the withdrawal slips R5, R7 and R9 were presented by the Customer.

I wish to advert to the evidence given by the Workman before the Labour Tribunal. He admitted that he made payments in respect of the withdrawal slips R5, R7 and R9 and admitted recording the NIC number and the date of issue. He also admitted the Savings Account in question was a dormant account. As to R5 he did not obtain the authorisation of the manager, but only of Gunerathne the savings account officer. He also admitted that new Pass Books were issued on all three occasions on the dates the alleged transactions on R5, R7 and R9 said to have taken place and it is he who requested for new Pass Books from Gunerathne. In fact the learned Labour Tribunal President has questioned the Workman as to why three Pass Books were issued. His explanation was the system does not indicate that a fresh Pass Book has been issued. Even if it is so, the system shows the details of the last withdrawal and if the customer produces an old pass Book which is not compatible with the system, naturally the question arises as to how the previous transaction was carried out. According to the Workman, on all three occasions the old Pass Book he says was produced before him by the customer. In answering the question whether the account holder presented the Pass Book herself, he had

said he cannot say whether the account holder was present or not, as he cannot identify a customer when documents are passed over the counter. In the statement, the workman made to the Bank Officials (R11) he had said that he knows the customer concerned well as he has seen her on numerous occasions.

The three Pass Books have been issued by the Workman within a span of 2 1/2 months, the first one on the 26th April 1998, the second one a little more than two weeks thereafter, on the 15th of May and the third one, another six weeks later on the 2nd July, which the Workman admitted as wrong in answering the learned President of the Labour Tribunal.

All the payments have been made with a single signatory approving the payment instead of two signatures as required under the bank regulations and the position of the Workman was, at the relevant time, practice was to make payments on a single authorisation.

It would be pertinent to consider the statement made by Leela Edirisinghe which was produced by the Appellant at the inquiry and which the learned President of the Labour Tribunal has considered. It was Leela Edirisinghe who made the other disputed payment of Rupees 12,000 from the same savings account. She had stated that the National Identity Card number of the customer written on the reverse of the withdrawal slip had been written by the savings account officer, Gunarathne and not by her. She had also stated that she has no clear recollection as to whether the withdrawal slip was presented to her by the customer over the counter or not, implying that the customer may not have been present.

It is common ground that the account in issue was dormant at the time the impugned transactions were carried out. The Workman in his evidence had admitted that fact (Page 444 of the Labour Tribunal proceedings). However, the learned President of the Labour Tribunal has misdirected himself by concluding that "at no time it is asserted that the impugned account was a dormant account" and for that reason he concludes that the absence of the

"dormant endorsement" on the withdrawal slips is not a conclusive factor. In my view, this finding is not supported by evidence. As evidenced by the demonstration withdrawal slip produced as R4, when a withdrawal slip of a dormant account is fed into the terminal, the endorsement (WDL isa/ dormant osa)' gets printed on the withdrawal slip. None of the impugned withdrawal slips R 5, R 7, and R 9 carries that endorsement. As the Workman himself has admitted the account is a dormant account. The only conclusion one can come to is that, initially some other piece of paper was inserted into the computer instead of a withdrawal slip, as explained by witness Nimal Weerasinghe.

At this point I wish to refer to some of the matters taken into consideration by the learned President of the Labour Tribunal in concluding that the termination was unjust.

The learned President of the Labour Tribunal has stated in his order that at no point was it asserted that the savings account in issue was treated as a dormant account in the computer system or that the account was activated. This self same conclusion, in turn, had been used to justify the absence of the dormant account endorsement (WDL isa/ dormant osa)' on the withdrawal slips R 5, R 7 and R 9. This conclusion appears to be incorrect as the Workman himself has admitted that at the time the new passbooks were issued the impugned account was dormant. (Proceedings of 18 June 2009 page 444 of the Labour Tribunal proceedings). In any event the savings account in issue had to be dormant as for a period of nearly 15 years the account holder had not carried out any transactions. According to the evidence if for a period of two years there are no transactions automatically the account gets converted it into a dormant account. Hence the learned President of the Labour Tribunal has drawn a wrong conclusion.

In considering an allegation of unfair dismissal, the concerns of a Labour Tribunal should be;

(a) Were the alleged grounds of misconduct sufficiently established by evidence? What was the quality and nature of the misconduct.

(b) Are there proved reasons or legitimate inferences from the evidence available as regards how and why the business of the employer was, or might be reasonably expected to be adversely affected directly or indirectly by the act in question?

The above view was expressed by Amarasinghe J in the case of *Premadasa Rodrigo vs. Ceylon Petroleum Cooperation (1991) 2 SLR 182.*

In the instant case the learned President of the Labour Tribunal had held that, as regard to charges 1 to 12, of the charge sheet served on the workman, the Workman (Dayananada), Leela Edirisinghe, K.A. Gunerathne, Vijitha Kumarasinghe, W.A.B. Kumaraguru have actively colluded towards the commission of the alleged irregularities. The learned President of the Labour Tribunal doubted the evidence was sufficient to pin the irregularities on the Workman. In addition, the learned President of the Labour Tribunal had considered in his order, as to whether each of the charges on the charge sheet that was served on the workman at the domestic inquiry, had been established by the Appellant Bank. It is my view that the Labour Tribunal fell into error in approaching the issue in the manner referred to above.

As his lordship Justice Vythiylingam said in the case of the *Associated Battery Manufacturers (Ceylon) LTD vs. United Engineering Workers Union* 77 NLR 541,

"The employers position in this case was that the termination of the services of the Workman was justified for the reason that at the domestic inquiry had been on the theft of property belonging to the company. In other words, the reason for the termination was connected with the conduct of the Workman. The issue before the Tribunal in this case was whether having regard to all the facts and circumstances of the case the termination of the employment of the workman was justified or not, and **not simply whether the workman was**

guilty of theft of the boots or not." His Lordship further held "in the instant case the Tribunal had to find as a fact whether the workman did commit theft of the boots or not, but this was only incidental to the decision as to whether the termination of the employment was justified or not an not for the purpose of punishing him for a criminal offence. It has been emphasised in a number of cases that the proceedings before a Labour Tribunal are not criminal in nature and therefore the standards of proof require to establish a criminal charge are wholly inappropriate where the Tribunal has merely to ascertain the facts and make an order which in all the circumstances of the case is just and equitable. In doing so the Tribunal is not bound by the rules of evidence contained in the Evidence Ordinance and made base its decisions on evidence which would be shut out from the ordinary courts of law".

The learned President of the Labour Tribunal has concluded that, when one considers the irregularities alleged in charges 1 to 12, if in fact they had taken place, then the workman has actually contributed towards the commission of these irregularities. The relevant portion of the order is reproduced below.

"මෙම නඩුවේ ඉහත සම්පිණ්ඩනය කර ඇති අයුරින් පළමු චෝදනා 12 සැළකිල්ලට ගත් කළ, එවැනි අක්‍රමිකතාවයක් සිදු වී ඇති නම් එයට මෙම නඩුවේ ඉල්ලුම්කරුවන දයානන්ද ද, නීලා එදිරිසිංහ ද, කේ. ඒ. කේ. ගුණරත්න ද, විජිත කුමාරසිංහ ද, බී. ඒ. ඩබ්ලිව්. කුමාරගුරු ද යන අය සක්‍රීයව දායක වී ඇත. මෙම පස් දෙනාගෙන් ඉල්ලුම්කරු පමණක් මෙම ක්‍රියාවලියේ දී විශේෂත්ව කොට දැක්වීමට හැකි ආකාරයට නඩුව ඔප්පු කළා ද යන ප්‍රශ්නය පැන නගී."

Having concluded so, instead of giving his mind as to whether, having regard to all the facts and circumstances of the case the termination of employment of the workman was justified or not, the learned President had considered whether the workman is guilty of each of the charges on the charge sheet that was served on the workman at the domestic inquiry.

I am of the view that, had the learned President of the Labour Tribunal considered the totality of the facts in its correct perspective, he would have come to the conclusion, that the Workman had actively contributed towards

the irregularities committed and they are of serious enough to justify termination of employment.

I do not think there is any need to stress the significance of preserving the good name and the integrity of a financial institution such as a bank. As much as the services offered by the institution, the trust and the confidence reposed on such financial institutions by the public is equally important in attracting business. On the other hand, the Bank as an employer, undoubtedly expects its officers to justify, the trust and confidence reposed in them. As held in the case of *Bank of Ceylon vs. Manivasagasivam (1995) 2 SLR 79,* "utmost confidence is expected from any officer employed in the bank. There is a duty, both to the bank to preserve its fair name and integrity and to the customer whose money lies in deposit with the bank"

Thambaiah J in the case of *Sithamparanathan vs. Peoples Bank (1989) 1 SLR 124,* stated that "where an officer employed in a bank, though not directly guilty of fraud or fraudulent transaction has been found to have dishonestly participated in withdrawals of money from the bank, his conduct not being absolutely above board, he is not a fit and a proper person to be employed by a bank".

The evidence that had been led in the instant case before the Labour Tribunal clearly establishes that the Workman had dishonestly participated in withdrawals of money from a bank account and this conduct is certainly not above board.

Allegations involving misconduct or moral turpitude in proceedings before a Labour Tribunal must be proved by a balance of probabilities. It is not necessary to call for proof beyond reasonable doubt. As such, in order to hold in favour of the Appellant Bank the misconduct on the part of the Workman must be proved on a balance of probabilities. *Prima facie* it can be seen that as a cashier and the operator of the computer, the Workman has played a major role in these fraudulent withdrawals though complicity of other officials cannot be ruled out. Moreover, after evaluating all the evidence discussed

above, I am of the firm view that the fault on the part of the Workman has been established on a balance of probability.

In the case of *Bristol Myera Squibbs (Phils) Inc. vs. Baban G.R. No. 167449, December 17,2008, 574 SCRA 198* , it was decided that,

> "As a general rule, employers are allowed a wider latitude of discretion in terminating the services of employees who perform functions by which their nature requires the employer's full trust and confidence. The mere existence of basis for believing that the employee has breached the trust and confidence is sufficient and does not require proof beyond reasonable doubt. Thus, when an employee has been guilty of breach of trust or his employer has ample reason to distrust him; a labour tribunal cannot deny the employer, the authority to dismiss him."

The learned High Court Judge had affirmed the order of the Labour Tribunal. On consideration of the order of the learned High Court Judge, it appears to me that the Judge of the High Court had lost sight of one of the basic principles of evidence that has not only has guided our courts but also guided the English courts for centuries.

The best evidence rule though now whittled down to some extent demands, the evidence, in order to be receivable, must come through proper instruments; thus a judge must not import his personal knowledge, except in the case of judicial notice. Simply put the facts must be established by legal evidence or by legitimate inferences.

The learned High Court Judge had concluded that the Appellant Bank after a domestic inquiry had recovered the amount so withdrawn from the impugned account from an employee, Leela Edirisinghe.

There is no evidence led before the Labour Tribunal to establish such a fact. Of the four impugned withdrawals, Leela Edirisinghe had acted as cashier on one occasion and a witness had said, according to his knowledge the amount

alleged to have been paid by Leela Edirisinghe (Rs.12, 000) was deducted from her salary in installments of Rs.1000/-. Thus, it appears that the Appellant has taken steps against the cashier Edirisinghe as well.

The Learned High Court Judge has also held that the Appellant has totally and willfully failed to call the customer Thamara Kannangara and her sister who happened to be a Grama Seva Niladhari. The learned High Court Judge had gone on to state that the said Grama Seva Niladari had played a major role in obtaining an additional National Identity Card for the customer. She had further stated that this leads to a serious suspicion that the customer obtained a second National Identity Card with the aid of the Grama Seva Niladhari with the intention of committing the fraud. There is absolutely no evidence to this effect, nor is there even a suggestion that either the customer or the Grama Seva Niladhari had defrauded the bank

A court no doubt is entitled to draw inferences, but such inferences must be drawn on the evidence placed before the court and if facts fall within the threshold laid down in section 114 of the Evidence Ordinance.

The learned High Court Judge had stated that the customer could not have received a Pass Book unless she visited the bank. There is no evidence that the customer had in her possession any of the three new Pass Books the Workman admitted that he issued. The day she complained to the bank about the discrepancy in her bank account, what she produced was the Pass Book that had been issued to her when she opened the bank account in 1981.

The learned High Court Judge had further stated that the Bank must ensure the cancellation of the previous Pass Book, prior to handing over the new Pass Book. According to his own admission it was the Workman, who obtained the new Pass Books and updated it and the interaction was between the customer and the Workman. When the learned High Court Judge states, that the 'bank must ensure the cancellation' it has to be done by an employee of the bank. As it was the Workman, who interacted with the customer, Thamara Kannangara, the Workman ought to have checked whether the old Pass Book

was cancelled before handing over the new Pass Book.This apperantly had not happened and it's another clear indication that the impugned transactions were not genuine. Going by the reasoning of the learned High Court Judge the Workman had, on no less than three occasions carried out the task him himself admitted and that it was he who had requested that new Pass Books be issued on three occasions.

There is another aspect emanating from the order of the learned High Court Judge I wish to address. She had stated that,

> "I observed that there is no justification in the termination of services of the Applicant whilst permitting the other respondents at the domestic inquiry inclusive of senior officers who have sanctioned the related payments to continue in services with lesser punishments or otherwise"

It is clear from the view expressed by the learned High Court Judge that one reason for her to hold that the termination of services is unjust is that other employees who have had connived in the impugned transaction had been dealt with leniently.

This approach is totally erroneous in my view. There is no material placed either before the Labour Tribunal or before the High Court to draw such a conclusion, particularly regarding cashier Leela Edirisinghe.

As far as the Workman is concerned, according to witness Fernando, over a shortage of Rs. 10,000 at Borella Branch the Workman has been warned to be more diligent and had been ordered to pay Rs.5000/-. Then in 1981 due absence from work without leave, he was deemed to have vacated his post and his services had been terminated. Thirteen years later in 1994, he had rejoined the bank as a new recruit.

The employer in my view must be permitted to exercise his discretion, with regard to errant employees taking into account facts and circumstances of the mischief committed, the extent of culpability and previous antecedents. There is no known principle in our law that the same punishment must be imposed when the same charge is laid against more than one and when all are found guilty.

In the case of *Gunarathne vs. People's Bank and Others, (2001) 1 SLR 381,* it was held that,

"Although charges laid against two persons are the same where there is discretion in imposing punishments, the degree of culpability in each person should be considered and different punishments may be imposed. This is a permissible and valid differentiation being in no way consistent with the equal protection of law guaranteed by Article 12 (1)."

It is to be noted that in as much as the Labour Tribunal exercises just and equitable jurisdiction so does the Supreme Court in determining infringements of fundamental rights.

This position was affirmed in the case of *W.M. Mendis and Co. Ltd. Vs. Sunil Liyanage, S.C Appeal 132/2004 (S.C Minutes 10.01.2006),* wherein the court observed thus, as per Justice Jayasinghe;

"It is my view that the Labour Tribunal fell into an error in coming to a finding that the Petitioner was entitled to compensation for the reason, that there are other employees who were similarly circumstanced and not dealt with by the company and that such indifference of the Appellant-Company amounted to discrimination."

The Workman did hold a position of trust and he himself is responsible for breaching that trust and I wish to quote the following passage with approval from the case of *Democratic Workers' Congress vs. De Mel and Wanigasekara (CGG 12, 432 19th May 1961)*

"The contractual relationship as between employer and employee as so far it concerns a position of responsibility is founded essentially on the confidence one has in the other and in the event of any incident which adversely affects that confidence the very foundation on which that contractual relationship is built should necessarily collapse…..once this link in the chain of the contractual relationship snaps it would be illogical or unreasonable to bind one party to fulfil his obligations towards the other. Otherwise it would really mean an employer being compelled to employ a person in a position of responsibility even though he has no confidence in the latter."

Considering the attendant facts, circumstances and the applicable law, I hold that the termination of services of the Workman by the Appellant-Bank is not unjust and hence the order of the Labour Tribunal is not one that is just and equitable.

Upon evaluation of the totality of material placed before the Labour Tribunal and the orders made by the Learned President of the Labour Tribunal and the learned Judge of the High Court respectively, in answering the questions of law on which leave was granted , I hold thus;

The labour Tribunal as well as the High Court have-

(a) arrived at the findings without proper evaluation of the totality of the evidence.

(b) erred in holding that the termination of the services of the Workman was unjust on the basis that other employees who were involved in the impugned transactions were treated more leniently.

(c) erred in directing the Appellant to have the Workman reinstated in service, when clearly the Appellant, the employer, has lost confidence in the Workman.

Accordingly, I set aside the order of the Labour Tribunal dated 05.03.2010 and the order of the Learned High Court Judge dated 11.05.2011.

However the workmen should be entitled to all the statutory dues.

The Appeal is allowed. I make no order as to costs.

Judge of the Supreme Court

Justice Priyasath Dep P.C

I agree

Judge of the Supreme Court

Justice Rohini Marasinghe

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 respect of violation of Fundamental Rights in terms of Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C. (F.R.) Application No. 64/2015

ACME Lanka Distillers (Pvt.) Ltd.,
73/1,
Old Awissawella Road,
Hanwella.

Petitioner

Vs.

1. Hon Ravi Karunanayake,
   Minister of Finance, Ministry of Finance,
   General Treasury,
   Colombo 1.

2. L.K.G. Gunawardhane,
   Commissioner General of Excise,
   No. 34,
   W.A.D. Ramanayake Mawatha,
   Colombo 02.

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

Respondents

COUNSEL

R. Chula Bandara with S.L. Samarakoon and E.M.L.K. Edirisinghe, M.L.R. De Silva, Mangala Jeevendra and R. De Silva on the instructions of Ananda G. Silva for the Petitioner.

Viraj Dayaratne, DSG with Ms. Viveka Siriwardena, DSG and Dr. Avanti Perera, SSC for the Respondents

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S.C. F.R. Application No. 71/2015

1. Uva Glen (Pvt) Ltd., Duwahenawatta, Millewa, Moragahahena, And
   No. 13A, Badulupitiya Road,
   Badulla.
2. Mr. Karupaippiahpillai Kumaranayagam,
   No. 48-1/2, Dickman's Road,
   Colombo 05.
3. Mr. Karupaippiahpillai Jayanayagam, No. 38, Elibank Road,
   Colombo 05.
4. Ms. Priyashanthini Kumaranayagam,
   No. 48-1/2. Dickman's Road,
   Colombo 05.

Petitioners

Vs.

1. Hon Ravi Karunanayake,
   Minister of Finance,
   Ministry of Finance
   Colombo 1.
2. Dr. R.H.S. Samarathunga,
   Secretary,
   Ministry of Finance,
   The Secretariat,
   Colombo 01.
3. Mr. L.K.G. Gunawardena,
   Commissioner General of Excise,
   Department of Excise,
   No. 34. W.A.D. Ramanayake Mawatha,
   Colombo 02.
4. Mr. D.P.M.V. Hapuarachchi,
   Former Commissioner General of Excise,
   Department of Excise,
   No. 34. W.A.D. Ramanayake Mawatha,
   Colombo 02.
5. Mr. A. Bodaragama,
   Deputy Commissioner of Excise (Revenue),
   Department of Excise,
   No. 34. W.A.D. Ramanayake Mawatha,
   Colombo 02.

Respondents

COUNSEL Saliya Pieris with Thanuka Nandasiri, Susil Wanigapura and Pasindu Thilakarathne instructed by Mrs. G. Thavarasa for the Petitioners

Viraj Dayaratne, DSG with Ms. Viveka Siriwardena, DSG and
Dr. Avanti Perera, SSC for the Respondents

S.C. F.R. Application No. 72/2015

1. Nipponexpo (Private) Limited,
No. 123,
Kumaran Ratnam Road,
Colombo 2

And also of

No. 152/A, Nagahalanda Watte,
Palugama,
Dompe.

2 Vethody Kumaran Chandrasena,
No. 123,
Kumaran Ratnam Road,
Colombo 2.

3. Prasannan Chandan,
No. 123,
Kumaran Ratnam Road,
Colombo 2.

4. Vethody Chandrasena Kumara,
No. 123,
Kumaran Ratnam Road,
Colombo 2.

5. Vishnu Valsan Vethody,
No. 123,
Kumaran Ratnam Road,
Colombo 2.

Petitioners

Vs.

1. Hon. Ravi Karunanayake,
Minister of Finance,

The Ministry of Finance,
The Secretariat, Colombo 01.

2. Dr. R.H.S. Samarathunga,
   Secretary,
   The Ministry of Finance,
   The Secretariat,
   Colombo 01.
3. Mr. L.K.G. Gunawardena,
   The Commissioner General of Excise,
   Department of Excise,
   No. 34,
   W.A.D. Ramanayake Mawatha,
   Colombo 02.
4. Mr. D.P.M.V. Hapuarachchi,
   Former Commissioner General of Excise,
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.
5. Mr. A. Bodaragama, Deputy Commissioner of Excise (Revenue),
   Department of Excise,
   No. 34, W.A.D. Ramanayake Mawatha,
   Colombo 02.
6. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

COUNSEL

Sanjeewa Jayawardane, P.C. with Rajeev Amarasuriya and Charitha Rupesinghe instructed by Ashoka Niuwhella for the Petitioners

Viraj Dayaratne, DSG with Ms. Viveka Siriwardena, DSG and Dr. Avanti Perera, SSC for the Respondents

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S.C. F.R. Application No. 84/2015

1. Scotland Distillers and Blenders (Pvt) Ltd.,
   30/7, Galpotta Street,
   Colombo 13.
2. Sundary Sundaralingam,
   20/2, Lower Kings Street,
   Badulla

Petitioners

Vs.

1. Hon. Ravi Karunanayake,
   Minister of Finance,
   Ministry of Finance,
   The Secretariat,
   2nd Floor,
   Colombo 01.
2. The Secretary,
   Ministry of Finance,
   The Secretariat, 2nd Floor,
   Colombo 01.
3. The Commissioner General of Excise,
   Excise Department of Sri Lanka,
   No. 34,
   W.A.D. Ramanayake Mawatha,
   Colombo 02.
4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents.

COUNSEL Kushan de Alwis, P.C. with Ms Ayendra Wickremasekara for the 1st and 2nd Petitioners.

Viraj Dayaratne, DSG with Ms. Viveka Siriwardena, DSG and Dr. Avanti Perera, SSC for the Respondents

BEFORE K. Sripavan, C.J.,
C. Ekanayake, J.,
R. Marasinghe, J.

ARGUED ON 30TH April 2015

DECIDED ON **24.06.2015**

K. SRIPAVAN, C.J.,

It was agreed among Counsel that the aforesaid applications were to be heard together as they were similar in nature and one order could be made in respect of the said four applications.

When the applications were taken up for hearing, Learned D.S.G. raised a preliminary objection on the ground that the said applications had been filed outside the time period

stipulated in Article 126(2) of the Constitution and hence should be dismissed in limine. Learned D.S.G. contended that the alleged infringement of the Petitioners' fundamental rights by the Respondents took place when the budget proposal was brought to the public domain by way of a budget speech made in Parliament on 29th January 2015 and that the Petitioners should have invoked the jurisdictions of this Court within one month from 29th January 2015.

It is common ground that S.C. Applications 64/2015, 71/2015, 72/2015 and 84/2015 were filed on 12th March 2015, 13th March 2015, 13th March 2015 and 17th March 2015 respectively. The Petitioners in all these applications impugn the Excise Notification No. 973 published in the Gazette Extraordinary No. 1901/19 dated 13th February 2015 by the Hon. Minister of Finance. The Petitioners in S.C. Applications 71/2015. 72/2015 and 84/2015 in paragraphs 16, 30 and 14 respectively averred that they became aware of the said publication only at a later date and were able to secure a copy of the relevant Gazette only after 27th February 2015.

It must be emphasized that courts of law have nothing directly to do with mere decisions of policy or budget speeches made in Parliament. Such speeches or budget proposals have no legal impact until Parliament confers some legal power on it. As soon as the Parliament confers some legal power or authority it becomes the function of the courts to see that the power is not exceeded or abused. Additionally, this Court has to consider, the violation, if any, of the Petitioners is by "executive or administrative" action. The Rule of Law which postulates equal subjection to the law requires the observance of the law in all cases. In fact, it could be said that perhaps the most important defining feature in a democratic society based upon the rule of law is that any aggrieved person has the opportunity of challenging the decision of the Hon. Minister of the Government of the day, in appropriate cases.

I am not of the view that the moment a person becomes aware of the possibility of an infringement, he must rush to Court and invoke the jurisdiction under Article 126. Any aggrieved person has the right to challenge the infringement not only when it is imminent but also after it has occurred. The failure to challenge an imminent infringement will never

be a bar to challenge the actual infringement. In *Siriwardena and Others* Vs. *Brigadier J. Rodrigo and Others* (1986) 1 S L R 384 at 387, Ranasinghe, J. stated that "*where a Petitioner establishes that he became aware of an infringement, or the imminent infringement, not on the very day the act complained of was so committed, but only subsequently on a later date, then, in such case, the said period of one month will be computed only from the date on which such Petitioner did in fact become aware of such infringement and was in a position to take effective steps to come before this Court.*"

In the instant applications, the infringement occurred not when the budget proposals were made in Parliament but only when the Hon. Minister of Finance acted upon the budget speech and published the impugned Gazette notification.

Article 126(2) must be given a generous and purposive construction. The starting point of one month prescribed by Article 126(2) is when the Petitioners were freely able to purchase a copy of the impugned Gazette, which is on or after 27th February 2015. The preliminary objection raised by the learned D.S.G. is therefore overruled as the Petitioners have invoked the jurisdiction of this Court within one month from 27th February 2015. The applications are now set down for hearing on its merits.

CHIEF JUSTICE

C. EKANAYAKE, 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

Alli Company (Pvt) Ltd.
Plaintiff-Appellant

SC (CHC) 47/2008
High Court Colombo (Civil)
Case No. 35/2004(3)

Vs

Mohamad Noohu Abdul Salam
Defendant-Respondent

Before : Chandra Ekanayake Acting C J
Priyasath Dep PCJ
Sisira J De Abrew J

Counsel : Basheer Ahamed with M Riyaz and MS Sonali Silva for the Plaintiff-Appellant.
Murshid Maharoof with Shamir Zavahir and Muzeena Kaleel for the Defendant-Respondent

Argued on : 27.8.2014, 9.10.2014 and 10.11.2014
Written Submissions
tendered on : By the Plaintiff-Appellant on 12.1.2015
By the 2nd and 3rd Defendant-Respondents on 2.3.2015
Decided on : 11.6.2015

Sisira J De Abrew J.

This is an appeal against the judgment of the learned High Court Judge of Colombo exercising civil jurisdiction wherein he dismissed the Plaintiff's action. Being aggrieved by the said judgment, the Plaintiff-Appellant has appealed to this court.

The Plaintiff-Appellant in its plaint and evidence states inter alia the following matters.

1. The Plaintiff-Appellant is the registered owner of trade mark No.24094 which carries the trade mark "ALLI BEEDI". The Plaintiff-Appellant is also the owner of trade mark No.56213 which carries the trade mark Alli Suruttu (Alli cigars).
2. The Plaintiff-Appellant markets and sells its beedi and cigars in covers marked P11 and P12 to the plaint and uses the ring labels marked P13 and P14 on its beedi and cigars.
3. The Plaintiff-Appellant has become aware that the Defendant-Respondent had started to market and sell his beedi and cigars in covers marked P17 and P18 which are similar to the Plaintiff-Appellant's trade mark and back ground in P11 and P12. P17 depicts Apli Beedi while P18 depicts Apli Suruttu(cigars).
4. The Plaintiff-Appellant has become aware that the Defendant-Appellant had started to market and sell his beedi and cigars with ring labels marked P20, P21 and P22 which are similar to the Plaintiff-Appellant's trade mark and background in ring labels marked P13 and P14. In other words what the Plaintiff-Appellant says is that its covers P11 and P12 are similar to the Defendant-Respondent's covers marked P17 and P18 and that the Plaintiff-Appellant's ring labels P13 and P14 are similar to the Defendant-Respondent's ring labels marked P20, P21 and P22.
5. The Plaintiff-Appellant says that it has been selling Alli beedi for the last 45 years and Alli cigars for the last 25 years.

The Defendant-Respondent in his answer and evidence, inter alia, states the following matters.

1. He is the registered owner of trade mark No.44765 which carries the trade mark ‘APLI’.
2. He has been selling his beedi and cigars under the name of ‘Apli beedi’ and ‘Apli cigars’ for the last 22 years in covers marked P17 and P18 using the ring labels marked P21 and P22. He further says that P17 depicts ‘APLI BEEDI’, P18 depicts ‘APLI SURUTTU’ (cigars) and P21 and P22 depict ‘APLI’.

The Plaintiff-Appellant in his plaint moved for a permanent injunction restraining the Defendant-Respondent and/or his agents from using the trade mark of the Plaintiff-Appellant in a deceptively similar manner as shown in the documents marked P17,P18,P20,P21 and P22 to the plaint.

The Plaintiff-Appellant contends that he, as the owner of trade mark ‘Alli’, is entitled to the rights under Section 121 of the Intellectual property Act No.36 of 2013. The Plaintiff-Appellant further contends that when the Defendant-Respondent sells his beedi and cigars in covers marked P17 and P18 using his ring labels marked P20 and P21, he violates the Plaintiff-Appellant’s trade mark rights under Section 121 of the Intellectual property Act No.36 of 2003(the Act) and also competes unfairly with the Plaintiff-Appellant which amounts to violation of Section 160 of the Act. The contention of the Plaintiff-Appellant is that when a consumer buys the Defendant-Respondent’s beedi and cigars he may be buying them under the impression that they are Alli beedi and cigars because the packs (covers) and ring labels of the beedi and cigars of the Defendant-Respondent are similar to the Plaintiff-Appellant’s packs and ring labels. However it has to be noted here that the Plaintiff-Appellant’s beedi and cigars carry the name of ‘Alli’ and the Defendant-Respondent’s beedi and cigars carry the name of ‘Apli’. Although the Plaintiff-Appellant contends so it has to be noted here that the Plaintiff-Appellant has not

obtained a trade mark registration in respect of P11, P12, P13 and P14 which are the covers and ring labels of the Plaintiff-Appellant. Therefore the Plaintiff-Appellant is not entitled to claim relief under Section 121 of the Act.

The learned trial Judge, after considering the evidence led at the trial, concluded that the Plaintiff-Appellant had not established its cause of action under Section 121 of the Act. Learned counsel for the Plaintiff-Appellant, at the hearing before us, submitted that he was not challenging this decision. In my view the decision of the learned trial Judge on the above point is correct.

Learned counsel for the Plaintiff-Appellant however contended that he was entitled to succeed cause of action under Section 160 of the Act. The learned trial Judge at page 7 and 8 of the judgment (pages 332 and 333 of the brief) concluded that the Defendant-Respondent was guilty of unfair competition as the acts committed by him come under Section 160 of the Act. However the learned trial Judge decided that the Defendant-Respondent was entitled to the benefit of the defence of 'honest concurrent user'. It has to be noted here that the Defendant-Respondent has been selling his beedi and cigars in covers marked P17 (APLI BEEDI) and P18 (APLI SURUTTU) for the last 22 years.

Learned counsel for the Plaintiff-Appellant contended that the learned trial Judge was wrong in coming to the above conclusion as the defence of 'honest concurrent user' is not available in the Intellectual Property Act No.36 of 2003. The most important question that must be decided in this case is whether the defence of honest concurrent user can be applied in Sri Lanka. I now advert to this contention. In considering this contention it is relevant to consider a passage from the book titled 'Intellectual Property by WR Cornish 4th edition page 628 which reads as follows:

"Contrast with these cases of shared reputation, the difficulties that may arise between the two traders each of whom has built up an independent reputation quite honestly in the same or similar mark. If one can show that he has the reputation in a business name for a particular area, the other will not be permitted to use the name in that area, however much he may enjoy a reputation in the name in some other part of the country. But if each has built up his reputation in his own locality and argument arises because both are expanding business into intermediate territory, neither may be able to show that the public there associates the name with him so as to lead to passing off by the other."

P Narayanan in his book titled "Law of Trade Marks and Passing Off (5th edition) at page 626 states thus: *"Concurrent user of a trade name by the defendant is a good defence in an action for passing off".*

It is therefore seen that the defence of 'honest concurrent use' is available in the English Law. The law of Intellectual Property is based on the English Law and this law (Intellectual Property Law) deals with commercial matters. For commercial matters the law that should be applicable is the English Law. When the Intellectual property Act No.36 of 2003 is silent on the aforementioned point, the English Law will have to be applied in terms of Introduction of Law of England Ordinance No.5 of 1852. For the above reasons, I hold that the defence of 'honest concurrent user' can be applied in Sri Lanka.Then the Courts can apply the principles relating to the 'honest concurrent user' found in the English Law. As I pointed out earlier the Defendant-Respondent has been selling his beedi and cigars in covers marked P17 and P18 under the name of Apli beedi and Apli cigars for the last 22 years. The Defendant-Respondent became the registered owner of the trade mark 'Apli' in 1982. This position has been admitted by the witnesses of the Plaintiff-Appellant. According to the evidence, both brands that is to say Alli and Apli are in the market

for over 22 years. Thus the consumers who smoke beedi and cigars should be conversant with the two brands and should be aware that there are two brands. Thus they should be able to identify the two brands. This is because both brands are in existence for the last 22 years. Therefore it is difficult to think that consumers are misled when they buy Apli brand. Therefore in my view, in a situation of this nature, applying the principle relating to the defence of 'honest concurrent user' is justified. If the Apli beedi and cigars have just been sent to market, situation would have been different as the consumers may be unaware of the existence of two brands.

When I consider the above matters, I hold the view that the Defendant-Respondent is entitled to claim the defence of 'honest concurrent user' although it is not available in the Intellectual Property Act No.36 of 2003. For the above reasons, I hold that the principles of English Law relating to the defence of 'honest concurrent user' can be applied in the above situation as our law is silent on this point.

For the aforementioned reasons, I hold that there is no merit in this appeal. I therefore upholding the judgment of the learned trial Judge dismiss the appeal with costs.

Judge of the Supreme Court

Chandra Ekanayake Acting C J

I agree.

Acting 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

SC/CHC/Appeal/08/2007

HC (Civil) No. 294/2002(1)

Merchant Bank of Sri Lanka Ltd.,
No. 28, St. Michael's Road,
Colombo 3.
(formerly at No. 189, Galle Road, Colombo 3)

PLAINTIFF

Vs.

1. Deguruge Nihal Perera
Caring on business under the name, style
and firm of "Desan Enterprises"
At No. 19/21, Eksath Mawatha,
Mahara, Kadawatha.

2. D.C.A. Ramani Mallika
No. 14, Eksath Mawatha,
Mahara, Kadawatha.

DEFENDANTS

AND

1. Deguruge Nihal Perera
Caring on business under the name, style
and firm of "Desan Enterprises"
At No. 19/21, Eksath Mawatha,
Mahara, Kadawatha.

2. D.C.A. Ramani Mallika
No. 14, Eksath Mawatha,
Mahara, Kadawatha.

DEFENDANTS-PETITIONERS

Vs.

Merchant Bank of Sri Lanka Ltd.,
No. 28, St. Michael's Road,
Colombo 3.
(formerly at No. 189, Galle Road, Colombo 3)

PLAINTIFF-RESPONDENT-RESPONDENT

AND BETWEEN

1. Deguruge Nihal Perera
Caring on business under the name, style
and firm of "Desan Enterprises"
At No. 19/21, Eksath Mawatha,
Mahara, Kadawatha.

2. D.C.A. Ramani Mallika
No. 14, Eksath Mawatha,
Mahara, Kadawatha.

DEFENDANTS-PETITIONERS-APPELLANTS

Vs.

Merchant Bank of Sri Lanka Ltd.,
No. 28, St. Michael's Road,
Colombo 3.
(formerly at No. 189, Galle Road, Colombo 3)

PLAINTIFF-RESPONDENT-RESPONDENT-RESPONDENT

BEFORE: B.P. Aluwihare P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Pubudu Alwis with Premachandra Epa for the Defendant-Petitioner-Appellants

Prasanna Jayawardena P.C. for the Plaintiff-Respondent-Respondent

ARGUED ON: 14.08.2015

DECIDED ON: 03.11.2015

GOONERATNE J.

This appeal refers to an order refusing to purge default, in an application made to the High Court of Western Province (exercising Civil Jurisdiction) to purge the default of appearance of the Defendant-Petitioner-Appellants. On the day fixed for trial in the High Court on 22.03.2004, Defendant-Petitioner-Appellants were absent and unrepresented and the matter was fixed for ex-parte trial against both Defendants on 28.05.2004, and Plaintiff Respondent-Respondent (Merchant Bank of Sri Lanka) having placed evidence

before the High Court at the ex-parte trial obtained an ex-parte judgment against the said Defendants-Petitioner-Appellants by the judgment of the learned High Court Judge dated 10.06.2004. On a perusal of the learned High Court Judge's order dated 11.01.2007, I find that the following two important matters were considered and accordingly the High Court refused to purge default. The said two matters are:

(a) Admissibility of Petitioners-Defendants-Appellants counter affidavit. Affidavits were rejected by the learned High Court Judge as being devoid of any validity in law.

(b) Absence of proof of reasonable grounds for default or the reasons for default being not acceptable.

The grounds of appeal to the Apex Court are contained in para 18 of the petition dated 07.03.2007.

In brief the facts pertaining to the case of the Plaintiff as presented by the plaint are as follows. Plaintiff Bank filed action against the Defendants seeking a judgment against the Defendants jointly and severally in a sum of Rs. 3,827,668/89 being the amounts due from the Defendants for facilities extended by the Plaintiff Bank to the 1st Defendant. The 2nd Defendant had guaranteed the repayment of the said facilities on guarantee and indemnity bonds. The learned

High Court Judge has carefully referred to the series of steps taken in the High Court starting from the point of service of summons on the both Defendants-Petitioner-Appellant up to the date of default of appearances. As such it would be unnecessary to repeat in this judgment the procedural steps that had taken place in the High court, as the record bears all such procedural steps.

It is settled law that an ex-parte judgment cannot be entered without a hearing and adjudication. Trial Judges need to be satisfied that the Plaintiff is entitled to the relief claimed. It is also necessary for the trial Judge at an ex-parte trial to reach findings on relevant points after a process of hearing an adjudication. It is preferable to lead oral testimony at the ex-parte trial but law does not prohibit evidence being placed before court in support of the claim by way of an affidavit. (Section 85(1) of the Code). I have examined the judgment entered by the learned High Court Judge. Plaintiff at the trial had placed evidence by way of an affidavit affirmed to, by one Mrs. Liyanage Renuka Amarasinghe who was an Assistant Director of the Finance Unit of the Plaintiff Bank. Documents P1 to P8 had been produced along with the affidavit, which documents are relevant and important to establish Plaintiff's case. In brief the trial Judge very correctly gives his mind to the facts pleaded in the affidavit, more particularly the request of the 1st Defendant for certain discounting facilities for which the Bank

responded by letter of 04.10.1983. 1st Defendant by letter P2 accepted Plaintiff's offer. By document P3 Bill of Exchange, entered on 22.08.1995 for a sum of Rs. 1,500,000/- Defendant having agreed to repay the amount due on P3 had subsequently defaulted. But the 1st Defendant-Appellant had subsequently agreed to settle and admitted the transaction . Thereafter a letter of demand was sent and as there was no response to the Letter of Demand plaint was filed.

The learned High Court Judge has considered all necessary points and evidence and entered judgment, accordingly. I also examined the order of the learned High Court Judge dated 11.01.2007 whereby he refused to vacate the ex-parte judgment, entered in default. The two points referred to above, (a) & (b) have been considered inter alia by the trial Judge and had been dealt adequately with cogent reasons.

However prior to examining, the position dealt by the learned High Court Judge in (a) above, I will proceed to consider the position in (b) above (absence of reasonable grounds).

It seems to be the position of the Defendant-Petitioner-Appellants that they were present in court on all dates when the case had been called/mentioned. On the trial date according to the case presented by the Appellants, they arrived in court on 24.03.2004 and having looked at the notice

board, they found that it was not put down for trial on 24.03.2004 but having inquired they came to know that the trial had been held on 22.03.2004 in their absence. In the written submissions the Appellants have stated that they had taken all necessary steps and acted with due diligence but what is stressed is that the wrong date had been taken down by their Attorneys and as a result court had proceeded with the ex-parte trial and entered judgment.

At the inquiry to vacate the ex-parte judgment (purge default inquiry) the appellant's position in brief was that on 16.03.2005 the 1st Defendant-Petitioner-Appellant gave evidence at the inquiry and at the conclusion of his evidence in examination-in-chief, the counsel for the Respondent had moved for a date to cross-examine the witness. Court allowed this application and re-fixed the inquiry on 18.06.2005. On the said date cross-examination and re-examination of the witness was concluded. At that stage an application was made for a postponement by the Appellant's party to enable them to lead the evidence of both the senior and junior counsel of the Appellant who were not present on the trial date which resulted in default of appearance. To this application the Plaintiff-Respondent-Respondent's counsel had vehemently objected. The learned High Court Judge having heard counsel on either side made order refusing to grant a postponement of the inquiry.

It is the position of the Appellant that it was in the best interest of justice, and it was essential to lead the evidence of both the senior and junior counsel. Appellants further submit that refusal to grant a date by the trial Judge has resulted in a miscarriage of justice and the learned trial Judge had erred in refusing to grant a postponement which is a breach of the rules of natural justice according to the Appellants. The order of the learned High Court Judge regarding the objection to grant a date are contained in the proceedings of 18.05.2006.

It is necessary to ascertain the grounds on which the learned trial Judge made order refusing to grant a postponement to the Appellants. In the said order the learned High Court Judge takes the view that further inquiry was fixed on 25.11.2005 for 18.05.2006 which is almost a period of six months to the date of further inquiry date (18.05.2006) Journal Entry (22) of 25.11.2005 and Journal Entry (23) of 18.05.2006 establish this fact. Learned High Court Judge further observes that during the period of six months referred to above no attempt or steps had been taken by the Appellant's party to ensure the presence of the witnesses whom the Appellants relies, to prove their case. Nor have the Appellants moved for summons officially. It is the view of the High Court Judge that the Appellant's party had not acted with due diligence and failed to exercise necessary care to take the required steps.

I wish to observe that the learned High Court Judge was not in error when he pronounced the order dated 18.05.2006 refusing to grant a postponement for the reasons stated in the said order. Any Judge sitting in a court of law need to control court proceedings and manage the cases before the court with proper case management. Justice need to move forward at a reasonable pace. It cannot be delayed nor can it be hurried. Both those factors tend to result in injustice. A counsel appearing for a client must be methodical and organize his work and cases of his client to the best of his/her ability and serve his client in the best possible way which need to be of prime importance. I endorse the views expressed by the leaned High Court Judge, in the said order.

In the order of the learned High Court Judge dated 11.07.2007 (refusal to purge default) at folio 190 of the brief, he has focused on two other important points. It supports the trial Judge's earlier order of 18.05.2006. It is stated that two Attorneys-at-Law named therein, one who gave the 1st Defendant-Petitioner-Appellant the date of trial as 24.03.2004 and the other Attorney who is said to have checked the date with the said Appellant (as 24.03.2004) were not called to give evidence. The learned trial Judge observes that the attitude of the Petitioners towards the preparation of the inquiry, suggests total inactiveness and sluggishness on their part. Both the orders are of

some significance to the case before this court. It suggests and emphasizes the need to prepare for the cases and further demonstrates the indifferent attitude of the Attorneys who handled the case of the Appellants. Counsel need to anticipate, leading the evidence of a witness, in court. This cannot be achieved by moving for postponements as a habit. Having failed to summon the required witness, on time and date cannot be made use of to blame the trial court, subsequently, in an appeal, before the Supreme Court.

The learned High Court Judge in his very comprehensive order of 11.01.2007 (final paragraph) refer to another indifferent attitude of the concerned Attorneys. The wrong date was detected on 24th March and a late application to court under Section 86(2A) of the Code was made on 06.04.2004. The order further highlight the failure of the Appellant to have brought to the notice of court that they were present in court on the 24th March and the trial Judge had observed that a motion should have been filed on that date itself to keep the court informed. It is the view of the trial Judge that such a delay renders the version highly improbable. I see no basis to take a different view of that from the learned High Court Judge.

In A.G. vs. Herath and another 2002 (2) SLR 162 Udalagama J. in a somewhat similar case held “another normal practice of diligent counsel would be to obtain, before the due date a copy of the previous day’s proceedings. If that was done in the instant action the next date would invariably appear at the end of the previous day’s proceedings. Obviously this had not been done. Such failure could not amount to a mistake”.

In this regard I also wish to observe that registered Attorneys-at-law usually employ Clerks to attend the registry of the District Court and other original courts for the purpose of obtaining proceedings, checking the next date etc. In the yester years these Clerks were called ‘Proctors Clerk’. This practice continues even today. If the party concerned was vigilant enough very many problems arising in court as taking down the wrong date, etc. could have been avoided if the record was checked at an earlier stage.

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. David Appuhamy Vs. Yassassi Thero 1987 (1) SLR 253.

In this case another important matter had been urged as in (a) above. However I have already dealt with (b) above before considering the validity of the affidavit presented to the High Court. Defendant-Petitioner-Appellants have not

been able to satisfy the learned High Court Judge of the required reasonable ground to cure their defect as regards default of appearance. On that ground alone this appeal has to be rejected. It may be of some academic interest to consider (a) above. Learned President's Counsel for the Plaintiff-Respondent-Respondent in his submissions has invited this court to consider several case laws, in this regard.

The evidence transpired in the High Court, establish that services of Mr. Chinthaka Ratnayake Attorney-at-law was engaged as junior counsel for the Appellants. Affidavit filed along with the petition was affirmed before the said Attorney-at-Law. Courts in Sri Lanka and U.K do not condone this practice. An affidavit sworn before deponents own lawyer is not acceptable and strict compliance with Section 86(3) of the Civil Procedure Code is essential to enable a party to proceed to the very end of his case. Pakeer Mohideen Vs. Cassim 4 NLR 299; Jayathilake and Another Vs. kaleel and Others 1994(1) SLR 319; Inaya Vs. Orix Leasing Co. 1993(3) SLR 197. As regards a valid affidavit to be filed under Section 86(3) of the Code was also dealt in Coomaraswamy Vs. Mariamma 2001 (3) SLR 312. The legal position as stated in the above case laws remains intact up to date. Further arguments on this aspect maybe developed as time goes by, but, whatever it may be the law seems to be settled on this aspect.

In view of the above facts and circumstances and material placed in the context of this case, we are not inclined to grant any relief to the Defendant-Petitioner-Appellants. Therefore we proceed to dismiss this appeal without costs.

Appeal dismissed.

JUDGE OF THE SUPREME COURT

B.P. Aluwihare P.C. J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C. (CHC) Appeal No.08/2010
HC/Civil/ 263/2007/MR

Sanicoch Group of Companies,
No. 24, Bristol Street,
London FCIY 452
England.

Appearing by its Attorney
Denham Oswald Dawson
157, Dutugemunu Street,
Kohuwala.

PLAINTIFF

Vs.

Kala Traders (Pvt.) Limited,
No. 151, Dam Street,
Colombo 12.

DEFENDANT

In the matter of an application made under and in terms of Section 86(2) of the Civil Procedure Code.

Kala Traders (Pvt.) Limited,
No. 151, Dam Street,
Colombo 12.

DEFENDANT-PETITIONER

Vs.

Sanicoch Group of Companies
No. 24, Bristol Street,
London FCIY 452
England.

Appearing by its Attorney
Denham Oswald Dawson
157, Dutugemunu Street,
Kohuwala.

PLAINTIFF-RESPONDENT

AND NOW

Kala Traders (Pvt.) Limited,
No. 151, Dam Street,
Colombo 12.

DEFENDANT-PETITIONER-APPELLANT

Vs.

Sanicoch Group of Companies
No. 24, Bristol Street,
London FCIY 452
England.

Appearing by its Attorney
Denham Oswald Dawson
157, Dutugemunu Street,
Kohuwala.

PLAINTIFF-RESPONDENT-RESPONDENT

BEFORE: Chandra Ekanayake J.
Upaly Abeyrathne J.
Anil Gooneratne J.

COUNSEL: Ikram Mohamed P.C. with Padma Bandara and
N. Udalagama for the Defendant-Petitioner-Appellant

S.C.B. Walgampaya P.C., with Upendra Walgampaya
for the Plaintiff-Respondent-Respondent

ARGUED ON: 18.05.2015

DECIDED ON: 02.10.2015

GOONERATNE J.

This is an appeal to the Supreme Court from the order of the High Court of Western Province in exercising its Civil Jurisdiction (Commercial High

Court). Order was delivered by the said High Court on 20.10.2010, refusing to vacate an ex-parte judgment entered in default as per Section 86(2) of the Civil Procedure Code. In this regard an Acceleration Application bearing No. 01/110 had also been filed, and the Journal Entry of 08.10.2010 in S.C. Acceleration No. 01/2010 may also be noted as parties agreed to accelerate the appeal on the following basis.

(i) All actions pending between the said parties would be stayed until the determination of Case No. SC (CHC) Appeal No. 08/2010.

(ii) The outcome of the decision in case SC (CHC) Appeal No. 08/2010 would be taken by all parties as full and final settlement of all disputes pertaining to this case between the parties.

(iii) As these matters are agreed upon the Defendant-Appellant-Respondent agrees to have this appeal referred for acceleration and application for acceleration is agreed upon.

Parties also agree that if the aforesaid agreement is not conceded then the acceleration would be refused.

The Plaintiff-Respondent-Respondent, Sanicoch Group of Companies of U.K. filed action through Power of Attorney holder as described in the caption to the petition, against the Defendant-Petitioner-Appellant namely Kala Traders

(Pvt.) Ltd. to recover a sum of Rs. 147,180.000/- in the Commercial High Court of Colombo. On the summons returnable date Defendant-Petitioner Company was not represented, and as such being absent and unrepresented the case had been fixed for ex-parte trial, against the Defendant-Petitioner-Appellant. Plaintiff-Respondent-Respondent obtained an ex-parte judgment after ex-parte trial and this appeal arises from the order of the learned High Court Judge dated 20.01.2010, refusing to set aside the ex-parte judgment, wherein the Defendant-Petitioner-Appellant sought to purge the default before the Commercial High Court. I would wish to refer to the following undisputed facts, prior to examining the above order of 20.01.2010, delivered by the learned High Court Judge of the Commercial High Court.

The record bears the fact that summons was served on the Defendant Company on 23.09.2007, and the summons returnable date was 29.10.2007. Defendant-Petitioner-Appellant does not dispute the service of summons on the Defendant Company. Subsequent to having obtained an ex-parte judgment, decree was served on the Defendant Company on 23.09.2008. An application to vacate the ex-parte decree was made by the Defendant-Petitioner-Appellant on 07.10.2008. Plaintiff-Respondent-Respondent filed objection to same on 15.01.2009. Inquiry into this application as per Section

86(2) of the Civil Procedure Code was held in the High Court on 30.03.2009, and order delivered as stated above on 20.01.2010. At the inquiry to purge default an employee of the Defendant Company one Chandrasiri Perera gave evidence. There was no appearance on behalf of the Defendant Company on the summons returnable date and parties do not dispute that the Managing Director of the Defendant Company was kidnapped and missing since 20.07.2006, and suspected of having been murdered for which the police had conducted investigations. The other Directress was the said Managing Director's daughter Ms. Vanaja Sriskandarajah, and the Defendant Company's position was that she was continuously resident in Australia, and was in Australia at all relevant times to pursue her studies. The evidence led at the inquiry also reveal that the wife of the Managing Director Yogarani Sriskandarajah (not a Director) was too compelled to leave Sri Lanka and had been residing in Australia as there had been threats to her life as well, and even during the short period she was present in the island she was staying in hotels in Sri Lanka, being reluctant to disclose her proper whereabouts.

The only witness who gave evidence at the above inquiry was the above named Chandrasiri Perera who was attached to the Company since 1996. It was his evidence that he held the post of an Executive Officer in the company

and that there were only two Directors, in the said company. One was the Managing Director who went missing since the year 2006 and the other was the daughter of the Managing Director Vanaja Sriskandarajah who had never participated in the affairs of the company. The evidence of this witness was that the daughter was in Australia from that time onwards and resident in that country for purposes of her studies. (The period referred to above according to evidence was the 1996 period-folio 587) A question posed may be to get further clarification, the witness states from the time he joined the company (1996) Vanaja Sriskandarajah would have been in Sri Lanka for two years only, but thereafter left Sri Lanka.

It was also the evidence of the above witness that since the Managing Director, Sriskandarajah went missing, the company was in a state of collapse and no proper person to take decisions on behalf of the company. It is stated that other subsidiary companies also faced the same fate. There is some reference in evidence to another company called 'Franklin Development Company' where the son of the Managing Director of the Defendant Company was involved but they were separate companies from each other, but had one office for all the other companies. It is further stated that the wife of the above Sriskandarajah was in the island around the year 2008 but she had been staying in

a hotel but never occupied the residence at Gregory's Road, Colombo 7. She was in Sri Lanka for about 2 ½ months but never visited the Defendant Company, nor was she willing to make her presence felt in Sri Lanka due to death threats. The evidence on this point was to impress court that the wife's movements within the country was very much restricted even during the short period of 2 ½ months mentioned above.

I find an important item of evidence that had transpired from the only witness, as to who gave instructions to take steps to file an application to purge the default. Evidence on this point, as testified by witness was that the wife Yogarani Sriskandarajah had been given a Power of Attorney by her daughter Vanaja Sriskandarajah but no document produced, and one Rohana Kumara had been appointed as a Director to take necessary steps in the process of purging default. However it is in evidence that subsequently a new board had been appointed to conduct the affairs of the company.

The above witness testified that in 2008, Yogarani Sriskandarajah the wife of the former Managing Director was present in the Island and he had told her about the case in question. He also states in evidence, having consulted may be the lawyers, he realized that nothing could be done to cure the defect until the receipt of the 'Decree' and he admits that the Decree was served and was signed

and accepted by him on behalf of the company. The position of the Defendant Company as testified by the witness in gist was that:

(1) During the period summons were served on the company, no proper steps could have been taken to represent the company in court, since there were no Directors available to take responsibility, and initiate action.

(2) According to form No. 48 issued by the Registrar of Companies which had been marked and produced in court as 'P1' details of the two Directors are provided and same being the only two persons mentioned above.

(3) Subsequent to serving the Decree, a new Board of Directors appointed, and as such steps were taken to purge default.

(4) Defendant Company could not take proper legal steps on the summons returnable date due to reasons beyond its control and not due to any negligence on the part of the organization.

At this point let me also consider the position of the opposing party who placed material before the learned High Court Judge who more or less relied upon the version of the Plaintiff-Respondent-Respondent in refusing to vacate the ex-parte order. The following points emerged in cross-examination of the above witness.

(a) As at today witness is serving as a Manager of the Company.

(b) No instructions taken from Vanaja Sriskandarajah after the year 2006 and no notice given to her, regarding the affairs of the company.

(c) After Nadarajah Sriskandarajah went missing from June 2006 his wife was consulted and he did what she told him.

(d) No connection with Company Secretary, but aware that the Secretary is in Bambalapitiya.

(e) Witness speaks of document P1 and the proxy signed during that time where Yogarani Sriskandarajah (wife) had signed based on a Power of Attorney obtained by the daughter Vanaja Sriskandarajah. Proxy was signed by Company Secretary as well.

(h) There is a connection between the case relevant to Proxy VI and the case pertaining to the inquiry regarding purge default.

(j) During the year 2006-2007 witness was doing office work. Suggestion made to witness that he was not aware of the whereabouts of the Directors and Company Secretary was a lie was denied by witness, and the suggestion that when the Defendant Company need to recover money steps taken to initiate proceeding in court and when others sought to recover money from the Company the Defendant-Petitioner-Appellant avoids such situation was also denied by witness.

(k) Yogarani Sriskandarajah had death threats and as such she had not disclosed her movements and stayed away from Sri Lanka. Even during the period she was in Sri Lanka she spoke from hotels, where she was staying and reluctant to disclose permanent or temporary residence due to threats.

The learned High Court Judge in his order dated 20.10.2010, states the fact of summons being duly served is not in issue. However he emphasizes the fact that in these circumstances internal mismanagement of the company and problematic situation within, would not be a ground to be considered to excuse default, for the reason that persons responsible had not acted with due diligence (ඊට වගකිව යුතු අයට පැන නැගුණු තත්වයක් තුල නිසි අවධානය යොමු කර කටයුතු නොකිරීම තුලින් පැන නගින්නක් බැවිනි). The above position of the learned trial Judge no doubt gives the impression that he has not totally rejected the position of mismanagement urged on behalf of the company by the Defendant-Petitioner-Appellant, but observes that such a situation which cannot condone default arose as a result of those responsible acting without due diligence.

The order of the learned High Court Judge also stress the fact that although the fact of mismanagement and the breakdown of the affairs of the company was suggested, cross-examination of the only witness reveal that as regards other cases during the relevant period the Defendant-Petitioner-Appellant Company had taken necessary steps, to defend or prosecute and appear in courts, in those cases. Further the learned High Court Judge doubts whether the evidence led to demonstrate that a person named as 'Rohana

Kumara' was appointed as Director to take necessary steps to purge default, was in fact done with due authority. No Power of Attorney or other written authority was produced in court, to prove above.

In this regard the High Court Judge also observes that difficulties undergone or faced by the other Directress resident in Australia and her mother who had death threats, are factual matters known to those two persons only, who had chosen not to give evidence in court. Order of the learned High Court Judge refer to the fact that evidence by the witness on the question of difficulty of getting the Directors and Secretary of the Company involved in the case in hand to defend the action is doubtful. The Judge in this regard draw a comparison and states that if the other cases were defended or prosecuted at the relevant period, there is no reason to excuse the default of the case in hand and it is nothing but negligence or willful negligence on the part of the Defendant-Petitioner Appellant.

Chapter XII of the Civil Procedure Code deals with consequences and cure (when permissible) of default in pleading or appearing. The relevant sections of the code dealing with the case in hand would be Section 86(2) of the Code. It reads thus:

> 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.

The above section enables the Defendant in an action to excuse his default and obtain an order to set aside the judgment entered in default in the manner provided by the above section. The above section requires the Defendant to satisfy court that the Defendant had reasonable grounds for such default. To state very briefly is that, the Defendant party need to satisfy court which would mean, to meet the expectations or desires, to be accepted by as adequate in the circumstances. What should or would be adequate needs to be only reasonable grounds. It is well known according to case law that inquires on application to set aside an ex-parte decree is not regulated by any specific provision of the Civil Procedure Code but such inquiries must be conducted consistent with rules of Natural Justice and the requirement of fairness. Section 839 of the Code applies. De Fonseka Vs. Dharmawardena (1994) 3 SLR 49. What is decided by court is

essentially a question of fact on the part of the Defendant whether there are reasonable grounds. Wimalawathie Vs. Thotamuna 1998 (2) SLR Vol. 1 at pg. 1.

At this point of my judgment I would also prefer to look at the other provisions relating to default which concerns the Plaintiff in an action. Such provisions are contained in Section 87(3) of the Code, the only difference in the two sections are that Section 86(2) enables to purge default only on service of decree and that too within 14 days. But Section 87(3) requires the application to restore be made within a reasonable time. (There is no rigid deadline for the Plaintiff to apply but for the Defendant to purge default a time limit is specified). However both these sections has set the standard of proof required by law to be only to satisfy court of reasonable grounds for default. Legislature has taken much care to see the ends of justice and to introduce the word 'reasonable', to excuse default.

No doubt it is a liberal approach which enables the defaulter to cure or rectify a defect on his part and get into the correct track and face an interpartes trial. However it should be permitted subject to terms in order to compensate the opposing party for whatever inconvenience caused to such party.

The entirety of the order of the learned High Court Judge pertains to the factual position and an analysis of evidence and his views of the material that

transpired at the inquiry. There is absolutely no reference made in the said order to the relevant provisions of the Civil Procedure Code viz. Section 86(2) of the Code. It is incumbent upon the trial Judge to have analysed in a case of this nature, the evidence led in the case along with the provisions of the statute i.e the important ingredients of Section 86(2), being satisfied or not of the required reasonable grounds, as per the relevant section. A mere statement in the order expressing the view (last para of order) that the above facts would not be sufficient to set aside the ex-parte judgment would not suffice especially where the intention of the legislature had been made very clear in the relevant section of the Code.

Section 86(2) of the Code contemplates of a liberal approach emphasising the aspect of reasonableness opposed to rigid standard of proof. That being the yardstick the learned Judge's order should indicate with certainty that reasonable grounds for default had not been elicited at the inquiry. Nor does the order demonstrate by reference to evidence and provisions contained in Section 86(2), that there was a willful abuse of the process or willful default which would enable court to reject the Defendant-Petitioner-Appellant's case. This is essential in the background of undisputed facts referred to in this judgment at the very outset. I cannot lose sight of the fact that undisputedly the two Directors of

the company who are responsible and bound to take decisions on behalf of the company, were not available since one went missing and the other not resident in Sri Lanka which resulted in mismanagement of the affairs of the company at the relevant time. In the context of the case in hand with reference to evidence led at the inquiry, death threats to the family which resulted in the Managing Director going missing and suspected of being murdered would have had a serious adverse impact on the rest of the family and their affairs with its business establishment, at the relevant period.

Ordinarily in the absence of a plausible explanation it is possible to conclude that reasonable grounds had not been elicited as regards the case in hand. If that be so mismanagement of the company may not be a reasonable ground, and this court would not have had a difficulty in affirming the views of the learned High Court Judge. However the facts placed before the High Court is an extreme and an unavoidable situation where a court of law cannot ignore having regard being had to the common course of events, human conduct and public and private business in their relation to the facts of the case in hand. In a family business though it was a limited liability company the main person or the live-wire of the business went missing. It is no ordinary situation but an extreme, extraordinary situation for the family, that resulted in mismanagement of the

affairs of the company, which arose or had a serious impact on the other members of the family as observed above. Much emphasis need to be placed in interpreting Section 86(2) of the Code. Court must use the yardstick of a subjective test rather than having resorted to an objective test in determining what is reasonable.

There is another important matter to be considered. This is an action against a juristic person. Viz. Kala Traders (Pvt.) Ltd. The role of the legal personality also need to be considered and it could never have been dismissed by a stroke of a pen, expressing that mismanagement of the company is no ground of reasonableness. It is axiomatic that Directors are responsible for the management of a company's business and if for instance one scrutinizes Section 184 of the Companies Act No. 7 of 2007, one would observe that it grants the Board with all powers necessary for that purpose. These powers would include the right of representation for and on behalf of the company in litigations involving the company. In addition the articles of association of the company would also regulate the management of the company. As such a company operates through its contractual organ and the most important organ is an effective Board of Directors.

As far back as 1843 the seminal case of Foss Vs. Harbottle (1843) 2 Hare 461 held that only the company through its organs – the Board or general meeting can initiate proceedings for a wrong done to the company. In the same way it is the Board that can act for the company in litigation initiated against it. As such it becomes a question of fact for the learned District Judge or the High Court Judge as the case may be, in default proceedings to ascertain whether there was an Effective Board in the first place. It would be highly irregular to dismiss an application on the basis, that mismanagement of a company would not constitute a reasonable ground, for default.

There had been much emphasis placed by a Plaintiff-Respondent-Respondent that Defendant had appeared in other actions filed by the Defendant or filed against the Defendant marked V1 and V2, and as such the default in the case in hand is nothing but their negligence. In any event V1 relates to an action as far back as year 2006. However I observe that such a finding by the learned High Court Judge is an erroneous conclusion and a misconstruction of the relevant circumstances when a subjective test and a liberal approach is clearly envisaged within the four corners of the relevant Sections, (86(2)). The question of default has to be assessed by a case by case basis. In all the above matters expressed and stated in this judgment, I am strongly of the view that the circumstances which

prevailed at the relevant period although summons had been served on an employee of the company, it would not have been possible to enter an appearance on behalf of the company on the summons returnable day in the absence of an active/effective Board of Directors. Therefore in all the above facts and circumstances I set aside the order of the learned High Court Judge dated 20.01.2010, and vacate the ex-parte judgment, and permit the Defendant to file answer and defend the said action. However considering whatever inconvenience caused to the Plaintiff-Respondent-Respondent, we direct the Defendant-Petitioner-Appellant to make payment in a sum of Rs.100,000/- as costs to the Plaintiff-Respondent-Respondent prior to filing answer in the relevant High Court. Registrar of this court is directed to send a copy of this judgment to the Registrar of the relevant High Court of Colombo.

Appeal allowed.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT

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

SC(FR) Application No. 31/2014

1. R.P.P.N. Sujeewa Sampath
2. R.P.P.N. Hasali Gayara

Both of 114, Thimbirigasyaya Road,
Colombo 5.

PETITIONERS

Vs.

1. Sandamali Aviruppola
   Principal
   Vishaka Vidyalaya
   133, Vajira Road.
   Colombo 5.
2. Anura Dissanayake
   Secretary, Ministry of Education
   Ministry of Education
   Isurupaya
   Battaramulla.

3. Bandula Gunawardhana
   Minister for Education
   Ministry of Education
   Isurupaya
   Battaramulla.
4. A. S. Rohini
5. K. A. D. M. S. Rathnayake
6. S. Guneratne
7. R. A. I. Randunge

   All Members of the Interview Board
   (on admissions to Grade 1, 2014)
   C/o. Vishaka Vidyalaya
   133, Vajira Road.
   Colombo 5.

8. Members of the Appeal Interview Board
   (on admissions to Grade 1, 2014)
   C/o. Vishaka Vidyalaya
   133, Vajira Road.
   Colombo 5.

8A. Gita Abeygunawardene
   Principal of Holy Family Convent
   Chairman of the Appeal Interview Board

8B. A. S. Rohini
   Secretary of the Appeal Interview Board.

8C. N. R. Jinasena

Member of the Appeal Interview Board.

8D. H. A. M. C. A. Jayasundara

Member of the Appeal Interview Board.

8E. Shrimathi Jayasoorioya

Member of the Appeal Interview Board.

9A. N. N. Kottage (Minor)

9B. R. Kottage

Both of 110/1, Thimbirigasyaya Road,

Colombo 5.

10A. S. I. S. H. Amaratunga (Minor)

10B. N. I. W. A. Karunaratne

Both of 43, Siripa Road

Colombo 5.

11A. D. S. Atapattu (Minor)

11B. K. A. D. K. Samaraweera.

Both of 119, Havelock Road,

Colombo 5.

12A. H. M. T. Wijewardene (Minor)

12B. R. H. K. Erandhika

Both of 76/3, Thimbirigasyaya Road,

Colombo 5.

13A. I. T. Lanka Geeganage (Minor)

13B. A. Udayangani Dahanayake

Both of 57/8, D.S. Fonseka Road,

Colombo 5.

14A. E. Y. M. Leelaratne (Minor)

14B. E. T. D. Leelaratne

Both of 20/2, Fife Road,

Thimbirigasyaya,

Colombo 5.

15. Ranjith Chandrasekera

Director of Education

National Schools

Isurupaya,

Battaramulla.

16. Hon. Attorney General

Attorney General's Department

Hultsdorp

Colombo 12.

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.,

Sarath de Abrew J. &

Anil Gooneratne J.

COUNSEL: Viran Corea with Ermiza Tegal for Petitioners

Asthika Devendra for 9B & 13B Respondents

Rohan Deshapriya with Chanakya Liyanage for 11B Respondent

Nandun Fernando with Dilukshan Fernando for 10B Respondent

Yuresha de Silva S.S.C for Attorney General.

ARGUED ON: 27.02.2015

DECIDED ON: 26.03.2015

GOONERATNE J.

This was a school admission case. The 1st Petitioner is the father of the 2nd Petitioner who filed the present Fundamental Rights Application as the 2nd Petitioner the daughter was denied admission to Grade I of Vishaka Vidyalaya for the year 2014. The 1st Petitioner claims that he has been a resident at the address given in the caption to this application (No. 114, Thimbirigasyaya Road, Colombo 5) for well over 20 years. It is averred in the pleadings of the Petitioners that the

Ministry of Education issued a Circular dated 23.5.2013 regarding admissions of children to Government schools (Grade 1) for the year 2014 and it is marked and produced as P2. On or about 20.6.2013, the Petitioners submitted an application (P3) for admission to Grade 1 in the said school.

This application for admission was under the category of 'proximity' of residence, to the school in question. In this application the Petitioners also challenge as per sub paras (e) and (f) of the prayer to the petition, the decision of the 1st to 3rd and or 15th Respondents to grant admission to Grade 1 of Visaka Vidyalaya, to 9A, 10A, 11A, 12A, 13A & 14A Respondents being the children of 9B, 10B, 11B, 12B, 13B & 14B Respondents.

Petitioners argue that the decision of the official Respondents namely 1st, 2nd and or 3rd Respondents and or 15th Respondent refusing admission to the said school to the 2nd Petitioner and the decision to grant admissions to the said school and relevant Grade to 9A, 10A, 11A, 12A, 13A and 14A Respondents, Constitute a violation/and infringement of Article 12(1) of the Constitution. In fact good part of the submissions of learned counsel for the Petitioner was more or less focused on the irregularities of the decision to admit 9A, 10A, 11A, 12A, 13A and 14A Respondents. The learned counsel for Petitioners drew the attention of

this court to a large number of documents annexed to the Petition to demonstrate that his daughter is more than qualified to be admitted to Visaka Vidyalaya under the 'proximity' of residence category. All those documents are pleaded and annexed to para 10 of the petition. Learned counsel emphasized the fact that the selection procedure was flawed and the children admitted had been irregularly admitted in violation of circular P2.

Learned counsel for the Petitioner argued that at the interview held on 30.8.2013 by the authorities concerned, he had been informed that no marks could be allocated for the title deed relied upon by Petitioner to prove residency as the 1st Petitioner's mother had executed the deed of gift in favour of the 1st Petitioner's brother-in-law. It was the case of the Petitioners that he was totally unaware of such a transaction, although he continued to reside in the given address, for a long period of time. An attempt was made to demonstrate that his mother had done so and gifted the property in question to Petitioner's brother-in-law since his in-laws or sister were in need of money. The deed of gift in favour of Petitioner's brother-in-law bears the No. 511 of 29.11.2007 (P6). Petitioner inter alia pleads that the above deed of gift No. 511 was revoked by Petitioner's mother, by a deed of revocation bearing No. 411 of 23.10.2013 (P7).

On or about 15.10.2013 the school authorities displayed the selection list which gives the cut off marks as 68 but the Petitioner's daughter was not selected and not even included in the waiting list. The waiting list includes applicants who secured marks between 59 and 67. Petitioner claims that his child should be entitled to higher marks than what was allocated by the selection panel. In fact I have perused the written submissions of the Petitioner and the chart at para 21 of same, projects a figure of 96 marks after taking into consideration his explanation. This seems to be the way the Petitioner analyzes his own case, but even in the appeal made by the Petitioner he was not successful as the Appeal's panel had rejected his appeal more particularly as no marks had been allocated to the Petitioner as regards the deed.

On 24.12.2013 the final list was displayed on the notice board. The cut off marks as 67 and Petitioner's child's name was not included nor was she considered to be in the waiting list. In fact another complaint that was suggested by learned counsel for the Petitioner was that either 8 or 6 persons mentioned as Respondents to this application whose children were selected are not residents in the given addresses. However I observe that at the hearing this argument was not fully addressed by learned counsel, for the Petitioner.

Another argument advanced on behalf of the Petitioner was that the selection panel had only allocated 21 marks for electoral list (clause 6:1 of P2) and whereas Petitioner claim he would be entitled to full marks (35). The matter disclosed by the Petitioner indicates that it was due to non inclusion of their names in the electoral list for the years 2008 & 2009, for which an appeal had been made. Petitioner contends that the official Respondents are privy to the records and should ascertain the truth of the statements made by the Petitioner in this regard. Petitioner drew the attention of this court to Clause 8:3 of P2 where the Interview Board could verify above from the Department of Elections. However the 4th to 7th Respondents and 8A & 8E Respondents had not done so. Therefore the 1st Petitioner stresses that his child would be entitled to the full marks of 35 for the electoral list.

The other complaint of the Petitioner was that only 2 marks were allocated in proof of additional documents in proof of residence. Petitioner contends that a variety of documents had been submitted in this regard. However I observe that in view of the several documents submitted, the Petitioners may be entitled to more than 2 marks. Even if the authorities allocate full marks (5) to this category, still the petitioner would be expected to score more marks to prove his entitlement. The question is whether he has been successful on all important

matters in terms of circular P2? Does even the cumulative effect of all documents submitted by the Petitioner bring him at least to a closer point to the cutoff point?

Petitioner in this application itself thought it fit to contest the position of 9B to 13B Respondents who were successful to gain admissions to the school in question. 9B Respondent's case is challenged on the basis that the residence relied upon by 9B Respondent is just bare land. 9B Respondent was permitted to submit new documents. Additional documents had not been annexed to the objection of 9B Respondent. They were registered voters of a different address. Even as regards 10B Respondent the Petitioner states he is not a resident at the given address and it is a bare land. Lease 1R 9D is only for 3 years and full 4 marks cannot be allocated. Lease 1R9B is a purely a business premises. Documents submitted by 10B Respondent is blatantly unclear. Documents considered after closing date. As regards 11B and 12B Respondents the Petitioners challenge their lease agreements. It is suggested that the names are not registered as required by law.

What is significant in the application of the Petitioners is that the material disclosed by the Petitioners in their pleadings itself disclose the inability to gain admission to the school in question. It is evident that the deed relied upon by the Petitioner was not in favour of the Petitioner's mother Leelawathie. At the relevant time and period the deed had been executed in favour of another relative of the Petitioner. The subsequent revocation of same cannot show any good results as the revocation was in the latter part of year 2013, which is outside the scheme contemplated under Circular P2. As such the authorities concerned cannot be unnecessarily blamed on this account, and this court does not wish to interfere with the ruling given by the selection panel and the Appeal's Board. Further the Petitioner's argument does not demonstrate unfairness and arbitrariness. Nor can I conclude that petitioner's attempt to pursue his application under the fundamental rights jurisdiction denies the required equality or discrimination.

The other question is on the electoral list where the Petitioner's claim full marks. Petitioners also state that his name does not appear in the electoral list for the year 2008 and 2009, but an appeal had been made on same and as a result of the appeal his name was relisted in the years 2010, 2011 and 2012. I am not in a position to accept that argument since electoral list are

usually kept intact or updated by entering the relevant forms provided by the Department of Elections. It is an annual process, and the registered voter is expected to give details of residents in a particular household through the chief occupant. One may for various reasons not have the name registered in the electoral list for a particular year but he would not be deprived of registering the residents of the household in the subsequent years if the forms are duly perfected and accepted by the Commissioner of Elections. The authorities concerned have considered and given the marks according to the available data i.e for the years 2010 to 2012. Further where the actual residence of a party is in doubt or where the prescribed criteria is at issue the burden would be on the applicant to prove residence and convince the school authorities.

Where eligibility for school admission based on prescribed criteria is at issue, the burden is on the applicant to prove residence for the purpose of admission. This burden is to be discharged based on documents presented to the school authorities, which must be validated through a scrutiny and check conducted by the school authorities at the time the application was presented. If incorrect particulars are provided by an applicant, the school authorities could reject the application.

The official Respondents produce the Land Registry folios (1R2) to support the position that the premises in question was gifted to another, by the Petitioner's mother. Further the 1st Respondent takes up the position that such a transfer had not been disclosed by the petitioner in his affidavit 1R3, and the petitioner could reasonably expected to be aware of such transaction. Therefore the 1st Respondent state that petitioner has submitted incorrect particulars and it lacks uberrimae fides. The 1st Respondent also very firmly state that no undertaking was given about any site inspection by the authorities concerned, and maintain that by 1R4 marks awarded at the interview are reflected in the 2nd column on the extreme right side. 1st Respondent also state revocation of the alleged gift P7 had been executed on 23.10.2013 and registered on 29.10.2013, and it is clearly after the date (30.8.2013) on which the Petitioners attended the admission interview. By this Respondents urge that if the deed of revocation (P7) was considered by the Appeal's Panel the Petitioner would receive preferential treatment to the detriment of all other applicants.

I wish to observe that the Petitioners have not succeeded in convincing this court with the available material, that they could attract the constitutional remedies relating to fundamental rights. There is enough and more

justification for the school authorities to reject the application of the Petitioners due to their inability to establish 'proximity' of residence. In fact what was pursued turned against the Petitioners, for very good cogent reasons. As such this court need not take the next step to consider the case of the 9B to 13B Respondents, as no kind of hostile discrimination against the Petitioners were proved and established. Notwithstanding above 9B to 13B Respondents, were able to produce lease agreements acceptable as per Circular P2. As such these Respondents were able to fortify their case on site inspections carried out by the authorities concerned. Such a site inspection could not have been extended to the petitioners in the absence of proof of residence required to be established in terms of Circular P2.

Petitioners were not able to establish proximity of residence from the documents relied upon mainly due to the reason that a valid deed during the relevant period had not been produced. Therefore the authorities concerned are not obliged to give any under taking for a site inspection. It is apparent that the school authorities and the admission's panel cannot be faulted in the circumstances and the context of the case presented by the Petitioners. In this state of affairs, I can find no reason to grant relief to the petitioners. The

application of the Petitioners does not seem to fall within the ambit of Article 126 Of the Constitution. Jurisdiction under Article 126 is limited to hearing and determining only questions relating to the infringement of a fundamental right. The grievance projected by the Petitioners cannot be said to be the consequences of the infringement of the fundamental right of equal protection of the laws or of discrimination against the petitioners on any ground set out in Article 12(1) or 12(2) of the Constitution. However before I conclude I refer to the case of Buddhan Choudhury Vs. State of Bihar, 1955 AIR (SC) 191, Das C.J., referring to American decisions said –

> "It is suggested that discrimination may be brought about either by the Legislature or the Executive or even the Judiciary and the inhibition of Article 14 extends to all actions of the State denying equal protection of the laws whether it be the action of any one of the three limbs of the State. It has, however, to be remembered that, in the language of Frankfurter J., in Snowden v. Hughes, (1943) 321 U.S.I, 88 L.e.d. 497, 'the Constitution does not assure uniformity of decisions or immunity from merely erroneous action, whether by the Courts or the executive agencies of a State." The judicial decision must of necessity depend on the facts and circumstances of each particular case and what
>
> may superficially appear to be an unequal application of the law may not necessarily amount to a denial of equal protection of law unless there is shown to be present in it an element of intentional and purposeful discrimination.

The application of the Petitioners do not fall within the ambit of Artocle 126 of the Constitution although our jurisdiction in this regard is most extensive. I am unable to grant the petitioners any relief. I would accordingly dismiss this application, but make no order as to costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C. 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/F.R. No. 39/2013

Abdul Jabar Mohamed Sakir

No. 61, Dambulla Road,

Kurunegala

(On behalf of minor M.S.F. Shameeha)

PETITIONER

Vs.

1. The Principal

   Holy Family Convent

   Kurunegala.

2. The Zonal Director of Education

   Zonal Education Office,

   Kandy Road,

   Kurunegala.

3. Provincial Director of Education

   Office of the Provincial

   Director of Education,

   Kurunegala.

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

11. P.M. Nazir
Deputy Director of Education
Provincial Education Office,
Kurunegala
And 05 others.

RESPONDENTS

BEFORE: Priyasath Dep P.C.,J.
Upaly Abeyratne J. &
Anil Gooneratne J.

COUNSEL: Mahanama de Silva for the Petitioner
Rajiv Goonetilleke S.S.C for the Attorney General

ARGUED ON: 12.02.2015

DECIDED ON: 23.03.2015

GOONERATNE J.

In this application the Petitioner complains of violation of a fundamental right, which arose in respect of admitting his daughter to year 1, Holy Family Convent, Kurunegala in the year 2013. The Petitioner invoked the jurisdiction given to this court by Article 126 of the Constitution and he alleges that it is a right infringed which is declared and recognized by Article 12(1) of the Constitution. The facts briefly are as follows.

The main complaint of the Petitioner was that the child of the 4th Respondent had been selected for admission to the above grade (year 1) over and above the Petitioner's child and according to the Petitioner's calculation of marks the 4th Respondent's child could not have been awarded marks over and above of what his child secured and in this respect the authorities concerned had erred. More particularly the Petitioner complains that 4 extra marks had been granted to the 4th Respondent's child for a deed produced as regards proof of residence. However the Petitioner does not contest the marks granted to his child, and also at the hearing it was conceded that he is not the most proximate to the

concerned school. Learned Senior State Counsel in his oral and written submissions strongly urged the following on behalf of the official Respondents.

1. The Petitioner does not reside at the given address; 61 Dambulla Road, Kurunegala, which is a business premises used as a Liquid Petroleum (LP) Gas distributor/sales outlet.

2. In any event, even if the 4th Respondent was not to be granted the marks for the deed as averred by the Petitioner, the Petitioner was not the most proximate to the school. There are others including the Petitioner who had scored the same mark who were more proximate to the school.

3. The 4th Respondent was entitled to the full 10 marks as the interview board had the discretion in interpreting the school admission circular. The admission circular made no mention of marks being reduced if a grandparent of the child (the applicant's father) had died and the parent of the child was to inherit such property.

Admission of students to the school in question is governed by circular annexed marked P1. (Circular No. 2012/19). By letter P2 Petitioner's application for admission of his child was rejected. Letter P2 indicates that the petitioner's child obtained 90 marks, and as per the selection procedure and interview the minimum marks required for admission of a child would be 93. As the Petitioner was not agreeable to the marks allocated in letter P2, Petitioner as pleaded, met the Chairperson of the Interview Board and informed him

accordingly. Thereupon the Petitioner was given letter P3, requesting him to attend an interview on the same day. Petitioner pleads that he produced all documents required by P3. However Petitioner states two other lists had been exhibited on the notice board of the school which included a temporary admission list of selectees and a 'waiting list'. By the temporary admission list the 4th Respondent's child had been selected and allocated 90 marks. In the waiting list (as in para 9 of the petition) the following names appear.

NAME	**MARKS ALLOCATED**
1. M.S.F. Shameeha (Petitioner's child)	90
2. M.F.F. Shamha	90
3. F.A Ashik	90

Petitioner at all stages of the selection procedure complains of the admission of the 4th Respondent's child. According to the Petitioner the 4th Respondent's child would be entitled to only 81 marks, and therefore the Petitioner's child having obtained 90 marks should be selected (P4). On or about 28.11.2012 Petitioner lodged an appeal on the above basis, and has maintained the above position even before the Appeals' Board. However on or about 13.12.2012 the final list of children admitted had been exhibited, and the 4th

Respondent's child had been allocated 92 marks and selected. The day after, on 14.12.2012 he lodged an appeal with the Human Rights commission (P6). Petitioner refers to Electoral registers P7A to P7E Applicable to the 4th Respondent and state, 4th Respondent's wife is not registered. As such only 25 marks could be allocated in terms of clause 6:1 of P1. The authorities have given 35 marks according to the information Petitioner had received. Another point

stressed is that 4th Respondent is residing in an address given by him and it was owned by 4th Respondent's father. In terms of Circular P1 Clause 6:IV only 6 marks could be given. 4th Respondent cannot be allocated the full 50 marks because of intervening schools close to his residence. Therefore Petitioner pleads selection of 4th Respondent's child is arbitrary and capricious and it violates Article 12(1) of the Constitution.

The subject of school admissions to Government schools have become highly competitive. It is evident that very many parents with the birth of their child, anticipate and plan well ahead of time to gain admission to a school of their choice. The growing population in the country has made it a difficult and a complex task for the authorities in the Education field to provide a school of one's choice. There were three matters highlighted by the learned Senior State counsel

in his submissions before this court, as described above. Consequent upon an appeal to the persons concerned by the Petitioner, a site inspection was carried out and it was found that the Petitioner was not resident within the premises relied upon by the Petitioner. The 3rd Respondent by an affidavit filed in this court states that the premises in question is a commercial premises used as a 'Gas' sales outlet (some photographs produced R2-R5). Whether such premises was used for both residential and commercial purposes would be a question of fact that the petitioner alone should establish. In fact he states he had moved out of such place due to road expansion.

Respondents also produce an important letter 14R3 which was annexed to the 11th Respondent's affidavit. Contents of 14R3 suggests that it is a commercial/business premises and cannot confirm that the Petitioner is resident in such premises. 14R3 is a letter issued by the Jumma Mosque of the area. Petitioner has also produced X20 which confirm that the petitioner is of Muslim origin. It is also gives details of family and the address. I do not think there is any conflict in the above two letters. More weight should be given to letter 14R3, which specifically refer to the question of a business premises.

Our attention was also drawn to Clause 8,3 (අ) and 10:8 of Circular P1, which requires the rejection of the Petitioner's application if residential requirement is found to be incorrect. Accordingly official Respondents submit that the Petitioner's application was rejected since he was not resident in the given address. The official Respondent's further plead that they also informed the Human Rights Commission of the above facts (R1 & 14R2).

I have also considered the submissions of learned counsel for the Petitioner that two additional marks had been added to the 25 marks already allocated to the electoral register. This position seems to have transpired before the Human Rights Commission. Our attention was also drawn to document 14R6 and more particularly cage 2 of same and the hand written portion below cage 2 of 14R6. I observe that it is not legible at all but even if it could be accepted that two more marks cannot be added or such calculation remains unexplained, I have to accept the argument put forward by the learned Senior State Counsel that the Petitioner was not the most proximate to the school in question. Further it is difficult for this court to draw mala fides on the part of the official Respondents, based on mere assertions. It would be essential that in the performance of a

public duty evidence should established something more than mere suspicions. In any event a high degree of proof should be placed before court, to enable court to arrive at such a decision based on mala fides.

There is this factor of proximity that cannot be ignored as regards school admissions. Proximity to the school in question, become highly competitive for those who profess the Islam faith since the religious quota permits only the admission of one Muslim child. The 4th Respondent's child was according to the authorities concerned the most proximate to the school and two other children with equal marks were more proximate, to the school than the Petitioner's child. As such the Petitioner's right to be selected on this basis becomes more diminished and no chance of success at all. Document 14R5 indicates that the parents of F.A Ashik who was the next most proximate child than the Petitioner's had filed a SCFR Application 41/2013 challenging the selection of 4th Respondent's child. This court had refused to grant leave to proceed on 16.05.2015, to the Petitioner in that application.

Learned counsel for the Petitioner strenuously argued that the 4th Respondent was only able to submit a deed of his late father (child's grand-father) and his entitlement would be only for 6 marks as per clause 6:1 (ii) of Circular P1,

and the authorities concerned could not have given 10 marks. In case of death of the parent's father or mother who had title to the property by way of a deed and who had by the relevant time passed away, the laws of succession is clear on the point as immediately on death the property of the deceased parent's would vest on the heirs. On the death of a person his estate in the absence of a will passes at once by operation of law to his heirs and the dominium vests in them. Once vested they cannot be divested of it except by several well-known modes recognized by law 10 NLR at 242.

Circular P1 does not contemplate such a situation. Clause 5:6 of P1 grants the Interview Board a discretion to interpret the circular and make a log entry. 11th Respondent had produced the log entry marked 14R8.

Article 12(1) would ensure that invidious distinction or arbitrary discrimination should be avoided, by the state. It seems to lay down a general rule of equality. It only guarantees a right to equality of opportunity for being considered, as in the case in hand for selection of a child to a Government school. In the process of selection of a child there could be and there may occur some mistakes or wrongs that could be identified. But I do not think that every wrong

or mistake could attract the fundamental rights jurisdiction guaranteed by the Constitution. In the case in hand this court was invited to consider certain aspects of admissions of Petitioner's child who had flagrant and vital lapses that could not have given an edge over all others in the run. i.e 'residency' requirement.

In fact emphasis of the Petitioner was on the basis of the 4th Respondent's child's selection and nothing else. On one hand Petitioner himself should have come with clean hands and not left room for court to doubt the 'residency' requirement. On the other hand the Selection Board had to perform a difficult task as the quota available was limited to select only one child from among the Muslim Community.

In the above circumstances before I conclude it would be important to also give our mind to the question as to when the Supreme Court or under what circumstances court will intervene, and to take cognizance of the distinction between ordinary rights and fundamental rights. I am guided by the following decided case, which amply demonstrate that the Petitioner cannot in any event, rely on the fundamental rights jurisdiction of this court, in the circumstances and context of this application.

In W.K. Nimala Wijesinghe Vs. A.G and Others. S.C Application 13 of 1979.

Held:

(1) The Supreme Court is undoubtedly the guardian and protector of the fundamental rights secured for the people and its powers are given in very wide terms; but the authority of the Supreme Court is not absolute, for these powers are subject to certain well defined principles and it is conceded that there are limits which the Supreme Court cannot transgress, however hard and unfortunate a case may be. The Supreme Court has to take congnizance of the distinction between ordinary rights and fundamental rights and it is only a breach of a fundamental right that calls for intervention of Court.

Every wrong decision or breach of the law does not attract the constitutional remedies relating to fundamental rights. Where a transgression of the law takes place, due solely to some corruption, negligence or error of judgment, a person cannot be allowed, to come under Article 126 and allege that there has been a violation of the constitutional guarantees.

(2) The Petitioner may legitimately complain of a grave miscarriage of justice, but that is not enough to establish that the procedure adopted by theexecutive in discontinuing her has impinged on the fundamental rights secured to her by the Constitution.

Per Sharvananda, J.: "Though the Petitioner has suffered a miscarriage of justice, yet this Court is helpless in affording any relief. The jurisdiction of this Court under Article 126 of the Constitution is limited to hearing and determining only questions relating to the infringement of a fundamental rights."

In the above circumstances I have no alternative but to dismiss the Petitioner's application. The Respondents, however, will not be entitled to any costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C.,J.

I agree.

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C (FR)Application No. 108/2010

Kelum Dharshana Kumarasinghe
Attorney at Law
No. 38, Bodhirukarama Lane
Galborella, Kelaniya.

PETITIONER

FOR & ON BEHALF OF

1. L.M.R. Pushpasiri,
   C/o, Swarna Saloon,
   Mapitigama, Alawwa.

2. S. D. G. Dharmasiri
   201/02, Dissage Watta,
   Suriyagama, Kadawatha.

3. J. K. Rathnasiri Mahamagahena
   Karaputugala, Kamburupitiya.

4. D.M.R. Banda
   105/01A, Gala Junction
   Kiribathgoda.

5. G. W. Jayarathna,
   Sooriyapaluwa,
   Kadwatha,

6. P. D.A. Rohan,
42/1, Wihara Mawatha,
Naligama, Ragama.

7. R. M. Ariyarathna,
Yapahuwa Junction
Mahawa.

8. H.A.S. Geethadeva,
413, Maligathenna,
Weyangoda.

9. P.H. Wasantha
Batadoowa, Batapola,
Meetiyagoda.

10. G.M.A. Bandara
11, Roswatta, Polgahawela.

11. M.G. Donald,
126A, Giyagala Watta,
Garuwalgoda West,
Agalugaya, Habaraduwa.

12. H.P.D.S. Pathirana
189/2, Dewahera,
Nittambuwa.

13. H. D. Reshan,
Randolawatta, Mitiyagoda.

DETAINEES

Detained at the Criminal Investigations Department

Vs.

1. S. Hettiarachchi
   Additional Secretary
   Ministry of Defence, Public Security,
   Law and Peace, Colombo 3.

2. Mahinda Balasooriya
   Sri Lanka Police Department
   Police Headquarters, Colombo 1.

3. Nandana Munasinghe
   Deputy Inspector General of Police
   Criminal Investigations Department
   Secretariat Building, Colombo 1.

4. Vass Gunawardena,
   Senior Superintendent of Police
   S.S.P Office, Kurunegala Police Station
   Kurunegala.

5. Withana,
   Inspector of Police,
   Police Station, Gokarella,
   Kurunegala.

6. I.P., C.D.I. Paranagama,
   Inspector of Police
   O.I.C., Special Investigations 1,
   Criminal Investigations Department,
   Colombo 1.

7. Prasanna Wickramasooriya,
   Chairman,
   Airport Aviation,
   Sri Lanka Airport, Katunayake.

8. S.I. Jayawardena
Police Station, Kurunegala.

9. Hon. Attorney General
Attorney General's Department,
Colombo 1.

RESPONDENTS

BEFORE: Chandra Ekanayake J.

P. B. Aluwihare P.C., J. &

Anil Gooneratne J.

COUNSEL: Upul Jayasuriya with

Sandumal Rajapakshe and

Erandi Jayasuriya for Petitioners

Asad Navavi S.S.C. for the Respondents except the 7th Respondent

The 7th Respondent is absent and unrepresented

ARGUED: 26.05.2015

DECIDED ON: 28.07.2015

GOONERATNE J.

Petitioner to this Fundamental Rights Application, has filed this application against the Respondents as per Article 126(2) of the Constitution on behalf of 13 detainees who were detained at the relevant period and time at the Criminal Investigations Department. On 30.09.2010 this court granted leave to proceed for alleged violations of Articles 12(1), 12(2), 13(1) and 13(2) of the Constitution. It is averred in the petition that the detainees are all persons who served the Sri Lanka Army as non-ranking officers. It is stated in the petition that the said detainees have never been convicted of any offence previously. It is also pleaded that the detainees in question are held against their will at the C.I.D along with scores of other detainees who were engaged in the propaganda campaign supporting former Army Commander, General Fonseka, at the Elections held and concluded on 26.1.2010.

The second para of the petition describes the violations for which each of the Respondents are held liable by the Petitioner. The allegations are

more particularly leveled against the 1st, 4th, 7th and 8th Respondents, which could be stated as follows.

(a) 1st Respondent for issuing detention orders in violation of the rights of the detainees.

(b) 4th Respondent influenced other Respondents to fabricate false charges along with the 7th Respondent.

(c) 7th Respondent initiated the abduction of detainees, without having any power to do so.

(d) 8th Respondent was responsible for detention of detainees.

It is pleaded that no reasons whatsoever had been adduced to the 1st to 13th detainees for their arrest and detention at the point of arrest and detention or thereafter by the Respondents concerned. It is the case of the Petitioner as presented on behalf of the detainees that all of them commenced a journey to go to Anuradhapura on a pilgrimage to dedicate a vow at the sacred Bo Tree at Anuradhapura to invoke blessings of the Triple Gem for the victory of the Presidential Candidate, General Sarath Fonseka. The team of the pilgrimage party consisted of the above detainees and 7 other civilians. During the course of the journey they had stopped the bus in which all of them were travelling, and at Gokarella to have tea. Whilst having tea the 7th Respondent along with some

thugs surrounded them and abducted the 1st to 13th detainees as described in the petition. It is stated that the 7th Respondent at that point of time contacted the 4th Respondent over the mobile phone. Thereafter all of the detainees and the civilians were taken to the Gokarella Police Station. It is the position of the Petitioner that when the detainees were taken to the police station all of them were unarmed. It is also stated that there was no reason to have them arrested. The reason for arrest not notified.

In the petition filed of record the following matters, inter alia are pleaded and learned counsel for the petitioner drew the attention of this court to same.

> After they were arrested by the Gokarella police at about 1.30 p.m the detainees have been transported to the police station of Kurunegala and subsequently statements were recorded. Thereafter they were further questioned by the police and handed over to the CID.

> The Petitioner states that during the time when statements recorded from the 1st to 13th Detainees following transpired;

(a) 1st to 13th detainees were assaulted by the said Vas Gunawardana (4th Respondent) at the Gokarella Police station.

(b) 1st detainee was taken away by aforesaid Vas Gunawardana and forced him to give a statement against the Presidential Candidate Sarath Fonseka stating that aforesaid Sarath Fonseka has sent them to kill the President and has guaranteed the safety of the 1st detainee if he is willing to do so.

(c) When the 1st detainee refused to do so he was again assaulted by the aforesaid SSP Vas Gunawardena.

(d) On the way to Kurunegala from the police station of Gokarella they were treated badly and were put under the seats of the carriage with a barrage of filthy words at the behest of SSP Vas Gunawardana.

It is also disclosed in the petition filed of record that the detainees were produced before the learned Magistrate of Kurunegala on 26.01.2009 at about 8.00 p.m. A 'B' report bearing No. B 347/2010 is also mentioned on producing the detainees before the learned Magistrate, who had remanded the detainees until 05.02.2010 (vide P2/P3). It is pleaded that investigations were in progress to ascertain whether they were engaged in offences under Section 140 and 113(b) of the Penal Code, and also to check whether they were Army deserters. It is pleaded by the Petitioner that the 'B' report does not divulge any offence and the detainees were kept as detainees only for the purpose to ascertain whether they were Army deserters.

On or about 28.01.2010 a motion was filed in the Magistrate's Court to obtain bail, but the learned Magistrate made order on 03.02.2010 refusing bail. Subsequently it is pleaded in the petition that the case had been called again on 05.02.2010 and a further 'B' report was filed by the CID alleging that investigations are pending and the detainees and others are being investigated as to whether the detainees were engaged in a conspiracy against the Government and detention orders were issued on the detainees. Proceedings in the Magistrate Court are submitted marked P4 to P7. On 08.02.2010 when the matter was taken up before the Magistrate the CID produced detention orders marked P8 to P21 inclusive of the 'B' report.

The Respondent's position could be gathered from the pleadings of the 4th & 6th Respondents and the application for the detention order submitted to this court by motion dated 14.10.2010. I would refer to the main points urged by the Respondents as follows:

(1) In the affidavit of the 6th Respondent it is stated inter alia that the 1st to 13th detainees are no longer held in detention as they were discharged by court on 22.02.2010.

(2) The 6th Respondent further states that on 25.01.2010 the day before the Presidential Election, the Gokarella Police arrested 1 – 13th detainees and 7 other civilians in a place called 'Kiriwavula located in the Gokarella Police area, as the detainees and the civilians could not give a plausible explanation as to the reason to be gathered in that place. As such the police for security reasons had to ensure that the above detainees and others were gathered not for any sinister motive and they were handed over to the CID.

(3) Detainees were produced before the learned Magistrate on 26.01.2010 and ordered the detainees to be remanded till 05.02.2010.

(4) Investigations were conducted to ascertain as to why the detainees were gathered in the Gokarella area and also to find out whether the detainees were Army deserters.

(5) 6th Respondent on 05.02.2010 requested the learned Magistrate to hand over the detainees to the CID.

(6) Investigations were conducted expeditiously and as there were no incriminatory material could be found the detainees were produced before the Magistrate's Court on 22.02.2010 and accordingly discharged. It is pleaded that the detainees could have been held under detention till 09.06.2010. However the CID expeditiously concluded investigations within 14 days.

(7) The 4th Respondent in his affidavit inter alia state that the persons who were arrested were duly informed of the reason for arrest. The 4th Respondent's affidavit disclose the following. The 4th Respondent states:

(8) (a) On 25th January 2010 (ie the day before the Presidential Election) around 17.40 p.m. I was informed by DIG Anura Senanayake who was in charge of election related matters within the North Western Province that a group of persons who had arrived in a bus at Kiriwawula in the Gokarella Police area were behaving in a suspicious manner and directed me to ascertain why this group had gathered at this location.

(b) In pursuant to this information I directed the 5th respondent who was the officer in charge of Gokarella Police Station to go to the said location and ascertain the reason for the arrival of this group of persons. Accordingly the 5th respondent went to the place where these persons were gathered and questioned them as to what had brought them to Gokarella. This group had comprised of 13 ex-army personnel and 7 civilian. When being questioned these men had given contradictory answers which had given rise to further suspicion about their arrival in the Gokarella area. Because of their unconvincing response to the police questioning and because this was the Presidential Election period these persons were arrested and taken to the Gokarella Police Station to conduct further inquiries. At

this time there was no conclusive proof that the ex-army personnel were army deserters.

(c) I was informed of this move by the 5th Respondent and consequently I went to the Gokarella Police Station. Statements of the arrested persons were recorded by the Police and these persons were handed over to the Criminal Investigations Department for further investigations on this day itself.

The 4th Respondent denies that he used any force or assaulted any one of the detainees.

The above would be the version of both parties to this application. However I would proceed to give my mind to the factual position initially which led to the arrest of the detainees. The 6th Respondent in his affidavit state that the detainees were arrested as they could not give a plausible explanation as to what brought them to the place they were gathered. The 4th Respondent in his affidavit takes up the position that he directed the 5th Respondent, Inspector of Police Gokarella, to go to the place where the detainees and civilians were gathered and find out the reason for their arrival at that place. The 4th Respondent also state that when being questioned contradictory answers given

by the detainees give rise to further suspicion about their arrival at Gokarella. It is also stated by the 4th Respondent that there was no conclusive proof that the detainees were Army deserters. The 5th Respondent's notes are produced marked 4R1.

Perusal of 4R1, I find that 12 persons whose statements were recorded and arrested had categorically stated that they are on their way to 'Anuradhapura'. Another person has stated that they are on a pilgrimage. (no reference to destination) .

Another had stated that he is on tour to Jaffna and Killinochchi. Two others have stated that they are proceeding to Polonnaruwa. Having given each persons' destination, many have stated that they are proceeding to Arnuradhapura to devote a vow. It is observed that a few have stated that the purpose of the visit to Anuradhapura is to bestow blessings on General Fonseka who was the Presidential Candidate. What is 'contradictory', from a reasonable mans point of view, having perused the entirely of '4R1' is rather doubtful. Majority of the detainees named in 4R1 does not given any contradictory views on destination, nor have they been reluctant to express their purpose of travel. There is no identifiable fault that could be gathered from the statements of each

one of them as far as the destination, direction of travel and the purpose of travel. Even to get to Jaffna and Killinochchi, or Polonnaruwa the route has to be the same route. There is nothing extraordinary in such a position, or as to how such a journey becomes so suspicious. Further the bus driver himself confirm the destination as 'Anuradhpura'. The detainees and the civilians in that group as described by the Petitioner was in a group supportive of a propaganda campaign. What is wrong in them gathering at a point to have tea? It is quite normal. Detainees being present at the place and the contents in 4R1 cannot give rise to any suspicion, as 4R1 gives plausible explanation, of travel and purpose. This would fortify the position of the detainees that arresting them was illegal.

To look at the entirety of 4R1 to be fabricated statements, still I find it difficult to accept that the author of 4R1 (if fabricated) did so to demonstrate a contradictory position? What could be gathered from 4R1, has to be any normal persons reaction to questioning by the police. To support a candidate at a general or Presidential Election is each person's wish and choice, the way he or she wants to support. There is absolutely no illegality that could be inferred from the contents of 4R1, which statements were recorded from the detainees. Further it is common ground to expect our local people to be gathered as a group prior to

an election. (the group which consists of 20) It is unfortunate that both 4th & 6th Respondents thought it fit to swear an affidavit of this nature, lacking in cogent reasons regarding arrest, and for both of them to express a view of a 'contradictory' position, without an acceptable basis, before the Supreme Court.

In order to demonstrate the required illegality the Petitioner alleges fabrication of false charges without any basis and stress that there were no reasons adduced by the Respondents to arrest and detain, the detainees. It was also contended by learned counsel for the Petitioner that the detainees were never informed of the reasons for their arrest. In the affidavit of the 4th Respondent it stated that the detainees were informed of the reason for arrest. The 4th Respondent in his affidavit more particularly para 8(b) states inter alia that because of their (detainees) unconvincing response to the police questioning and it was the Presidential Election period, detainees were arrested and taken to the Gokarella police to conduct further inquiries.

The only document produced by the Respondent was document marked 4R1 and pg. 1 of 4R1 gives the date 25.01.2010. time 2000. It is recorded that the suspects and the bus bearing No. 63 - 1234 taken into custody by the

police officer of the rank described therein. Other than the statements recorded as stated above of the several detainees and 7 other persons there is no indication whatsoever in 4R1 that the detainees were informed of the reason to arrest. 4R1 refer to 4th Respondent's role in this entire episode and the directions given by the above stated Deputy Inspector General of police. All that could be gathered from 4R1 seems to be to collect information at any cost to implicate the detainees, which is a very remote possibility of an offence to be committed in anticipation, and nothing else. The purported arrest seems, to be highly questionable as it is very doubtful whether such arrest was according to procedure established by law. Even if deprivation of personal liberty is in certain circumstances permissible, what is projected in 4R1 in reality seems to be arbitrariness.

The law enforcement officers had in mind a possible coup to overthrow the Government by unlawful means, and therefore directions were given to apprehend the detainees by a higher officer of the police to find out whether they were also Army deserters. The application for a detention order submitted to court by motion dated 14.10.2010 and the detention order itself

bear testimony to this fact. However Respondents although made a serious effort to implicate the detainees, could not succeed in their attempt. As such as pleaded by the Respondents since no incriminatory material came up against the detainees they were produced before court and were discharged on 22.2.2010. Before I proceed further I would wish to refer to a case of an extra judicial arrest.

> In Pelawattage (AAL) for Piyasens v O.I.C Wadduwa and other, the arrest of the petitioner merely because he was unable to explain his presence near a certain hotel at Kurunegala was held to be violative of Article 13. The man was 'wanted' in connection with offences committed in earlier years elsewhere. Kulatunga, J. said "If Piyasena was a wanted man in respect of offences committed in 1990 and 1992, and the 2nd respondent had information that Piyasena was at Kurunegala, there was nothing to prevent the 2nd respondent obtaining a warrant for his arrest. To permit extra-judicial arrests would be detrimental to liberty. Interested parties can get involved in such exercises. It would also encourage torture in the secrecy of illegal detention. We cannot encourage illegality to help the police to apprehend criminals. The end does not justify the means." (S.C Application 494/93 & S.C minutes of 22.3.1995)

I also find an averment, at para 8 of the 4th Respondent's affidavit, which gives the impression to this court that it was the first available information the 4th Respondent received from a DIG who was involved in election related matters within the North Western Province, about the detainees who were

supposed to be behaving in a suspicious manner. That was the first information that led to the ultimate arrest of the detainees. If the DIG concerned, Anura Senanayake as described in the affidavit provided information of a group of persons who arrived in a bus in the Gokarella police area was behaving in a suspicious manner and a direction given to inquire, more information on the matter should be elicited. At least an affidavit giving details of facts that led to the arrest should have been sworn by way of an affidavit by the said DIG, Senanayake and such material should have been placed before this court, to test and verify the veracity of the statements contained in the affidavits of 4th and 6th Respondents.

When the Law Enforcement authorities concerned take steps to deprive persons of their personal liberty by arrest and detention, the Apex Court need to be informed of all details of such arrest and detention, if such arrest is challenged in court. In the absence of such details and cogent reasons to arrest the detainees would naturally fortify the case of the detainees, who have placed material of illegal arrest by the state machinery which seems to have been abused at that point of time. The liberty of an individual or a group of persons, as per

Article 13(1) is a matter of great constitutional importance. This liberty should not be interfered with, whatever the status of that person or persons arbitrarily or without legal justification.

The concept of 'arrest' and 'detention' within the frame work of our Constitutional law consists of numerous judgments of the Apex Court with a variety of views expressed by judges who heard those cases from various points of view. Whatever it may be, the guarantee extended by the Constitution to safeguard the personal liberty of the citizen is paramount. However before I proceed any further (although with the available facts I have already observed of illegal arrest), I wish to incorporate the following excerpts from the judgment reported in Channa Pieris and Others Vs. A.G and Others (Ratawesi Peramuna Case). – Digest to Sri Lanka Law Reports Vol. (1) 1994 pg. 2/3

The Ratawesi Peramuna was an anti-government organization. However as a matter of law, merely vehement, caustic and unpleasantly sharp attacks on the government, the President, Ministers, elected representative or public officers are not per se unlawful

Per Amerasinghe, J.

(a) "The right not to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution, Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law."

(b) "Legitimate agitation cannot be assimilated with incitement to overthrow the government by unlawful means. What the third respondent is supposed to have heard, even according to the fabricated notes he has preferred, was a criticism, of the system of Government, the need to safeguard democracy, and proposals for reform."

(c) "The call to 'topple' the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated.

If the throwing down was to be accomplished by democratic means, the fact that the tumble may have had shocking or traumatic effects on those who might fall is of no relevance. It is the means and not the circumstances that have to be considered.

The obvious purpose of Regulation 23(a) is to protect the existing government not from change by peaceable, orderly, constitutional and therefore by lawful means, but from change by violence, revolution and terrorism, by means of criminal force or show of criminal force.

The entirety of the case of the Respondents no doubt rest on suspicion and nothing else. This would mean an unconfirmed or partial belief, especially that something is wrong or someone is guilty. It is necessary to have some idea of 'suspicion' and 'prima facie' proof as both these factors may tend to assist court to resolve a case of arrest and detention, in the area of fundamental rights. The following case law seems to be on point. In Hussien Vs. Chong Fook Kam (1969) 3 A. E. R 1626 Lord Devlin said ….

"Suspicion in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.' Suspicion arises at or near the starting- point of an investigation of which the obtaining of prima facie proof is the end. When such proof has been obtained, the police case is complete, it is ready for trial and passes on

to its next stage. It is indeed desirable as a general rule that an arrest should not be made until the case is complete. But if arrest before that were forbidden, it could seriously hamper the police. To give power to arrest on reasonable suspicion does not mean that it is always or even ordinarily to be exercised. It means that there is an executive discretion. In the exercise of it many factors have to be considered besides the strength of the case. The possibility of escape, the prevention of further crime and the obstruction of police inquiries are examples of these factors ….

…..There is another distinction between reasonable suspicion and prima facie proof. Prima facie proof consists of admissible evidence. Suspicion can take into account matters that could not be put in evidence at all. There is a discussion about the relevance of previous convictions in the judgment of Lord Wright in McArdle v Egan, (1933) 150 L.T. 412. Suspicion can take into account also matters which, though admissible, could not form part of a prima facie case. Thus the fact that the accused has given a false alibi does not obviate the need for prima facie proof of his presence at the scene of the crime; it will become of considerable importance in the trial when such proof as there is, is being weighed perhaps against a second alibi; it would undoubtedly be a very suspicious circumstances…."

In fact as observed above this is a case of suspicion only which lacks prima facie proof. That is the reason why the detainees were discharged after a period of arrest and detention may be after 1 ½ to 2 months of being kept in custody. I would go to the extent of observing that, at least a good part of that period to be an apparent deprivation of personal liberty of all the detainees.

In this case, by motion of 14.10.2010 as directed by court the application for detention order had also been produced, which is part and parcel of the record. Consequently detention orders P9 to P21 are also included in the record, which orders were produced by the petitioner. I also find annexed to the application for detention, addressed to the Secretary, Ministry of Defence dated 05.02.2010, two reports by the officer in charge of the Special Unit of the C.I.D addressed to Assistant Director C.I.D and report of Assistant Director C.I.D to Director C.I.D. It would be rather prolix if I am to incorporate the two reports in this judgment since the application to Secretary, Defence incorporates what is stated in the two reports.

A perusal of the relevant portions of the application dated 05.02.2010, and the several Detention Orders demonstrates a mechanical process, adopted by the Secretary, Defence, which lacks his own opinion.

The Detention Order (P9 - P12) issued as per 19(1) of Emergency Regulations No. 1 of 2005, the gist of it refers to:

(a) 19(1) order

(b) Gazette No. 1405/14 of 13.8.2005 and powers vested as per Regulations 19 and para 1 of same.

(c) Based on facts presented to Secretary, he is of opinion, that

(d) the named detainees who are in custody, would commit offences under the said regulations along with

(e) An armed group of persons who are planning to collect weapons and ammunitions to commit an offence or attempting to commit an offence to overthrow the Government.

(f) Named detainees are suspected of aiding and abetting the acts in (e) above which would result in public unrest and breach of peace.

The question is, as to how the concerned Additional Secretary of Defence who issued the Detention Order, formed an opinion of a possible attempt to commit an offence or whether he had reasonable grounds to form an

opinion as per the relevant regulations. The application of 05.02.2010 addressed to Secretary Defence, the 1st & 2nd pages of same up to para 3 refers to certain investigation (not involving the detainees). Para 4 of same refer to the contradictory position taken by the detainees. (I have already dealt with that

position). Para 5 is a doubtful view, expressed by the Deputy Inspector General of Police, C.I.D that the detainees were acting on instructions of a retired Colonel of the Army, which information or material are not available or referred to in the affidavits of the 4th & 6th Respondents. Para 6 again refer to suspicion. Para 7 refer to the necessity of keeping the detainees in continued custody for the purpose of extensive investigation.

The 1st Respondent to this application has not sworn an affidavit. As such I had to refer to the Detention Orders (P9 – P12) and ascertain as to how the 1st Respondent formed an opinion to issue Detention Orders. The opinion has been formed by the 1st Respondent only on facts presented to him by the official or officials who submitted the application for detention referred to above. Such material was only hearsay/vague and without sufficient material that the detainees would act in a prejudicial manner to national security or maintenance of public order.

In Jayaratne and Others Vs. Chandrananda de Silva, Secretary, Ministry of Defence & Others 1998(2) SLR 129/130…

Eleven petitioners were arrested and detained by virtue of orders issued by the 1st respondent purporting to act under Emergency Regulation 17(1) on the basis that their detention was necessary to prevent them from acting in a manner prejudicial to public order. The 1st respondent stated in his affidavit that the detention orders were issued at the request of the Director CID and on the basis of material submitted to him alleging that there were threats directed at the Presidential Commission investigating the incidents at Batalanda; that there was information that the detainees (Police Officers) whose names transpired before the Commission were attempting to leave the Island and that there was a possibility that they would inflict violence on the Commissioners themselves and witnesses who have testified before the Commission.

1. Communicating the purpose or object of the arrest does not satisfy the Constitutional requirement that the reasons for the arrest must be disclosed.

2. the material available to the 1st respondent was vague and was pure hearsay. He could not reasonably have formed an opinion adverse to the petitioners on such material. Consequently, he did not entertain, and could not have entertained, a genuine apprehension that the petitioners would act in a manner prejudicial to the national security or the maintenance of public order.

3. The 'balance of convenience' is not a defence that can be advanced for upholding the arrest and preventive detention of the petitioners. A reasonable apprehension of past or future wrong doing is an essential prerequisite for the deprivation of personal liberty.

I refer to an extract from the text of "our Fundamental Rights of personal security and physical liberty. A.R.B. Amerasinghe Pg. 93.

REASONABLE GROUNDS FOR SECRETARY'S ORDERS: Although others may assist the Secretary in carrying out his orders, the orders must be his own, I explained the matter in the case of Malinda Channa Pieris

> "This court must be satisfied that (a) the Secretary (b) was of such opinion before Regulation 17(1) can be invoked as a procedure established by law empowering a deprivation of personal liberty. The Secretary should be able to state that he himself came to form such an opinion. In *Weerakoon Vs. Weeraratne* Kulatunga, J. found that the Secretary had acted mechanically as a rubber stamp at the behest of the police and placed his signature on papers submitted to him… Kulatunga, J in *Sasanasiritissa Thero and others Vs. De Silva and others* observed that the Secretary and his Additional Secretaries has ''signed orders mechanically on the request of their subordinates" and the Court found that the Secretary and Additional Secretaries "never held the opinion they claim to have entertained". It is a matter of personal judgment. And so, for instance, an affidavit supporting the detention from his successor in office would be of no avail.

The application for detention is dated 05.02.2010 and the Detention Order is also of the same date. This is nothing but a mechanical process, designed to deprive the personal liberty of the detainees. Inability of the Law Enforcement Authority and the executive to successfully implicate the detainees ultimately resulted in the discharge of them on 22.02.2015 by the learned Magistrate. There was absolutely no material to frame any kind of charges against the detainees as from the date of arrest and producing them before the Magistrate, or thereafter.

The Petitioner has taken up the position of assault on the detainees and also a particular assault on detainee No. 1 by the 4th Respondent. I do not think that this court could arrive at such a conclusion in the absence of a report or material in that regard. However there can be no doubt that there was no material on which the 1st Respondent could reasonably have formed an opinion as referred to in Detention Order P9 to P21, nor can I hold that the detainees were acting in a manner prejudicial to national security or public order or inflict violence on the Government or was part of a coup to overthrow the Government.

Court therefore holds that the fundamental rights guaranteed under Article 12(1), 13(1) and 13(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka have been infringed by 3rd, 4th, 5th, 6th & 8th Respondents. Thus we direct the State to pay each detainee a sum of Rs. 20,000/-, as compensation and Rs. 25,000/- as costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake J.

I agree.

JUDGE OF THE SUPREME COURT

P.B. Aluwihare P.C., J.

I agree.

JUDGE OF THE SUPREME COURT

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

S.C/FR Application No. 204/2011

J. A. Lionel Chandraratne (Library Assistant ,
Galgammulla Public Library)
Ranasgalla,
Nakkawatta.

PETITIONER

Vs.

1. Mr. Tissa R. Balalla
The Governor of the North Western Province
Governor's Office,
Kurunegala.

2. Mr. Gamini Wattegedera
The Chairman
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

3. Mr. H. M. Mettananda Nilame
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

4. Mr. Sarath Stanley
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

5. Mr. M. Iqbal
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

6. Ms. Kanthi Vehalla
The Secretary
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

7. Mr. T. G. U. B. Tambugala
The Chief Secretary of the North Western Province,
Office of the Chief Secretary
Kurunegala.

8. W. M. M. B.Weerasekera
The Commissioner of Local Government
Department of Local Government of the
North Western Province
Kurunegala.

9. Mr. Vijitha Bandara Ekanayake
The Secretary
Kuliyapitiya Pradeshiya Sabha,
Kuliyapitiya.

10. Hon. The Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.,
Upaly Abeyratne J. &
Anil Gooneratne J.

COUNSEL: Jeffry Alagaratnam P.C. with
Lasantha Gurusinghe for Petitioner

Rajitha Perera Senior State Counsel with
Suren Gnanaraj S.C. for 1st – 8th and 10th Respondents

WRITTEN SUBMISSION FILED ON:

01.04.2015 (Respondents)

DECIDED ON: 20.05.2015

GOONERATNE J.

The Petitioner was employed as a Library Assistant in the North Western Provincial Public Service and claims that he has about 30 years service in the Provincial Public Service, without being duly promoted to the post of Librarian Grade III (per sub para 'c' of the prayer to the petition). It is the position of the Petitioner that the denial of the due post to him is a violation of his fundamental rights to equality and equal protection of law guaranteed by Article 12(1) of the Constitution. Leave to proceed was granted on 13.5.2012. The gist of the Petitioner's argument was that 11 acting Librarians who were much junior to the Petitioner in service and who held inferior positions were appointed as 'Librarian Grade III'. Petitioner also claim that he possess the required qualifications to be promoted for the post in question since 1986, but had been over looked. When this application was taken up for hearing on 11.03.2015, parties agreed to conclude this application based on written submissions. Accordingly court granted months time to file written submissions.

It would be necessary to find out details of the Petitioner's service record as pleaded and stated in his written submissions. He was initially

appointed to a post called “Library in Charge” on 02.01.1980, and absorbed to the above Provincial Council. On or about 1986 Petitioner applied for the post of ‘Librarian Grade III’, according to the procedure contemplated in documents P20 & P21 (Gazette). It is admitted that Petitioner’s services were disrupted (as pleaded) from 23.10.1986 to 08.06.1993 and 19.12.1996 to 17.11.1997. Petitioner states such disruption was due to an abortive disciplinary inquiry and thereafter on an irregularity in reinstatement. Petitioner states that all this happened due to baseless allegations resulting from political animosity for which the 2nd to 6th Respondents were responsible. However petitioner argues that he successfully challenged the disciplinary inquiry before the Human Rights Commission and before the Parliamentary Committee on Public Petitions. He relies on documents P6, P7, P10 P11 & P16. As a result Respondents were directed as stated by the Petitioner to be reinstated with back wages. Petitioner blames the Respondents for partially carrying out the Human Rights Commission directive. In this regard the petitioner draws the attention of this court to 4 matters.

(i) the Petitioner was not reinstated but only re-appointed as a new employee to the post of ‘Library Assistant’ which is lower than his original post ‘Library in Charge’ and (vide P15)

(ii) only increments and not the back wages were paid for the first disruption of service and,

(iii) the Petitioner was not re-designated/placed in the proper salary scale in the original post (i.e Library in Charge) and,

(iv) the Petitioner was not considered for the promotion as Librarian Grade III for which he initially applied in 1986.

Petitioner argues that there were two disruptions of service and two re-appointments as a new employee, and the Petitioner with 30 years in service is only a Library Assistant. It is also pleaded that on 01.10.1996 (P27) the relevant Provincial Public Service Commission appointed him as Acting Librarian Grade III but within two months the Commission dismissed him, on 19.12.1996. (P12 & P13). He further pleads that he was even recommended for the post of 'Librarian Grade III' by his superiors and produce documents P29, P32A, P32B & P32C in proof of such recommendations. When all this was pending, Petitioner allege that the 6th Respondent by letter of 11.6.2008 appointed 11 acting Librarians who were very junior to the Petitioner in service. Petitioner of course continuously agitated for his promotion but the 8th Respondent by P33 dismissed the Petitioner's application on 15.01.2010 (P33).

There is reference made to Gazette marked P20 which refer to the qualifications required for appointment of 'Librarian Grade III'. It was revised on 31.10.1994. Petitioner states that 50% of the available vacancies were reserved for internal candidates. Petitioner claims he is duly qualified in terms of Circular P20 and the subsequent Circular of 31.10.1994. It is further pleaded that the Provincial Public Service Commission again varied the eligibility criteria for internal candidates for Librarian Grade III by Gazette of 23.7.1999 increasing the service requirement from 5 years service to 10 years, and increasing the qualification from 3 credit passes to 6 credit passes. Petitioner state that he and several other candidates as a result of the above change in 1999 became ineligible. Nevertheless the 6th Respondent by his letter of 11.6.2008 appointed 11 Acting Librarians to the post of Librarian Grade III based on former criteria disregarding the criteria gazette on 23.7.1999.

Petitioner allege that he also should have been considered for appointment along with the 11 persons mentioned above. Petitioner highlight in his petition at paras 36 & 37 his qualifications [(P23 A – D) and P36 (A) and P36(B)]. Petitioner urge that the authorities never disputed his qualifications. It is the position of the Petitioner that the above 11 persons appointed and were

Acting Librarians with lesser service/qualifications to the post of Librarian Grade III and were appointed on 11.6.2008 overlooking the Petitioner.

Petitioner also argue, as in his written submissions, that as required by gazette dated 23.07.1999 nine (9) ineligible internal candidates who were only Acting Librarians filed a Writ Application bearing No. HCW/12/2001 in the High Court of the North Western Province challenging the eligibility criteria gazetted on 23.07.1999 and sought promotions to the post of 'Librarian Grade III'. However it is stated that due to an understanding between the Petitioners in the above application and the 6th Respondent the above High Court application was withdrawn (Q3, P32C). It is the Petitioner's position that none of the above 9 petitioners were qualified according to the gazette of 23.07.1999 but the 6th Respondent appointed them as Librarian Grade III. Petitioner also contends that two others were also promoted to the above post. Petitioner having ascertained the position as stated above requested that he also be promoted but the 8th Respondent by letter P33 rejected Petitioner's request, as the above 11 persons were promoted by a decision of the Board of Ministers in view of the High Court case and as such it is personal to the said 11 persons.

I have also noted the contents of paras 11 & 38 of the amended petition in which it is stated "that at that time for the promotion Petitioner was not considered by the Provincial Public Service Commission due to political animosity or ulterior purposes and an abortive disciplinary inquiry". I observe that such a statement would require the Applicant or Petitioner to establish that discrimination on ground of political opinion or for ulterior purposes must be deliberate and with material to prove malice on the part of the person who did so. Mere assertions and bare statements would not suffice, in the absence of substantiating such a fact in issue.

I have noted the following, gathered from affidavits filed in these proceedings by the 2nd and 7th Respondents.

(a) Petitioner at various stages served as, and held the posts of

(1) Library in Charge
(2) Library Assistant
(3) Acting Librarian Grade III

(b) Respondents deny that Petitioner served for 30 years as a Library Assistant

(c) These Respondents specifically state and deny that Petitioner served for 30 years without a promotion due to the lapse of the Respondents

(d) No application produced to establish that Petitioner applied for the post of Librarian Grade III in the year 1986.

(e) Petitioner was interdicted on or about 23.10.1986 and para 11 of Petitioner's affidavit is admitted by the above Respondents as regards misappropriation of building material.

(f) Documents P2 & P3 admitted

(g) P2 & P3 are not the subject matter of these proceedings as these events happened in 1987.

(h) Documents P6 & P7 admitted (letter by the committee on public petitions) on the recommendation of the said committee petitioner accepted the position and was appointed as a new employee to the post of "Library in Charge" as from 08.06.1993.

(i) Letter P10 & P11 admitted. It states the period between 01.01.1980 to 30.11.1986 to be added to Petitioner's service, and the period 01.12.1986 to 06.06.1993 to be added to his service <u>without pay</u>.

(j) These Respondents state documents P36a and P36b cannot apply to the petitioner. It applies to Clerks and parallel grades and the Official Languages Department and not to the Library Service.

(k) The Petitioners in the High Court case referred to by the Petitioners were <u>all Acting Librarians</u>. <u>The Petitioner was only a Library Assistant</u>. The decision in documents 7R1 & 7R2 are also relevant in this regard.

The learned Senior State Counsel in his written submissions emphasis the fact that in view of prayer 'c' of the petition of the Petitioner the burden to establish same is on the Petitioner, which had not been discharged by the Petitioner. The said prayer 'c' is sought, to direct the 1st to 9th Respondents to appoint the Petitioner to the posts of Librarian Grade III. Further it is emphasized that the proof of qualifications of the Petitioner required as per the scheme of recruitment alone would not suffice. Learned Senior State Counsel state it would only give entry to sit for the examination for selection to the above posts. The Petitioner had not sat for any examination as required by the scheme of recruitment or could not have sat for the required examination as he was not qualified for gaining entry to sit for an examination.

It is also urged on behalf of the Respondents that the scheme of recruitment applicable to the above post is not document P20 as contended by the Petitioner but document marked 2R1. One of the main requirements to recruit for the post of Librarian Grade III is by an open competitive and a limited competitive examination. Learned Senior State Counsel also argue that the Petitioner only hold the post of "Library Assistant" (P15 of 17.11.1997). As such the petitioner is not similarly circumstanced with the Petitioners of the

High Court case who were holding the post of “Acting Librarians’. Documents 7R1 & 7R2 are relevant and 7R1 and 7R2 identifies 11 persons holding the post of Acting Librarian. Grade III. What should be noted is that it is personal appointments to them who were the appointees as a settlement reached between parties.

This court having considered the case of either party wish to observe that in a case where appointments to the public service are in question, a court should not approve or declare appointments and promotions which are outside a scheme of recruitment, applicable to various posts in the Government sector. The material furnished to this court indicates that the Petitioner had, at least two long disruption of services during his career in the library service. Although he was exonerated by some means, whenever the Petitioner was reinstated he had been posted to a lower grade in the library service. One could observe it is unfortunate but courts cannot rule on matters purely on sympathetic grounds. On the other hand the application of the Petitioner to this court seems to be time barred. I have also no reason to doubt the submissions of learned Senior State Counsel, in a gist on the following.

1. The Petitioner does not have the qualifications required to face the examination for the post of Librarian Grade III in terms of circular 2R1 which is the applicable scheme to the Petitioner.
2. The Petitioner is not similarly circumstanced as the other Petitioners in the High Court application as the others were clearly Acting Librarians Grade III and the Petitioner was a Library Assistant holding appointment based on P15.
3. The Petitioner has been unable to establish that his Fundamental rights have been violated by any of the Respondents.

Petitioner has not established to the satisfaction of this court that he has fulfilled the requirements in the scheme of recruitment applicable to the post in question. It is obligatory for the Petitioner to prove that he has been treated differently to succeed in terms of Article 12(1) of the Constitution. In the case of C.W. Mackie & Co. Ltd. Vs. H. Mologoda, Commissioner General of Inland Revenue 1986 (1) SLR 300, it was held that in order to sustain the plea of discrimination based on 12(1), a party will have to satisfy court the following two points.

(a) That he has been treated differently from others.

(b) That he has been differently treated from persons similarly circumstanced without a reasonable basis.

The Petitioners referred to in the High Court case, relied upon by the Petitioner are not persons similarly circumstanced. In all the above facts and circumstances of this application, I am not inclined to grant relief to the Petitioner.

The application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C. , J.

I agree

JUDGE OF THE SUPREME COURT

Upali Abeyratne J.

I agree

JUDGE OF THE SUPREME COURT

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

S.C/FR Application No. 204/2011

J. A. Lionel Chandraratne (Library Assistant ,
Galgammulla Public Library)
Ranasgalla,
Nakkawatta.

PETITIONER

Vs.

1. Mr. Tissa R. Balalla
The Governor of the North Western Province
Governor's Office,
Kurunegala.

2. Mr. Gamini Wattegedera
The Chairman
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

3. Mr. H. M. Mettananda Nilame
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

4. Mr. Sarath Stanley
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

5. Mr. M. Iqbal
Member
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

6. Ms. Kanthi Vehalla
The Secretary
The Provincial Public Service Commission in the
North Western Province,
Provincial Council Complex
Kurunegala.

7. Mr. T. G. U. B. Tambugala
The Chief Secretary of the North Western Province,
Office of the Chief Secretary
Kurunegala.

8. W. M. M. B.Weerasekera
The Commissioner of Local Government
Department of Local Government of the
North Western Province
Kurunegala.

9. Mr. Vijitha Bandara Ekanayake
The Secretary
Kuliyapitiya Pradeshiya Sabha,
Kuliyapitiya.

10. Hon. The Attorney General
Attorney General's Department
Colombo 12.

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.,
Upaly Abeyratne J. &
Anil Gooneratne J.

COUNSEL: Jeffry Alagaratnam P.C. with
Lasantha Gurusinghe for Petitioner

Rajitha Perera Senior State Counsel with
Suren Gnanaraj S.C. for 1st – 8th and 10th Respondents

WRITTEN SUBMISSION FILED ON:

01.04.2015 (Respondents)

DECIDED ON: 20.05.2015

GOONERATNE J.

The Petitioner was employed as a Library Assistant in the North Western Provincial Public Service and claims that he has about 30 years service in the Provincial Public Service, without being duly promoted to the post of Librarian Grade III (per sub para 'c' of the prayer to the petition). It is the position of the Petitioner that the denial of the due post to him is a violation of his fundamental rights to equality and equal protection of law guaranteed by Article 12(1) of the Constitution. Leave to proceed was granted on 13.5.2012. The gist of the Petitioner's argument was that 11 acting Librarians who were much junior to the Petitioner in service and who held inferior positions were appointed as 'Librarian Grade III'. Petitioner also claim that he possess the required qualifications to be promoted for the post in question since 1986, but had been over looked. When this application was taken up for hearing on 11.03.2015, parties agreed to conclude this application based on written submissions. Accordingly court granted months time to file written submissions.

It would be necessary to find out details of the Petitioner's service record as pleaded and stated in his written submissions. He was initially

appointed to a post called “Library in Charge” on 02.01.1980, and absorbed to the above Provincial Council. On or about 1986 Petitioner applied for the post of ‘Librarian Grade III’, according to the procedure contemplated in documents P20 & P21 (Gazette). It is admitted that Petitioner’s services were disrupted (as pleaded) from 23.10.1986 to 08.06.1993 and 19.12.1996 to 17.11.1997. Petitioner states such disruption was due to an abortive disciplinary inquiry and thereafter on an irregularity in reinstatement. Petitioner states that all this happened due to baseless allegations resulting from political animosity for which the 2nd to 6th Respondents were responsible. However petitioner argues that he successfully challenged the disciplinary inquiry before the Human Rights Commission and before the Parliamentary Committee on Public Petitions. He relies on documents P6, P7, P10 P11 & P16. As a result Respondents were directed as stated by the Petitioner to be reinstated with back wages. Petitioner blames the Respondents for partially carrying out the Human Rights Commission directive. In this regard the petitioner draws the attention of this court to 4 matters.

(i) the Petitioner was not reinstated but only re-appointed as a new employee to the post of ‘Library Assistant’ which is lower than his original post ‘Library in Charge’ and (vide P15)

(ii) only increments and not the back wages were paid for the first disruption of service and,

(iii) the Petitioner was not re-designated/placed in the proper salary scale in the original post (i.e Library in Charge) and,

(iv) the Petitioner was not considered for the promotion as Librarian Grade III for which he initially applied in 1986.

Petitioner argues that there were two disruptions of service and two re-appointments as a new employee, and the Petitioner with 30 years in service is only a Library Assistant. It is also pleaded that on 01.10.1996 (P27) the relevant Provincial Public Service Commission appointed him as Acting Librarian Grade III but within two months the Commission dismissed him, on 19.12.1996. (P12 & P13). He further pleads that he was even recommended for the post of 'Librarian Grade III' by his superiors and produce documents P29, P32A, P32B & P32C in proof of such recommendations. When all this was pending, Petitioner allege that the 6th Respondent by letter of 11.6.2008 appointed 11 acting Librarians who were very junior to the Petitioner in service. Petitioner of course continuously agitated for his promotion but the 8th Respondent by P33 dismissed the Petitioner's application on 15.01.2010 (P33).

There is reference made to Gazette marked P20 which refer to the qualifications required for appointment of 'Librarian Grade III'. It was revised on 31.10.1994. Petitioner states that 50% of the available vacancies were reserved for internal candidates. Petitioner claims he is duly qualified in terms of Circular P20 and the subsequent Circular of 31.10.1994. It is further pleaded that the Provincial Public Service Commission again varied the eligibility criteria for internal candidates for Librarian Grade III by Gazette of 23.7.1999 increasing the service requirement from 5 years service to 10 years, and increasing the qualification from 3 credit passes to 6 credit passes. Petitioner state that he and several other candidates as a result of the above change in 1999 became ineligible. Nevertheless the 6th Respondent by his letter of 11.6.2008 appointed 11 Acting Librarians to the post of Librarian Grade III based on former criteria disregarding the criteria gazette on 23.7.1999.

Petitioner allege that he also should have been considered for appointment along with the 11 persons mentioned above. Petitioner highlight in his petition at paras 36 & 37 his qualifications [(P23 A – D) and P36 (A) and P36(B)]. Petitioner urge that the authorities never disputed his qualifications. It is the position of the Petitioner that the above 11 persons appointed and were

Acting Librarians with lesser service/qualifications to the post of Librarian Grade III and were appointed on 11.6.2008 overlooking the Petitioner.

Petitioner also argue, as in his written submissions, that as required by gazette dated 23.07.1999 nine (9) ineligible internal candidates who were only Acting Librarians filed a Writ Application bearing No. HCW/12/2001 in the High Court of the North Western Province challenging the eligibility criteria gazetted on 23.07.1999 and sought promotions to the post of 'Librarian Grade III'. However it is stated that due to an understanding between the Petitioners in the above application and the 6th Respondent the above High Court application was withdrawn (Q3, P32C). It is the Petitioner's position that none of the above 9 petitioners were qualified according to the gazette of 23.07.1999 but the 6th Respondent appointed them as Librarian Grade III. Petitioner also contends that two others were also promoted to the above post. Petitioner having ascertained the position as stated above requested that he also be promoted but the 8th Respondent by letter P33 rejected Petitioner's request, as the above 11 persons were promoted by a decision of the Board of Ministers in view of the High Court case and as such it is personal to the said 11 persons.

I have also noted the contents of paras 11 & 38 of the amended petition in which it is stated "that at that time for the promotion Petitioner was not considered by the Provincial Public Service Commission due to political animosity or ulterior purposes and an abortive disciplinary inquiry". I observe that such a statement would require the Applicant or Petitioner to establish that discrimination on ground of political opinion or for ulterior purposes must be deliberate and with material to prove malice on the part of the person who did so. Mere assertions and bare statements would not suffice, in the absence of substantiating such a fact in issue.

I have noted the following, gathered from affidavits filed in these proceedings by the 2nd and 7th Respondents.

(a) Petitioner at various stages served as, and held the posts of

(1) Library in Charge
(2) Library Assistant
(3) Acting Librarian Grade III

(b) Respondents deny that Petitioner served for 30 years as a Library Assistant

(c) These Respondents specifically state and deny that Petitioner served for 30 years without a promotion due to the lapse of the Respondents

(d) No application produced to establish that Petitioner applied for the post of Librarian Grade III in the year 1986.

(e) Petitioner was interdicted on or about 23.10.1986 and para 11 of Petitioner's affidavit is admitted by the above Respondents as regards misappropriation of building material.

(f) Documents P2 & P3 admitted

(g) P2 & P3 are not the subject matter of these proceedings as these events happened in 1987.

(h) Documents P6 & P7 admitted (letter by the committee on public petitions) on the recommendation of the said committee petitioner accepted the position and was appointed as a new employee to the post of "Library in Charge" as from 08.06.1993.

(i) Letter P10 & P11 admitted. It states the period between 01.01.1980 to 30.11.1986 to be added to Petitioner's service, and the period 01.12.1986 to 06.06.1993 to be added to his service <u>without pay</u>.

(j) These Respondents state documents P36a and P36b cannot apply to the petitioner. It applies to Clerks and parallel grades and the Official Languages Department and not to the Library Service.

(k) The Petitioners in the High Court case referred to by the Petitioners were <u>all Acting Librarians</u>. <u>The Petitioner was only a Library Assistant</u>. The decision in documents 7R1 & 7R2 are also relevant in this regard.

The learned Senior State Counsel in his written submissions emphasis the fact that in view of prayer 'c' of the petition of the Petitioner the burden to establish same is on the Petitioner, which had not been discharged by the Petitioner. The said prayer 'c' is sought, to direct the 1st to 9th Respondents to appoint the Petitioner to the posts of Librarian Grade III. Further it is emphasized that the proof of qualifications of the Petitioner required as per the scheme of recruitment alone would not suffice. Learned Senior State Counsel state it would only give entry to sit for the examination for selection to the above posts. The Petitioner had not sat for any examination as required by the scheme of recruitment or could not have sat for the required examination as he was not qualified for gaining entry to sit for an examination.

It is also urged on behalf of the Respondents that the scheme of recruitment applicable to the above post is not document P20 as contended by the Petitioner but document marked 2R1. One of the main requirements to recruit for the post of Librarian Grade III is by an open competitive and a limited competitive examination. Learned Senior State Counsel also argue that the Petitioner only hold the post of "Library Assistant" (P15 of 17.11.1997). As such the petitioner is not similarly circumstanced with the Petitioners of the

High Court case who were holding the post of “Acting Librarians’. Documents 7R1 & 7R2 are relevant and 7R1 and 7R2 identifies 11 persons holding the post of Acting Librarian. Grade III. What should be noted is that it is personal appointments to them who were the appointees as a settlement reached between parties.

This court having considered the case of either party wish to observe that in a case where appointments to the public service are in question, a court should not approve or declare appointments and promotions which are outside a scheme of recruitment, applicable to various posts in the Government sector. The material furnished to this court indicates that the Petitioner had, at least two long disruption of services during his career in the library service. Although he was exonerated by some means, whenever the Petitioner was reinstated he had been posted to a lower grade in the library service. One could observe it is unfortunate but courts cannot rule on matters purely on sympathetic grounds. On the other hand the application of the Petitioner to this court seems to be time barred. I have also no reason to doubt the submissions of learned Senior State Counsel, in a gist on the following.

1. The Petitioner does not have the qualifications required to face the examination for the post of Librarian Grade III in terms of circular 2R1 which is the applicable scheme to the Petitioner.
2. The Petitioner is not similarly circumstanced as the other Petitioners in the High Court application as the others were clearly Acting Librarians Grade III and the Petitioner was a Library Assistant holding appointment based on P15.
3. The Petitioner has been unable to establish that his Fundamental rights have been violated by any of the Respondents.

Petitioner has not established to the satisfaction of this court that he has fulfilled the requirements in the scheme of recruitment applicable to the post in question. It is obligatory for the Petitioner to prove that he has been treated differently to succeed in terms of Article 12(1) of the Constitution. In the case of C.W. Mackie & Co. Ltd. Vs. H. Mologoda, Commissioner General of Inland Revenue 1986 (1) SLR 300, it was held that in order to sustain the plea of discrimination based on 12(1), a party will have to satisfy court the following two points.

(a) That he has been treated differently from others.

(b) That he has been differently treated from persons similarly circumstanced without a reasonable basis.

The Petitioners referred to in the High Court case, relied upon by the Petitioner are not persons similarly circumstanced. In all the above facts and circumstances of this application, I am not inclined to grant relief to the Petitioner.

The application of the Petitioner is dismissed. No costs.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C. , J.

I agree

JUDGE OF THE SUPREME COURT

Upali Abeyratne 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 Articles 17 and 126 of the Constitution

S.C.FR. Application No. 230/2015

1. Safra Travels and Tours (Pvt) Ltd.,
   No. S/L/G4, Dias Place,
   Gunasinghepura,
   Colombo 12.

2. Nawas Samsudeen Mohamed
   Althaf and Ainul Fouzia Mansoor
   of No. 751, Blumandol Road,
   Colombo 15.

   Carrying on the business in the name and style of

   Transworld Travels and Tours,
   at 476, Maradana Shopping Complex, Colombo 10.

3. Kara Travels and Tours (Pvt) Ltd.,
   60 B, Green Lane, Kotahena,
   Colombo 13.

Petitioners

Vs

1. M.H.M. Zameel,
   Director,
   Department of Muslim Religious and Cultural Affairs, No. 180,
   T.B. Jayah Mawatha,
   Colombo 10.

2. M.H.M Haleem,
   Minister of Muslim Religious and Cultural Affairs and Posts,
   No. 310, D.R. Wijewardena Mawatha,
   Colombo 10.

3. Abdul Majeed,

4. Y.L.M. Navavi,

5. Fahim M. Hashim,

6. Dr. Thaha Ziyad,

7. Ash Sheikh M.S.M. Thassim,

8. A.A.M. Ilyas,

9. Mr. Yaseen,

   3rd to 9th Respondents
   All of c/o

   Hajj committee,
   Ministry of Muslim Religious and
   Cultural Affairs and Posts,
   No. 310,
   D.R. Wijewardena Mawatha,
   Colombo 10.

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

11. Welcome Travels,
    Nooraniya Street,
    Mutur-05.

12. Hamdan Travels,
    95, Amugamuwa Road,
    Gampola.

13. Amana Travels,
    No. 37, Kolonnawa Road,
    Kolonnawa.

Respondents

* * * *

BEFORE : **Eva Wanasundera, PC., J.**
P. Jayawardena,PC., J. &
Anil Gooneratne, J.

COUNSEL : Manohara de Silva, PC. with Mrs. Pubuduni Wickramaratne for the Petitioner.

Suren Gnanaraj, SSC., for 1st - 3rd & 10th Respondents.

S.A. Parathalingam, PC. With Lakshmanan Jeyakumar & S.W. Jayasekara for 5th & 8th Respondents.

M. Maharoof with S. Savahim for 6th, 7th, & 9th Respondents.

ARGUED ON : 20.07.2015

DECIDED ON : 23.07.2015

* * * * * *

Eva Wanasundera, PC., J.

In this application the Petitioners by Petition dated 10th June, 2015 are challenging the findings of the 1st to 9th Respondents whose acts constitute executive and/or administrative action as contemplated by Articles 17 and 126 of the Constitution. The Petitioners complained that their Fundamental Rights protected by Article 12 and Article 14 have been infringed by the 1st to 9th Respondents.

Leave to Proceed was granted by this Court on 15th June, 2015 for the alleged violation of Articles 12(1) and 14(1) (e) of the Constitution. Court further granted an interim order directing the 1st Respondent to comply with the order made by this Court on 30.07.2013 made in SC. FR. 264/2013.

On 19.06.2015, Counsel Mr. N. Kariapper made an application to intervene in this matter on behalf of three Companies, who have, as claimed, been in this business for 15 to 25 years, namely Al Hikma Haj Services (Pvt) Ltd., Sadiyan Halaldeen Sirajudeen Kakiya Travels and Tours and Kubaa Travels (Pvt) Ltd. as they have not got any quota for this year. However this application for intervention was not supported.

Senior State Counsel Mr. Suren Gnanaraj informed Court on 23.06.2015 that the 1st Respondent shall comply with the interim order issued by this Court. In SC. FR. 264/2013, this Court had made order on 30.07.2013 to read: "… However this Court is of the view that strict compliance with the guidelines as laid down by this Court must be strictly complied with unless there is an intelligent rationale for any departure. Counsel for the parties also concur with this view. This Court therefore, directs State Counsel to convey to the authorities that in the future any unexplained deviation from the applicable guidelines will have to be explained to this Court prior to any arrangement being put in place in respect of any future pilgrimage. " (a copy is attached to the petition as P4).

Accordingly the Senior State Counsel informed that the 1st, 2nd and 3rd Respondents had held fresh interviews in terms of the guidelines and in terms of the interim order of this Court and moved to file copies of the final marks, mark sheets and quotas allocated to Hajj Travel Operators. On 13th July 2015 the 1st Respondent filed an affidavit as objections to the Petition of the Petitioners, dated 10th June, 2015 with documents Z 1 , a document in the Tamil Language with an English translation and 8 annexure letters, Z 2 with 2 annexure letters, Z 3 , and Z 4 , two documents in the Tamil Language with translations in English of the same. The objections of the 6th and 7th Respondents were filed with an affidavit dated 10th July 2015. The 9th Respondent has filed objections on 10th July 2015. The 5th and 8th Respondents have filed objections on the 9th July 2015. The 2nd and 10th Respondents have filed before this Court the mark sheets of all the 166 Hajj Travel Operators marked as 'X' and the list of quotas given to the selected 93 Operators marked as 'Y'. The Petitioners also filed counter objections to the objections of 1st, 2nd 3rd and 10th Respondents.

Court observes that the "Hajj" is an annual pilgrimage made by the Muslims around the world to the city of Mecca in the Kingdom of Saudi Arabia. It is the largest annual pilgrimage in the world. In Sri Lanka the government regulates the whole process of Hajj pilgrims going to Mecca through the Department of Muslim Religious and Cultural Affairs. A Hajj Committee is appointed for the purpose of negotiating the number of pilgrims allowed by Saudi Arabia, registering the Hajj Tour Agents and the pilgrims who are willing to make the pilgrimage, supervision of Hajj process etc. Guidelines to

regulate Hajj/Umra Pilgrimages from Sri Lanka was drafted and given effect to with effect from 01.05.2013 at the request of the Supreme Court in relation to cases SC. FR. 345/06 and SC. FR. 500/12 in which the Department of Muslim Religious and Cultural Affairs was required to formulate a series of comprehensive guidelines for the operation of the Hajj Pilgrimage in this country.

The said Guidelines was marked as P1 and produced with the Petition by the Petitioners. At page 9 of the Guidelines under the Heading "The Hajj Travel Operators", the basic process number 4 explains that a special interview panel would be chosen to interview, assess and recommend the list of worthy Tour Operators. The evaluation criteria that would be used for this purpose would be found in the Annexure II for reference and that document is marked as P 1 A. The Heading in P 1 A is "Criteria Evaluation". Criteria is laid down under 6 headings, namely, Registration, Physical Capabilities, Financial Capabilities, Experience, Reliabilities and Special Facilities. They are again subdivided into sub- categories giving different marks under each category. They are Company/Business Registration, Previous Year Hajj License, Tourist Board license, Civil Aviation, IATA Registration, Active Management with Front Office, Competency of Guide (Moulavi), Efficient Group Leader, Good Services-Food, Accommodation, Medical Facilities, Bank Statements/Reference, Payment of Income Tax, Value of Capital Assets, Audited Accounts/ P&L or Income, Number of Years, Additional Experience, Effective Arrangement with Mu'allim, No Complaints* Absence of Mismanagement/casualties, Contingency Fund, Orientation Program, Training on Ethics, Grievance Handling, and Publications. The total number of marks which can be given is 100. The last paragraph mentions that the cut off mark is 50. Anyone getting less than 50 marks are not eligible to take any pilgrims as Travel Operators. If anyone gets more than 75 marks, they are eligible to be considered for the increase from the minimum quota numbers. The interview panel recommends the operators and submit the list to the Minister for approval.

In the present case there are three Petitioners, namely (1) Safra Travels and Tours (Pvt) Ltd., (2) Nawas Samsudeen Mohamed Althaf and Ainul Fouzia Mansoor carrying on the business as Transworld Travels and Tours and (3) Kara Travels and Tours (Pvt) Ltd. The marks given at the interview held afresh after the interim order of this Court,

was filed on 07.07.2015 marked 'X' and the quota allocation was marked and produced as 'Y'. Out of the 166 applicants as Tour Operators only 93 were selected to be given the quotas. The Petitioner No. 1 , Safra Travels & Tours (Pvt) Ltd., has got 87 marks and has gained 40 quotas, Transworld Travels and Tours has got 64 marks and has gained 15 quotas and Kara Travels & Tours (Pvt) Ltd. has got 97 marks and has gained 50 quotas.

The Petitioner's Counsel submitted that the 1st Respondent's affidavit dated 13.07.2015, paragraph 5 has shown the basis on which the Hajj Committee has allocated quotas and the bands given in the chart which is shown herein below is not consistent and therefore arbitrary. I observe that the number of quotas allotted to Sri Lanka is a "given". It is static. That number is not adjustable as it is given by the Kingdom of Saudi Arabia. This year the allocated quota is 2240. When marks are given to all the participants, the first step is to take those who have obtained 50 marks or more into one separate category. In this instance there were 93 companies/ persons amongst whom the 2240 quotas have to be distributed. There are persons who have received similar marks, eg. 71 marks were obtained by 5 persons, 91 marks were obtained by 6 persons etc. There are others who have received separate stand alone marks. A mathematician has to make a plan as to how similar quotas would be given to those who have got similar marks without any discrimination. It is not an easy task, to divide 2240 quotas amongst many groups with similar marks and others to add up to 93 persons.

Marks Range	**Quotas**
92 and above	50
90-91	45
85-89	40
81-84	35
80	30
75-79	25
70-74	20
60-69	15
50-59	10

This table at the 1st glance could look arbitrary but it is definitely not so. Discrimination has been eliminated and quotas have been given exactly according to the marks. It is my view that an ordinary person could not have done this task. The Hajj Committee has got the assistance of a mathematician proper and performed this task.

I observe that this allocation of 2240 quotas amongst 93 persons without a discrimination cannot be done by arithmetic or algebra which the common person would understand but by certain formulas taught only in advanced mathematics. It is only after determining the quotas that the table aforementioned is made ready for a normal person to understand how it was allocated . There is no arbitrariness in this table. The table would be having different bands in different years depending of the number of quotas allocated and the marks received by Travel Operators at the interview.

The Petitioner's Counsel argued that the 1st Petitioner should have got maximum marks (4) for "Active Management with office premises", maximum marks (4) for "Payment of Income Tax", maximum marks (2) for "Programme for Hajj Orientation and Training", maximum marks (2) for "Arrangements for training on ethics of congregation, social living (planning social living orientation program)", and maximum marks (2) for "Handbook on Service Delivery", thus adding 4 more marks which would make his total as 91 marks. Then he would be entitled to 45 quotas (Vide table above).

If he is given 45 quotas, then the whole table will have to be changed according to the mathematical formula used to prepare the table, to include him in that band. The 5 quotas he gains will have to be deducted from some person or other or any number of them, to keep the total number of quotas as a static, i.e. 2240. Then the whole table will have to be changed once again. Anyway as argued by the Counsel for the 1st Respondent, the 1st Petitioner is not entitled to 4 more marks but one more mark. Then he is yet in the range of 85-89 marks getting 40 quotas.

I am at a loss to understand how to get it adjusted if he has to be given 4 more marks because those from whom those quotas should be taken away from, are not before Court . They are not made parties to this case by the Petitioner.

Petitioner's Counsel again argued that the quotas given to 'bessa' (Officials quotas) can be taken and given to the Petitioners which is an untenable argument since they are given if at all, subject only to donations and not to Tour Operators, who operate for money on business.

The Petitioner's Counsel also argued that the 2nd Petitioner should not have been deprived of 3 marks under the criteria 'medical facilities', since Medical Facilities are granted by the Doctors who get the quota allocated under the category of "Bessa" meaning "Official travellers" who are normally sent by the Ministry as a practice. Opposing Counsel explained that those who are taken under 'bessa' are not allowed to go beyond a certain point in the whole area and only pilgrims are allowed into a particular area. If one goes under 'bessa' he/she cannot enter the ritual area. "Medical Facilities" is a part of Evaluation Criteria in the guidelines and as such cannot be ignored. If the operator has medical facilities with a medical person in the team he would get more marks than another operator who does not have them. Even if he gets those 3 marks, his total marks would be 67. According to the aforementioned table yet he would be getting 15 quotas only.

The 3rd Petitioner Kara Travels and Tours (Pvt) Ltd. has got the highest marks of all. As claimed by him to get 2 more marks, still he would be within 50 quotas range as his total will be then 99 marks. It would not make any change for the 3rd Petitioner.

Other Counsel representing some of the members of the Hajj Committee also made submissions opposing the Petitioners' application before this Court. They pointed out that the marks given at the interview to any Travel Operator cannot be changed without making all other operators as parties to this application simply because the quotas given to them will be affected.

The interview panel consisting of members of the Hajj Committee should be able to decide on the marks to be given to any operator as they feel is correct after consideration of the material before them. This process, I observe is not easy considering the members who come before them as applicants to take pilgrims to Mecca, the holy land. The pilgrims who go under their care have to be looked after by the operators and whether the operators are competent to give them the necessary

care and comfort and satisfy them is the key point when the operators are interviewed. The members of the Hajj Committee are competent experienced persons who should not be tied down to technical evaluations of the capabilities of operators. Instead they should be given the freedom to use their authority in a just and reasonable manner, directed by the 'guidelines', under different categories. They are able only to give marks. The table as aforementioned giving the quotas of who will get how much quotas is really decided by the mathematical formula which distributes the static figure given by the Kingdom of Saudi Arabia, into quotas to the eligible operators, in accordance with the marks obtained.

A travel operator who fights for one or two more marks coming under Article 12 or 14 of the Constitution hardly thinks of what would happen to others who are less fortunate and have get lesser marks meaning lesser quotas. Anyway this Court was educated by Counsel in the manner the operators who get 10, 15 or 20 quotas make the pilgrimage. They get together into groups of 50 and appoint a leader and take the pious pilgrims to the holy land. Since the Petitioners have filed this fundamental rights application, opposing Counsel was heard to say that Sri Lanka might not get any quotas as Sri Lanka has delayed. Who will suffer as a result? It is none other than the pilgrims who have high expectations of reaching Mecca and doing the rituals. I hold that the 'guidelines' have been adhered to in a rightful manner.

This Court holds that the fundamental rights of the three Petitioners have not been infringed. This application is dismissed. However, I order no costs.

Judge of the Supreme Court

P. Jayawardena,PC., J.

I agree.

Judge of the Supreme Court

Anil Gooneratne, 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
Section 126 of the Constitution.

Ginigathgala Mohandiramlage Nimalsiri,
349/1, Horagala Watta,
Beraketiya,
Kiriwattuduwa.

Petitioner

SC FR Application No. 256/2010

Vs.

1. Colonel P.P.J. Fernando,
   Commanding Officer,
   3/Sri Lanka General Corps,
   Panagoda Army Camp,
   Homagama.

2. Major General H.L. Weeratunge,
   Colonel Commander,
   General Services Corps,
   Panagoda Army Camp,
   Homagama.

3. Brigadier W.R. Palihakkara,
   Director,
   Pay and Records Office,
   Panagoda Army Camp,
   Homagama.

4. Major General H.J.G. Wijeratne,
   Director General (Legal),
   Sri Lanka Army,
   Army Headquarters,
   Colombo 02.

5. Lt. General Jagath Jayasooriya,
   Commander of the Sri Lanka Army,
   Army Headquarters,
   Colombo 02.

6. Mr. Gotabhaya Rajapakse,
   Secretary,
   Ministry of Defence, Public Security,
   Law and Order,
   Colombo 03.

7. Honourable Attorney General,
   Department of the Attorney General,
   Colombo 12.

Respondents

Before : Chandra Ekanayake J.
S.E. Wanasundera, PC, J.
Priyantha Jayawardena, PC, J.

Counsel : Asthika Devendra with Lilan Warusavithana for the Petitioner
Rajiv Goonatillake, SSC for the 1st to 7th Respondents

Argued on : 2nd July, 2015

Decided on : 17th September, 2015

Priyantha Jayawardena, PC. J,

This is an application filed under Article 126(1) of the Constitution in which the Petitioner prays for an order declaring that his fundamental rights to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution have been violated by reason of the Petitioner not being re-enlisted to the Sri Lanka Army for the third time.

The Petitioner has joined the Sri Lanka Army Regular Force on 21.01.1986. After training he entered into the Sri Lanka Army General Services Corps as a Clerk to the Director Board of the Pay and Records office which is part of the headquarters of the Sri Lanka Army.

In terms of the Soldiers Service Regulations No. 01 of 1994 on Enlistment and Re-engagement the original enlistment of a soldier shall be 12 years which consists of two periods of 5 years and 7 years.

The Petitioner was first enlisted for a period of five years from 21.01.1986 to 20.01.1991, and thereafter he was re-enlisted from 21.01.1991 to 20.01.1998 for a period of further seven years.

The Petitioner while serving his second enlistment was arrested on 07.05.1996 by the Padukka Police on the suspicion of the murder of the Akaravitage Airangani, his wife and was produced before the Magistrate's Court of Homagama. The Petitioner was in remand custody from 08.05.1996 to 20.08.1996 for a period of 3 months and thereafter released on bail by the Magistrate's Court on 20.08.1996. The Petitioner was required by the Army to seek re-enlistment for a further period of 10 years if he wishes to re-enlist for the third time on or about June 1997. He has requested that he be re-enlisted during the said period.

The Petitioner was in active service until he was interdicted on 15.09.1997. The Petitioner's second re-enlistment period was ended on 20.01.1998, but he has been paid half pay up to 30.09.1998 which was beyond the period of the second enlistment. Therefore, the Petitioner claimed that his application for the third re-enlistment should be considered as accepted. Further, the Petitioner stated that he entertained a legitimate expectation to obtain the third enlistment.

The Petitioner on numerous occasions had requested from the authorities of the Sri Lanka Army that he be allowed to serve in the active service or to resign from the Army as the case pending against him was getting prolonged. One of the said appeals dated 23.02.1999 was preferred to the Director, Pay and Records requesting that since up to that date no charges had been preferred against him, to take steps to engage him in active service and if the Army was unable to do the same to allow him to resign as a soldier who had completed 12 years of service. In response to the requests for re-enlistment, the Petitioner was informed by the Director Board of Pay and Records of the Sri Lanka Army by their letter dated 05.05.1999 that they had been informed by the Legal Services Directorate that it was not possible to re-engage him in services until such time the case pending against him was concluded.

The Petitioner had been further copied a letter of the Board of Directors of Pay and Records dated 26.07.1999 addressed to the Legal Department of the Army stating that the Director Board of Pay and Records has suspended to re-enlist the Petitioner for a further period of 10 years acting on the instructions of the Legal Services Directorate.

Thereafter, by the letter dated 31.08.1999 the Petitioner was again informed by the Board of Directors of Pay and Records of the Sri Lanka Army that they had been instructed by the Directorate of Legal Services of the Army that the Petitioner could not be taken back to service until the case pending against him was concluded.

On 05.12.2008 the Petitioner was discharged by the Magistrate's Court of Homagama on a decision taken by the Honourable Attorney General in terms of section 396 of the Criminal Procedure Code.

Further, an Attorney-at-Law on the instructions of the Petitioner sent a letter dated 30.07.2009 to the 5th Respondent informing that the Petitioner on several previous occasions had requested from the Army that he be allowed to serve in the Army pending the case or to be discharged from the Army as having served only 12 years.

The Petitioner was requested by letter dated 14.10.2009 sent on behalf of the 1st Respondent to be present on or before 25.10.2009 for clearance in order for the Petitioner to be discharged.

Thereafter, by his letter dated 09.11.2009 the Petitioner had informed the Commanding Officer that since steps are being taken to discharge the Petitioner from the Army having considered his period of service in the Sri Lanka Army to be 12 years, he had requested that a letter be given to him saying that he had been discharged accordingly.

Further, by his letter dated 08.02.2010 addressed to the Commanding Officer the Petitioner has mentioned that he has expressed his desire to work in the Security Division of a State Bank and therefore he required a letter in proof of his service in the Sri Lanka Army to be submitted to the aforesaid bank.

Thereafter, a letter dated 16.03.2010 was issued on behalf of the 1st Respondent, Commanding Officer informing that the Petitioner had been discharged from the Sri Lanka army with effect from 20.01.1998 after serving in the Sri Lanka Army for 12 years.

The Petitioner challenged the refusal to re-enlist him to the Sri Lanka Army for the third time on two grounds. The first ground of challenge was that the refusal to re-enlist the Petitioner to the Sri Lanka Army was illegal, irrational and arbitrary. The second ground of challenge was that he had a legitimate expectation that he would be re-enlisted to the Sri Lanka Army once the pending case against him before the Magistrate's Court was concluded. In the circumstances, he pleaded that his fundamental rights guaranteed under Article 12(1) of the Constitution have been infringed by the Respondents.

The Court having heard the learned Counsel for the Petitioner in support of this application, granted leave to proceed for the alleged infringement of fundamental rights guaranteed by Article 12(1) of the Constitution.

Thereafter, the 5th Respondent filed an Affidavit on behalf of the Respondents and stated that the Petitioner's second period of enlistment came to an end on 20.01.1998. The Soldiers Service Regulations No. 1 of 1994 governs the re-enlistment of soldiers, which does not provide for automatic re-enlistment. He further stated that the re-engagement in service is at the discretion of

the relevant authorities and upon a soldier satisfying the conditions set out in Regulation 4 of the said Regulations.

The Soldiers Service Regulations No. 01 of 1994 on Enlistment and Re-Engagement states as follows;

> 2. Save as hereinafter provided, the period of original enlistment of a soldier is twelve years of which he shall serve the first five years in the Regular Force and the remaining seven years in the Reserve unless otherwise ordered by Commander of the Army.
>
> 3. A soldier may, before the expiry of the period of his original enlistment, be re-engaged for a further period of military service in the Regular Force. Such further military service may be in one or more periods, but the aggregate of such service shall not exceed twenty years.
>
> Provided, however, that no soldier shall serve beyond the age of 55 years,
>
> 4. (1) An extension of service in the Regular Force beyond the period of five years referred to in Regulation 2 or re-engagement for a further period beyond the period of original enlistment referred to in Regulation 3, may be allowed to a soldier who:-
>
> (a) is efficient, well-behaved and recommended by his Commanding Officer; and
>
> (b) has passed a medical test to the satisfaction of the Commander of the Army:
>
> Provided that a soldier who is not recommended by his Commanding Officer for an extension of service or for re-engagement, but in all other respects is eligible therefore may, appeal to the Commander of the Army against the refusal by Commanding Officer to recommend such soldier, and the Commander of the Army may, if he thinks fit, allow an extension of service or re-engagement as the case may be, to such soldier.
>
> (2) The number of soldiers who will be allowed to extend their services in the Regular Force beyond the period of five years or to re-engage for a further period beyond the period of original enlistment shall depend on the number of vacancies as determined by the Minister of Defence.

According to the 5th Respondent's Affidavit the Petitioner was arrested on 07.05.1996 and was produced before the Magistrate's Court of Homagama in case number NS 489/96 on 08.05.1996 in connection with the murder of his wife Akaravitage Irangani and was in remand custody at the Welikada Prison for a period of 3 months from 08.05.1996 to 20.08.1996 and thereafter released on bail by the Magistrate's Court on 20.08.1996.

By the order dated 04.09.1997 of the Army Commander, it was informed to the Petitioner that he was suspended from service with half pay with effect from 01.08.1997 in terms of Regulation 22(4) (a) of the Sri Lanka Army Pay Code, 1982 and Regulation 112 of the Sri Lanka Army Disciplinary Regulations, 1950.

In view of the fact that criminal proceedings were pending against the Petitioner, when his period of second engagement came to an end on 20.01.1998, the Petitioner's service was not extended beyond that date.

Moreover, while the Petitioner was serving his second enlistment the Petitioner had been convicted of three charges levelled against him under Sections 106(b), 116(c) and 106(b) of the Army Act No. 17 of 1949 namely; absence from duty without leave; failure to appear for the weekly Muster Parade and making of false declarations. He had been reprimanded for all three charges.

The 5th Respondent stated that there were no grounds for the Petitioner to have a legitimate expectation of being re-enlisted in the Sri Lanka Army for the third time, and also that the Petitioner was aware that his Commanding Officer had not recommended him for re-enlistment. Further, the Army has acted according to the rules and regulations applicable for re-enlistment.

Further, the Petitioner has requested that steps be taken to discharge the Petitioner from Army with effect from 20.01.1998 on which date his 12 years service period was completed.

The Petitioner's service has been suspended since 15.09.1997. Hence, he was entitled to payment of half salary only for the remainder of his service period i.e. only until 20.01.1998. As stated by the Respondents, the payment of salaries beyond that period i.e. until 30.09.1998 had been due to an oversight.

Moreover, the 5th Respondent stated that the Petitioner had not forwarded any appeal to the Commander of the Army in terms of Regulation 4(1) of the said Regulations. Since the Petitioner had not availed himself of this opportunity, his present application is misconceived in law.

The 5th Respondent stated in his Objections that the Petitioner is not entitled to the benefits sought for the following reasons;

i. his period of engagement came to an end on 20.01.1998 whilst a charge of murder was pending against him in court,

ii. in view of the pending criminal case his service could not have been extended beyond 20.01.1998 in terms of Regulation 4 (1) (a) and Regulation 2 of the said Regulations,

iii. extension of service is not automatic nor is it a legal right of a soldier. Considering the pending murder charge and his convictions under the Army Act the Petitioner could not have been classified as "well behaved",

iv. the Petitioner was discharged from the murder charge against him on 05.12.2008 after his initial period of engagement came to an end on 20.01.1998.

Therefore, it was contended that the Petitioner has failed to establish that his fundamental rights have been violated.

When the matter was taken up for argument the learned Counsel for the Petitioner firstly submitted that the Respondents failed to exercise the discretionary powers in a fair manner. Further, the failure to re-enlist the Petitioner is illegal, irrational and arbitrary and infringed the fundamental rights guaranteed to the Petitioner under Article 12(1) of the Constitution.

Counsel for the Petitioner further submitted that the Petitioner was not responsible for the false allegation made against him of murdering of his wife and he is not responsible for the delay of ten years for him to be discharged by the Magistrate's Court. The Petitioner's position is that the refusal to re-enlist him for the third time was a violation of the principles of the administration law which amounts to a violation of the equal protection guaranteed by the Constitution. Thus, he is entitled to Constitutional remedies.

On the other hand, the learned Senior State Counsel for the Respondents submitted that the actions of the Respondents were neither illegal, irrational nor arbitrary and that there was no violation of the Petitioner's rights.

He submitted that in terms of the Army Regulation No.112 the Petitioner was suspended as he was charged with murder. In fact, the Petitioner was discharged from criminal proceedings after the date of his re-enlistment fell due. Hence, it was submitted by the Respondents that the Sri Lanka Army did not act irrationally or arbitrarily by not re-enlisting the Petitioner in 1998.

Further, it was submitted that the Petitioner was not discharged earlier as grave criminal charges were pending against the Petitioner and it would be irrational to discharge the Petitioner or issue the Petitioner a certificate of discharge prior to conclusion of the criminal proceedings pending in court.

Having considered the material produced in court I am of the opinion that the Petitioner did not establish that he had either a contractual or statutory right to obtain the third re-enlistment.

Further, in *Dissanayake v. Kaleel* (1993) 2 SLR 135 at 184 Mark Fernando J. stated that fairness lies at the root of equality and equal protection. However, the Petitioner neither

established that he was eligible for the third enlistment nor the refusal to enlist him for the third time is unreasonable, discriminatory or arbitrary. The unreasonableness should be judged from an objective basis.

Further, the refusal by the Respondents to enlist the Petitioner for the third time is neither irrational nor arbitrary. On the contrary the said decision was reasonable and based on the facts and circumstances of this case and the regulations that are applicable to the Petitioner.

Thus, the Petitioner failed to prove that the refusal to enlist him for the third time amounted to a violation of his fundamental rights guaranteed by the Constitution.

The second ground of challenge was that the Petitioner had a legitimate expectation that he would be re-enlisted to the Sri Lanka Army once the pending case against him before the Magistrate's Court was concluded.

The Petitioner submitted that he had a legitimate expectation to enlist for the third time after his second enlistment. Thus, the failure to enlist him for the third time violated his fundamental rights guaranteed by the Constitution.

The Petitioner stated that he was in remand custody from 08.05.1996 to 20.08.1996 for a period of 3 months and thereafter released on bail by the Magistrate's Court on 20.08.1996. The Petitioner was required by the Army to seek re-enlistment for a further period of 10 years if he wishes to re-enlist for the third time on or about June 1997. He has requested that he be re-enlisted during the said period.

The Petitioner's second re-enlistment period was ended on 20.01.1998, but he has been paid half pay up to 30.09.1998 which was beyond the period of the second enlistment. Therefore, the Petitioner claimed that his application for the third re-enlistment should be considered as accepted. Further, he also entertained a legitimate expectation to obtain the third enlistment.

In *Dayaratne v. Minister of Health and Indigenous Medicine* (1999) 1 SLR 393 Amarasinghe J. held that destroying of a legitimate expectation is a ground for judicial review which amounted to a violation of equal protection guaranteed by Article 12 of the Constitution. Thus, it is necessary to consider the applicability of the doctrine of legitimate expectation to the instant application to ascertain whether the Petitioner could have had a legitimate expectation to obtain the third re-enlistment and if so whether it has been breached by the Respondents.

Legitimate expectation is a concept evolved in Europe. Though the doctrine of legitimate expectation commenced as a remedy in public law, later the said doctrine was applied to cases arising from European Convention on Human Rights and Fundamental Freedoms etc. In Sri Lanka the said doctrine of legitimate expectation is applied in the fields of public law,

fundamental rights law and in labour law. In labour law the said doctrine is applicable to the state sector and the private sector in like manner.

The doctrine of legitimate expectation applies to situations to protect legitimate expectation. It arises from establishing an expectation believing an undertaking or promise given by a public official or establishing an expectation taking into consideration of established practices of an authority. However, the said criteria should not be considered as an exhaustive list as the doctrine of legitimate expectation has a potential to develop further. Legitimate expectation can be either based on procedural propriety or on substantive protection.

Procedural expectations are protected by requiring that the promised procedure be followed save in very exceptional circumstances, for instance where national security warrants a departure from the expected procedure. However, in such instances the decision-maker must take into account all relevant considerations.

In *Dayaratne v. Minister of Health and Indigenous Medicine* (1999) 1 SLR 393 Amarasinghe J. held that when a change of policy is likely to frustrate the legitimate expectations of individuals, they must be given an opportunity of stating why the change of policy should not affect them unfavourably. Such procedural rights have an important bearing on the protection afforded by Article 12 of the Constitution against equal treatments arbitrarily, invidiously, irrationally, or otherwise unreasonably dealt out by the Executive.

An expectation is considered to be legitimate where it is founded upon a promise or practice by the authority that is said to be bound to fulfil the expectation. Therefore, an expectation reasonably entertained by a person may not be considered as legitimate because of some countervailing consideration of policy or law. Further, clear statutory words override any expectation howsoever founded. Where an expectation is founded on a policy and later a relevant change of policy is notified, the expectation founded on the previous policy cannot be considered as legitimate.

An expectation the fulfilment of which results in the decision maker making an unlawful decision cannot be treated as a legitimate expectation. Therefore, the expectation must be within the powers of the decision-maker for it to be treated as a legitimate expectation case. If a person did not expect anything, then there is nothing that the doctrine can protect.

In order to seek redress under the doctrine of legitimate expectation a person should prove he had a legitimate expectation which was based on a promise or an established practice. Thus, the applicability of the said doctrine is based on the facts and circumstances of each case.

In the instant application the Petitioner's second argument was based on the legitimate expectation of substantive protection. In his Petition he states that he was first enlisted from

21.01.1986 to 20.01.1991, for a period of five years and thereafter he was re-enlisted from 21.01.1991 to 20.01.1998 for a period of further seven years. The Petitioner while serving his second enlistment was arrested on 07.05.1996 and was in remand custody from 08.05.1996 till 20.08.1996 and subsequently released on bail on 20.08.1996. Thereafter, he was interdicted on 15.09.1997 and was on half pay up to 30.09.1998.

It was further submitted on behalf of the Respondents that they have not made any express representation at any stage to the Petitioner that he would be re-engaged. And also the Petitioner has failed to demonstrate that the Sri Lanka Army or the Respondents have had a past practice of re-enlisting persons in similar circumstances.

It is apparent from the documents filed by the 5th Respondent that the payment of half the salary beyond the end of the second enlistment was an administrative error, an error cannot be a basis of a legitimate expectation. In order to succeed in an application made on the grounds of legitimate expectation, the expectation must be legitimate. Mistakes, decisions based on erroneous factual data or illegality cannot be the basis for a legitimate expectation. A similar view was expressed in *Vasana v. Incorporated Council of Legal Education and Others* (2004) 1 SLR 154.

As stated above the Petitioner had preferred several appeals to re-enlist him for the third time or to allow him to resign as a soldier who had completed 12 years of service. By appeal dated 23.02.1999 addressed to the Director, Pay and Records the Petitioner had requested to take steps to engage him in active service and if the Army was unable to do the same to allow him to resign as a soldier who had completed 12 years of service.

The Soldiers Service Regulations No. 1 of 1994 which governs the re-enlistment of soldiers does not provide for automatic re-enlistment. Whether a soldier has a right to be re-enlisted depends on whether he had met the criteria set out in the aforesaid Regulation No. 4. Thus, a Commanding Officer may in his discretion recommend an efficient and well behaved soldier for re-engagement. However, such discretion shall be used in line with the principles of natural justice. As such, there was no statutory or legal right which entitled a soldier to be re-engaged in service as of right for a further term, upon the conclusion of an enlistment. Further, the convictions under the Army Act are relevant facts when using the discretion for an enlistment. The Petitioner failed to prove that he has fulfilled the required criteria to enlist for the third time.

The Petitioner's re-enlistment for the third time fell due on 20.01.1998. However, the Petitioner was discharged from criminal proceedings on 05.12.2008 which was long after his re-enlistment fell due. Therefore, the date of re-enlistment has passed by the time the Petitioner was discharged from the criminal proceedings. It was not possible to back-date the third enlistment.

Further, the Petitioner failed to prove that there was an established past practice of re-enlisting persons similarly circumstanced. Moreover, the Petitioner could not have had a legitimate expectation to be re-enlisted upon the conclusion of his second enlistment on 20.01.1998 as the Respondents have not given an undertaking to the Petitioner in regard to his third enlistment nor have the Respondents adopted a past practice in regard to persons similarly circumstanced. Mere expectation of a citizen will not, by itself, give rise to an enforceable right.

Further, the Petitioner has on several occasions requested from the Sri Lanka Army to allow him to resign as a soldier who had completed 12 years of service. Such requests to resign from the Sri Lanka Army estop the Petitioner invoking the doctrine of legitimate expectation and seeking for a further enlistment in the Sri Lanka Army.

Moreover, the Petitioner has not availed himself the opportunity of lodging an appeal to the Commander of the Army in terms of Regulation 4 (1) of the Soldiers Service Regulations No. 1 of 1994, which provides that a soldier who is not recommended by his Commanding Officer for an extension of service or re-engagement may appeal to the Commander of the Army against the refusal by the Commanding Officer. Thus, I am also of the view that the doctrine of legitimate expectation cannot be invoked by a person who has not exhausted his remedies unless he can satisfy court as to why he did not exercise his rights made available to him.

I hold that the Petitioner has failed to establish that he was entitled in law to be enlisted in the Sri Lanka Army for a third time and he had a legitimate expectation to be enlisted for the third time. Further, the Respondents' failure to grant the third enlistment to the Petitioner was neither unreasonable, illegal, irrational nor arbitrary. In the circumstances, I hold that that the Petitioner failed to establish that his fundamental rights guaranteed by the Constitution have been infringed by the refusal to enlist the Petitioner for the third time to the Sri Lanka Army. This application is therefore dismissed.

I order no costs.

Judge of the Supreme Court

Chandra Ekanayake 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. F.R Application No. 273/2014

D.M. Anura Mangala
Unit 4A/66 Badulu Oya,
Kandekatiya.

PETITIONER

Vs.

1. The Inspector General of Police
N.K. Illangakoon
Police Headquarters,
Colombo 1.
2. Deputy Inspector General of Police
Uva Province
Roshan Fernando
Deputy Inspector General ‘s Office
Badulla.
3. M. Kumara Balasuriya
Inquiring Officer
Assistant Superintendent of Police
Police Office
Badulla.

4. Hon. Attorney General
Department of Attorney General
Colombo 12.

RESPONDENTS

BEFORE: Chandra Ekanayake J.
Priyantha Jayawardena P.C., J. &
Anil Gooneratne J.

COUNSEL: Amila Palliyage for the Petitioner
Ms. Viveka Siriwardane D.S.G. for the Attorney General

WRITTEN SUBMISSIONS FILED ON:

06.04.2015 (Respondents)

ARGUED ON 24.02.2015

DECIDED ON: 04.06.2015

GOONERATNE J.

When this Fundamental Rights Application was supported before this court on 24.2.2015, the learned Deputy Solicitor General who appeared for the

Respondents raised a preliminary objection, to the effect that the Petitioner's application to this court has been filed out of time. Learned counsel for the Petitioner, however does not concede this position.

It is pleaded that the Petitioner joined the police force as a Sub-Constable on or about 04.10.1988. He had served in that capacity as stated in the stations mentioned in para 2 of his petition. His post in the police service has been confirmed on or about 2006 and appointed a Police Constable. It is also pleaded that he was arrested on 27.03.2007 based on charges of Bribery and Corruption, and had been interdicted pending investigations. Perusal of the body of the petition it is stated that two charges were framed against the applicant petitioner and a disciplinary inquiry was held. At the conclusion of the inquiry, he was found guilty by order of 21.08.2008, (P5) and services terminated. The disciplinary order communicated by P6 of 25.9.2009. Petitioner also appealed against the said order and inter alia it is pleaded that his appeal was turned down, and he was accordingly informed by Inspector General of Police (P10 of 24.05.2010). It is also stated that proceedings were instituted in the High Court by Commission to Investigate Allegations of Bribery and Corruption. However on

02.07.2010, prosecuting counsel informed the High Court that the prosecution does not wish to proceed with the case. Accordingly the learned High Court Judge discharged and acquitted the Accused on the said date (02.07.2013) (P12).

I have perused the written submissions of learned Deputy Solicitor General. Petitioner by sub paras 'g' and 'h' of the prayer to the petition moves to set aside orders marked P5 and P6 dated 21.8.2008 and 25.9.2009 respectively and inter alia seeks to declare violations guaranteed under Article 12(1), 13(3) and 13(5) of the Constitution. Learned Deputy Solicitor General contends that whilst the prosecution against the petitioner was pending under the provisions of the Bribery Act, the Police Department initiated disciplinary proceedings and charges preferred for violating Police Department orders and for corrupt conduct of accepting gratification unlawfully and thereby bringing the Police Department into disrepute. The disciplinary authority found the Petitioner guilty of charges and terminated Petitioner's services. Petitioner appealed to the National Police Commission, but the Commission rejected the appeal and its outcome communicated (P10). Learned Deputy Solicitor General contends that the High Court acquitted (P12) the Petitioner, and it was so because the learned trial Judge was informed that the prosecution does not wish to proceed with the case as the

main witness for the prosecution went back on his evidence. Thereafter the Petitioner appealed to the Human Rights Commission (P14) on 01.8.2013 and to the Public Service Commission on 26.6.2014.

The learned Deputy Solicitor General with emphasis argues that the outcome of the High Court case filed against the Petitioner has no bearing on the disciplinary order made against the Petitioner by the Police Department after a due inquiry. It is also said that a criminal prosecution and disciplinary proceedings are independent of one another. As contained in chapter XLVII and Section 28.6 and 28.7 of the Establishment Code an acquittal or discharge by a court of Law will not be a ground to set aside a disciplinary Order made in a disciplinary inquiry. The burden of proof defer in the above two proceedings. The said Sections 28.6 and 28.7 reads thus:

28:6 The fact that an officer has been acquitted or discharged or found not guilty by a Court of Law or Statutory Authority is no reason at all why he should not be dealt with under this Code, if there is sufficient material on which disciplinary proceedings can be taken against him.

28:7 An officer who has been punished under this Code for any offence, other than a punishment in terms of sub-section 28:3 above, may not claim

remission of such punishment on the ground that he has subsequently been acquitted or discharged by a court of Law in respect of that same offence, or that the order of a Court has been set aside in appeal.

I observe that thereafter the applicant had made several attempts to get himself reinstated in the service of the Police Department, but there seems to have been no response (vide P15 to P20).

The fundamental rights application has been filed by Petition dated 16.09.2014. The prayer to the Petition by its sub paras (d) to (k) seeks substantive relief and sub paras (g) and (h) contemplates to set aside order dated 21.08.2008 (P5) and the letter of termination of the Petitioner's services dated 25.09.2009 (P6). Petitioner has also by sub para (i) of the prayer to the petition moved court to have himself reinstated in the service of the Police Department, with all increments and promotions. As such it is apparent that taking the above sub paras (g), (h) and (i) together, which prayer would be the most beneficial to the Petitioner, had filed this application after a fairly long lapse of time (delay of 5 years). This is definitely outside the time period contemplated by law.

I am inclined to agree with the views expressed by learned Deputy Solicitor General that the High Court case filed against the Petitioner would have no bearing on the disciplinary orders made against the petitioner by the Police Department which was canvassed by the Petitioner but subsequently turned

down by the 1st Respondent. The above stated provisions of the Establishment Code are very clear. I have also perused Section 28:3 of the Establishment Code. It relates to a report sent by court or statutory authority where the public servant is found guilty under the Criminal Procedure Code. It has no relevance to the case in hand. Nor has Article 13(3) and 13(5) of the Constitution any relevance. Article 13(3) contemplates a fair trial and 13(5) relates to presumption of innocence. I have already stated above that Criminal Proceedings cannot have any bearing on a disciplinary proceedings held by the Police Department. Nor can there be any conflict between the above stated articles of the Constitution and the disciplinary orders made against the Petitioner as per the Establishment Code.

Petitioner should have filed this application within one month of receiving orders marked P5 or P6. We are satisfied that this application is out of time, and hence jurisdiction of this court cannot be exercised after the period of

one month from the date of the Executive or Administrative acts complained of by the Petitioner. Preliminary objection upheld. This application is dismissed without costs.

Application dismissed without costs.

JUDGE OF THE SUPREME COURT

Chandra Ekanayake 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

S.C (FR) 451/2011

Horathalge Thilak Lalitha Kumara
"Dharmashri" , No. 2, Korossa,
Udugampola.

PETITIONER

Vs.

1. S.S. Hewapathirana
Secretary,
Ministry of Youth Affairs and Skills Development,
"Nipunatha Piyasa",
No. 354/2", Elvitigala Mawatha,
Colombo 5.

2. H. Chithral Ambawatte
Director General,
Department of Technical Education and Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.

3. P. K. Sarathchandra
Administrative Officer,
Department of Technical Education and Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.

4. T. A. Piyasiri
Director General,
Tertiary and Vocational Education Commission,
"Nipunatha Piyasa",
No. 354/2", Elvitigala Mawatha,
Colombo 5.

5. P. B. Abeykoon,
Secretary,
Ministry of Public Administration and Home Affairs,
Independence Square,
Colombo 7.

6. Wasantha Gunaratne
Director (Administration)
Department of Technical Education and Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.

7. T. M. D. Tennakoon
Maintenance Engineer
Department of Technical Education and Training,
P.O. Box 557, Olcott Mawatha,
Colombo 10.

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

RESPONDENTS

BEFORE: Priyasath Dep P.C., J.
Upaly Abeyrathne J. &
Anil Gooneratne J.

COUNSEL: Sanjeewa Ranaweera for the Petitioner

Suren Gnanaraj S.C for the Attorney General

ARGUED ON: 06.08.2015

DECIDED ON: 17.09.2015

GOONERATNE J.

The Petitioner holds a Bachelor's Degree in Engineering (Mechanical) from the University of Moratuwa (on or about December 1995) and claims that he was qualified to be employed as a Mechanical Engineer. During the period 02.12.1997 to 02.09.1998, he served the Department of Mechanical Engineering of the Open University, Sri Lanka. Petitioner received training in the public service as a Graduate Trainee from the latter part of year 2004, thereafter selected as a Training Assistant (Maintenance) in the Department of Technical Education and Training, Colombo 10 (P3 of 20.09.2005). He passed the Efficiency Bar

Examination only in the year 2010 (P4). Petitioner claims, that duties and responsibilities of the post of Maintenance Engineer and those of the Petitioner as a Training Assistant are substantially the same. The Maintenance Engineer was one A.K.J. Karunasena who had retired from service and applications were called by Gazette P6 of 21.01.2011 for the said post, which fell vacant.

Petitioner's main complaint is that the 7th Respondent was appointed to the post of Maintenance Engineer, Department of Technical Education and the Petitioner impugns inter alia the selection or appointment of the 7th Respondent, over and above him as the Petitioner claims to be the most suitable candidate to be appointed to the said post. Petitioner argues that the new selection criteria and or the new scheme for awarding marks ought to have been disclosed and published in advance of the interview date but it was not done. He also complains that there was no approved selection criteria/scheme/guidelines to select a suitable candidates. In other words the entire selection process was flawed and as such 7th Respondent's selection and appointment as 'Mechanical Engineer' was illegal and null and void. On 17.01.2012 this court granted leave to the Petitioner for an alleged violation of Article 12(1) of the Constitution.

The structured interview to fill the above vacancy was held on 26.04.2011 (P8). Petitioner pleads that before the interview may be several days before he had inquired from the 6th Respondent about the selection criteria and the scheme adopted, but he had not disclosed and had indicated that it would be disclosed at the interview. As such Petitioner pleads that he had no opportunity to challenge the scheme of interview and the new selection criteria. Our attention was drawn to clause 72 and 73 of P14 (procedural rules of PSC). The said rules envisage of including the marking scheme in the advertisement calling for applications to fill vacancies. Learned Counsel for the Petitioner argues that this was a serious lapse in the entire selection process as no such marking scheme was advertised or made known to candidates, prior to the interview.

The Petitioner has also pleaded 'Mala Fides' and state in para 23 of his original petition that he objected to certain corrupt practices that was prevalent in the Maintenance Division of the concerned department. It is also stated that this refers to the period the Petitioner was functioning as the Acting Maintenance Engineer. He relies on document P12 & P13 to explain above. In P12 the Petitioner has not approved payments. P13 focus not so much on any irregularity but refer to a request for additional payments for the Petitioner in view of the effort made by him in the work place in spite of certain difficulties

within the organization. The question is whether court could draw any inference of bad faith from the material placed before court by the Petitioner? Does P12 and p13 suggest an act performed fraudulently or dishonestly. Material should indicate something more than suspicion. Merely pleading mala fides would not suffice unless properly demonstrated and explained.

It appears from the material placed before this court and on perusing the objections of the Respondents, a preliminary objection has been raised in the affidavit of the 2nd Respondent submitted to this court with the motion dated 14.09.2012. It is stated in para 5 of the said affidavit that 2nd to 5th Respondents named by the Petitioner being members of the interview panel, and from that the 3rd to 5th Respondents were not members of the interview panel, and two others who should be in the panel are not made parties to this application. It is the position of the Respondents that such a failure to name the correct persons in the interview panel is fatal to this application and the Petitioner has obtained leave to proceed by misleading court. Necessary parties are not named.

Court observes that on the day this application was supported (17.01.2012) no such objection had been raised by the counsel for the state, who represented the Hon. Attorney General. On 22.11.2012 this matter had been

mentioned in court and learned counsel for Petitioner had moved court to amend the caption since a right to amend had been reserved by the Petitioner in para 3A of his petition dated 28.09.2012. Court had directed the Petitioner to file amended caption. Even on the said date Respondent does not seem to have raised the preliminary objection. The Petitioner had with the amended caption filed of record, has also added the members of the PSC. (motion dated 14.12.2012). However the objection raised by the Respondent as regards necessary parties cannot be considered at this point of time since the Petitioner has filed amended caption and court granted permission to do so without any formal objection being raised or recorded by the Respondents on 22.11.2012.

The position of the official Respondents as stated in the affidavit of the 2nd Respondent and the written submissions filed of record, in a gist is that the Petitioner did not possess the requirements and requisites to be appointed as the Mechanical Engineer of the concerned department. The case of the 7th Respondent had been supported by the official Respondents, although a person called P.N.K. Kariyawasam was selected, as he scored the highest marks at the interview but did not assume duties for the reasons stated in letter annexed to letter of 04.05.2011. Thereafter the next person in the list being the 7th

Respondent who came 2nd at the structured interview had been requested to assume duties. Respondents support their case by stating that there were three (3) others who obtained higher marks than the Petitioner and they ought to obtain priority over the Petitioner and one other candidate called W.R.A.S.R. Ranasinghe obtained the same marks as the petitioner. Interview Panel notes/marks are produced marked 2R11. It indicates that 9 candidates were interviewed and seven had been given marks from the highest to the lowest point marks. Petitioner and the said Ranasinghe received the same marks (44) and so was candidate Nos. (3) and (9) who received 51 marks.

I find that to a valid question posed by the Petitioner that he had no prior notice to the marking scheme and that it is obligatory on the part of the official Respondents to disclose to the candidates the relevant marking scheme prior to the interview, seems to be replied as follows by the official Respondents.

(a) Candidates who satisfied the basic qualifications (set out in Gazette marked P6) and who submitted a complete application were called for the structured interview held on 26.04.2011.

(b) Marking scheme that was adopted at the said interview had been previously approved by the 1st Respondent.

(c) The marking scheme was not disclosed to any candidate, thus all candidates were treated equally. (marking scheme and approval produced as 2R9 and 2R10) .

Further to above a comparison of marks received at the interview has also been demonstrated in the affidavit of the 2nd Respondent as follows. In this regard I prefer to incorporate para 13(a) to (f) of the 2nd Respondent's affidavit.

(a) a total of 9 candidates (including the Petitioner) were called for the interview that was held on 26.04.2011;

(b) the interview panel which consisted of the persons mentioned earlier and their findings dated 26.04.2011 were submitted to the 1st Respondent;

(c) the above mentioned interview was satisfactorily and properly conducted;

(d) as there was no decision or agreement or decision to disclose to the candidates the marks they scored at the said interview there was no basis to disclose the said marks to the Petitioner;

(e) the placements as per the said interview was as follows – Mr. P.N.K. Kariyawasam came 1st, the 7th Respondent came 2nd, Mr. W.A. Niroshan came 3rd and Mr. G. Austin and Mr. M.A.K. Senadheera came 4th (two persons) and Mr. W.R.A.S.R. Ranasinghe and the Petitioner were placed 5th (also two persons) respectively;

(f) as is apparent from the above, there were persons far more competent than the Petitioner at the interview.

I do not agree and cannot support the Respondents as regards the preliminary objections raised in the written submissions. The Petitioner has filed amended caption, and he reserved the right to add the correct parties in his original petition. However I find a very valid point raised by the Petitioner of non-disclosure of the relevant marking scheme. Ordinarily this would be a ground to be considered very seriously. As such this court need to consider whether in fact the Petitioner was prejudiced by such, non disclosure, and whether all other candidates were treated equally in this respect and all respects of the interview process. Another point to be considered is whether the interview panel has correctly evaluated the qualifications of candidate and whether there was a failure to allocate marks according to the marking scheme. In that regard Petitioner also has been critical of documents 2R14 to 2R17 and state that 7th Respondent had no prior working experience. The question of 'mala fides' and 'bias' has been raised and I have expressed my views on same but would consider same in my conclusions, also.

In the context of the aforesaid material contained in this judgment, the first document to be examined is Gazette marked P6. It is the Gazette that invites applications for the post of Maintenance Engineer in the concerned

department. What matters would be the qualifications referred to in item 4 of P6. Two important criteria is contained under educational and other qualifications, i.e a degree in Mechanical Engineering and 5 years experience in maintenance of Plant and Machinery in a factory/workshop. To this application important documents such as Degree Certificate, Certificates of Professional and or Technical Qualifications that confirmed experience need to be attached. Let me look at 2R9 and 2R11 being the scheme of marks (reverse of 2R9) and interview marks respectively. Highest marks are given to persons with a degree, (20 marks) professional qualifications (30 marks) and experience (30 marks). It is clear that the Petitioner and all others except the candidate who was placed No. (4) in the list had obtained 10 marks, for the degree certificate. That is for the reason, candidates placed as No. (4) in the order of priority had a 2nd class, but all others an ordinary pass. Therefore he received 15 marks (yet not selected)

This court cannot fault the interview panel for allocation of marks for degree certificate. In fact a candidate placed No. (4), and not selected had obtained more marks than all others. Then comes the professional qualifications. (30 marks) 2R9 describes the several categories no doubt which has to be well known in the Engineering field and among other professionals. Candidate placed

as No. (1) (did not assume duties) and the 7th Respondent has obtained 15 and 10 marks respectively. Petitioner had not been allocated any marks for this category. Obviously he does not qualify to get marks for this category, and the documents submitted by Petitioner, even to this court does not indicate fulfillment of that requirement. As such it is clear that all this had to be done on presentation of the required certificates. In the absence of tendering the required certificate marks cannot be allocated. As such this court will not unnecessarily blame the interview panel as the Petitioner did not possess any professional qualifications. The 7th Respondent to this application has disclosed that he had obtained a Post Graduate Diploma from the University of Katubedda in the year 2007 (Electrical Engineer). Accordingly the panel has given 10 marks. I note that only three candidates have been awarded marks under this category, and accordingly marks were allocated to candidates who were placed 1st , 2nd and the 4th in the list, and no other. Not even the candidate placed as No. 3 in the list, were awarded marks under the said category.

The 3rd important category in 2R11 and 2R9 is 'experience' which carries 30 marks. The 7th Respondent's certificates produced and marked 2R14 to 2R19 and the other documents filed along with the motion dated 29.09.2014

gives a clear indication of his experience and the panel has awarded 25 marks. The Petitioner has been awarded 20 marks for his experience. The candidate placed 4th and the other candidate placed 5th (not the Petitioner) have been given 20 and 15 respectively. It is observed that Petitioner's experience had been accepted and given marks on what is due to him. I have to observe at this point that Article 12 of the Constitution forbids hostile discrimination but does not forbid reasonable classification. Equality before the law does not mean that the same set of laws should apply to all persons under every circumstance, ignoring differences and disparities. Reasonable classification is inherent in the concept of 'equality' because all persons are not similarly situate. It is my considered view that marks had been allocated under the above category in a very reasonable manner by the interview panel.

In Deradason Vs. Union of India AIR (1964) SC 179 at 185. Mudhalkari J. observed: what is meant by equality in this Article is equality among equals. It does not provide that what is aimed at is an absolute equality of treatment to all parties in utter disregard in every conceivable circumstances of differences such as age, sex, education and so on and so forth and as may be found among people in general.

The next category in 2R11 and 2R9 is knowledge of English. Petitioner cannot complain of that, since he has obtained 10 marks being the maximum. The balance categories for selection are knowledge of computer and leadership. Each of them carry 5 marks. Petitioner has obtained 2 marks for each of them. 'Leadership' would be a subjective assessment. It is a matter to be left in the hands of any interview Board.

I see no basis to fault the interview panel in allocating marks in the context of this case. All candidates had been treated equally in all respects. Further three (3) other candidates were placed above the Petitioner and another obtained the same marks as the Petitioner. As such four others are in a better position than the Petitioner. It would be discriminatory against the three other candidates if the Petitioners argument is to be accepted, as non disclosure of the marking scheme has not prejudiced any one or more of the candidates who were called for the interview. The Gazette Notification P6 on the other hand disclose the importance of producing the Degree Certificate, any other certificates to prove one's professional qualifications and material to establish the required job experience. These three aspects have attracted the highest marks to be awarded at the interview. As such, candidates who apply for the post need to be mindful of same.

Inequality, per se, does not violate equal protection; for every selection of persons for regulation pronouncing inequality in some degree. The inequality to offend the principle of equality, must be actually and palpably unreasonable and arbitrary. Arkansas Gas Co. V. Railway Commissions, 261. U.S. 379 at 384. A classification having some reasonable basis does not violate this principle merely because, in practice, it results in some inequality – Lindslay Vs. Natural Carbonic Gas Co. (1910) 2004 US 61 at 78,79.

To survive equal protection attack the different treatment of two classes of persons must be justified by a relevant difference between them.

On the question of 'mala fides the two documents P15 & P16 had been produced relating to purported disciplinary action. However the Respondent Department had by 2R24 tendered an apology and withdrew the allegations, and documents 2R25 & 2R26 fortify the position of the official Respondents. Petitioner also attempt to connect a repair to a vehicle and expect to get some advantage from same but letter 2R27, 2R28 & 2R29 seems to explain the position. I do not think any 'mala fides' could be drawn from above. In the public service, Government servants may have to put up with unwanted situations and face difficulties in the performance of one's duties. It is not possible to draw a parallel

with the selection procedure merely in the way Petitioner attempt to take cover by focusing mala fides. Selection process has been very reasonable and marks had been allocated in a fair transparent manner for all the candidates, without the Petitioner being penalized. In these circumstances Petitioner has not been successful in establishing any violation under Article 12(1) of the Constitution. Therefore we proceed to dismiss this application without costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

Priyasath Dep P.C., J.

I agree

JUDGE OF THE SUPREME COURT

Upaly Abeyrathne 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

SC/FR/768/2009

1. Sisira Kumara Wahalathanthri
Puhulyay
Ambalantota.

2. Dannister Gunasekara
No. 153/01/B,
Weerakatiya Road,
Aluthgoda, Tangalle.

PETITIONERS

Vs.

1. Jayantha Wickramaratne
Inspector General of Police
Police Headquarters,
Colombo 01.

2. Kalinga Silva
Headquarter Inspector
Tangalle Police Station,
Tangalle.

3. S. J. B. Suwaris
Inspector of Police
Police Station
Tangalle.

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

RESPONDENTS

BEFORE: Wanasundara P.C., J.
Jayawardena P.C., J &
Gooneratne J.

COUNSEL: J.C. Weliamuna with Pulasthi Hewamanne for the petitioners

Varunika Hettige S.S.C. for Respondents

WRITTEN SUBMISSIONS FILED ON:

23.03.2012 (by the Petitioners)
15.07.2013 (by the Respondents)

ARGUED ON: 11.08.2015

DECIDED ON: 05.11.2015

GOONERATNE J.

The two Petitioners are members of the Janatha Vimukthi Peramuna which is a recognized political party. The 1st Petitioner was the group leader of the

Hambantota District JVP candidate for the Southern Provincial Council Elections 2009. The Petitioners filed this Fundamental Rights Application alleging that the Respondents had violated their fundamental rights guaranteed under Article 12(1), 12(2) and 14(1) (a) of the Constitution. As regards the 2nd Petitioner as per sub para (c) of the prayer to the Petition, Respondents have allegedly violated the fundamental rights of the 2nd Petitioner guaranteed under Article 13(1) & 13(2) of the Constitution. Respondents are police officers, marked as 1st and 2nd Respondents the Inspector General of Police and the Hon. Attorney General, named as 3rd and 4th Respondents. The Southern Provincial Council was dissolved on 03.08.2009 (P1) and the Commissioner of Elections then called for nominations to hold elections for the said Provincial Council. (P2). Thereafter the JVP tendered nominations for the District of Hambantota and among others was the 1st Petitioner as a candidate for the above Provincial Council Elections (P3). In para 6 of the petition it is pleaded that the 1st Petitioner took steps to establish a branch office in the manner described in the said paragraph.

The substantial complaint of the Petitioners are more particularly contained in paragraphs 7 – 11 of the petition and the corresponding paragraphs of the affidavit of the 2nd Petitioner. It is stated that a group of supporters of the United Peoples' Freedom Alliance attacked and set fire to the above

branch/elections office of the JVP on 18.09.2009. 2nd Petitioner lodged a complaint at the Tangalle Police Station about the above incident. It is the position of the Petitioners that the police have not taken action to investigate the said complaint. Police according to the Petitioners were inactive and acting under the dictation of higher political authorities, as can be seen by the complaint bearing No. EIB 96/62. Police inactions are further demonstrated and supported by document P5 pertaining to other complaints made by the JVP pertaining to serious acts of violence which have not been investigated. Petitioners aver in their petition that they were disappointed over the inaction of the police as described in para 9 of the petition and thereby were prevented in engaging in peaceful political propaganda in connection with the above election. The 2nd Petitioner as a mark of protest displayed a banner over the burnt out election office which reads "uy Prd rdPmlaI wdKavqfjS m%Pd;ka;%jdoh fuSlo?

Petitioners plead that on 24.09.2009 around 7.30 a.m the 2nd Petitioner was accompanying his wife to the bus stand on the other side of the road. Three police jeeps rushed towards him and stopped in front of him, and about 15 Police Constables were in the police jeep and several of them who were

armed, forcibly took the 2nd Petitioner into custody. The officer who made the arrest is described as “Maha Kalu Sinhalaya” (Petitioner reserves the right to add him). 2nd Petitioner was not informed of the reason for his arrest. Police Officer also removed the banner that was displayed and took it to the police station.

Petitioners aver in their pleadings that, at the Tangalle Police Station, police had inquired from the 2nd Petitioner as to who displayed the banner and the 2nd Petitioner admitted that he displayed the banner as a protest to undemocratic practices of the Rajapakse regime. Police officers replied by saying that the 2nd Petitioner and the JVP cannot criticize the President or call his government, “uy Prd rdPmlaI wdKavqfjS m%Pd;ka;%jdoh fuSlo?”. It was the position of the police that these type of banners cannot be displayed and police have instructions to remove such banners. Petitioner also state that the police had not informed the reason for arrest, nor had stated about a complaint being lodged against displaying of the banner. On the same day at about 2.00 p.m (24.09.2009) the 2nd Petitioner was produced before the Magistrate, Tangalle and remanded as the police objected to bail. However on 30.09.2009 the 2nd Petitioner had been released on bail. (P6)

The position of the Petitioner was that the destruction of the elections office and the arrest of the 2nd petitioner resulted in the propaganda activities of the party being adversely affected. Police connived with the perpetrators to curtail political activities of the JVP, i.e being inactive in investigating the arson attack. The grounds of violation of fundamental rights are dealt in paragraph 14 of the Petitioner's Petition.

I have noted the contents of the affidavit filed in these proceedings by the 2nd and 3rd Respondents. It is stated that a complaint was made by the 2nd Petitioner on 19.09.2009 at about 1.05 a.m to the Tangalle Police, as to setting fire to a pandol erected by the Janatha Vimukthi Peramuna. 3rd Respondent avers that the aforesaid complaint was bereft of any reference to the supporters of United People's Freedom Alliance attacking and setting fire to an Election office of the JVP. Nor did such complaint identify any alleged attackers and support this position with documents 3R1. In order to meet the position of police inaction, the 3rd Respondent aver that within 20 minutes of recording the statement of the complainant a police party left the station to investigate (3R2).

The 3rd Respondent in para 6 IV of his affidavit disclose the role of the police as follows:

(a) Though an application to establish an election office was granted by the 2nd Respondent there was no election office of the said Janatha Vimukthi Peramuna (JVP) at the said location which was about 3 k.m from Tangalle – Weeraketiya Road.

(b) At the said location there was a pandol depicting JVP election propaganda material erected about 30 meters from a partly built house which did not even have an electricity supply.

(c) The said pandal was erected on the road reservation and was gutted by fire.

(d) That neither the complainant nor anyone else recognized the identity of the persons who carried out the said attack, explaining as follows: -

> "(i) on the next day I did further investigations but no evidence was revealed as to who was responsible for this attack.
>
> (ii) Photographs of the said scene was taken by PS 22492 Gamage and submitted to the Police Station which were properly documented under production record (PR) 155/9.
>
> (iii) I then informed the facts of this case to the Magistrate of Tangalle under case No. BR 605/09"

The material placed before this court by the Respondents tend to demonstrate that the police were not inactive as regards the complaints made by the JVP, and had taken whatever possible action on such complaints. The affidavit of the 3rd Respondent attempt to show that the police did not act under the

direction of the ruling party. The 3rd Respondent also aver that on 24.09.2009 he was on special duty regarding the arrival of the then President of the country and he had received information about a display of the banner which display words which could bring disaffection to the Government, which would promote ill will and hostility among the people. The 3rd Respondent also had mentioned that the banner in question was displayed over the burnt banner of the JVP at No. 153/13, Aluthgoda Tangalle which is the same place he visited on 19.09.2009 as in para 6 of his affidavit.

The main question to be considered in a case of this nature is to decide the scope of the fundamental rights alleged to have been violated as pleaded by the Petitioners. This is no doubt a very crucial function of this court as the rights guaranteed by the constitution permits the legislator to impose restrictions i.e in the larger interest of the community, to mainly to maintain peace and harmony within the country. On the other hand freedom of speech has to ensure a free flow of ideas political or not, to maintain democracy and to ensure that people are provided with information for which the people are entitled, to be informed. Does the words used in the banner, amounts to committing of an offence under Section 120 of the Penal Code? Or is it common

usage of words within the scope and ambit of political criticism? At the hearing of this application the learned counsel for the Petitioners indicated to this court that he would not urge the issue of police inaction, in the manner pleaded.

In answer to paragraph 13 of the Petitioner's affidavit with annexure P6, ('B' report) the 3rd Respondent in his affidavit (at paragraph 9) states about the display of the banner as one which could bring disaffection to the Government and which could promote feelings of ill will and hostility among the people. It is also stated that on 24.09.2009 he was on special duty regarding the arrival of His Excellency the President in Tangalle. Pleadings of the 3rd Respondent on this point disclose that allegedly the banner violated the relevant laws and could easily bring discontent and disaffection among people. The banner was removed by the police and 2nd Petitioner's statement recorded and police took steps to produce the 2nd Petitioner before the Magistrate who remanded the 2nd Petitioner, but two days later was released on bail. As regards the position of informing the 2nd Petitioner, the reason for his arrest which must be conveyed to any suspect is not specifically dealt and stated by the 3rd and 2nd Respondents in their affidavits. It is no excuse or answer to merely plead that the words in the banner violated the relevant laws of the country. The constitutional requirement as per Article 13(1) is unambiguous as the suspect has to be informed the reason

for his arrest, and in a case of this nature it is incumbent upon the police Respondents to specifically plead that the 2nd Petitioner was informed, the reason for his arrest, and not expect court to surmise such compliance as required by law or gather such material from police notes. Even the written submissions filed on behalf of the Respondents (para 3 (iii) pg. 4) is silent on this point. Admission of a banner being displayed by the 2nd Petitioner is another matter which may be a plus point to the Petitioners as the 2nd Petitioners had not made any attempt to hide the truth. Perhaps the 2nd Petitioner believed that his acts or actions concerning the display of the banner is a legitimate right which he should pursue, in the context and background of the case where a pandol erected by the JVP was burnt.

A material fact contained in a document (3R8) when it is not pleaded in the petition and affidavit, would amount to a lapse on the part of the Respondents even if the document is filed with the petition and affidavit. Police notes and notes from the Information Book provides information but it cannot be full proof or conclusive.

I have had the advantage of perusing a variety of authorities. There is an important matter to be kept in mind in a case of this nature where the Apex Court of the country is called upon to decide such a case. Any Government or an

agency of the Government should be open to uninhibited public criticism. Curtailing such criticism or an attempt to resist such expression of persons or criticism would place an undesirable fetter of freedom of expression. The position may be different if a person by his speech or writing persuade others to violate existing law or overthrow by force or other unlawful means the existing Government but all other utterances or publication against the Government must be considered absolutely privileged.

Every citizen has a right to criticize an inefficient or corrupt government without fear of civil as well as criminal prosecution. This absolute privilege is founded on the principle that it is advantages for the public interest that the citizen should not be in any way fettered in his statements, and where the public service or due administration of justice is involved he shall have the right to speak his mind freely. City of Chicago Vs. Tribune Co (1923) 139 NE 86; Derbyshire County Council V. times Newspapers Ltd. (1993) AC 534.

The two main issues to be considered is whether the words exhibited in the banner fall within the meaning of Section 120 of the Penal Code and also violate Section 74(1) of the Provincial Councils Elections Act No 02 of 1988 (as amended), and if not whether as a result of the 2nd Petitioner being arrested and

produced before a Magistrate infringes upon the fundamental rights of the Petitioners.

I have considered the views expressed by both parties in each other's written submissions. I am inclined to hold the view that initially the background facts need to be examined for the display of the banner which ultimately led to the arrest of the 2nd Petitioner. An election office of the JVP was established. A complaint was received by the police about a fire to a pandol erected by the JVP in or around the elections office. Though the persons who set fire to the pandol were unknown, an allegation was to the effect that supporters of the United People's Alliance attacked and set fire to the pandol. A Complaint was made to the respective police but the culprits were not apprehended. In response to the above incident as a mark of protest the JVP and more particularly the 2nd Petitioner displayed a banner over the burnt pandol with the words "uy Prd rdPmlaI wdKavqfjS m%Pd;ka;%jdoh fuSlo?".

The above would be the background facts, and the resulting position of the burnt pandol, of the JVP. This no doubt was the spontaneous reaction by a party who suffered some damages or injury and from that (JVP) point of view is something to be taken very seriously. Even the general public may condone such acts of setting fire, especially during a period of elections in the country.

The question posed in the banner is about democracy of the Government of the day Is this democracy? m%Pd;ka;%jdoh fuSlo?. Connected to the incident of setting fire a question is posed. This does not, or posing such a question cannot be a basis to impute any wrong/offence, on the person responsible for exhibiting of those words. What had been objectionable to the police and the Respondents is the reference made to government and the particular government regime. i.e Rajapakse Government or Rajapakse regime, or more particularly to the words "uy Prd". The adjective and the adjectival phrase used before Rajapakse Government is uy Prd. This means big and dirty. Or immensely dirty. I am firmly of the view that such comment or remarks contained in the banner makes no reference to an individual as the then President, but to the government of the day. I do agree with the learned counsel for the Petitioner that universally in political parlance calling a government dirty is quite common and a way of criticizing a government.

I also agree that its quite common to refer to a government and or a its regime by name of the Head of the State or Government. Reference made to like 'Obama Government' or "Obama Regime or Administration" is not a bad practice but a reference made universally.

I reject the submissions made on behalf of the Respondents that use of the words uy Prd serves to mean a person reeking in filth or is filthy and un parliamentary. How the words displayed in the banner came to light need to be understood based on the background facts and circumstances that led to such display, which facts are considered above in this judgment. One cannot forget the fact that the people in the area or the general public became aware of the background facts, prior to such a display of the banner, since a JVP pandol was burnt. It is regrettable that the Respondents attempt to give an unacceptable extended meaning to the words displayed on the banner without understanding same in the context it was published. It is also unfortunate that for reasons best known to the Respondent the 2nd Petitioner was arrested and taken into custody and thus deprived and curtailed him of a right guaranteed under the Constitution. The guarantee extended by the Constitution to safeguard the personal liberty of the citizens is paramount.

In *Channa Peiris and others Vs. A.G and Others (Ratawesi Peramuna Case) – Digest Sri Lanka Law Reports Vol. (1) 1994 pgs. 2/3*

the Ratawesi Peramuna was an anti-government organization. However as a matter of law, merely vehement, caustic and unpleasantly sharp attacks on the government, the President, Ministers, elected representative or public officers are not per se unlawful

Per Amerasinghe, J.

(a) "The right not to be deprived of personal liberty except according to a procedure established by law is enshrined in Article 13(1) of the Constitution, Article 13(1) prohibits not only the taking into custody but also the keeping of persons in a state of arrest by imprisonment or other physical restraint except according to procedure established by law."

(b) "Legitimate agitation cannot be assimilated with incitement to overthrow the government by unlawful means. What the third respondent is supposed to have heard, even according to the fabricated notes he has preferred, was a criticism, of the system of Government, the need to safeguard democracy, and proposals for reform."

(c) "The call to 'topple' the President or the Government did not mean that the change was to be brought about by violent means. It was a call to bring down persons in power by removing the base of public support on which they were elevated.

If the throwing down was to be accomplished by democratic means, the fact that the tumble may have had shocking or traumatic effects on those who might fall is of no relevance. It is the means and not the circumstances that have to be considered.

The obvious purpose of Regulation 23(a) is to protect the existing government not from change by peaceable, orderly, constitutional and therefore by lawful means, but from change by violence, revolution and terrorism, by means of criminal force or show of criminal force.

Lingens Vs. Austria, 8 July 1986, No. 9815/82, EHRR 407.

> "The limits of acceptable criticism are …. wider as regards a politician as such than as regards a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and must consequently display a greater degree of tolerance"
>
> (at paragraph 42)

Amaratunga Vs. Sirimal and Others (Jana Ghosha Case) 1993 1 SLR 264,

> "The right to support or to criticize Governments and political parties, policies and programmes, is fundamental to the democratic way of life, and the freedom of speech and expression is one which cannot be denied without violating those fundamental principles of liberty and justice which lie at the base of all civil and political institutions" (pg. 271)

Joseph Perera alias Bruten Perera Vs. The Attorney General and Others 1992 1 SLR 199

> is yet another significant case where a citizen's right to criticize the government has been recognized in this country. In this case, *Sharvananda CJ held* that the constitutionally guaranteed <u>freedom of speech and expression includes the expression of one's ideas through banners, posters, signs</u> etc. (vide: pg. 223 of). Moreover, his Lordship went on to state as follows:

> "…. There must be untrammeled publication of news and views and of the opinions of political parties which are critical of the actions of government and expose its weakness. <u>Government must be prevented from assuming the guardianship of the public mind</u>. Truth can be sifted out from falsehood only if the Government is vigorously and constantly cross-examined. (at page 224).

The Respondents thought it fit to charge the 2nd Petitioner in the Magistrate Court under Section 120 of the Penal Code and Section 74(1) of the Provincial Council's Elections Law .

Section 20 reads thus:

> Whoever by words, either spoken or intended to be read, or by signs; or by visible representations, or otherwise, excites or attempts to excite feelings of disaffection to the President or to the Government of the Republic, or excites or attempts to excite hatred to or contempt of the administration of justice, or excites or attempts to excite the People of Sri Lanka to procure, otherwise than by lawful means, the alteration of any matter by law established, or attempts to raise discontent or disaffection amongst the People of Sri Lanka, or to promote feelings of ill-will and hostility between different classes of such People, shall be punished with simple imprisonment for a term which may extend to two years.

It is a section which requires exciting or attempts to excite feelings of disaffection to the Government. It is an offence against the State embodied under Chapter VI of the Penal Code. A prosecution under Chapter VI of the Penal Code requires the sanction and authority of the Hon. Attorney General (Section 127). In the absence of such authority no prosecution could be launched. The material provided to this court does not indicate any such authority of Attorney General.

Section 120 must be read with its explanation which reads as follows:

> *Explanation* – It is not an offence under this section by intending to show that the President or the Government of the Republic have been misled or mistaken in measures or to point out errors or defects in the Government or any part of it, or in the administration of justice, with a view to the reformation of such alleged errors or defects, or to excite the People of Sri Lanka to attempt to procure by lawful means the alteration of any matter by law established, or to point out in order to

> their removal matters which are producing or have a tendency to produce feelings of hatred or ill-will between different classes of the People of Sri Lanka.

The Penal effect of this section read along with the explanation need to be understood, that pointing out errors or mistakes of the Government cannot form the basis of an offence.

The Constitutional guaranteed freedom of speech and expression would not be negated by Section 120 of the Penal Code. Provision of Section 120 of the Penal code and its explanation contained therein guarantee freedom of expression and speech, and the explanation to the section no doubt fortify this position in great measure. Whatever comments and strongly used words against the government which does not excite feelings and cause public disorder by acts of violence cannot be a basis to prosecute a person under Section 120 of the Penal Code. I am of the view and I hold that the words displayed in the banner are not words strongly used to cause harm. Underline meaning of the words conveyed in the banner is to pose a question as regards 'democracy' and its need to be upheld, in the given circumstances and its context. There is no material presented to this court of any evidence of violence, by the 2nd petitioner who was a suspect in the Magistrate's Court, to be charged, without lawful justification and authority. I also hold that the words displayed in the banner does not constitute

an offence under Section 120 of the Penal Code, and there is absolutely no basis to arrest the 2nd Petitioner. To cause any annoyance or embarrassment to a Head of State or the Government will not form the basis of a prosecution under Section 120 of the Penal Code. Essence of Section 120 is whether the words in question incite the People to commit acts of violence and disorder and not whether the words are defamatory or not.

In a very recent case, where I had the benefit to be associated and share the bench with my brothers Justice Dep and Justice Sisisra de Abrew. (S.C 63/2009), considered a similar matter. In the said case the allegation was pasting of posters by the JVP which was against the Government. Hon. Justice Dep who delivered the judgment with whom I agreed, considered all the background facts. The following excerpts from the said judgment immensely fortified my views as regards the application of Section 120 of the Penal Code.

> ……. "This case emphasize the fact that what is relevant is the state of mind of the arresting officer at the time of arrest.
>
> The Petitioners were originally produced under S. 118 of the Penal Code. The learned Magistrate had pointed out that this section was repealed by the Penal Code
>
> (Amendment) Act, No. 12 of 2002. Then the Police had relied on Section 120 of the Penal Code. Section 120 refers to exciting or attempt to excite feelings of disaffection to the President or Government of the Republic, which is similar to the offence referred to

as “Sedition” under Common Law. This position taken up by the police was apparent from the B reports filed by them marked as P5 & P6. The Section 120 of the Penal Code should be read with the explanation given to it.

…… At this stage it is appropriate to consider the interpretation given by the Indian Supreme Court on the corresponding section of the Indian Penal Code.

In the case of Kedar Nath Singh V the State of Bihar 1962 AIR 955 1962 SCR Supl (2) 769, the Supreme Court of India held that “a citizen has a right to say or write whatever he likes about the government, or its measures, by way of criticism or comment, so long as he does not incite people to violence against the Government established by law or with the intention of creating public disorder” (pages 805 0 807)

Therefore intention to incite people to violence or create public disorder are essential constituent element of sedition.”

Information (‘B’ Report) filed in the Magistrate’s Court also reveal that the 2nd petitioner has allegedly violated Section 74(1) of the Provincial Councils Elections Act. Section 74(1) reads thus.

Section 74(1) begins with the following introductory paragraph:

“During the period commencing from the first day of the nomination period at an election and ending on the day following the day on which a poll is taken at such election, no person shall for the purpose of promoting such election display

(a) in any premises, whether public or private, any flag or banner except in or on any vehicle that is used for the conveyance of a candidate at such election; or …..”

The main ingredient to be established as required by the said section would be words displayed in a banner for the purpose of promoting such election.

The use and the purpose of the banner in question, is in no way connected to election promotional material for the Provincial Council Election. Prohibition under Section 74(1) is the display of election related matters pertaining to the Provincial Council Election.

The banner conveys a meaning about Democracy of the Government of the day. To be more precise, it states whether it is a democratic way of the Government, as the banner in question stood over the burnt pandol erected by the JVP. Merely being critical of the Government and its democracy would not constitute an offence under Section 120 of the Penal Code and Section 74(1) of the Provincial Councils Elections Act. What is conveyed in the banner has nothing to do with any election. To be critical of former President's Government or for that reason of any Government is a right that should be enjoyed by any person in a country committed to preserve democracy, and to protect the basic principles and true nature, scope and extent of fundamental rights guaranteed by our

Constitution. Petitioners being members of a recognized political party could oppose the Government and its policies. The arrest of the 2nd Petitioner is arbitrary and cannot be discriminated because of his or his party's political

opinion. There is nothing improper, illegal or mischievous contained in the banner, to excite the public or disturb national/public security.

Therefore I hold that the Respondents have violated Article 12(1), 12(2), 13(1) and 14(1)(a) of the Constitution. Respondents were motivated by extraneous factors such as 2nd Petitioner being a supporter of a political party which opposes the Government, and its policies, and the banner in question was critical of the Government of the then President of the country who was to travel on the road (para 9(ii) of the 3rd Respondent's affidavit). 2nd and 3rd Respondents alone cannot be held Responsible for the above violations. As the State is liable I order the Inspector General of Police to pay Rs. 20,000/- to the 2nd Petitioner on behalf of the State.

Application allowed.

JUDGE OF THE SUPREME COURT

Wanasundara P.C., J.

I agree

JUDGE OF THE SUPREME COURT

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 under Article 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Hapugodage Jagath Perera
Petitioner

SC/FR 1006/2009

Vs

1. Gothami Ranasinghe
   Inspector of Police,
   Officer-in-Charge of the Minor Crime Branch,
   Police Station,
   Mirigama.

2. Milla Vitharana alias Millavithanachchi
   Inspector of Ploice,
   Officer-in-Charge of the Traffic Branch,
   Police Station,
   Mirigama.

3. Milinda Premanath Karunaratne,
   Sub Inspector of Police,
   Police Station,
   Mirigama.

4. Inspector General of Police,
   Police Head Quarters,
   Colombo1.

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

Respondents

Before : K Sripavan CJ
Eva Wanasundera PC J
Sisira J de Abrew J

Counsel : P K Prince Perera with Asanka Dissanayake for the Petitioner.
K G Jinasena with K Anurangi for the 1st,2nd and 3rd Respondents.
Yohan Abeywickrama SSC for the 4th and 5th Respondents.

Argued on : 29.9.2015
Decided on : 15.12.2015

Sisira J De Abrew J.

The Petitioner, by his petition dated 29.12.2009, seeks a declaration that his fundamental rights guaranteed by Articles 11,12(1),13(1) and13(2) of the Constitution of the Republic have been violated by the 1st 2nd 3rd Respondents. The 1st Respondent who is an Inspector of Police is the Officer-in-Charge of Minor Crimes Branch of Mirigama Police Station. The 2nd Respondent who also an Inspector of Police is the Officer-in Charge (OIC) of the Traffic Branch of Mirigama Police .On 19.11.2009 he acted as acting OIC of Mirigama Police Station. The 3rd Respondent is a Sub Inspector of Police attached to Mirigama Police Station. This Court, by its order dated 17.3.2010, granted leave to proceed for the alleged violation of the petitioner's fundamental rights guaranteed by Articles 11,13(1) and13(2) of the Constitution.

The Petitioner, inter alia, complains the following matters.

The Petitioner who is running a business called Ranga Sweet has employed several employees one of whom is Asanka Sanjaya Kumara. On 17.11.2009 he accompanied Asanka Sanjaya Kumara to Mirigama Police Station as the said

person had been noticed to appear at the Police Station for an inquiry on a complaint made by the wife of Asanka Sanjaya Kumara who was living in separation from her husband. It has to be noted here that the Petitioner had not been noticed by Mirigama Police Station but he went to the Police Station only to offer his assistance to his employee. In the course of the inquiry, the 1st Respondent who was conducting the inquiry instructed the said Asanka Sanjaya Kumara to hand over the dowry property to his wife who was working as a Home Guard at the Mirigama Police Station. At this stage the Petitioner requested the 1st Respondent to advise the parties to lead a peaceful marriage life as the future life of the child of the parties would be destroyed by the separation of the parties. At this stage the 1st Respondent left the inquiry room and brought the 2nd Respondent who questioned the Petitioner about the purpose for which he came. When the Petitioner started leaving the inquiry room, the 2nd Respondent took him inside the Police Station building and assaulted him as a result of which he fractured his teeth. In fact one tooth fell on the ground. Thereafter the Petitioner was put inside police cell. When Asanka Sanjaya Kumara came near the police cell, the Petitioner told him that the 2nd Respondent assaulted him and broke his teeth. Around 4.00 p.m. the Petitioner was produced before the Magistrate on a B report. The Petitioner complained to the Magistrate that the 2nd Respondent (Millavithana) assaulted and broke his teeth. The Magistrate remanded him and ordered the Superintendant of Prisons to produce him before the Prison Doctor and submit a report. The vehicle of the Petitioner which had been parked outside the Police Station was taken to the Police Station and parked inside premises of the Police Station by the 3rd Respondent. However the vehicle was later released to the wife of the Petitioner. The Petitioner was released on bail on 26.11.2009. The Petitioner

states that no sooner he was released on bail he got himself admitted to Ragama Hospital and was discharged on 2.12.2009.

Asanka Sanjaya Kumara has filed an affidavit in this Court marked P16 confirming the facts stated by the Petitioner.

The 1st,2nd and 3rd Respondents in their statement of objections, inter alia, state the following matters. On 19.11.2009 around 11.30.a.m, whilst the 1st Respondent was conducting an inquiry at the Mirigama Police Station on a complaint made by the wife of Asanka Sanjaya Kumara (Niluka Chathurangi who is a Home Guard attached to the Police Station) the Petitioner without permission appeared before the 1st Respondent and demanded not to conduct the inquiry. When the 1st Respondent requested the Petitioner to leave the inquiry room, he refused to do so and started scolding the 1st Respondent in high voice. Having heard the commotion the 2nd Respondent approached the place where the inquiry was being conducted and ordered the Petitioner to leave the Police Station. However the Petitioner who did not obey the said order went up to the Traffic Branch of the Police Station and abused the 2nd Respondent in obscene language pulling from the uniform. In the circumstances the 2nd Respondent controlled the Petitioner using minimum force and as a result, he fell on the ground damaging his teeth. The 2nd Respondent further states that his left hand ring finger was bitten by the Petitioner during the incident. This was the story narrated by the 1st, 2nd and 3rd Respondents in their Statement of objections. The Respondents in their objections further states that the petition of the Petitioner has not been filed within one month of the alleged violation of fundamental rights and therefore the petitioner he cannot maintain his petition. Learned counsel who appeared for the 1st, 2nd and 3rd Respondents did not however support this objection at the hearing. However, it is noted that soon

after the Petitioner was discharged on bail on 26.11.2009, he got himself admitted to Ragama Hospital and was discharged only on 2.12.2009. It appears that before 2.12.2009 he was not in a fit condition to instruct his lawyers to file this petition. The petition was filed on 29.12.2009. When I consider these matters, I am of the view that there is no merit in the said objection.

I will now consider whether I can accept the position taken up by the 1st, 2nd and 3rd Respondents. Their position is that the Petitioner fractured his teeth as he fell on the ground when minimum force was being used. Have the Respondents taken up this position when 1st B report was filed on 19.11.2009? The answer is in the negative. If the position taken up by the 1st 2nd and 3rd Respondents is true, the 2nd Respondent who filed the B report should have stated it in the B report. Failure to mention the above facts in the B report shows that said position is untrue. Part of the story of the Respondents is that when the Petitioner was ordered to leave the Police Station, he without obeying the command went to Traffic Branch and abused the 2nd Respondent by pulling from his uniform. Can this story be believed? There is no evidence to suggest that the Petitioner has a criminal record. In my view this story is fraught with falsehood. I therefore, hold that the position taken up by the 1st, 2nd and 3rd Respondents is not true and cannot be accepted. Assuming without conceding that the position taken up by the Respondents is true, what flows from it. Then the 1st, 2nd and 3rd Respondents admit that the Petitioner fractured his teeth as a result of his fall. How did he fall? He fell on the ground as a result of the minimum force used by the 2nd Respondent. In a Police Station where there is a platoon of police officers, a Police Officer does not have to use such a high force to control an unarmed man. This observation suggests that the 2nd Respondent when using the so called minimum force had severely assaulted the

petitioner. When I consider all the above matters, I arrive at a conclusion that 1st,2nd and 3rd Respondents have, indirectly, admitted in their statement of objection that the petitioner sustained injuries in his teeth as a result of the assault launched by the 2nd Respondent to the petitioner. I will now consider whether the position taken up by the petitioner can be accepted or not. Soon after the alleged assault by the 2nd Respondent, the petitioner, inside the police cell itself, told Asanka Sanjaya Kumara that the 2nd Respondent assaulted him and broke his teeth. Asanka Sanjaya Kumara in his affidavit marked P16, inter alia, admits that the petitioner who was bleeding from his mouth told the above incident to him. He further states that he observed blood on the petitioner's shirt. Asanka Sanjaya Kumara further, in his affidavit, states that before the assault when the petitioner was leaving the inquiry room, the 2nd Respondent, ordering him to stop, forcibly took the petitioner inside the Police Station.

When the petitioner was produced before the learned Magistrate on 19.11.2009, he told the learned Magistrate that the 2nd Respondent assaulted him and broke his teeth. The learned Magistrate, in the B Report, made a note confirming the above facts. The learned Magistrate further ordered the Superintendant of Prisons to produce him before the Prison Doctor. The Prison Doctor, in his report dated 20.11.2009, confirms that the petitioner's teeth were fractured. This Court, before granting leave to proceed, called for the Medico Legal Report (MLR) of the petitioner from the Judicial Medical Officer (JMO) of Ragama Hospital. The JMO in his report confirms that the petitioner had suffered a fracture in his teeth. Therefore, without any hesitation I conclude that the position taken up by the petitioner is true and can be accepted. The petitioner, in his petition, states that as a result of the above incident he was in severe mental and physical pain. When I consider all the above matters, I hold

that the petitioner had suffered mental and physical torture and was subjected to cruel and inhuman treatment by the 2nd Respondent. At this stage I would like to consider a judicial decision of this court.

The petitioner in Amal Sudath Silva Vs Kodituwakku Inspector of Police and others [1987] 2 SLR 119 complained that he was arrested by the police on 9.10.1986 on suspicion of having committed theft of side mirrors from several motor vehicles; that he was thereafter, taken to the Panadura police station and kept in custody for 5 nights without being produced before a Magistrate; that during this period of 5 days he was severely beaten up by the 4 respondents with batons; that he was hung to a beam at the police station by his hands tied to a rope; that his penis was crushed as a result of it being put into a drawer and closed causing him unbearable pain and suffering and that when he asked for water he was given water mixed with chili powder which he was forced to drink.

> Atukorale J (with Sharvananda CJ and LH de Alwis J agreeing) at page 126 and 127 held thus: "Article 11 of our Constitution mandates that no person shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment. It prohibits every person from inflicting torture some, cruel or inhuman treatment on another. It is an absolute fundamental right subject to no restrictions or limitations whatsoever. Every person in this country, be he a criminal or not, is entitled to this right to the fullest content of its guarantee. Constitutional safeguards are generally directed against the State and its organs. The police force being an organ of the State is enjoined by the Constitution to secure and advance this right and not to deny, abridge or restrict the same in any manner and under any circumstances. Just as much as this right is

enjoyed by every member of the police force, so is he prohibited from denying the same to others, irrespective of their standing, their beliefs or antecedents. It is therefore the duty of this court to protect and defend this right jealously to its, fullest measure with a view to ensuring that this right which is declared and intended to be fundamental is always kept fundamental and that the executive by its action does not reduce it to a mere illusion. This court cannot, in the discharge of its constitutional duty, countenance any attempt by, any police officer however high or low, to conceal or distort the truth induced perhaps, by a false sense of police solidarity. The facts of this case have revealed disturbing features regarding third degree methods adopted by certain police officers on suspects held in police custody. Such methods can, only be described as barbaric, savage and inhuman. They are most revolting to one's sense of human decency and dignity particularly at the present time when every endeavour is being made to promote and protect human rights. Nothing shocks the conscience of a man so much as the cowardly act of a delinquent police officer who subjects a helpless suspect in his charge to depraved and barbarous methods of treatment within the confines of the very premises in which he is held in custody. Such action on the part of the police will only breed contempt for the law and will tend to make the public lose confidence in the ability of the police to maintain law and order. The petitioner may be a hard core criminal whose tribe deserve no sympathy. But if constitutional guarantees are to have any meaning or value in our democratic set up, it is essential that he be not denied the protection guaranteed by our Constitution."

It is the duty of the police to maintain law and order in the country. The police must take every step to instill confidence in the minds of the people in their day to day operation.

I have earlier held that the position taken up by the 1st, 2nd and 3rd Respondents was not true and could not be accepted. They state that the petitioner was arrested due to the acts committed by him at the Police Station. I have earlier rejected the stand taken up by them. Considering the totality of the circumstances, I hold the view that there were no reasonable grounds for the 2nd Respondent to arrest the petitioner and the arrest was illegal.

Applying the principles laid down in the above judicial decision and considering the facts of this case, I hold that the petitioner's fundamental rights guaranteed by Article 11 and 12(1) of the Constitution have been violated by the 2nd Respondent. But there is no material to conclude that the 1st Respondent has violated the fundamental rights of the petitioner. The allegation levelled against the 3rd Respondent is that he brought the petitioner's vehicle which had been parked outside the Police Station to the premises of the Police Station. This material is not sufficient to conclude that the 3rd Respondent had violated the fundamental rights of the petitioner. For the above reasons I hold that the 1st and 3rd Respondent are not guilty of violating the fundamental rights of the petitioner. There is no material before court to conclude that the petitioner's fundamental rights guaranteed by Article 13(2) of the Constitution have been violated.

The 2nd Respondent is now dead. The question that remains for consideration is whether the State should pay compensation to the petitioner for the violation of his fundamental rights by the 2nd Respondent. The 2nd Respondent violated the fundamental rights of the petitioner when he was

functioning as a Police Officer in the course of his official duties. I therefore hold that the State should pay compensation ordered by this Court. The petitioner has suffered permanent damages as he has lost his teeth. When I consider all the aforesaid matters, I hold that the petitioner is entitled to receive a sum of Rs.500,000/- from the State as compensation. I order that the State should pay this amount. I direct the Inspector General of Police (the 4th Respondent) to take steps to ensure the payment of this amount to the petitioner.

Judge of the Supreme Court.

K Sripavan CJ.

I agree.

Chief Justice

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 under and in terms of Article s 17 and 126 of the Constitution.

1. Coral Sands Hotel (Private) Limited,
   No. 326, Galle Road,
   Hikkaduwa.

2. S.E. Goonewardena,
   Managing Director,
   Coral Sands Hotel Limited, Hikkaduwa.

Petitioners

Vs.

S.C. FR Application No. 170/2015

1. Ravi Karunanayake, MP,
   The Minister of Finance,
   The Ministry of Finance and Planning,
   The Secretariat,
   Colombo 01.

2 L.K.G. Gunawardena,
   Commissioner General of Excise,
   Excise Department of Sri Lanka,
   No. 34, W.A.D. Ramanayaka Mawatha,
   Colombo 02.

3 Damayanthi Paranagama,
   The Divisional Secretary,
   The Divisional Secretariat,
   Hikkaduwa.

4 The Attorney General,
   Department of Attorney General,
   Colombo12.

Respondents

BEFORE : K**.** Sripavan., C.J.
P. Jayawardena, P.C., J.
U. Abeyrathne, J.

COUNSEL Senany Dayaratne with Eshanthi Mendis instructed by Suraj Rajapakse for the Petitioners.

Viveka Siriwardene, D.S.G. for the . Attorney General

ARGUED ON : 30.11.2015

WRITTEN SUBMISSIONS)
FILED ON) : 04.12.2015

DECIDED ON : 08.12.2015

SRIPAVAN, C.J.

The Petitioners in this application sought to challenge the Excise Notification bearing No. 974 published in the Gazette Extraordinary No. 1901/19 dated 13.02.15 marked **P7** on several grounds as set out in the Petition dated 15.05.15. Leave to proceed was granted on 09.06.15 under Articles 12(1) and 13(6) of the Constitution for the alleged violation of the Petitioners' fundamental rights. While the application was pending, the 3rd Respondent issued a letter dated 07.10.2015 marked **X1** (annexed to the Motion dated 29.10.15) requesting the Petitioners to make a payment of Rs. 240,000/= being the balance enhanced licence fees for the year 2015 in terms of **P7**, if the Petitioners application for the Excise licence for the year 2016 is to be considered. In these circumstances, the Petitioners sought interim relief restraining any one or more of the Respondents from requiring the payment of an enhanced licence fees as referred to in the Excise Notification bearing No. 974.

The impugned Excise Notification 974 is issued by the First Respondent by virtue of the powers vested in him by Section 25 read with Section 32 of the Excise Ordinance. It further provides that Schedule **"A"** of the said Notification shall come into operation with effect from 01.01.15. Whilst Section 25 of the Excise Ordinance deals with the form, conditions and restrictions subject to which every Excise Licence shall be granted, Section 32(1) empowers the Minister to make rules for the purpose of carrying out the provisions of the Excise Ordinance. Thus, the Minister is empowered to make rules relating to "excise revenue". When an objection was taken by the Attorney-General in the case of *Rajanayagam* Vs. *Wijeratne* (1998) 3 S.L.R. 129 that Excise Notification did not relate to "excise revenue" the Court at page 136 noted as follows:-

> *"Excise revenue" is defined in section 2 as "revenue derived or derivable from any duty, fee, tax, fine…" Learned State Counsel's contention is plainly untenable because the notification refers to "application fees", and "fees for shifting", and thus obviously relates to excise revenue. But, more important, that contention is based on a misinterpretation of section 32(1), because the phrase "relating to excise revenue" does not qualify "rules", but only "other law for the time being in force". Thus Section*

32(1) imperatively requires Parliamentary approval for all rules made under the Excise Ordinance, whether or not they relate to "excise revenue".

It is therefore manifest that "annual licence fees" referred to in Schedule A of the Excise Notification No. 974 falls within the definition of "Excise revenue." Section 32 further provides that the rules made by the Minister by way of notification once confirmed by Parliament with or without modification **AND** upon such confirmation being notified in the Gazette shall have the force of law from the date of such notification. (emphasis added). There is no evidence before Court to establish that Excise Notification No. 974 has been placed before Parliament and has been confirmed without any modification. Even if the said Notification is confirmed, it will acquire the status of law from the date on which the confirmation is notified in the Gazette. In the absence of any confirmation by Parliament and the subsequent publication of such confirmation in the Gazette, can the Third Respondent recover the enhanced licence fee imposed under Section 32 of the Excise Ordinance ?

Section 25 of the Excise Ordinance states that every licence shall be granted on payment of such fees, if any, for such period. (emphasis added). This necessarily implies that a statutory duty is cast upon the person granting licence to recover the fees limited to such period. If the licence is to be granted for the period commencing from 01.01.16 until 31.12.16 the authority granting licence cannot insist upon the payment of the balance fees for the previous year, imposed by Excise Notification 974 not confirmed by Parliament and the notification of such confirmation is not gazetted in terms of Section 32. Statutory power conferred upon the authority granting the licence must be exercised on considerations relevant to the purpose for which it is conferred. Instead, if the authority takes into account wholly irrelevant or extraneous considerations not provided by law, the exercise of power by the authority will be ultra-vires and the action becomes bad in law.

There is another reason why the licence fees should be imposed by law passed by Parliament. The constitutional role of the Parliament in exercising full control over public finance is provided for in Article 148 of the Constitution thus:-

"Parliament shall have full control over public finance. No tax, rate or any other levy

shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law." (emphasis added).

Thus, statues imposing any tax, rate or levy upon a citizen should have the approval of Parliament. It is a matter for the legislature to decide what considerations relating to the amelioration of hardship or to the interests of the economic progress of the people should be given effect to.

This Court, under Article 126 of the Constitution has the implicit power to issue whatever direction or order necessary in a given case, including all incidental or ancillary powers required to secure enforcement of the citizen's fundamental right. The Constitution enshrines and guarantees the rule of law and Article 12(1) is designed to ensure that each and every authority of the State, acts bona fide and within the limits of its power and when the Court is satisfied that there is an abuse or misuse of power and the jurisdiction of the Court is invoked, it is incumbent on the Court to afford justice to the affected citizen.

For the reasons stated, Court issues an interim order restraining and/or preventing the Respondents and/or their servants and agents from taking any consequential steps requiring the Petitioners to pay the licence fees, being the purported arrears for the year 2015 in terms of the Excise Notification No. 974 published in the Gazette Extraordinary No. 1901/19 dated 13.02.15, until the final hearing and determination of this application. Consequently, any action on the document marked **X1** dated 07.10.2015 issued by the 3rd Respondent is also stayed until the final hearing and determination of this application.

CHIEF JUSTICE

P. JAYAWARDENA, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT.

U. ABEYRATHNE, 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.

Tiran P.C. Alles
No. 345/33, Kuruppu Lane,
Colombo 8.

Petitioner

Vs.

S.C. FR Application No. 171/15

1. Mr. N.K. Illangakoon
   Inspector General of Police
   Police Headquarters
   Colombo 01
2. Mr. Mevan Silva,
   Superintendent of Police,
   Director, Special Investigations Unit
   Police Headquarters
   Colombo 01.
3. Mr. M.D.C.P. Gunatilleke
   Inspector of Police,
   OIC Unit 1
   Special Investigations Unit
   Police Headquarters
   Colombo 01.
4. Mr. Ruwan Gunasekera
   Assistant Superintendent of Police
   Police Media Spokesman
   Police Headquarters
   Colombo 01.
5. The Hon. Attorney General
   Attorney General's Department,
   Hulftsdorp,
   Colombo 12.

Respondents

BEFORE : K**.** Sripavan., C.J.
E. Wanasundera,P.C., J.
R. Marasinghe, J.

COUNSEL		Romesh de Silva, P.C. with Sugath Caldera for Petitioner. Yasantha Kodagoda, P.C., Additional Solicitor General with Ms. Viveka Siriwardene, Deputy Solicitor General for Attorney General.
ARGUED ON	:	30.07.2015
WRITTEN SUBMISSIONS) FILED)	**:**	05.08.2015
DECIDED ON	**:**	**02.09.2015**

SRIPAVAN, C.J.

The Petitioner's complaint is that there is an imminent danger of the petitioner being arrested without due process of law being followed and the Petitioner apprehends that such arrest would be solely on political grounds and *mala fide* thereby becomes unlawful, arbitrary and capricious.

Learned Additional Solicitor General referred to Section 32(1)(b) of the Criminal Procedure Code and argued that any Peace Officer may without an order from a Magistrate and without a warrant, arrest 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.

The relevant question would therefore be whether it was reasonable for the Peace Officer on whom the power is conferred to be satisfied of the existence of the facts, the existence of which empowered him to make the arrest. I am of the view that the burden is on the Peace Officer to place sufficient material to satisfy Court that the deprivation of petitioner's liberty is not arbitrary, capricious and unreasonable. The standard of review is consonant with the approach to the interpretation of statutory provisions vesting power, should be based on objective standards and subject to review as to its reasonableness.

Article 13(1) of the Constitution embodies a salutary principle safeguarding the life and liberty of the subject and must be complied with by the Executive. The Executive, the legislature and the Judiciary are the creation of the Constitution. The language of the Constitution should be interpreted and effect given to it as a paramount law to which all other laws must yield. Thus,

the Constitution is but a higher form of statutory law. Article 13(5) provides that every person shall be presumed innocent until he is proved guilty. These Articles coupled with the constitutional mandate to secure and advance fundamental rights bind the judiciary to make just and equitable orders and directions under Article 126(4). Further, Article 12prohibits any arbitrary, capricious and/or discriminatory action. It is now well settled that powers vested in the State, public officers and public authorities are not absolute or unfettered but are held in trust for the public to be used for the public benefit and not for improper purposes. Where a Police Officer has discretion, the exercise of that discretion would also be subject to Article 12 as well as the general principles governing the exercise of such discretion.

It may be appropriate to refer to the observations of Scott L.J. in *Dumbell* Vs. *Roberts* (1944) 1 All E R 326 at 329 cited by Gratiaen J. in *Muthusamy* Vs. *Kannangara* (1951) 52 N.L.R. 324 at 330 as follows :

> "*The principle of personal freedom, that every man should be presumed innocent until he is found guilty applies also to the Police function of arrest… for that reason it is of importance that no one should be arrested by the Police except on grounds which the particular circumstances of the arrest really justified the entertainment of a reasonable suspicion."*(emphasis added)

It is for the Court to determine the validity of the arrest objectively. In *Dissanayaka* Vs. *Superintendent, Mahara Prison and Others* (1991) 2 S L R 247 at 256 Kulatunga, J. emphasized that "*the Court will not surrender its judgment to the executive, for if it did so, the fundamental right to freedom from arbitrary arrest secured by Article 13(1) of the Constitution will be defeated. The executive must place sufficient material before the Court to enable the Court to make a decision, such as the notes of investigations including the statements of witnesses, observations etc. without relying solely on bare statements in affidavits."*

The documents filed by the 2nd Respondent along with his affidavit dated 04.06.15 reveal the following :-

1. The document **2R1** is the first complaint to the Inspector General of Police. The complaint is dated 25.02.2015 whereas the rubber stamp of the office of the Inspector General of Police bears the date as 01.02.2015, on the first complaint.

2. Paragraph 5 of the said affidavit of the 2nd Respondent states that the complaint **2R1** relates to a fraud involving Emil Kanthan and the former President. Thus, the complaint is not against the Petitioner.
3. The two agreements referred to in paragraphs 9(j) and 9(l) of the said affidavit with regard to the construction of 400 houses each by RADA both in Trincomalee and in Batticaloa are not before Court. There is no evidence to establish that the said agreements were entered into by the Petitioner on behalf of RADA.
4. Paragraph 9 (n) of the said affidavit states that upon the request of the Petitioner in his capacity as the Chairman of RADA, the Additional Government Agent/District Secretary, Batticaloa issued a letter certifying that the work relating to Jaya Lanka Housing Programme had commenced. There is no evidence to show the number of houses that had not been constructed.
5. No statements from the Government Agents/Divisional Secretaries of Trincomalee and Batticaloa during the relevant period are filed for the consideration of Court.
6. The only evidence to show that the Petitioner received money was based on the confession made by Shanthi Kumar Gajan Kumar to the learned Magistrate on 21.05.2015 marked **2R5.** The learned Magistrate translated Gajan Kumar's statement made in English language into Sinhala Language and recorded it.
7. The proceedings in S.C.FR 184/07 dated 17.11.2008 marked **H** shows that the Attorney-General presented an indictment against the Petitioner to the High Court of Colombo and that the Attorney-General would not be objecting to the grant of bail when the indictment is served in the High Court. The proceedings before the High Court is not before this Court in order to ascertain whether the same allegations or complaints against RADA were inquired into by the Police and an indictment was served against the Petitioner by the Attorney General.

No evidence has been placed before Court to establish that the Petitioner is interfering with any witnesses or might interfere with any of the witnesses. Whenever the Police requested the Petitioner to present himself for investigation, he has complied with such requests.

In any event, by an Order issued by the Magistrate, Colombo Fort, the foreign travel of the Petitioner has been banned.

Considering the totality of the material placed before Court, I do not see any justifiable or reasonable grounds to arrest the Petitioner. Court is therefore inclined to grant leave to proceed for the alleged imminent violation of Articles 12(1) and 13(1) of the Constitution by the second and third respondents.

The parties are directed to maintain the "*status quo*" as at today until the final hearing and conclusion of this application. Objections of the respondents to be filed within 4 weeks from today. Counter objections if any, within two weeks thereafter.

CHIEF JUSTICE

E. WANASUNDERA, P.C.,J

I agree.

JUDGE OF THE SUPREME COURT.

R. MARASINGHE, J.

I agree.

JUDGE OF THE SUPREME COURT.

3.

(i)

(ii)

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 in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Articles 127 and 128 of the Constitution.

ORIGINALLY

Sees Lanka (Private) Limited, Block 43,
Export Processing Zone,
Biyagama.
By its Power of Attorney holder Don Lalith Hilary Ganlath of Ganlath's Law Office,
Mezzanine Floor, Galadhari Hotel, No. 64,
Lotus Road, Colombo 1.

Plaintiff

Vs.

D.C. Colombo Case No. 59519/MR
H.C. Case No. WP/HCCA/COL. 63/2009 (L.A.)
S.C. H.C. CALA 331/2010

Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 1.

Defendant

LATER

Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 1.

Defendant- Petitioner

Vs.
Sees Lanka (Private) Limited, Block 43,
Export Processing Zone,
Biyagama.
By its Power of Attorney holder Don Lalith
Hilary Ganlath of Ganlath's Law Office,
Mezzanine Floor, Galadhari Hotel, No. 64,
Lotus Road, Colombo 1.

Plaintiff- Respondent

NOW

Sees Lanka (Private) Limited, Block 43,
Export Processing Zone,
Biyagama.
By its Power of Attorney holder Don Lalith
Hilary Ganlath of Ganlath's Law Office,
Mezzanine Floor, Galadhari Hotel, No. 64,
Lotus Road, Colombo 1.

P*laintiff- Respondent-Petitioner*

Vs.
Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 1.

Defendant- Petitioner-Respondent.

BEFORE : K**.** Sripavan., C.J.
C. Ekanayake, J.
P. Dep, P.C., J.

COUNSEL Maithri Wickremasinghe, P.C. with Rakitha Jayatunge for Plaintiff-Respondent-Petitioner.
Hiran De Alwis with Kalpa Virajith and A. Ranasinghe, for Defendant-Petitioner-Respondent.

ARGUED ON : 14.10.2014
WRITTEN SUBMISSIONS)
FILED) By the Plaintiff-Respondent-Petitioner on : 30.10.14
By the Defendant-Petitioner-Respondent on :28.10.14

DECIDED ON **:** 28.04.2015

SRIPAVAN, C.J.

When this leave to appeal application was taken up for support on 11.03.2011, Learned Counsel for the Defendant-Petitioner-Respondent raised the following two preliminary objections to the maintainability of the application :

(1) The Plaintiff-Respondent-Petitioner cannot proceed with this application for leave, in so far as the Plaintiff-Respondent-Petitioner Company is not re-registered in terms of the Companies Act No. 7 of 2007.

(2) The Plaintiff-Respondent-Petitioner was not properly before Court and/or has no locus standi for making this application and/or instituting action in as much as the Power of Attorney relied upon is for a Company incorporated in Sri Lanka.

However, on 12.10.2011 Learned Counsel for the Defendant-Petitioner-Respondent informed Court that in view of the document marked "A" filed along with the written submissions of the Plaintiff-Respondent-Petitioner, he was not pressing the first preliminary objection. Thus, both Counsel made their submissions on the second preliminary objection. The argument on the said preliminary objection commenced on 22.02.2012 and the application was re-fixed to be resumed on 11.05.2012. However, the same Bench could not be constituted due to various reasons and the matter finally came up for hearing before the same Bench on 14.10.2014. Both Learned Counsel not only made oral submissions but also filed comprehensive written submissions too.

For purposes of convenience and to avoid any doubt the aforesaid second objection is split into the following two questions :

(1) Whether the Plaintiff-Respondent-Petitioner by instituting an action in the District Court had locus standi to maintain the said action in as much as the Power of Attorney relied upon by the Plaintiff-Respondent-Petitioner is in respect of a Company incorporated in Sri Lanka.

(2) Whether the Plaintiff-Respondent-Petitioner by instituting this leave to appeal application is properly before this Court in as much as the Power of Attorney relied upon by it is for a Company incorporated in Sri Lanka?

The Plaint dated 30.08.2007 filed by the Plaintiff-Respondent-Petitioner (hereinafter referred to as Plaintiff) in paragraph (1) of the plaint states thus :-

" The Plaintiff is a body corporate duly incorporated under the Company Laws of Sri Lanka and has its registered Office at the above-mentioned address outside the local limits of the territorial jurisdiction of this Court."

The address of the Plaintiff as given in the caption of the Plaint reads as "Block 43, Export Processing Zone, Biyagama." The agreement marked X1 and entered into by the Plaintiff on 12.04.1989 with the Greater Colombo Economic Commission refers to the address of the Plaintiff as 22 3/1 and 22 3/2, Sir Baron Jayatillake Mawatha, Colombo 1."

It is observed that the Defendant-Petitioner-Respondent (hereinafter referred to as the Defendant) in paragraph 3 of the answer filed on 16.05.2008 pleaded that the Plaintiff could not have and maintain the action in terms of Section 9 of the Civil Procedure Code. It is also noted that the Defendant in compliance with Section 76 of the Civil Procedure Code, in paragraph 1 of the answer expressly traversed that the Court had no jurisdiction.

In order to decide whether the Plaintiff in fact had locus standi to institute and maintain the action in the District Court, the Court should permit the parties to adduce material to show whether the Plaintiff in fact resides within the local limits of the territorial jurisdiction of the District Court.

In the case of *Paul Pereira* Vs. *Chelliah,* 74 NLR 61, the Court concluded that in deciding an objection to jurisdiction based on the ground that the Defendant resides outside the jurisdiction of the Court, the Court has to look at the case on the facts as pleaded and a mere denial in the answer of the Defendant is not sufficient to oust jurisdiction. This observation is further strengthened by an opinion expressed by Atukorale, J. in the case *Udeshi* vs. *Mather* (1988) 1 SLR 12 at 17 in the following manner.

> *"I am of the opinion that the Court of Appeal should have, in the circumstances of this case, granted the appellants' request to adduce evidence to establish their non-residence in Sri Lanka on or about the material date, namely, the date of institution of the application. As set out above, the respondent in his written objections made no challenge to the validity of the appointment of the appellants' attorney-at-law on the ground that the 8 appellants were resident in Sri Lanka at the time. True, no doubt, as pointed out by learned counsel for the respondent, the powers nor copies thereof had been filed in court at the time the written objections were filed. But the respondent could have without much difficulty secured their production in court for his perusal before tendering his objections. Or he could have, after they were tendered to court, moved to amend the same or to file additional objections in terms of rule 54 of the Supreme Court Rules of 1978."*

However, on 27.08.2008, the Defendant filed a motion and stated as follows :

"Whereas the Defendant as set out in <u>its Answer</u> by way of a preliminary objection objected to the jurisdiction of this Court.

Therefore in view of -

a. The arbitration clause as morefully set out in the Agreement No. 73 annexed to the Plaint marked as "XI" and more particularly Clause 27 thereof.

b. In terms of the Arbitration Act No. 11 of 1995

The Defendant respectfully objects to the jurisdiction of Court .

We respectfully bring this matter to the notice of court and move that the Plantiff's action be dismissed."(emphasis added)

Thus, it could be clearly seen that the Defendant originally objected to the jurisdiction of the District Court on the basis of the averments contained in paragraph 1 of the answer on the ground of the arbitration clause set out in Agreement No. 73 and annexed to the plaint marked XI read with the provisions contained in the Arbitration Act No. 11 of 1995. In the meantime, the Plaintiff by a motion dated 03.09.2008, sought leave of Court in terms of Section 94 of the Civil Procedure Code to deliver interrogatories for the examination of Defendant. It is therefore apparent from the proceedings that the Defendant by a motion dated 27.08.2008 did not object to the exercising of the jurisdiction by the District Court based on a Power of Attorney filed by the Plaintiff. The Defendant having failed to raise an objection based on the Power of Attorney of the Plaintiff Company is now precluded from raising an issue based on such ground. The general denial of jurisdiction in the answer is insufficient if it cannot indicate that the objection is based on the Power of Attorney filed by the Plaintiff. I am of the view that Section 76 of the Civil Procedure Code requires a specific denial of jurisdiction on the basis of the Power of Attorney filed by the Plaintiff. If the

Power of Attorney was not filed, the defendant could have secured its production in Court for perusal before tendering the Answer or should have moved to amend the Answer in order to raise an objection based on the Power of Attorney. The denial must very clearly and unambiguously state the legal basis upon which the jurisdiction of the Court was denied.

When the matter came up in the District Court on a date fixed for trial namely, on 16.09.2008 the Plaintiff was not present and the Defendant made submissions based on the Power of Attorney and argued that Plaintiff was not properly represented before Court on the basis that the Power of Attorney holder was not a "recognized agent".

The Defendant is not entitled to take up the jurisdictional issue in piecemeal at different occasions. He had been diligent in taking up the said objection in his motion dated 27.08.2008. Upon reading of the pleadings and the motion dated 27.08.2008, the Court and the parties without any ambiguity can come to a conclusion that the jurisdiction of the District Court was objected based on Agreement No. 73 read with the provisions contained in the Arbitration Act No. 11 of 1995. Having taken up a jurisdictional issue on one basis, challenging the jurisdiction on a different basis could not be allowed, thereafter. In *Jalaldeen* Vs. *Rajaratnam* (1986) 2 SLR 201, the Court observed that an objection to jurisdiction must be taken at the earliest opportunity and the issues relating to the fundamental jurisdiction of the Court cannot be raised in an oblique or veiled manner but must be expressly set out. Accordingly, I hold that the question whether the Plaintiff was properly before the District Court based on the Power of Attorney authorizing the institution of the proceedings in the District Court does not arise for determination at all as no objection was taken on that basis.

The second question that arises for consideration is whether the Plaintiff is properly represented before this Court in as much as the Power of Attorney relied upon by it for authorizing the institution of a leave to appeal application is in respect of a company incorporated in Sri Lanka. A copy of the Power of Attorney relied upon by the Plaintiff is filed of record. It is special Power of Attorney No. 448 dated 6th June 2006 and attested by Chandani Manjula Jayawardene. The body of the said special Power of Attorney, reads thus :

> *Now know ye and these presents witnesseth that the said Sees Lanka (Private) Limited has made nominate and appointed and by these presents nominate and appoint the said DON LALITH HILARY GANLATH as our true and lawful Attorney to transact the following business and affairs.*
>
> *"To act on our behalf on all matters concerning our Company and especially negotiations relating to the land, building and factory situated in the Biyagama Export Processing Zone depicted in Plan No. 160/88 dated 31st October 1988 made by S.A.V. Perera, Licensed Surveyor and Lot 43A depicted in Plan No. 643 dated 24th April 1994 made by J.R. Alahakone, Licensed Surveyor. Our Attorney is empowered to negotiate with the Board of Investment of Sri Lanka, all other Authorities and Agencies concerning the payment of compensation for improvements made on the said land and relating to the company's legal, beneficial and proprietary rights into and upon all the building and erections constructed on the said lands. Our Attorney is also empowered to institute legal action and to obtain relief therefrom against the Board of Investment of Sri Lanka and all other Persons, Companies and Enterprises who have entered upon the said two lands and are occupying same. <u>Our Attorney is also empowered</u> to represent our Company before Tribunals, Arbitrators and Court of Law and in*

all other discussions on our behalf and to sign Proxies, documents and other undertakings." (emphasis added)

Tambiah, J. in *Science House (Ceylon) Limited* Vs. *IPCA Labotatories Private Ltd.* (1989) 1 SLR 155 at 168 states as follows:-

The term "Power of Attorney" is not defined in the Civil Procedure Code.

Broadly speaking, it is a formal instrument by which authority is conferred on an agent. Such an instrument should be construed strictly and as giving only such authority as it confers expressly or by necessary implication."

("Code of Civil Procedure by Chitaley & Rao, 3rd Edn. Vol. 2 p. 1398).

The Stamps Ordinance in s. 94 defines "Power of Attorney". "Power of Attorney includes an instrument empowering a specified person to act for and in the name of the person executing it." In short, a person holding a Power of Attorney is an agent appointed under a writing by a Principal to act for him. As such he cannot be considered a principal officer of the Company and put in the same class or category as the Directors, Managers and other responsible officers of a Company or other Corporate Body …."

The power of Attorney holder therefore becomes the "agent" of the Plaintiff Company. One has to consider whether he is a "recognized agent" for purposes of signing a proxy. "Recognized agent" is defined in Section 5 of the Civil Procedure Code as including the persons designated under that name in Section 25 and not others. Section 25(b) designates one class of recognised agents, namely, those holding general Powers of Attorney from parties not resident within the local limits of the jurisdiction of the Court where the application is made or act done authorizing them such appearances and application and do such acts on

their behalf. Even though the Power of Attorney relied upon by the Plaintiff is not a general Power of Attorney it authorises the power of Attorney holder to sign proxies, documents, and other undertakings on behalf of the Plaintiff Company. In *Lanka Estates Agency Ltd.* Vs. *Corea,* (52 N.L.R. 477), Gratiaen, J. noted that an agent with a special authority to represent his principal in matters in connection with a particular trade or business is a recognized agent within the meaning of section 25(b) of the Civil Procedure Code. Section 25(b) was not intended to refer only to persons who hold general powers of attorney authorizing them to represent the principal in every conceivable kind of transaction and in connection with every kind of legal proceeding. Thus, even a "Special Power of Attorney" could also be accepted for purposes of Section 25(b) of the Civil Procedure Code.

The proxy dated 11.10.10 filed in the Supreme Court empowers Mrs. Chandani Chandrapala to be the instructing Attorney-at-Law to appear for the Plaintiff Company before the Supreme Court and to file leave to appeal application against the judgment of the High Court dated 17.9.2010.

The Supreme Court is the highest and final superior court of record in the Republic and exercises civil and criminal appellate jurisdiction within the Republic of Sri Lanka as provided in Article 127(1) of the Constitution. Thus, the Supreme Court has all island jurisdiction in respect of civil appellate matters. The Power of Attorney empowers the said "Don Lalith Hilary Ganlath" to sign the proxy on behalf of the Plaintiff Company. The proxy filed in the Supreme Court reads thus:-

> "*We , Sees Lanka (Private) Limited Block 43, Export Processing Zone, Biyagama,*
>
> *By its Power of Attorney holder Don Lalith Hilary Ganlath of Ganlath's Law*

Office, Mezzanine Floor, Galadari Hotel, No. 64, Lotus Road, Colombo 1.

have nominated constituted and appointed and do hereby nominate, constitute and appoint Chandani Chandrapala Ganlaths, Attorney-at-Law to be our instructing Attorney-at-Law and to appear for us and in our name and on our behalf before Supreme Court of the Democratic Socialist Republic of Sri Lanka, to appear and therein to

to institute Leave to Appeal against the Judgment of the High Court dated 17.9.2010 of the HC Case No: WP/HCCA/COL/63/2009/LA and to file all the necessary papers and to take all necessary steps in the Supreme Court and to obtain the reliefs as prayed for and to take all necessary steps."

Learned President's Counsel for the Plaintiff in his written submissions has taken up the position that when the Power of Attorney holder in this case signed the proxy, he has signed it as if the proxy has been signed by the Plaintiff Company. With all due respect I am unable to agree with this submission. The question whether a Power of Attorney could be used by a person resident within the local limits of the jurisdiction of the Court was considered in various cases. Atukorale, J. in *Udeshi* Vs. *Mather* refers to the following two cases at page 20.

"In *Alia Markar* v. *Pathu Muttu and Natchiya* *a preliminary objection was taken in appeal that the appellant, a Mohamedan woman was not properly before court since the proxy signed by her two attorneys was bad for the reason that she and both her attorneys were resident within the local limits of the jurisdiction of the court and as such the attorneys were not the recognised agents of the appellant and had no authority to sign the proxy. The validity of this objection was upheld but since it was not taken in the court below the appellant was granted an opportunity of signing a fresh proxy and of ratifying the acts purported to be done in her name. In Segu*

Mohamadu vs. Govinden Kangany the power of attorney granted by the plaintiff to his attorney was, in terms, one subsisting only during his absence from the island. But at the time the attorney signed the proxy the plaintiff, admittedly, was resident in the island. The proxy was held bad but as the objection had not been taken in the lower court it was held to be no ground for reversing the decree since the defect did not affect the merits of the case or the jurisdiction of the court. The appeal was therefore dismissed."

Learned Counsel for the Plaintiff Company relied on Sections 19 and 20 of the Companies Act No. 7 of 2007 and argued that a proxy can be signed by a Power of Attorney holder in terms of Section 19(1)(b) of the said Act.

Section 19(1)(b) of the Companies Act No. 7 of 2007 provides as follows:-

"A contract or other enforceable obligation may be entered into by a company as follows:

(b) an obligation which, if entered into by a natural person is required by law to be in writing signed by that person and be notarially attested..."

Section 19 falls within the heading of "Company Contracts etc." The marginal note to Section 19 refers to the method of contracting and gives a clue to the meaning and purpose of the section. Section 20(3) specifically provides that the provisions of the Powers of Attorney Ordinance and the law relating to powers of attorney executed by natural person shall with necessary modifications apply in relation to a power of attorney executed by a company. Section 25 of the Civil Procedure Code prohibits a power of Attorney being used by a person resident within the jurisdiction of the Court. (emphasis added)

In the case of *Alia Markar* Vs. *Natchia* (Browne's Report Vol. 2 – page 64 at 66) the question whether the proxy given to the proctor to conduct legal proceedings on behalf of another, be signed either by that person himself or by such a person as is designated by the Code to be a "recognized agent" was considered. Natchiya, the Appellant did not sign the proxy by herself. She granted a power of attorney to two of her male relatives to act for her in all matters of business and accordingly, the two Attorneys' authorized a proctor to appear in her name and to make the claim. Bonser C.J. made the following observations:

> *"Now, recognized agents are defined in sec. 25 of the Civil Procedure Code, and it is quite clear that these attorneys are not recognized agents within the meaning of that section ; because, although they hold a general power of attorney, yet Natchia and they are both resident within the local limits of the jurisdiction of the Court for appearance in which this proxy was signed. I think that Mr. Bawa's contention is correct, and that the proxy must either be signed by the party in person, or by a recognized agent as defined by sec. 25. That being so, I think the preliminary objection must prevail".*

Therefore, a Power of Attorney cannot be used by the Plaintiff Company situated within the jurisdiction of this Court to nominate a person who too resides within the jurisdiction of this Court to sign a proxy on behalf of the Plaintiff Company. In such a situation, a Power of Attorney holder could not become a "recognised agent" of the Plaintiff Company in terms of Section 25(b) of the Civil Procedure Code. A Company may be represented and subscribed by a registered Attorney in terms of Section 470 of the Civil Procedure Code and the appointment of a registered Attorney shall be in writing and signed by the client in terms of Section 27.

Hence, I hold that the Plaintiff's Company is not properly represented before this Court. The validity of the objection is therefore upheld. On the basis of the conclusion reached, the leave to appeal application is dismissed in all the circumstances without costs.

CHIEF JUSTICE.

C. EKANAYAKE, J.,

I agree.

JUDGE OF THE SUPREME COURT.

P. DEP, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT.

15

K. SRIPAVAN, J.

This Petitioner-Petitioner (hereinafter referred to as the Petitioner) instituted an application in the Court of Appeal against the 1st Respondent-Respondent (hereinafter referred to as the Respondent) seeking, inter alia, the following reliefs by way of Writ of Certiorari :-

(1) To quash the decision of the respondent to impose a “Reasonable

Price Formula" (RPF) as evident by the Circular bearing Nos. , MF/BL 132, MF/BL 135, MF/BL 136, MF/BL 144 and MF/BL 146.

(2) To quash the decision of the Respondent contained in the letter dated 3rd March 2003 (**P12)** informing the Uva Halpewatte Tea Factory that it had contravene expressed provisions of the Tea Control Act ,

(3) To quash the decision of the Respondent as contained in the letter dated 4th February 2003 **(P13)** to use the provisions of the Tea Control Act to enforce "Reasonable Price Formula" stipulated by the Respondent.

The legal basis upon which the Petitioner sought his reliefs are contained in paragraphs 43 and 47 of the Petition dated 3rd April 2003 which could be summarized as follows :-

(i) That the Respondent had no authority in terms of the Tea Control Act to lay down the "Reasonable Price Formula".

(ii) That the imposition of such a Formula is contrary, unilateral, and illegal.

(iii) That accordingly, the penal provisions of Section 8(2) of the Tea Control Act are superfluous.

(iv) That the enforcement of the provisions contained in Section 8(2) of the Tea Control Act as amended by Act No. 3 of 1993 when read with the other provisions of the Act, does not concern any right on the Respondent.

(v) That in any event, the decision of the Respondent fixing a "Reasonable Price Formula" has been made when giving the Petitioner or its members an opportunity of being heard thus violating the fundamental legal principle of *Audi Ultarem Partem.*

The Court of Appeal, by its Order dated 6th December 2010, held, inter alia, that the Teal Control Act specifically provides that if the Tea Commissioner is satisfied after such inquiry, as he may deem necessary, he may issue the direction specified in Section 8(2) of the said Act and that the form of inquiry is left to the Controller to decide depending on the nature of the violation. The Petitioner preferred an appeal against the said Order and Special Leave to Appeal was granted by this Court on 17th April 2011 on the following questions of law :

1. Has the Court of Appeal erred in interpreting the provisions of the Tea Control Act ?
2. Has the Court of Appeal erred in interpreting the provisions of Section 8 of the Tea Control Act as giving the Respondent the power to impose a "Reasonable Price Formula" when the wording of the said Section deals only with immediate purported power given to the Tea Controller to penalise a party for not adhering to the "Reasonable Price Formula" ?
3. Has the Court of Appeal erred in law in ignoring the submission of the Petitioner that Section 8 of the Tea Control Act (as amended) conferred power on "a non-existent Tea Controller ?
4. Has the Court of Appeal erred that the Respondent had no legal basis to impose a "Reasonable Price Formula"?
5. In any event, was the application seeking relief by way of Certiorari , filed after the lapse of an unreasonable period of time, made the application unmaintainable in law?

The Learned President's Counsel for the Petitioner sought to argue that the Office of "Tea Controller" created by Section 50(1) of the Tea Control Act No. 51 of 1957 was abolished by Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975.

Counsel submitted that the Office of the "Tea Controller" ceased to exist as far back as in 1975 and at the time when the Tea Control (Amendment) Act No. 3 of 1993 was passed there was no officer known to the law as the Tea Controller. It is on this basis Learned President's Counsel argued that no amended to the Tea Control Act could seek to clothe a non-existent officer with legal power. With all due respect, I am unable to agree with the submission made by the Learned President's Counsel.

The dominant purpose in construing a statute is to ascertain the intention of Parliament one of the well recognized canons of construction is that the legislature speaks its mind by use of correct expressions and unless there is any ambiguity in the language used the Court should adopt literal construction if it does not lead to an absurdity. In construing the provisions contained in Section 9(i) and 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975 effects should be made to ensure that each provision will have its play without any conflict with each others. The Court must look to the object which the statute seeks to achieve while interpreting the provisions in Sections 9(1) and 9(2). When the material words assists the achievement of the legislative policy, the Court would look at the context and the object of such words and interpret the meaning intended to be conveyed by the use of such words.

It is observed that prior to the abolition of Office of "Tea Controller" by Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975, the Office of the "Tea Commissioner" was created by Sections 9(1) and 9(2) of the said Act which reads as follows :

> *"9. (1) There may be appointed, for the purposes of this Law, a person, by name or by office, to be or to act as Tea Commissioner who shall, subject to provisions of this Law or any other written Law,-*

(a) *exercise, discharge and perform the powers, functions and duties vested in, and imposed on, the Tea Controller under any written law;"*

Thus, it could well be seen that the intention of the legislature was to create the office of the "Tea Commissioner" prior to the abolition of the "Tea Controller".

6.

(vi)

(vii)

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

In an application for Leave to Appeal/Appeal in terms of Section 5(c) (1) of the High Court of the Provinces (Special Provisions)(Amendment) Act, No. 54 of 2006 read together with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(HCCA) (LA) No. 346/2013
NWP HCCA Case No. 28/2012(Rev)
D.C.Kuliyapitiya Case No. 76/L

1. Geekiyanage Thanuja Sanjeewani Amarasinghe
   No. 14. Vijitha Road,
   Dehiwala.

2. Geekiyanage Sardha Maheshini Amarasinghe
   Sisira Niwasa,
   Narammala.

3. Dona Kusuma Sardhalatha Amarasinghe
   Sisira Niwasa
   Narammala.

Plaintiff-Petitioners-Petitioners

Vs.

1. Geekiyanage Nirosha Prasadini Kahandawarachchi
   No. 2, Esther Place
   Park Road, Colombo 05.

2. Chanaka Ravindra Kahandawarachchi
   No. 2, Esther Place
   Park Road, Colombo 05.

Defendant-Respondents-Respondents

Before	:	Priyasath Dep, PC. J Sarath de Abrew, J & Priyantha Jayawardana, J
Counsel	:	Rohan Sahabandu , PC for the Plaintiff-Petitioners-Petitioners
		Chrishmal Warnasooriya for the Defendant-Respondents-Respondents
Argued on	:	05.06.2014
Decided on	:	31.03.2015

Priyasath Dep, PC, J

1. The Plaintiffs-Petitioners-Petitioners above named (hereinafter referred to as "Petitioners") instituted an action in the District Court of Kuliyapitiya bearing No. DC 76/L against the 1st and 2nd Defendants –Respondents- Respondents (hereinafter referred to as the "Respondents") seeking inter alia the following reliefs;

    a. A declaration that the 2nd Petitioner is the absolute owner of the land described in the 2nd schedule to the Plaint which is a divided portion of the land described in the 1st Schedule to the Plaint, subject to the life interest of the 3rd Petitioner,

    b. A declaration that the 1st Petitioner is the absolute owner of the land described in the 3rd schedule to the Plaint which is a divided portion of the land described in the 1st schedule to the Plaint, subject to the life interest of the 3rd Petitioner,

    c. to eject the Respondents from the house standing on the land described in the 3rd schedule to the Plaint,

    d. (i)an interim injunction restraining the Respondents from cutting down the trees, destroying the cultivation and obstructing the 3rd Petitioners right to life interest in the lands described in the 2nd and 3rd schedules to the Plaint until the conclusion of the matter.

    (ii) an enjoining order preventing the Respondents from doing aforesaid acts until the granting of the aforesaid interim injunction.

(e)Issue a commission to a surveyor to survey and prepare a plan pertaining to the lands described in the schedule to the Plaint.

2. The learned Additional District Court Judge of Kuliyapitiya by order dated 11th December 2009 refused to grant an enjoining order as prayed for by the Petitioners.

3. In terms of the aforesaid order dated 11th December 2009 marked 'X2'the District Court issued notices of interim injunction to the Respondents returnable on the 4th of January 2010. The Respondents on 2nd August 2010 filed the statement of objections and the answer marked X3 and X4 respectively. The parties agreed that the inquiry into the interim injunction could be disposed of by way of written submissions.

4. The learned Additional District Judge of Kuliyapitiya by the Order dated 16th December 2010 marked X5 refused the interim injunction prayed for by the Petitioners.

5. The learned Additional District Court Judge was of the view that if the Petitioners are successful in the action and the judgment is in favour of the Petitioners in respect of the ownership to the property referred to in the 2nd and 3rd schedules to the plaint, the damages caused to the property could be remedied by way of compensation.

6. The Petitioners state that when this case was taken up on the 26th of June 2012 in the District Court of Kuliyapitiya, they informed court that the Respondents were cutting down trees and causing irreparable loss to the property and therefore in terms of the orders marked "X2" and "X5" moved the court to issue a commission to assess the damages that had been caused by the Respondents to the property belonging to the Petitioners.

7. The Petitioners filed a petition dated 4th July 2012 and on 9th July 2012 supported the same to obtain a commission from the court in respect of the following issues:

a) To survey the lands described in the 2nd and 3rd schedule to the Plaint;
b) To assess and/or estimate the damage that had been caused by the Respondents to the trees and/or cultivation in the lands described in the 2nd and 3rd schedule to the plaint.
c) To submit a full report in respect of the properties including the trees and permanent cultivation in the lands described in the 2nd and 3rd schedule to the Plaint;
d) To ascertain the net profits receivable monthly and /or annually in the lands described in the 2nd and 3rd schedule to the Plaint.

8.. The learned District Judge on 9th July 2010 allowed the Petitioners' application for a commission and issued a commission returnable on the 25th of October 2012.

9. The Petitioners state that the Respondents were not satisfied with the order dated 9th July 2012 made by the learned District Court Judge of Kuliyapitiya allowing a commission,

filed an application bearing No. 14/2012 (LA) in the High Court of Civil Appeal, Kurunegala seeking to set aside the said order dated 9th July 2012.

10 On 31st July 2012 the High Court of Civil Appeal, Kurunegala refused to grant leave to appeal to the aforesaid application of the Respondents and dismissed the Application.

11. Thereafter the Petitioners took steps to issue a commission to a court approved/listed surveyor returnable on the 25th of October 2012.

12. The Petitioners state that on 25th of October 2012 Mr. J.A. Rohitha Jayalath, licensed surveyor and assessor appointed by court as the commissioner, has tendered to court a Plan bearing No. 431 dated 22nd October 2012 together with a report prepared by him in performing his duties assigned to him by the court.

13. The Petitioners state that the report of the surveyor revealed that;

(a) The Respondents are obstructing and /or preventing the 3rd Petitioner from exercising her rights and entitlements as the life interest holder of the property;
(b)The Respondents had cut down several trees in the lands belonging to the Petitioners and removed the tree trunks making it impossible for the commissioner to estimate an assess the damage caused to the trees;
(c) The Commissioner was prevented and/or obstructed and/or unassisted by the Respondents from properly assessing and estimating the net monthly/annual profits receivable from the coconut cultivation in the lands described in the 2nd and 3rd schedule to the Plaint.

I4. In the circumstances, the Petitioners based on the report submitted that :

(a) The Commissioner could not assess and estimate the damage caused to the trees and cultivation in the lands described in the 2nd and 3rd schedule to the Plaint.

(b) the commissioner could not assess and estimate the net monthly and/or annual income receivable from the cultivation in the lands described in the 2nd and 3rd schedule to the Plaint.

15. The Petitioners submit that the order marked X5 is incapable of protecting the rights of the Petitioners and thus proved to be futile in view of the evidence transpired from the commissioner's report.

16 Therefore, being aggrieved and dissatisfied with the said order marked "X5" made by the learned Additional District Judge, the Petitioners invoked the revisionary jurisdiction of the High Court of Civil Appeal, Kurunegala by filing the application bearing No. NWP / HCCA 28/2012 seeking inter alia the following reliefs among other reliefs prayed for:

(a) Revise and/ or vary and /or set aside the order of the Learned Additional District Judge in the District Court of Kuliyapitiya case No. 76/L dated 16th December 2010.
(b) Direct the District Court Judge of Kuliyapitiya to hold a fresh inquiry into the application for the interim injunction made by the Petitioners in case No. 76/L;

17. The learned Judges of the High Court of Civil Appeal, Kurunegala by the order dated 17th July 2013 refused to grant the interim relief prayed for by the Petitioners and directed to fix the matter for objections of the Respondents on 27th August 2013.

18. The Petitioners submitted that the learned High Court judges having observed that the damages cannot be assessed erred when it refused to grant the interim relief prayed for by the Petitioners.

19. The Petitioners submitted that the reasons given by the Learned High Court Judges in refusing the Petitioners' application for the interim relief are based on surmise and conjuncture when they held that neither the Petitioners appealed against the order marked "X5" though the damage was not practicably assessable nor they moved the court for a commission immediately after the refusal of the interim injunction.

20.Being aggrieved by the order of the High Court of Civil Appeals, Kurunegala, the Petitioners filed this application in this court seeking leave.

21. When this application was taken up for support the learned Counsel for the Respondents raised the following Preliminary Objections:-

(1)This matter is not fit for review in terms 128(2) of the Constitution.

The learned Counsel submitted that the High Court correctly refused the interim relief for the reason that the material placed before the High Court seeking a revision of the order of the District Judge made in 2010 was based on Commissioners report filed in 2012.

(2)The affidavits tendered to Court on behalf of the Petitioners are defective for the reason that all affidavits filed are deposed and affirmed and the attestation cannot be relied upon and this amounts to violation of Rules 2 and 6 of the Supreme Court Rules of 1990.

(3) The Petitioners are guilty of misrepresentation for the reason that he had given a different address as the place of residence.

22.The Petitioner filed the revision application in the High Court of Civil Appeal, Kurunegala in Case No. 28/2012 on 05.12.2012 to revise the order dated 16.12.2010 of the District Court of Kuliyapitiya refusing the interim injunction and also to obtain a stay order based on the Commissioner's report dated 25.10.2012

23.The Petitioner did not take steps to revise the order of the District Court made on 16-12-2010 until this application was filed in High Court of Civil Appeal on 5-12-2012 almost two years after the order of the District Judge.

24.The Respondents submitted that by filing a revision application in the High Court(Civil Appeal) on 05.12.2012 the Petitioners sought to revise the order of the learned District Judge dated 16.12.2010 based on a Commissioner's report dated 09.07.2012. The District Judge made the order upon considering the material that was placed at that time before the court by the parties. The said order could not be revised by the High Court based on a report obtained subsequently after one and a half years. Respondents stated that they did not have an opportunity to challenge the report of the Commissioner. Therefore, Respondents submitted that the Petitioners cannot seek to revise the order made in 16th December 2002 on the basis of a report made available on 25.10.2012.

25.The Petitioners in this case sought interim injunction at two different stages of the proceedings. In the first instance by their Plaint dated 09.12.2009 sought an interim injunction. The Learned District Judge having inquired into the application refused to grant interim injunction. The second instance was when the case was pending in the District Court, Plaintiffs (Petitioners) filed a revision application in the High Court of Civil Appeal to revise the order of refusal based on the Commissioners report and to direct the learned District Judge to hold a fresh inquiry into the application for an interim injunction.

26. District Courts under the Judicature Act . The relevant section is the section 54 of the Judicature Act which reads thus:

> 54. (1) Where in any action instituted in a High Court, District Court or a Family 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 pendency of the action is doing or committing or procuring or suffering to be done or committed , or threatens or is about to do so procure or suffer to be done or committed, an act or nuisance in violation of the plaintiff's 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 therefore, 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.

27. The jurisdiction to grant injunctions is given to High Court/District Court under section 54(1) (a) of the Judicature Act to prevent the commission of act or nuisance which will produce injury to the Plaintiff. Under section 54 (1) (b) interim injunction could be granted during the pendency of the action if the defendant commit or threatens to commit 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 ineffective.

28. The first application for the interim injunction filed in the District Court was refused as there were no sufficient grounds to grant relief. The question that arises is as to whether after the refusal of the interim injunction, the Petitioner could make a new application for an interim injunction in the same court.

29.Interim injunctions are issued to prevent the commission of an act or nuisance which violate the rights of the Plaintiff that will render the final judgment ineffectual. The purpose of the interim injunction is to maintain the status quo and protect the subject matter of the case.

30.The question that arises is when the case is pending a party commits acts in violation of the Plaintiff's rights in relation to the subject matter of the property upon proof of such acts, could the same court grant relief in spite of the fact that it has previously refused to intervene.

31.The Petitioners position is that when the District Court refused to grant an injunction the court becomes funtus as far as granting of interim injunctions are concerned and therefore it is necessary to move the High Court by filing a revision application to revise the earlier order and direct the District Judge to hold a fresh inquiry.

32.I am of the view that after the earlier order of refusal, if fresh acts are committed by the defendants which violates the rights of the plaintiff which will render the judgment ineffectual upon proof of such violations a party could invoke the jurisdiction of the District Court. The change of circumstances, emergence of new grounds as a result of committing or threatening to commit acts or nuisance entitle a party to invoke the jurisdiction of the same court in spite of the previous refusal and the Court has jurisdiction to entertain such an application. These actions are referred to as quia timet actions incidental to the main actions.

33. The proper course of action for the Petitioner is to seek interim relief in the District Court itself, if there are fresh material regarding commission, continuance or threatened to commit acts or nuisances by the Defendants subsequent to the refusal of the previous application which will render the judgment ineffectual..

34.The first preliminary objection though referred to as a preliminary objection is also the main issue that has to be considered by this court in granting leave. I have carefully considered the comprehensive written submissions filed by both parties on this issue. I uphold the first preliminary objection raised by the learned Counsel for the Respondents. In view of this decision there is no need to consider the other preliminary objections raised by the Respondents regarding the maintainability of the application.

35.Therefore I am of the view that the Learned High Court of Civil Appeals correctly refused the application to revise the order of learned Additional District Judge made on 16-12-2010 refusing to grant an interim injunction.

Leave to appeal refused. No Costs.

Judge of the Supreme Court

Sarath de Abrew J.
I agree.

Judge of the Supreme Court

Priyantha Jayawardene 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 in terms of Section 5C of the High Court of the Provinces (Special Provisions) Act No. 19 of 1990 as amended by the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 read with Articles 127 and 128 of the Constitution.

ORIGINALLY

Sees Lanka (Private) Limited, Block 43,
Export Processing Zone,
Biyagama.
By its Power of Attorney holder Don Lalith Hilary Ganlath of Ganlath's Law Office,
Mezzanine Floor, Galadhari Hotel, No. 64,
Lotus Road, Colombo 1.

Plaintiff

Vs.

D.C. Colombo Case No. 59519/MR
H.C. Case No. WP/HCCA/COL. 63/2009 (L.A.)
S.C. H.C. CALA 331/2010

Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 1.

Defendant

LATER

Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 1.

Defendant- Petitioner

Vs.
Sees Lanka (Private) Limited, Block 43,
Export Processing Zone,
Biyagama.
By its Power of Attorney holder Don Lalith
Hilary Ganlath of Ganlath's Law Office,
Mezzanine Floor, Galadhari Hotel, No. 64,
Lotus Road, Colombo 1.

Plaintiff- Respondent

NOW

Sees Lanka (Private) Limited, Block 43,
Export Processing Zone,
Biyagama.
By its Power of Attorney holder Don Lalith
Hilary Ganlath of Ganlath's Law Office,
Mezzanine Floor, Galadhari Hotel, No. 64,
Lotus Road, Colombo 1.

P*laintiff- Respondent-Petitioner*

Vs.
Board of Investment of Sri Lanka,
West Tower,
World Trade Centre, Echelon Square,
Colombo 1.

Defendant- Petitioner-Respondent.

BEFORE : K**.** Sripavan., C.J.
C. Ekanayake, J.
P. Dep, P.C., J.

COUNSEL Maithri Wickremasinghe, P.C. with Rakitha Jayatunge for Plaintiff-Respondent-Petitioner.
Hiran De Alwis with Kalpa Virajith and A. Ranasinghe, for Defendant-Petitioner-Respondent.

ARGUED ON : 14.10.2014
WRITTEN SUBMISSIONS)
FILED) By the Plaintiff-Respondent-Petitioner on : 30.10.14
By the Defendant-Petitioner-Respondent on :28.10.14

DECIDED ON **:** 28.04.2015

SRIPAVAN, C.J.

When this leave to appeal application was taken up for support on 11.03.2011, Learned Counsel for the Defendant-Petitioner-Respondent raised the following two preliminary objections to the maintainability of the application :

(1) The Plaintiff-Respondent-Petitioner cannot proceed with this application for leave, in so far as the Plaintiff-Respondent-Petitioner Company is not re-registered in terms of the Companies Act No. 7 of 2007.

(2) The Plaintiff-Respondent-Petitioner was not properly before Court and/or has no locus standi for making this application and/or instituting action in as much as the Power of Attorney relied upon is for a Company incorporated in Sri Lanka.

However, on 12.10.2011 Learned Counsel for the Defendant-Petitioner-Respondent informed Court that in view of the document marked "A" filed along with the written submissions of the Plaintiff-Respondent-Petitioner, he was not pressing the first preliminary objection. Thus, both Counsel made their submissions on the second preliminary objection. The argument on the said preliminary objection commenced on 22.02.2012 and the application was re-fixed to be resumed on 11.05.2012. However, the same Bench could not be constituted due to various reasons and the matter finally came up for hearing before the same Bench on 14.10.2014. Both Learned Counsel not only made oral submissions but also filed comprehensive written submissions too.

For purposes of convenience and to avoid any doubt the aforesaid second objection is split into the following two questions :

(1) Whether the Plaintiff-Respondent-Petitioner by instituting an action in the District Court had locus standi to maintain the said action in as much as the Power of Attorney relied upon by the Plaintiff-Respondent-Petitioner is in respect of a Company incorporated in Sri Lanka.

(2) Whether the Plaintiff-Respondent-Petitioner by instituting this leave to appeal application is properly before this Court in as much as the Power of Attorney relied upon by it is for a Company incorporated in Sri Lanka?

The Plaint dated 30.08.2007 filed by the Plaintiff-Respondent-Petitioner (hereinafter referred to as Plaintiff) in paragraph (1) of the plaint states thus :-

" The Plaintiff is a body corporate duly incorporated under the Company Laws of Sri Lanka and has its registered Office at the above-mentioned address outside the local limits of the territorial jurisdiction of this Court."

The address of the Plaintiff as given in the caption of the Plaint reads as "Block 43, Export Processing Zone, Biyagama." The agreement marked X1 and entered into by the Plaintiff on 12.04.1989 with the Greater Colombo Economic Commission refers to the address of the Plaintiff as 22 3/1 and 22 3/2, Sir Baron Jayatillake Mawatha, Colombo 1."

It is observed that the Defendant-Petitioner-Respondent (hereinafter referred to as the Defendant) in paragraph 3 of the answer filed on 16.05.2008 pleaded that the Plaintiff could not have and maintain the action in terms of Section 9 of the Civil Procedure Code. It is also noted that the Defendant in compliance with Section 76 of the Civil Procedure Code, in paragraph 1 of the answer expressly traversed that the Court had no jurisdiction.

In order to decide whether the Plaintiff in fact had locus standi to institute and maintain the action in the District Court, the Court should permit the parties to adduce material to show whether the Plaintiff in fact resides within the local limits of the territorial jurisdiction of the District Court.

In the case of *Paul Pereira* Vs. *Chelliah,* 74 NLR 61, the Court concluded that in deciding an objection to jurisdiction based on the ground that the Defendant resides outside the jurisdiction of the Court, the Court has to look at the case on the facts as pleaded and a mere denial in the answer of the Defendant is not sufficient to oust jurisdiction. This observation is further strengthened by an opinion expressed by Atukorale, J. in the case *Udeshi* vs. *Mather* (1988) 1 SLR 12 at 17 in the following manner.

> *"I am of the opinion that the Court of Appeal should have, in the circumstances of this case, granted the appellants' request to adduce evidence to establish their non-residence in Sri Lanka on or about the material date, namely, the date of institution of the application. As set out above, the respondent in his written objections made no challenge to the validity of the appointment of the appellants' attorney-at-law on the ground that the 8 appellants were resident in Sri Lanka at the time. True, no doubt, as pointed out by learned counsel for the respondent, the powers nor copies thereof had been filed in court at the time the written objections were filed. But the respondent could have without much difficulty secured their production in court for his perusal before tendering his objections. Or he could have, after they were tendered to court, moved to amend the same or to file additional objections in terms of rule 54 of the Supreme Court Rules of 1978."*

However, on 27.08.2008, the Defendant filed a motion and stated as follows :

"Whereas the Defendant as set out in <u>its Answer</u> by way of a preliminary objection objected to the jurisdiction of this Court.

Therefore in view of -

a. The arbitration clause as morefully set out in the Agreement No. 73 annexed to the Plaint marked as "XI" and more particularly Clause 27 thereof.

b. In terms of the Arbitration Act No. 11 of 1995

The Defendant respectfully objects to the jurisdiction of Court .

We respectfully bring this matter to the notice of court and move that the Plantiff's action be dismissed."(emphasis added)

Thus, it could be clearly seen that the Defendant originally objected to the jurisdiction of the District Court on the basis of the averments contained in paragraph 1 of the answer on the ground of the arbitration clause set out in Agreement No. 73 and annexed to the plaint marked XI read with the provisions contained in the Arbitration Act No. 11 of 1995. In the meantime, the Plaintiff by a motion dated 03.09.2008, sought leave of Court in terms of Section 94 of the Civil Procedure Code to deliver interrogatories for the examination of Defendant. It is therefore apparent from the proceedings that the Defendant by a motion dated 27.08.2008 did not object to the exercising of the jurisdiction by the District Court based on a Power of Attorney filed by the Plaintiff. The Defendant having failed to raise an objection based on the Power of Attorney of the Plaintiff Company is now precluded from raising an issue based on such ground. The general denial of jurisdiction in the answer is insufficient if it cannot indicate that the objection is based on the Power of Attorney filed by the Plaintiff. I am of the view that Section 76 of the Civil Procedure Code requires a specific denial of jurisdiction on the basis of the Power of Attorney filed by the Plaintiff. If the

Power of Attorney was not filed, the defendant could have secured its production in Court for perusal before tendering the Answer or should have moved to amend the Answer in order to raise an objection based on the Power of Attorney. The denial must very clearly and unambiguously state the legal basis upon which the jurisdiction of the Court was denied.

When the matter came up in the District Court on a date fixed for trial namely, on 16.09.2008 the Plaintiff was not present and the Defendant made submissions based on the Power of Attorney and argued that Plaintiff was not properly represented before Court on the basis that the Power of Attorney holder was not a "recognized agent".

The Defendant is not entitled to take up the jurisdictional issue in piecemeal at different occasions. He had been diligent in taking up the said objection in his motion dated 27.08.2008. Upon reading of the pleadings and the motion dated 27.08.2008, the Court and the parties without any ambiguity can come to a conclusion that the jurisdiction of the District Court was objected based on Agreement No. 73 read with the provisions contained in the Arbitration Act No. 11 of 1995. Having taken up a jurisdictional issue on one basis, challenging the jurisdiction on a different basis could not be allowed, thereafter. In *Jalaldeen* Vs. *Rajaratnam* (1986) 2 SLR 201, the Court observed that an objection to jurisdiction must be taken at the earliest opportunity and the issues relating to the fundamental jurisdiction of the Court cannot be raised in an oblique or veiled manner but must be expressly set out. Accordingly, I hold that the question whether the Plaintiff was properly before the District Court based on the Power of Attorney authorizing the institution of the proceedings in the District Court does not arise for determination at all as no objection was taken on that basis.

The second question that arises for consideration is whether the Plaintiff is properly represented before this Court in as much as the Power of Attorney relied upon by it for authorizing the institution of a leave to appeal application is in respect of a company incorporated in Sri Lanka. A copy of the Power of Attorney relied upon by the Plaintiff is filed of record. It is special Power of Attorney No. 448 dated 6th June 2006 and attested by Chandani Manjula Jayawardene. The body of the said special Power of Attorney, reads thus :

> *Now know ye and these presents witnesseth that the said Sees Lanka (Private) Limited has made nominate and appointed and by these presents nominate and appoint the said DON LALITH HILARY GANLATH as our true and lawful Attorney to transact the following business and affairs.*
>
> *"To act on our behalf on all matters concerning our Company and especially negotiations relating to the land, building and factory situated in the Biyagama Export Processing Zone depicted in Plan No. 160/88 dated 31st October 1988 made by S.A.V. Perera, Licensed Surveyor and Lot 43A depicted in Plan No. 643 dated 24th April 1994 made by J.R. Alahakone, Licensed Surveyor. Our Attorney is empowered to negotiate with the Board of Investment of Sri Lanka, all other Authorities and Agencies concerning the payment of compensation for improvements made on the said land and relating to the company's legal, beneficial and proprietary rights into and upon all the building and erections constructed on the said lands. Our Attorney is also empowered to institute legal action and to obtain relief therefrom against the Board of Investment of Sri Lanka and all other Persons, Companies and Enterprises who have entered upon the said two lands and are occupying same. <u>Our Attorney is also empowered</u> to represent our Company before Tribunals, Arbitrators and Court of Law and in*

all other discussions on our behalf and to sign Proxies, documents and other undertakings." (emphasis added)

Tambiah, J. in *Science House (Ceylon) Limited* Vs. *IPCA Labotatories Private Ltd.* (1989) 1 SLR 155 at 168 states as follows:-

The term "Power of Attorney" is not defined in the Civil Procedure Code.

Broadly speaking, it is a formal instrument by which authority is conferred on an agent. Such an instrument should be construed strictly and as giving only such authority as it confers expressly or by necessary implication."

("Code of Civil Procedure by Chitaley & Rao, 3rd Edn. Vol. 2 p. 1398).

The Stamps Ordinance in s. 94 defines "Power of Attorney". "Power of Attorney includes an instrument empowering a specified person to act for and in the name of the person executing it." In short, a person holding a Power of Attorney is an agent appointed under a writing by a Principal to act for him. As such he cannot be considered a principal officer of the Company and put in the same class or category as the Directors, Managers and other responsible officers of a Company or other Corporate Body …."

The power of Attorney holder therefore becomes the "agent" of the Plaintiff Company. One has to consider whether he is a "recognized agent" for purposes of signing a proxy. "Recognized agent" is defined in Section 5 of the Civil Procedure Code as including the persons designated under that name in Section 25 and not others. Section 25(b) designates one class of recognised agents, namely, those holding general Powers of Attorney from parties not resident within the local limits of the jurisdiction of the Court where the application is made or act done authorizing them such appearances and application and do such acts on

their behalf. Even though the Power of Attorney relied upon by the Plaintiff is not a general Power of Attorney it authorises the power of Attorney holder to sign proxies, documents, and other undertakings on behalf of the Plaintiff Company. In *Lanka Estates Agency Ltd.* Vs. *Corea,* (52 N.L.R. 477), Gratiaen, J. noted that an agent with a special authority to represent his principal in matters in connection with a particular trade or business is a recognized agent within the meaning of section 25(b) of the Civil Procedure Code. Section 25(b) was not intended to refer only to persons who hold general powers of attorney authorizing them to represent the principal in every conceivable kind of transaction and in connection with every kind of legal proceeding. Thus, even a "Special Power of Attorney" could also be accepted for purposes of Section 25(b) of the Civil Procedure Code.

The proxy dated 11.10.10 filed in the Supreme Court empowers Mrs. Chandani Chandrapala to be the instructing Attorney-at-Law to appear for the Plaintiff Company before the Supreme Court and to file leave to appeal application against the judgment of the High Court dated 17.9.2010.

The Supreme Court is the highest and final superior court of record in the Republic and exercises civil and criminal appellate jurisdiction within the Republic of Sri Lanka as provided in Article 127(1) of the Constitution. Thus, the Supreme Court has all island jurisdiction in respect of civil appellate matters. The Power of Attorney empowers the said "Don Lalith Hilary Ganlath" to sign the proxy on behalf of the Plaintiff Company. The proxy filed in the Supreme Court reads thus:-

> "*We , Sees Lanka (Private) Limited Block 43, Export Processing Zone, Biyagama,*
>
> *By its Power of Attorney holder Don Lalith Hilary Ganlath of Ganlath's Law*

Office, Mezzanine Floor, Galadari Hotel, No. 64, Lotus Road, Colombo 1.

have nominated constituted and appointed and do hereby nominate, constitute and appoint Chandani Chandrapala Ganlaths, Attorney-at-Law to be our instructing Attorney-at-Law and to appear for us and in our name and on our behalf before Supreme Court of the Democratic Socialist Republic of Sri Lanka, to appear and therein to

to institute Leave to Appeal against the Judgment of the High Court dated 17.9.2010 of the HC Case No: WP/HCCA/COL/63/2009/LA and to file all the necessary papers and to take all necessary steps in the Supreme Court and to obtain the reliefs as prayed for and to take all necessary steps."

Learned President's Counsel for the Plaintiff in his written submissions has taken up the position that when the Power of Attorney holder in this case signed the proxy, he has signed it as if the proxy has been signed by the Plaintiff Company. With all due respect I am unable to agree with this submission. The question whether a Power of Attorney could be used by a person resident within the local limits of the jurisdiction of the Court was considered in various cases. Atukorale, J. in *Udeshi* Vs. *Mather* refers to the following two cases at page 20.

"In *Alia Markar* v. *Pathu Muttu and Natchiya* *a preliminary objection was taken in appeal that the appellant, a Mohamedan woman was not properly before court since the proxy signed by her two attorneys was bad for the reason that she and both her attorneys were resident within the local limits of the jurisdiction of the court and as such the attorneys were not the recognised agents of the appellant and had no authority to sign the proxy. The validity of this objection was upheld but since it was not taken in the court below the appellant was granted an opportunity of signing a fresh proxy and of ratifying the acts purported to be done in her name. In Segu*

Mohamadu vs. Govinden Kangany the power of attorney granted by the plaintiff to his attorney was, in terms, one subsisting only during his absence from the island. But at the time the attorney signed the proxy the plaintiff, admittedly, was resident in the island. The proxy was held bad but as the objection had not been taken in the lower court it was held to be no ground for reversing the decree since the defect did not affect the merits of the case or the jurisdiction of the court. The appeal was therefore dismissed."

Learned Counsel for the Plaintiff Company relied on Sections 19 and 20 of the Companies Act No. 7 of 2007 and argued that a proxy can be signed by a Power of Attorney holder in terms of Section 19(1)(b) of the said Act.

Section 19(1)(b) of the Companies Act No. 7 of 2007 provides as follows:-

"A contract or other enforceable obligation may be entered into by a company as follows:

(b) an obligation which, if entered into by a natural person is required by law to be in writing signed by that person and be notarially attested..."

Section 19 falls within the heading of "Company Contracts etc." The marginal note to Section 19 refers to the method of contracting and gives a clue to the meaning and purpose of the section. Section 20(3) specifically provides that the provisions of the Powers of Attorney Ordinance and the law relating to powers of attorney executed by natural person shall with necessary modifications apply in relation to a power of attorney executed by a company. Section 25 of the Civil Procedure Code prohibits a power of Attorney being used by a person resident within the jurisdiction of the Court. (emphasis added)

In the case of *Alia Markar* Vs. *Natchia* (Browne's Report Vol. 2 – page 64 at 66) the question whether the proxy given to the proctor to conduct legal proceedings on behalf of another, be signed either by that person himself or by such a person as is designated by the Code to be a "recognized agent" was considered. Natchiya, the Appellant did not sign the proxy by herself. She granted a power of attorney to two of her male relatives to act for her in all matters of business and accordingly, the two Attorneys' authorized a proctor to appear in her name and to make the claim. Bonser C.J. made the following observations:

> *"Now, recognized agents are defined in sec. 25 of the Civil Procedure Code, and it is quite clear that these attorneys are not recognized agents within the meaning of that section ; because, although they hold a general power of attorney, yet Natchia and they are both resident within the local limits of the jurisdiction of the Court for appearance in which this proxy was signed. I think that Mr. Bawa's contention is correct, and that the proxy must either be signed by the party in person, or by a recognized agent as defined by sec. 25. That being so, I think the preliminary objection must prevail".*

Therefore, a Power of Attorney cannot be used by the Plaintiff Company situated within the jurisdiction of this Court to nominate a person who too resides within the jurisdiction of this Court to sign a proxy on behalf of the Plaintiff Company. In such a situation, a Power of Attorney holder could not become a "recognised agent" of the Plaintiff Company in terms of Section 25(b) of the Civil Procedure Code. A Company may be represented and subscribed by a registered Attorney in terms of Section 470 of the Civil Procedure Code and the appointment of a registered Attorney shall be in writing and signed by the client in terms of Section 27.

Hence, I hold that the Plaintiff's Company is not properly represented before this Court. The validity of the objection is therefore upheld. On the basis of the conclusion reached, the leave to appeal application is dismissed in all the circumstances without costs.

CHIEF JUSTICE.

C. EKANAYAKE, J.,

I agree.

JUDGE OF THE SUPREME COURT.

P. DEP, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT.

15

K. SRIPAVAN, J.

This Petitioner-Petitioner (hereinafter referred to as the Petitioner) instituted an application in the Court of Appeal against the 1st Respondent-Respondent (hereinafter referred to as the Respondent) seeking, inter alia, the following reliefs by way of Writ of Certiorari :-

(1) To quash the decision of the respondent to impose a “Reasonable

Price Formula" (RPF) as evident by the Circular bearing Nos. , MF/BL 132, MF/BL 135, MF/BL 136, MF/BL 144 and MF/BL 146.

(2) To quash the decision of the Respondent contained in the letter dated 3rd March 2003 (**P12)** informing the Uva Halpewatte Tea Factory that it had contravene expressed provisions of the Tea Control Act ,

(3) To quash the decision of the Respondent as contained in the letter dated 4th February 2003 **(P13)** to use the provisions of the Tea Control Act to enforce "Reasonable Price Formula" stipulated by the Respondent.

The legal basis upon which the Petitioner sought his reliefs are contained in paragraphs 43 and 47 of the Petition dated 3rd April 2003 which could be summarized as follows :-

(i) That the Respondent had no authority in terms of the Tea Control Act to lay down the "Reasonable Price Formula".

(ii) That the imposition of such a Formula is contrary, unilateral, and illegal.

(iii) That accordingly, the penal provisions of Section 8(2) of the Tea Control Act are superfluous.

(iv) That the enforcement of the provisions contained in Section 8(2) of the Tea Control Act as amended by Act No. 3 of 1993 when read with the other provisions of the Act, does not concern any right on the Respondent.

(v) That in any event, the decision of the Respondent fixing a "Reasonable Price Formula" has been made when giving the Petitioner or its members an opportunity of being heard thus violating the fundamental legal principle of *Audi Ultarem Partem.*

The Court of Appeal, by its Order dated 6th December 2010, held, inter alia, that the Teal Control Act specifically provides that if the Tea Commissioner is satisfied after such inquiry, as he may deem necessary, he may issue the direction specified in Section 8(2) of the said Act and that the form of inquiry is left to the Controller to decide depending on the nature of the violation. The Petitioner preferred an appeal against the said Order and Special Leave to Appeal was granted by this Court on 17th April 2011 on the following questions of law :

1. Has the Court of Appeal erred in interpreting the provisions of the Tea Control Act ?
2. Has the Court of Appeal erred in interpreting the provisions of Section 8 of the Tea Control Act as giving the Respondent the power to impose a "Reasonable Price Formula" when the wording of the said Section deals only with immediate purported power given to the Tea Controller to penalise a party for not adhering to the "Reasonable Price Formula" ?
3. Has the Court of Appeal erred in law in ignoring the submission of the Petitioner that Section 8 of the Tea Control Act (as amended) conferred power on "a non-existent Tea Controller ?
4. Has the Court of Appeal erred that the Respondent had no legal basis to impose a "Reasonable Price Formula"?
5. In any event, was the application seeking relief by way of Certiorari , filed after the lapse of an unreasonable period of time, made the application unmaintainable in law?

The Learned President's Counsel for the Petitioner sought to argue that the Office of "Tea Controller" created by Section 50(1) of the Tea Control Act No. 51 of 1957 was abolished by Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975.

Counsel submitted that the Office of the "Tea Controller" ceased to exist as far back as in 1975 and at the time when the Tea Control (Amendment) Act No. 3 of 1993 was passed there was no officer known to the law as the Tea Controller. It is on this basis Learned President's Counsel argued that no amended to the Tea Control Act could seek to clothe a non-existent officer with legal power. With all due respect, I am unable to agree with the submission made by the Learned President's Counsel.

The dominant purpose in construing a statute is to ascertain the intention of Parliament one of the well recognized canons of construction is that the legislature speaks its mind by use of correct expressions and unless there is any ambiguity in the language used the Court should adopt literal construction if it does not lead to an absurdity. In construing the provisions contained in Section 9(i) and 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975 effects should be made to ensure that each provision will have its play without any conflict with each others. The Court must look to the object which the statute seeks to achieve while interpreting the provisions in Sections 9(1) and 9(2). When the material words assists the achievement of the legislative policy, the Court would look at the context and the object of such words and interpret the meaning intended to be conveyed by the use of such words.

It is observed that prior to the abolition of Office of "Tea Controller" by Section 9(2) of the Sri Lanka Tea Board Law No. 14 of 1975, the Office of the "Tea Commissioner" was created by Sections 9(1) and 9(2) of the said Act which reads as follows :

> *"9. (1) There may be appointed, for the purposes of this Law, a person, by name or by office, to be or to act as Tea Commissioner who shall, subject to provisions of this Law or any other written Law,-*

(a) *exercise, discharge and perform the powers, functions and duties vested in, and imposed on, the Tea Controller under any written law;"*

Thus, it could well be seen that the intention of the legislature was to create the office of the "Tea Commissioner" prior to the abolition of the "Tea Controller".

6.

(vi)

(vii)

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

In the matter of an application under Article 126(2) of the Constitution in respect of the violation of the Fundamental Rights to equality before the law and to the equal protection of the law guaranteed to the Petitioners under Article 12(1) of the Constitution.

1. B.M.N. Banneheka and

(minor) 1a.Master B.M.I.A. Banneheka,
Both of "Somi Kelum"
Ihala Malkaduwawa Road,
Kurunegala.

Application No. SC/FR/46B/2014

Petitioners

Vs.

1. Y.G. Thillakaratne, Principal (Chairman of the Interview Board)
Maliyadeva Boys College,
Negombo Road, Kurunegala.

2. L.U.W. Jayalath(Secretary of the Interview Board), Vice Principal,
Maliyadeva Boys College,
Negombo Road, Kurunegala.

3. J.M. Jayarathne, Principal of the Primary School, Maliyadeva Boys College,
Negombo Road, Kurunegala.

4. M.P. Liyanage (Representative of the Old Boys Association) Maliyadeva Boys College, Negombo Road, Kurunegala.

5. Rajapaksha (Representative of the School Development Society),
Maliyadeva Boys College, Negombo Road, Kurunegala.

(1st to 5th Respondents were members of the Interview Board).

6. D.M.N.W.B. Dissanayake (Chairman, Appeals and Objections Board), Principal , Sri Saranankara Central College, Bingiriya.

7. L.U.W.Jayalath (Secretary of the Interview Board and Secretary of the Appeals and Objections Board), Vice Principal, Maliyadeva Boys College, Negombo Road, Kurunegala.

8. Ms. Sunethra (Teacher of Maliyadeva Boys College) Maliyadeva Boys College, Negombo Road, Kurunegala.

9. R. Dharmasekera, (Representative of the Old Boys Association), Maliyadeva Boys College, Negombo Road, Kurunegala.

10. Ms. Samantha (Representative of the School Development Society), Maliyadeva Boys College, Negombo Road, Kurunegala.

(6^{th} to 10^{th} Respondents were members of the Appeals and Objections Board)

11. Secretary, Ministry of Education, Isurupaya, Battaramulla.

12. S.M.S.B. Samarakone, and

(minor) 12a. Master S.M.S.I. Samarakone, both of No. 90, Baudhaloka Mawatha, Kurunegala.

13. H.M.U.B. Herath , and

(minor) 13a. Master H.M.A.S.B. Herath, both of No. 28/2, Galwala Road, Negombo Road , Kurunegala.

14. T.K.N.L. Ariyasena, and

(minor) 14a. Master S.D. Senasinghe, both of
No. 9/7, Welagedera Mawatha,Uthuru
Wewa Rauma Road, Kurunegala.

15. R.D.B. Bandula, and

(minor) 15a. Master R.D.E. Pahan, both of
No. 133, Welangolla Road,
Yanthampalawa, Kurunegala.

16. S.M.R.N.K. Semasinghe, and

16a. Master S.M.S.P. Semasinghe, both of
No. 17/47, Iluppugedera Road,
Kurunegala.

17. Zonel Director of Education,
Education office, Kandy Road,
Kurunegala.

18. Director of National Schools,
Ministry of Education, Isurupaya
Battaramulla.

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

Respondents

Before	:	Dep, PC. J Marasinghe, J & Aluwihare, PC. J
Counsel	:	T.M.A. Muthalif for the Petitioners
		Suren Gnanaraj , SC for the Respondents
Argued on	:	17.09.2014
Decided on	:	25-03-2015

Priyasath Dep, PC. J

The Petitioners filed this Fundamental Rights application alleging that 1A Petitioner who was eligible to be admitted to Maliyadeva College was wrongfully not admitted to the College and thereby his fundamental rights were violated by the school authorities.

The 1st Petitioner submitted an application on behalf of his son (1A Petitioner) to be admitted to Grade 1 of Maliyadeva College. The application was submitted under the category of children of persons residing in close proximity to school referred to in Circular No.23/2013 issued by the Ministry of Education. Under that circular 50% of students are admitted to school from this category and a maximum of 50 marks are given based on residence. However if there are schools with primary sections located closer than to the school applied for, 5 marks are deducted for each school.

The Petitioners state that they were summoned for an interview before the Interview Board and they attended the interview and the Board having examined the documents gave 85 marks. The 1A Petitioner's name was included in the Temporary Waiting List at the 90th place.

The 1st Petitioner was informed that objections had been filed against his application and he was asked to present before the Appeal and Objection Board . He appeared before the Board and the Board reduced five marks from the allotted 85 marks and gave 80 marks as there is a school which is in close proximity to his residence.

The Petitioners state that when the final list was displayed 1A Petitioners name was not included in the amended waiting list which included the names of 11 other applicants who had obtain 80 marks

The Petitioners state that 12A-16A Respondents were wrongfully admitted to school. The 1st Petitioner submitted an appeal to the Secretary to the Ministry of Education. He complained to the Human Rights Commission and the Commission after inquiring into his complaint held that there is no violation of human rights. Thereafter the Petitioners filed this application in this Court.

The 1st Respondent Y. G.Tilakarathne, Principal, Maliyadeva College, Kurunegala filed a statement of objections and refuted the allegations made against the Interview Board and the Appeal and Objection Board. The 1st Respondent raised the following objections:

(a) the Petitioners are guilty of suppression and misrepresentation of facts
(b) the Petitioners' application is time barred.

In his statement of objections 1st Respondent stated that the Petitioners attended the interview held for the selection of students for admission to Grade 1. The 1st Petitioner was invited to identify the location of his residence on the area map. It was found that though not disclosed by the Petitioner , the Wehera Kanistha Vidyalaya is situated in close proximity to his residence and for that reason 5 marks were deducted and was allocated 85 marks.

The 1st Respondent stated that by letter dated 12-10-2013 he received an objection in relation to the marks alloted to the 1A Petitioner on the basis that there are other schools in close proximity to the Petitioners residence for which marks had not been deducted. Thereafter a field inspection was carried out by the Appeal Board. The 1st Petitioner was summoned before the Appeal Board and it was revealed that the 1st Petitioner had misled the Board in relation to the exact location of his residence. As a result the interview board was misled in relation to exact distance from Petitioners' residence to Maliyadeva College and the exact number of schools which are in close proximity to the Petitioners' residence. It was established that Nissanka Vidyalaya which had not been disclosed by the 1st Petitioner is in close proximity to the Petitioners' residence. The Board deducted five marks and revised the marks allotted to the 1A Petitioner to 80. The 1st Petitioner having accepted the decision placed his signature in the reverse of the document marked R1 in the presence of the members of the Appeal Board.

The 1st Respondent stated that the cut off mark for admission under the distance category was 83.5 and the 1A Petitioner having secured only 80 marks was not eligible to get admitted to the school.

The 1st Respondent denies that 12A- 16A Respondents were wrongly admitted. He states that they were admitted in terms of the Circular No 23/2013 which was marked P1. All of them had secured marks above the cut off marks. In his statement of objections he had explained as to how marks were allotted to 12A-16A Respondents. I am satisfied that they were lawfully admitted to the school.

Having considered the pleadings and documents in this application, I am of the view that the 1st Petitioner's son (1A Petitioner) was not admitted to the school as he failed to secure sufficient marks required for admission. I hold that there is no infringement of the fundamental rights of the Petitioner. The Human Rights Commission also had come to the same conclusion.

The application is dismissed .No Costs.

Judge of the Supreme Court

Rohini Marasinghe J.
I agree.

Judge of the Supreme Court

Buwanaka 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(2) of the Constitution.

Christobuge Chrishan Hilary Srikith Fernando.
No. 59, Puwakaramba Road,
Kadalana, Moratuwa.

Application No. SC/FR/498/2011

Petitioners

Vs.

1. National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

2. Mr. Karunasena Hettiarachchi,
   Chairman,
   National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

3. Mr. K.D.G. Gunaratne,
   Vice Chairman
   National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

4. Mr. N.P. Thibbutumunuwa,
   Working Director,
   National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

5. Dr. P.G. Maheepala
   Director,
   National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

6. Dr. Y.D.N. Jayatilaka
   Director,
   National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

7. A.K. Senevirathna
   Director,
   National Water Supply and Drainage Board (NWS &DB)
   Head Office.
   Galle Road, Ratmalana.

8. Mr. K.L.L. Premanath,
   General Manager
   National Water Supply and Drainage Board, P.O. Box 14, Mount Lavinia

9. Mr. G.S. Munasinghe,
   Additional General Manager
   (Cooperate Services)
   National Water Supply and Drainage Board, P.O. Box 14, Mount Lavinia.

10. Ms. C.V. Ethugala
    Director(Development)
    Ministry of Water Supply and Drainage,
    No. 35, "Lakdiya Medura",
    New Parliament Road,
    Pelawatta, Battaramulla.

11. Mr. A. Abeygunasekera
    The Secretary,
    Ministry of Water Supply and Drainage,
    No. 35, "Lakdiya Medura",
    New Parliament Road,
    Pelawatta, Battaramulla.

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

Respondents

Before	:	Priyasath Dep, PC. J S.E. Wanasundera, PC. J & B.P. Aluwihare, PC. J
Counsel	:	Razik Zarook, PC with Rohana Deshapriya and Chanakya Liyanage for the Petitioner. Rajive Gunatilleke,SSC for AG.
Argued on	:	01.08.2014
Decided on	:	25.03.2015

Priyasath Dep, PC, J

The Petitioner filed this fundamental rights application and obtained leave under article 12 and 14(g) of the Constitution. The Petitioner who is a civil engineer joined the National Water Supply and Drainage Board (hereinafter referred to as "Board") and presently holding the post of Assistant General Manager (Ground Water).

The Petitioner had obtained a degree in Civil Engineering from the University of Moratuwa in the year 1987. He has also obtained a Masters degree in Public Management from the Sri Lanka Institute of Development Administration. In addition he has a Post Graduate Diploma from University of Norway.

The Petitioner states that advertisements were published in January 2007 for the post of Deputy General Manager (Commercial) of the Board and the scheme of recruitment was set out in the advertisement. As he had completed and fulfilled all necessary requirements he applied for the above post.

The Petitioner states that he was interviewed for the post of Deputy General Manager (Commercial) on 20th April 2011 and he obtained 91 marks and came first in order of merit. He states that though he obtained the highest marks steps were not taken to promote him to the said post.

The Petitioner states that the degree of Master of Public Management obtained from the Sri Lanka Institute of Development Administration is an equivalent to the qualification as set out in the scheme of recruitment for the above post.

The Petitioner as well as the 1st Respondent sought clarifications from Sri Lanka Institute of Development Administration as to whether Master of Public Administration is equivalent to the Master of Business Administration. Sri Lanka Institute of Development Administration confirmed that the Master of Public Administration degree is equivalent to Master of Business Administration.

The Petitioner states that the Board had re-advertised the post of Deputy General Manger (Commercial) by letter dated 7th October 2011 for internal applicants and published in the newspapers on 16th October 2011 for external candidates. The Petitioner submits that by not appointing him for the post and re-advertising the said post is violative of rights guaranteed under article 12 (1) and article 14(1)(g) of the Constitution.

The 8th Respondent K.L.L. Premanath, General Manager of the Board filed a statement of objections and refuted the allegation made against the Board. He states that the post graduate qualification required for the post was a Master of Business Management. The Petitioner possessed a degree in Public Management. He states that under the scheme of recruitment the required degree is Master of Business Management, which qualification the Petitioner does not have. Therefore, the Board re-advertised the post and called for applications.

According to the advertisement, required qualification and experience are:

> "Membership of a recognized Institution of Business Administration with 15 years executive experience in a recognized marketing organization
>
> Or
>
> Post Graduate Degree in Business Administration with 13 years executive experience in a recognized marketing organization."

The learned Counsel for the 1st Respondent (Board) in his submission stated that the Petitioner did not have the requisite qualification which is a degree in Master of Business Administration though he had an equivalent degree. He submits that the scheme of recruitment is specific that the qualification should be a Master of Business Administration and not 'MBA or equivalent or similar qualification'.

The Scheme of Recruitment is specific as regards to the post graduate qualification. It does not refer to an equivalent or a similar qualification. In view of that fact there is a possibility that persons possessing a similar or an equivalent qualification did not apply for the post on the basis that they did not possess the requisite qualification and thereby not qualified to apply for the post advertised.

I accept the submissions made by the learned Senior State Counsel and I hold that the Board had taken a correct decision when it decided not to appoint the Petitioner to the Post of Deputy General Manager (Commercial) as the Petitioner did not have the requisite post graduate qualification.

I hold that there is no violation of the Petitioners fundamental rights guaranteed by the Constitution.

Application dismissed. No costs.

Judge of the Supreme Court.

Eva Wanasundera P.C., J.

I agree.

Judge of the Supreme Court

Buwenaka 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 under and in terms of Article 126 of the Constitution.

1. Wasantha Disanayake, No. 37/34, Weerapuranappu Place, Wariyapola Road, Matale.
2. Wickramapala Yapa, No. 189, Pallemulla, Haloluwa.
3. Wadugodage Shantha Weerasingha, Pahalawatta, Welihipitiya, Dikwella.
4. Kiribanda Bandara Wijewardane, No. 55, Isuru Uyana, Udaperuwa, Kinigama, Bandarawela.
5. Hapu Archchige Premachandra Jayawardane, No. 214C, Doranagoda West, Udugampola.
6. Wariga Jeyesta Mudiyanselage Bandula, No. 49, Irrigation Office Road, Matale.
7. Wanakku Arachchige Don Udaya PriyanthaJayakodi, No. 61, Bollatha, Ganemulla.
8. Wanigasekara Mudiyanselage Wajirapani Wishaka Wanigasekara, No. 220/A, Sarvodaya Mawatha, Makandana, Madapatha'
9. Desi Malkanthi Samarawickrama, No. 477/2, Makumbura, Pannipitiya.
10. Mathara Lokuge Kamal Priyantha, 8E, Mahabuthgamuwa, Angoda.

Petitioners

Vs.

S.C. FR Application No. 611/12

1. Secretary,
   Ministry of Public Administration and Home Affairs, Independent Square,
   Colombo 7.
2. Secretary,
   Ministry of Finance,
   Colombo 1.
3. Director General
   Department of Census and Statistics,
   No. 109, 5th Floor, Rotunda Tower,
   Colombo 03.

4 Director (Administration)
Department of Census and Statistics,
No. 109, 5th Floor, Rotunda Tower,
Colombo 03.

5. Director General of Examinations,
Department of Examinations,
Isurupaya, Battaramulla

6. Vidyajothi Dr. Dayasiri Fernando,
Chairman, Public Service Commission,
No. 77, Nawala Road, Narahenpita,
Colombo 05. And others.

7. Palitha M. Kumarasinghe, P.C. Members,
Public Service Commission, No. 177, Nawala
Road, Narahenpita, Colombo 05.

8. Sirimavo A. Wijeratne, Member, Public
Service Commission, No. 177, Nawala Road,
Narahenpita, Colombo 05.

9. S.C. Mannapperuma, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

10. Ananda Seneviratne, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

11. N.H. Pathirana, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

12. S. Thillanadarajah, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

13. M.D.W. Ariyawansa, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

14. A. Mohomed Nahiya, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

(All Members of the Public Service Commission)

06A. A. Sathya Hettige, Chairman,
Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

07A. S.C. Mannapperuma, Member,
Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

08A. Ananda Senevirathne, Member,
Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

09A. N.H. Pathirana, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

10A. S. Thilandarajah,
Member.
Public Service Commission,
No. 177, Nawala Road, Narahenpita,
Colombo 05.

11A. A. Mohomed Nahiya, Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

12A. Kanthi Wijethunga,
Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

13A. Sunil S. Sirisena,
Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

14A. I.N. Soysa,
Member,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.
(All Substituted Members of the Public Service Commission)

15. Secretary,
Public Service Commission, No. 177,
Nawala Road, Narahenpita, Colombo 05.

16. M.N. Junaid, Co-Chairman,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

17. C.N.C.W. Mathews,
Co-Chairman,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

18. B. Wijerathna,
Secretary,
National Salaries and Cadres Commission,
No. 130, Block 02, BMICH, Colombo 07.

19. Ariyapala de Silva,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

20. S.C. Mannapperuma,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

21. Deshabandu M. Mackey Mohomed,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

22. Prof. Carlo Fonseka,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

23. Soma Kotakadeniya,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

24. Jerry Jayawardena,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

25. Dr. Lionel Fernando,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,Colombo 07.

26. Leslie Devendra,
Member, National Salaries and Cadres
Commission, No. 130, Block 02,
BMICH, Colombo 07.

27. V. Kanagasabapathi,
Member,
National Salaries and Cadres Commission,
No. 130, Block 02,
BMICH,
Colombo 07.

28. Gunapala Wickramarathna,
Member, National Salaries and Cadres
Commission, No. 130, Block 02,
BMICH,Colombo 07.

29. Honourable Attorney General,
Department of Attorney General,
Colombo12.

Respondents

BEFORE : K**.** Sripavan., C.J.
B.Aluwihare, ,P.C., J.
P. Jayewardene, P.C., J.

COUNSEL Asthika Devendra for the Petitioners with J. Nandasiri, Viraj Dayaratne D.S.G. for 1st to 5th, 6A to 14A, 15th and 29th Respondents.

ARGUED ON : 23.09.2014

WRITTEN SUBMISSIONS)
FILED ON) : 26.11.2014 by the Respondents.

DECIDED ON : **10.09.2015**

SRIPAVAN, C.J.

The Petitioners are employees of the Department of Census and Statistics holding the post of "Statistical Officer – Grade I". They were originally appointed as "Statistical Investigators" during the period 1984 to 1991; absorbed to the post of "Statistical Officers – Grade II" on 4th October 2000; absorbed to the post of "Statistical Officers – Grade I" on 21st October 2011.

The Petitioners state that after the post of "Statistical Investigators" was abolished on 4th October 2000, the Officers holding the said posts were absorbed as "Statistical Officers"; the next promotion of the "Statistical Officer" being the post of "Statistician".

The Petitioners allege that the previous internal recruitment to the post of "Statistician" was in 2005 whereby letter dated 28th June 2005, applications were called from qualified internal candidates to fill the vacancies in the post of "Statistician". The marking scheme published along with the notification contained the allocation of marks as follows:-

1. Seniority - 60
2. Performance Appraisal Report - 25
3. Contribution to the Enforcement
   Of the Dept. Publications & Research 08
4. Educational Qualifications 07

Total 100

=====

The Petitioners state that the 3rd Respondent, by letter dated 12th September 2012 called for applications for examination from internally qualified "Statistical Officers". According to the said publication, vacancies are to be filled after interviewing the candidates who have obtained more than 40 marks at the written examination held by the 5th Respondent. The complaint of the Petitioners is that the new method of recruitment is a significant departure from the scheme of recruitment, the one which was in operation. The said scheme provided as follows:-

(i) Should have passed the Efficiency Bar Examination prescribed for Statistical Officer Grade III and should have satisfactorily and successfully completed 08 years of uninterrupted service as Statistical Officer in Grades I, II and III.

(ii) Required qualifications from Statistical Investigators prior to the absorption to apply for the post of "Statistician"' is

(i)	With a degree	-	5 years service both in the post of Statistical Investigator and in the post of Statistical Officer
(ii)	With Advanced Level	-	8 years service both in the post of Statistical Investigator and In the post of Statistical Officer.
(iii)	With Ordinary Level	-	10 years service both in the post of Statistical Investigator and in the post of Statistical Officer.

(iii) Required qualification from the Graduates who were recruited in 1999/2000 to perform and develop the significant/important functions of Government, 5 years of continuous service in the post of Statistical Officer excluding the period they served as Graduate Trainees.

Though the Petitioners in Paragraph 18 of the Petition state that they were never informed of a new scheme of recruitment and that they were neither asked to participate nor were their opinion obtained before the new scheme of recruitment was introduced, the 3rd Respondent at paragraph 10 of his affidavit dated 27th June 2012 states as follows:-

(a) The new scheme of recruitment was proposed strictly in accordance with the guidelines stipulated in the Public Administration Circular No. 6 of 2006, the aim of

which was to ensure uniformity in the salary and organizational structure of the public and corporation sectors;

(b) in granting approval to the said new scheme, the Public Service Commission considered the recommendations of the National Salaries and Cadres Commission, the Director General of Establishments, the Director General of Department of Census and Statistics and the Secretary to the Ministry of Finance and Planning;

(c) discussions were held with the Trade Unions of the Department of Census and Statistics and the views expressed by them were taken into consideration

(d) In keeping with all schemes of recruitment that have been prepared under the aforesaid circular, appointments to the post of "Statistician" under the limited stream (internal appointments) are to be made upon the results of a written examination;

(e) the subject matter of the written examination will be directly related to their area of work and therefore the best method is adopted in selecting candidates who have the required knowledge and skills for the said post;

(f) the Petitioners with their long period of service would be in an advantageous position since they would be more knowledgeable about the subject matter of the examination.

The Petitioners in their counter affidavit dated 8th July 2013, state that they were unaware of the averments referred to in paragraph 10(b) and (c) above. However, they did not deny the said averments.

A scheme of recruitment once formulated is not good for ever; it is perfectly within the competence of the appropriate authority to change it, rechange it, adjust it and re-adjust it according to the compulsions of changing circumstances. The Court cannot give directions as to how the Public Service Commission should function except to state the obligation not to act arbitrarily and to treat employees who are similarly situated equally. Once the Public Service Commission lays down a scheme, it has to follow it uniformly. Having laid down a definite scheme of promotion, the Public Service Commission cannot follow the irrational method of pick and choose.

Article 12(1) of the Constitution contemplates the right to equality and states that

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

What is meant here is that equals should be treated equally and similar laws and regulations should be applicable to persons who are similarly circumstanced. In reference to Article 12 (1) of the Constitution, it would be necessary to show that there had been unequal treatment and therefore there exist discriminatory action against the Petitioners.

The complaint of the Petitioners that their seniority was not considered adequately in the impugned scheme of recruitment cannot in any event form the basis of discrimination as the requirement of service from non-graduate to sit for the relevant examination is only 10 years of service. However, under the open competitive stream, only graduates become eligible to apply.

In *Union of India* Vs. *S.L. Dutta* (1991) 1 SCC 505; AIR 1991 SC 363 the petitioner who was serving as Air Vice Marshal was considered eligible to the promotion as Air Marshal. However, the scheme was changed by the Government and as per the changed policy, the petitioner was not considered eligible for the promotional post. The petitioner challenged the new scheme and the High Court allowed it holding that "*the new promotion policy was not framed after an in-depth study"* and directed the Government to consider the case of the petitioner under the old scheme of recruitment. On an appeal by the Government to the Supreme Court, the Court observed

> "*A consideration of policy regarding the promotional chances of officers of the Flying Branch in the Air Force would necessarily involve scrutiny of the desirability of such a change which would require considerable knowledge of modern aircraft, scientific and technical equipment available in such aircraft to guide in navigating the same, tactics to be followed by the Indian Air Force and so on. These are matters regarding which judges and lawyers of Courts can hardly be expected to have much knowledge by reason of their training and experience."*

Even from a practical point of view, the functions of the Court is not to advise in matters relating to promotions of public officers. The Court can only strike down a scheme of recruitment if it is wholly unreasonable and violates the provisions of the Constitution or any statute. It would be hazardous and risky for the Court to tread an unknown path and should leave such task to the expert bodies.

Considering all the above mentioned facts and circumstances, I am of the view that the new scheme of recruitment to the post of "Statistician" cannot be categorized as arbitrary and in

violation of the petitioners fundamental rights guaranteed in terms of Article 12(1) of the Constitution.

For the reasons stated above, I hold that the Petitioners have not been successful in establishing their fundamental rights guaranteed in terms of Article 12(1) of the Constitution had been infringed by the Respondents. The application is accordingly dismissed. I make no order on costs.

CHIEF JUSTICE

B. ALUWIHARE P.C.,J

I agree.

JUDGE OF THE SUPREME COURT.

P. JAYEWARDENE, P.C., J.

I agree.

JUDGE OF THE SUPREME COURT.